

## A Solution Acceptable to All - A Legal Analysis of the Senkaku-Diaoyu Island Dispute

R. Jade Harry

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# A Solution Acceptable to All? A Legal Analysis of the Senkaku-Diaoyu Island Dispute

R. Jade Harry<sup>†</sup>

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## Introduction

Japan's recent purchase of three of the Senkaku-Diaoyu Islands<sup>1</sup> has rekindled a long-simmering territorial dispute between Japan, China, and Taiwan.<sup>2</sup> Each of the three countries claims it has superior title<sup>3</sup> to this

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1. The international community refers to the islands under a variety of names. The Japanese name for the islands is Senkaku, the Chinese name is Diaoyu, and the Taiwanese name is Diayutai. As the topic of this Note pertains mostly to the dispute between Japan and China over the islands, this Note will refer to the islands as Senkaku-Diaoyu. Mure Dickie, *Q&A: The Senkaku/Diaoyu Islands*, FIN. TIMES (Sept. 25, 2012, 9:34 AM), <http://www.ft.com/intl/cms/s/0/6735bf86-0714-11e2-92ef-00144feabdc0.html#axzz2P3HbRrY>.

2. Justin McCurry, *Japan Stokes Tensions with China Over Plan to Buy Disputed Islands*, THE GUARDIAN (Sept. 5, 2012, 10:24 AM), <http://www.guardian.co.uk/world/2012/sep/05/japan-china-disputed-islands>.

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seemingly innocuous string of small volcanic islands located in the East China Sea, approximately 120 nautical miles northeast of Taiwan.<sup>4</sup> Although past attempts to settle the dispute kept hostilities at bay, actual progress towards achieving a long-term solution has been minimal.<sup>5</sup> In 1978, following another attempt to settle the dispute, Chinese reformer Deng Xiaoping said of the issue, “Our generation is not wise enough to find common language on this question. Our next generation will certainly be wiser. They will certainly find a solution acceptable to all.”<sup>6</sup> However, in spite of Deng Xiaoping’s political optimism, China and Japan have reached no such solution. In fact, following the 2012 purchase of the islands, international relations in the region have deteriorated to such an extent that many reporters,<sup>7</sup> scholars,<sup>8</sup> and government insiders<sup>9</sup> alike now predict war between China and Japan.

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3. Matt Blake, *Duel by Water Cannon: Japanese and Taiwanese Coastguards Blast Each Other with Spray in Row Over Disputed Islands*, DAILY MAIL (Sept. 25, 2012, 2:34 PM), <http://www.dailymail.co.uk/news/article-2208305/Senkaku-Islands-Japan-Taiwan-boats-attack-spray.html>.

4. Carlos Ramos-Mrosovsky, *International Law’s Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT’L LAW. 903, 903 (2008).

5. See Daniel Tretiak, *The Sino-Japanese Treaty of 1978: The Senkaku Incident Prelude*, 18 ASIAN SURV. 1235 (1978) (explaining the agreement between Japan and China concluded in 1978); see also Zhu Feng, *Diaoyu/Senkaku Row Darkens China-Japan Ties*, GLOBAL ASIA, [http://www.globalasia.org/Global\\_Asia\\_Forum/Diaoyu\\_Senkaku\\_Row\\_Darkens\\_China\\_Japan\\_Ties.html?PHPSESSID=e119538e1cf24d9134459784fbff1cef](http://www.globalasia.org/Global_Asia_Forum/Diaoyu_Senkaku_Row_Darkens_China_Japan_Ties.html?PHPSESSID=e119538e1cf24d9134459784fbff1cef) (last visited Apr. 2, 2013) (discussing the 1997 China-Japan Fisheries Agreement).

6. M. TAYLOR FRAVEL, *Explaining Stability in the Senkaku (Diaoyu) Islands Dispute*, in GETTING THE TRIANGLE STRAIGHT: MANAGING CHINA-JAPAN-US RELATIONS 144, 157 (2010); Rick Wallace and Michael Sainsbury, *Between a Rock and a Reef*, THE AUSTRALIAN (Sept. 24, 2012, 12:00 AM), <http://www.theaustralian.com.au/news/features/between-a-rock-and-a-reef/story-e6frg6z6-1226479819550>.

7. See, e.g., *Dangerous Shoals*, ECONOMIST (Jan. 19, 2013), available at <http://www.economist.com/news/leaders/21569740-risks-clash-between-china-and-japan-are-rising-and-consequences-could-be> (“China and Japan are sliding towards war.”); Jack Kelly, *Beware Another Pearl Harbor: China May Start a War When Its Economy Falts*, PITTSBURG POST-GAZETTE (Jan. 20, 2013, 12:14 AM), <http://www.post-gazette.com/stories/opinion/jack-kelly/beware-another-pearl-harbor-china-may-start-a-war-when-its-economy-falters-671184/>.

8. See, e.g., Rob Wile, *Professor Predicts War Between China and Japan*, GLOBAL POST (Dec. 26, 2012, 11:49 AM), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/china/121226/professor-war-china-japan-us>.

9. Malcolm Moore, *Military Conflict “Looms” Between China and Japan*, THE TELEGRAPH (Sept. 27, 2012, 3:16 PM), <http://www.telegraph.co.uk/news/worldnews/asia/china/9571032/Military-conflict-looms-between-China-and-Japan.html> (“One country must make a concession. But I do not see Japan making concessions. I do not see either side making concessions. . . . [U]nless one country makes concessions to the other, the escalation of a conflict between two countries will not stop until there is a military clash, like between the UK and Argentina.” (quoting Yan Xuetong, Chinese Representative to Council of Security Cooperation of Asia-Pacific)); Simon Tisdall, *China and Japan: A Dangerous Standoff Over the Senkaku Islands*, THE GUARDIAN (Sept. 17, 2012, 9:50 AM), <http://www.guardian.co.uk/commentisfree/2012/sep/17/china-japan-dangerous-standoff> (“Leon Panetta, the US defence secretary, currently visiting Japan, pointedly warned that ‘provocative behaviour’ by either side could lead to misjudgments, violence and, potentially, open warfare.”).

At first glance, the bitter dispute over the lilliputian islands may seem somewhat disproportionate. The islands have remained entirely undeveloped for hundreds of years;<sup>10</sup> their largest group of inhabitants is a small herd of wild goats.<sup>11</sup> Notwithstanding the size and relative uninhabitability of the Senkaku-Diaoyu Islands,<sup>12</sup> however, official sovereignty over the islands could be an extremely valuable territorial asset. A 1968 United Nations study suggested that substantial untapped oil reserves lie deep within the seabed surrounding the islands.<sup>13</sup> Accordingly, because the United Nations Convention on the Law of the Sea (the “UNCLOS”) grants generous property rights to the seabed extending up to two hundred nautical miles from the baseline surrounding any island, sovereignty over the islands would be the key to unlocking a potential treasure trove of natural resources.<sup>14</sup> Furthermore, the islands have become a tangible symbol of historical regional hegemony reaching back to the nineteenth century.<sup>15</sup> It seems, then, that this is not a territorial dispute that will gradually dissipate or that the relevant countries will resolve amicably. China and Japan have quarreled over the islands in the past,<sup>16</sup> but Japan’s purchase of the three islands is a particularly conspicuous claim of sovereignty<sup>17</sup> unprecedented throughout the history of the Senkaku-Diaoyu

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10. Mamta Badkar, *Why a Tiny, Uninhabited Island Chain is Causing a Huge Row Between China and Japan*, BUSINESS INSIDER (Sept. 17, 2012, 12:59 PM), <http://www.businessinsider.com/history-of-senkaku-diaoyu-dispute-2012-9>.

11. William Pesek, *Why Outrage Over Islands Full of Goats is Crazy*, BLOOMBERG (Sept. 18, 2012, 5:00 PM), <http://www.bloomberg.com/news/2012-09-18/why-outrage-over-islands-full-of-goats-is-crazy.html> (“Goats are all you will find on the cluster of uninhabited rocks over which the Japanese and Chinese seem ready to go to war.”).

12. *Territorial Disputes Involving Japan*, N.Y. TIMES (Sept. 20, 2012), available at <http://www.nytimes.com/interactive/2012/09/20/world/asia/Territorial-Disputes-Involving-Japan.html?ref=asia>.

13. Rep. of the Sixth Sess. of the Comm. for Coordination of Joint Prospecting for Mineral Res. in Asian Offshore Areas, U.N. Doc. E/CN.11/L.239 (1970) [hereinafter Rep. of the Sixth Sess.].

14. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. UNCLOS defines normal baseline as “the low water line along the coast as marked on large-scale charts officially recognized by the coastal State.” *Id.* at art. 5.

15. Dickie, *supra* note 1 (explaining that because China believes that Japan illegally seized control of the islands under cover of the 1894-95 Sino-Japanese War, the islands are an emotional symbol of the bullying China had suffered at the hands of foreign powers in the 19th and 20th centuries); Christopher Bodeen, *Senior Chinese Official Calls For Dialogue with Japan Over Disputed Islands, To Cool Tensions*, YAHOO! NEWS (Jan. 17, 2013, 1:44 AM), <http://news.yahoo.com/senior-chinese-official-calls-dialogue-japan-over-disputed-064445077.html>. (“For China, [the Senkaku-Diaoyu Islands] also mark a strategic gateway to the Pacific ocean and represent the deeply emotional legacy of Japan’s conquest of Chinese territory beginning in 1895 as well as its brutal World War II occupation of much of the country.”).

16. See *Timeline: Senkaku/Diaoyu Dispute*, THE GLOBE AND MAIL (Aug. 18, 2012, 10:47 PM), <http://www.theglobeandmail.com/news/world/timeline-senkakudiaoyu-dispute/article4488198/> [hereinafter *Timeline*]; *Q&A: China-Japan Islands Row*, BBC NEWS, <http://www.bbc.co.uk/news/world-asia-pacific-11341139> (last updated Apr. 29, 2013, 5:55 PM).

17. Although there is some dispute as to whether Japan is actually claiming that it has sovereignty by buying the islands, the Japanese Foreign Minister’s recent op-ed in

dispute.

Accordingly, Japan and China have come to an uncomfortable crossroads. Although there are many options for dispute resolution between countries, one seemingly attractive option is to seek formal review in an international forum such as the International Court of Justice (the “ICJ”), as did Singapore and Malaysia in 2008 over several islets at the eastern entrance of the Singapore Strait.<sup>18</sup> Litigating a territorial claim has a number of benefits, namely that the relevant region can resolve the issue peacefully, and thus avoid a long and violent conflict. By litigating, nations can also better preserve important economic relationships that are crucial to ongoing regional stability.

Nevertheless, litigation is a less-effective mechanism for resolving hotly contested territorial disputes between large countries<sup>19</sup> that are more capable of wielding “hard power,”<sup>20</sup> and therefore less inclined to compromise or submit to litigation.<sup>21</sup> Another glaring disadvantage of resolving this territorial dispute through litigation or arbitration is the lack of modern jurisprudence concerning territorial disputes between world powers. What law that does exist is largely anachronistic and counterproductive to the policy goals of the modern international legal regime. Thus, although using litigation or arbitration may be preferable to resorting to belligerent force, they are far from ideal.

A number of commentators have evaluated possible outcomes of an adjudication of the Senkaku-Diaoyu dispute.<sup>22</sup> This Note seeks to re-evaluate their arguments, particularly in light of Japan’s purchase of the islands, as well as a number of important treaties formed between Japan, China, and the United States following World War II. Furthermore, it will argue that no country has an overwhelmingly strong claim to the islands under current law. Moreover, the existing legal framework no longer meets the

*The New York Times* suggests that Japan is under the impression that it has full sovereignty rights. Therefore, the argument goes, Japan is only doing what any nation with sovereignty has the right to do. See Koichiro Genba, Op-Ed., *Japan-China Relations at a Crossroads*, N.Y. TIMES (Nov. 20, 2012), available at <http://www.nytimes.com/2012/11/21/opinion/koichiro-genba-japan-china-relations-at-a-crossroads.html> (“We cannot make any concessions where sovereignty is concerned.”).

18. See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malay. v. Sing.), 2008 I.C.J. (May 23).

19. There is a noticeable absence of disputes between major political powers in the ICJ’s history. See Ramos-Mrosovsky, *supra* note 4, at 937–38.

20. Here, the term hard power implies forcing your adversary to behave in a certain way through the threat or use of force. Daryl Copeland, *Hard Power v. Soft Power*, THE MARK (Feb. 2, 2010), <http://www.themarknews.com/articles/895-hard-power-vs-soft-power/UmE61BbBrDM>.

21. As a jurisdictional matter, nation-parties to international litigation before the ICJ and many other similarly situated tribunals must consent to the tribunal’s jurisdiction. Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT’L L. 29, 29 (2006).

22. See William B. Heflin, *Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 1 ASIAN-PAC. L. & POL’Y J., no. 2, 2000 at 18:1. See also Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PAC. RIM L. & POL’Y J. 63 (2002); Ramos-Mrosovsky, *supra* note 4.

needs of modern nations who seek peaceful arbitration of their territorial disputes, and the diplomatic alternatives to litigation are bleak. Therefore, this Note concludes that the international community should strongly consider adopting a more effective legal framework in the form of a multilateral treaty.

Part I will address the historical background behind sovereignty over the islands and delineate the factual fault lines of the territorial dispute. Part II will focus on the current law relevant to the dispute, including relevant covenants, customary law, and other sources of law that a tribunal analyzing the Senkaku-Diaoyu dispute would consider. Part III will then analyze how an international tribunal would likely resolve this dispute in light of the relevant sources of law. Part III will also consider possible alternatives to the current Senkaku-Diaoyu conflict outside the scope of litigation or arbitration. The Note concludes by proposing that international actors should compose and sign a multilateral treaty codifying the surviving customary law on territorial acquisition, while also expressly defining some of the more ambiguous terms and issues commonly arising in territorial sovereignty questions.

## I. Historical Background

Tracing the history of the Senkaku-Diaoyu Islands is challenging, particularly given their diminutive size and relative historical inconsequentiality. Until the mid-nineteenth century, they were often entirely neglected in official documents or lumped together with other larger sets of islands, such as the Ryukyu Islands or Taiwan<sup>23</sup> more generally.<sup>24</sup> Furthermore, no country has ever established a colony on any of the Senkaku-Diaoyu Islands.<sup>25</sup> Therefore, in light of the islands' recent place at the forefront of political affairs in the Pacific Rim, it is somewhat ironic that a major source of the confusion and uncertainty surrounding sovereignty over the islands derives from their general political irrelevance for many centuries.

China argues that Chinese nationals first discovered the islands in the fourteenth century, and then later returned to gather medicinal herbs and used the islands for navigational purposes.<sup>26</sup> There is no evidence that China left behind a flag or any other symbolic marker to indicate that the islands had become Chinese territory, but China argues that it included the islands on maps and official documents during that time and that the Ming Dynasty considered the islands to be part of China's official terri-

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23. Treaties and other historical documents often refer to Taiwan as "Formosa," a name that Portuguese colonialists gave to the Island in the sixteenth century. See Lee, *supra* note 22, at 89 n.115; Han-Yi Shaw, *Rule of Law and the Diaoyu/Senkaku Islands Dispute*, N.Y. TIMES (Oct. 20, 2012), available at <http://cn.nytimes.com/article/opinion/2012/10/20/c20shaw/en/?pagemode=print>.

24. Lee, *supra* note 22, at 90.

25. Martin Fackler, *In Shark-Infested Waters, Resolve of Two Giants is Tested*, N.Y. TIMES (Sept. 22, 2012), available at <http://www.nytimes.com/2012/09/23/world/asia/islands-dispute-tests-resolve-of-china-and-japan.html?pagewanted=all>.

26. Heflin, *supra* note 22, at 18:4.

tory.<sup>27</sup> Furthermore, the Dowager Empress of China, Cixi, made a grant of the islands to the head of the Imperial Household in 1893.<sup>28</sup>

Besides China's modest use of the islands, there were no other known claims to the islands until the mid-1890s, when Japan began to aggressively expand in both power and territory.<sup>29</sup> In 1894, the Japanese Interior Minister recommended that the Japanese government establish a national marker on the islands.<sup>30</sup> However, the Foreign Minister refused, "replying that such an act 'would attract the attention of [China],' and therefore, Japan 'should wait for a more opportune time' to do so."<sup>31</sup> Only later, in January 1895, did the Japanese Cabinet agree to place Japanese markers on the islands.<sup>32</sup>

Furthermore, during this era, a vicious war broke out between China and Japan, ultimately resulting in a number of victories for the Japanese military.<sup>33</sup> War-weary and defeated, the Chinese signed the Shimonoseki Treaty, ceding "to Japan in perpetuity and full sovereignty the . . . island of Formosa, together with all islands appertaining or belonging to the said island of Formosa."<sup>34</sup> It is possible that "all appertaining islands" may have included the Senkaku-Diaoyu Islands, but the parties chose not to expressly identify "all appertaining islands" in the treaty.<sup>35</sup> Therefore, it is unclear whether China transferred the rights to the Senkaku-Diaoyu Islands to Japan in the Shimonoseki Treaty, if China even held such rights to the islands at the time.<sup>36</sup>

Fifty years later and emerging from World War II, there was a palpable sentiment amongst the victorious Allies to punish the Axis powers, including Japan, for their overzealous territorial ambitions.<sup>37</sup> Before the end of the war, the Allied powers issued the Cairo Declaration<sup>38</sup> following the 1943 Cairo Conference,<sup>39</sup> stating that "Japan shall be stripped of . . . all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, [which] shall be restored to the Republic of

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27. Although there are claims that Chinese fisherman used the islands as places of temporary shelter and repair, China never established a permanent settlement of civilians or military personnel on the islands, and apparently did not maintain permanent naval forces in adjacent waters. MARK E. MANYIN, CONG. RESEARCH SERV., R42761, SENKAKU (DIAOYU/DIAOYUTAI) ISLANDS DISPUTE: U.S. TREATY OBLIGATIONS 2 (2012) [hereinafter Manyin], available at <http://www.fas.org/sgp/crs/row/R42761.pdf>.

28. *Id.*

29. Lee, *supra* note 22, at 89.

30. Heflin, *supra* note 22, at 18:4.

31. *Id.* (alteration in original).

32. *Id.*

33. Lee, *supra* note 22, at 89.

34. Treaty of Shimonoseki, Japan-China, art. II, Apr. 17, 1895, 181 Consol. T.S. 217, available at <http://china.usc.edu/ShowArticle.aspx?articleID=405>.

35. *Id.*

36. *See id.*

37. Lee, *supra* note 22, at 89-90.

38. *See id.* at 89. Declarations, unlike Treaties, are not binding on the nations to which they refer. Therefore, this statement, though politically powerful, was not legally binding on Japan.

39. *See id.*

China.”<sup>40</sup> Accordingly, at the 1951 San Francisco Peace Treaty negotiations, the present Allied powers forced Japan to rescind its rights to the majority of its territorial conquests acquired in the lead-up to and during World War II.<sup>41</sup> Mirroring the language of the Cairo Declaration, albeit removing any reference to territories “stolen from the Chinese,” Article 2(b) of the 1951 Treaty of Peace with Japan (the “1951 Treaty”) states that “Japan renounces all right, title and claim to Formosa and Pescadores.”<sup>42</sup>

However, where the Cairo Declaration declares that “Japan shall be stripped of . . . all the territories,”<sup>43</sup> the 1951 Treaty took a different approach, stating that “Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 degrees north latitude.”<sup>44</sup> The 1951 Treaty explains that the United States would have “the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of the islands, including their territorial waters.” Here, “territorial waters” refers to the “Nansei Shoto” south of 29 degrees north latitude.<sup>45</sup> Although the 1951 Treaty, again, makes no overt mention of the Senkaku-Diaoyu Islands, the United States and Japan understood Nansei Shoto to include the islands.<sup>46</sup> Similarly, the United States later issued the U.S. Civil Administration of the Ryukus Proclamation 27 (“USCAR 27”),<sup>47</sup> which defined the boundaries of “Nansei Shoto south of 29 degrees north latitude” to include the Senkaku-Diaoyu Islands.<sup>48</sup> Additionally, there appears to have been a general international consensus that the United States was the official administrator of the Senkaku-Diaoyu Islands following World War II.<sup>49</sup>

For a number of years following the transfer of the territories into a trusteeship, little was said in relation to official title to the Senkaku-Diaoyu Islands, possibly because the United States was directly administering the islands. Interestingly though, China released a handful of official government maps beginning in the 1960s that indicated a Chinese territorial boundary across the East China Sea, with the Senkaku-Diaoyu Islands falling outside the boundary line.<sup>50</sup> Additionally, the Chinese maps label the

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40. Cairo Communique, Dec. 1, 1943, 3 Bevens 858, available at <http://avalon.law.yale.edu/wwii/cairo.asp>.

41. See Treaty of Peace with Japan, art. II, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (entered into force Apr. 28, 1952) [hereinafter 1951 Treaty].

42. *Id.*

43. Cairo Communique, *supra* note 40 (emphasis added).

44. 1951 Treaty, *supra* note 41, at art. III.

45. *Id.*

46. Lee, *supra* note 22, at 90.

47. See Manyin, *supra* note 27, at 3.

48. *Id.*

49. Lee, *supra* note 22, at 90.

50. Bill Gertz, *Inside the Ring*, WASH. TIMES (Sept. 15, 2010), available at <http://www.washingtontimes.com/news/2010/sep/15/inside-the-ring-145889960/>.



string of islands as “Senkaku,”<sup>51</sup> the official Japanese name for the islands,<sup>52</sup> rather than “Diaoyu,” the Chinese name.<sup>53</sup>

Around the same time China released these maps, a UN group called the Economic Commission for Asia and the Far East published a report showing a high possibility of substantial hydrocarbon deposits in the seabed surrounding the Senkaku-Diaoyu Islands,<sup>54</sup> possibly as large as those found in the Persian Gulf.<sup>55</sup> For reasons that this Note will explain in greater depth in Part II, this report undeniably raised the value of the Senkaku-Diaoyu Islands.<sup>56</sup> Perhaps unsurprisingly, given the sudden possibility of vast, untapped oil supplies, Japan, Taiwan and China each claimed exclusive rights to the islands in 1971.<sup>57</sup> Notably, though, this was China’s first formal claim to the islands since the 1951 Treaty placed the islands under American control.<sup>58</sup>

Also around that time, the United States began to signal to the international community that it was ready to hand off the administrative rights related to the Senkaku-Diaoyu Islands.<sup>59</sup> In many respects, it had seemed as if the United States was leaning towards granting Japan full sovereignty rights over the Senkaku-Diaoyu Islands. During the 1951 Treaty negotiations and in later years, both John Foster Dulles, chief U.S. delegate to the conference, and President Dwight Eisenhower maintained that Japan would have “residual sovereignty” over the Ryukyu Islands, meaning that “the United States will not transfer its sovereign powers over the Ryukyu Islands to any nation other than Japan.”<sup>60</sup> Furthermore, in 1962, President John Kennedy stated, “I recognize the Ryukyus to be a part of the Japanese homeland and look forward to the day when the security interests of the Free World will permit their restoration to full Japanese sovereignty.”<sup>61</sup> Accordingly, in June 1971, the United States signed the Okinawa Reversion Treaty, providing for the return of “all and any powers of administration, legislation and jurisdiction,” over the Ryukyu and Daito Islands to Japan.<sup>62</sup> Additionally, an Agreed Minute to the Okinawa Rever-

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51. Han Yi-Shaw, *The Inconvenient Truth Behind the Diaoyu/Senkaku Islands*, N.Y. TIMES, (Sept. 19, 2012, 7:38 PM), available at <http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkaku-islands/>.

52. Gertz, *supra* note 50.

53. *See supra* note 1.

54. Rep. of the Sixth Sess., *supra* note 13.

55. *Id.*

56. Takashi Oka, *Oil Under East China Sea is the Crux of 3-Nation Issue*, N.Y. TIMES, Jan. 30, 1971, at A8.

57. Ramos-Mrosovsky, *supra* note 4, at 923.

58. *Id.*

59. *See* Manyin, *supra* note 27, at 4.

60. KERRY DUMBAUGH, DAVID ACKERMAN, RICHARD CRONIN, SHIRLEY KAN & LARRY NIKSCH, CONG. RESEARCH SERV., RL31183, CHINA’S MARITIME TERRITORIAL CLAIMS: IMPLICATIONS FOR U.S. INTERESTS 21 (2001) [hereinafter Dumbaugh, et. al.], available at <http://www.hsdl.org/?view&did=446508>.

61. *Id.*

62. *Id.* “Article I of the Okinawa Reversion Treaty defined the term ‘the Ryukyu Islands and the Daito Islands’ as ‘all territories with their territorial waters with respect to which the right to exercise all and any powers of administration, legislation and juris-

sion Treaty confirmed that the boundaries of the Ryukyu and Daito Islands were “as designated under USCAR 27,” which included the Senkaku-Diaoyu Islands.<sup>63</sup> Not insignificantly, the treaty relies on the same language that the 1951 Treaty used to grant administrative powers to the United States in 1951.<sup>64</sup>

Gradually, however, the official stance on the islands became much more restrained inside the beltway.<sup>65</sup> Despite ongoing Cold War tensions, President Richard Nixon’s administration had ambitious plans to visit the Communist People’s Republic of China (the “PRC”),<sup>66</sup> making him the first American president to pursue formal diplomatic relations with China in over 25 years.<sup>67</sup> A number of commentators believe that this sudden and significant shift in foreign policy caused the United States to backpedal and take a neutral position on the competing sovereignty claims over the Senkaku-Diaoyu Islands.<sup>68</sup> Indeed, before the Senate was able to review and ratify the Okinawa Reversion Treaty in late 1971, the Nixon Administration “removed the Senkakus from its inclusion in the concept of Japanese residual sovereignty.”<sup>69</sup> Furthermore, in a letter dated October 20, 1971, the State Department’s Acting Assistant Legal Adviser for East Asian and Pacific Affairs, Robert Starr, stated that

[t]he 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 claims . . . . 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.<sup>70</sup>

To date, the U.S. government takes a neutral stance on the Senkaku-Diaoyu Island dispute; former Secretary of State Hillary Clinton has said that, “with respect to the Senkaku Islands, the United States has never taken a position on sovereignty.”<sup>71</sup> Thus, despite the possible political motivations behind the United States’ explicit neutrality in 1971, it is clear that the United States unambiguously refrained from granting Japan full or even partial sovereignty rights over the Senkaku-Diaoyu Islands.

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diction was accorded to the United States of America under Article 3 of the Treaty of Peace with Japan . . . .” *Id.* at 21-22.

63. *Id.* at 22.

64. *Id.*; Treaty of Peace with Japan, *supra* note 41.

65. See Manyin, *supra* note 27, at 4-5.

66. Max Frankel, *Changing U.S. Attitude on China: Nixon Displays Signs of His Interest in Widening Ties*, N.Y. TIMES, Apr. 14, 1971, at A15; Max Frankel, *Nixon’s ‘Great Leap Forward’: Plan to Visit China May Bolster U.S. in Soviet Talks*, N.Y. TIMES, July 17, 1971, at A3.

67. James Reston, *London: The Nixon Doctrine and Assumptions*, N.Y. TIMES (Feb. 20, 1970), <http://query.nytimes.com/mem/archive/pdf?res=10A14FD3C5914768FDDA90A94DA405B808BF1D3>.

68. Manyin, *supra* note 27, at 4-5.

69. Dumbaugh, et. al., *supra* note 60, at 22.

70. Manyin, *supra* note 27, at 5.

71. *Id.*

However, Article II of the Okinawa Reversion Treaty poses a notable exception to the United States' otherwise cautious policy towards the Senkaku-Diaoyu Islands. Article II states that

treaties, conventions, and other agreements concluded between Japan and the United States of America, including, but without limitation to the Treaty of Mutual Cooperation and Security between Japan and the United States of America . . . become applicable to the Ryukyu Islands and the Daito Islands as of the date of entry into force of this Agreement.<sup>72</sup>

In other words, in the event of an armed attack on the Senkaku-Diaoyu Islands, the United States has an explicit security obligation to maintain the integrity of Japan's borders, including those islands for which it has only administrative rights.<sup>73</sup> To corroborate Article II, the Okinawa Reversion Treaty further stipulates in Article V that each party would act "in accordance with its constitutional provisions and processes in response to an armed attack . . . in the territories under the *administration* of Japan."<sup>74</sup>

Since the official transfer of administrative rights to Japan, tensions have risen as China has continued to make public claims to the islands.<sup>75</sup> The waters surrounding the islands have seen minor skirmishes amongst private citizens on fishing boats, as well as a number of symbolic landings on the islands, but thus far there has been no outright government-endorsed aggression from either country.<sup>76</sup> One scholar identified China's uncharacteristically pacifist behavior as a "delaying strategy," perhaps prolonging this potentially volatile dispute in the hopes of more favorable political conditions in the future.<sup>77</sup>

Although Deng Xiaoping may have made his statement<sup>78</sup> with good intentions, leaving the conflict to later generations has further clouded an already complex foreign policy problem. In the years since Japan and the United States signed the Okinawa Reversion Treaty, a nationalist movement relating to the Senkaku-Diaoyu dispute has matured in Japan.<sup>79</sup> Indeed, Japan claims that it bought the three islands in a response to the right-wing "Tokyo governor Shintaro Ishihara's April 2012 announcement in Washington, DC, that he intended to . . . purchase three of the eight [islands] from their private owner."<sup>80</sup>

72. *Id.*

73. Stephen Harner, *Is the U.S. Committed to Defend the Senkakus? Text of Article 5 of the U.S.-Japan Treaty*, FORBES (Sept. 23, 2012, 6:45 AM), <http://www.forbes.com/sites/stephenharner/2012/09/23/is-the-u-s-committed-to-defend-the-senkakus-text-of-article-5-of-the-u-s-japan-treaty/>.

74. Manyin, *supra* note 27, at 6 (internal quotation marks omitted).

75. *See supra* note 5.

76. *Timeline, supra* note 16.

77. FRAVEL, *supra* note 6, at 145.

78. *See supra* text accompanying note 6.

79. Chico Harlan, *With China's Rise, Japan Shifts to the Right*, WASH. POST (Sept. 20, 2012) [http://www.washingtonpost.com/world/asia\\_pacific/with-chinas-rise-japan-shifts-to-the-right/2012/09/20/2d5db3fe-ffe9-11e1-b257-e1c2b3548a4a\\_story.html](http://www.washingtonpost.com/world/asia_pacific/with-chinas-rise-japan-shifts-to-the-right/2012/09/20/2d5db3fe-ffe9-11e1-b257-e1c2b3548a4a_story.html) (stating that polls suggest Japanese are increasingly concerned about security and feel their country faces an outside threat).

80. Manyin, *supra* note 27, at 1.

That private owner was Hiroyuki Kurihara,<sup>81</sup> a conservative Japanese citizen himself who claimed that, “For over [forty] years, we have safeguarded these islands for our nation, . . . but now we’ve grown old.”<sup>82</sup> He believed that Ishihara would take up the mantle and actively defend the islands from Chinese aggression.<sup>83</sup> However, the Japanese government argues that this action would have created an ominous liability<sup>84</sup> and was concerned that Ishihara either directly, through his unchecked nationalist rhetoric, or indirectly, through mere ownership of the islands, would lead to an unstoppable intensification of hostilities between the two countries.<sup>85</sup> Nevertheless, Japan had rented the islands from Kurihara before.<sup>86</sup> Thus, there may have been other, relatively less provocative means of wresting the islands away from Governor Ishihara than complete nationalization of the islands.

However, the Japanese government’s procurement of the islands has arguably been much more provocative than Ishihara’s purchase likely would have been.<sup>87</sup> Since Japan has purchased the islands, China has erupted into riots.<sup>88</sup> Japanese citizens have countered these riots with their own protests and island landings.<sup>89</sup> China then aggressively sent out patrol boats<sup>90</sup> and surveillance drones near the islands.<sup>91</sup> Moreover, the two nations have tailed each other’s fighter jets in the airspace above the islands.<sup>92</sup> Most recently, China has announced that it will send in a cartographical team to survey the islands.<sup>93</sup> As this team is expected to set foot on the islands in order to “map[ ] caves and other features not visible from the air,”<sup>94</sup> this incendiary action could very well trigger Article II of the

81. Wieland Wagner, *Senkaku Islands Dispute: Former Owner Criticizes Japanese Government*, DER SPIEGEL (Sept. 24, 2012, 9:07 AM), <http://www.spiegel.de/international/world/tension-between-japan-and-china-in-senkaku-islands-dispute-a-857514.html>.

82. *Id.*

83. *Id.*

84. *Id.*

85. Manyin, *supra* note 27, at 1.

86. *Rented Islands Strain Sino-Japanese Relations*, CNN (Jan. 1, 2003, 10:49 PM), [http://articles.cnn.com/2003-01-01/world/China.islets\\_1\\_senkaku-islands-sino-japanese-relations-three-tiny-islands?\\_s=PM:asiapcf](http://articles.cnn.com/2003-01-01/world/China.islets_1_senkaku-islands-sino-japanese-relations-three-tiny-islands?_s=PM:asiapcf) (“By renting the islands . . . Japan hopes to keep their Japanese owner, Yukihiro Kurihara from selling them, the Yomiuri reported.”).

87. Dickie, *supra* note 1.

88. Ian Johnson & Thom Shanker, *More Protests in China Over Japan and Islands*, N.Y. TIMES (Sept. 18, 2012), <http://www.nytimes.com/2012/09/19/world/asia/china-warns-japan-over-island-dispute.html>.

89. Martin Fackler, *Dispute Over Islands Reflects Japanese Fear of China’s Rise*, N.Y. TIMES (Aug. 21, 2012), <http://www.nytimes.com/2012/08/22/world/asia/dispute-over-islands-reflect-japanese-fear-of-chinas-rise.html?pagewanted=all>.

90. Martin Fackler, *Chinese Patrol Ships Pressuring Japan Over Islands*, N.Y. TIMES (Nov. 2, 2012), <http://www.nytimes.com/2012/11/03/world/asia/china-keeps-up-pressure-on-japan-over-disputed-islands-with-patrols.html?pagewanted=all>.

91. *Dangerous Shoals*, *supra* note 7.

92. *Id.*

93. *China to Send in Surveyors to Disputed Senkaku Islands*, THE GUARDIAN (Mar. 12, 2013, 5:43 AM), <http://www.guardian.co.uk/world/2013/mar/12/china-surveyors-disputed-senkaku-islands>.

94. *Id.*

Okinawa Reversion Treaty and cause the United States to intervene on Japan's behalf.

Furthermore, the Japanese Foreign Minister, Koichiro Genba, recently released a brief op-ed to *The New York Times* arguing that “[t]he measure taken by the government of Japan was just a transfer of title under Japanese domestic law and just means that the ownership of the islands—held by the government until 1932—was returned from a private citizen to the government.”<sup>95</sup> When Genba referred to the government's “ownership” of the islands, he chose not to further clarify whether ownership here is defined as sovereignty rights or merely administrative rights.<sup>96</sup>

Genba also went on to suggest that “[s]ince China is undertaking various campaigns to promote their assertions in international forums, it seems to make sense for China to seek a solution based on international law.”<sup>97</sup> Nevertheless, he also explicitly stated, “We cannot make any concessions where sovereignty is concerned.”<sup>98</sup> This is a troubling juxtaposition of sentiments: Genba seemed to be urging China to cooperate in a case before the ICJ, or another equally legitimate international tribunal, while simultaneously declaring that Japan has no intention to cede its claim to sovereignty over the islands.

Although the background of the Senkaku-Diaoyu dispute presents a daunting thicket of political history, this Note has sufficiently unraveled the major historical points at issue. The discussion will now turn to the existing international legal structure concerning territorial disputes, particularly disputes over islands.

## II. Legal Structure

Like much of international law, the law governing territorial title of islands is a broad patchwork of customary law best illustrated in the cases flowing out of various international tribunals, such as the ICJ and the Permanent Court of Arbitration (the “PCA”).<sup>99</sup> Unfortunately, it is notably difficult to find a case that is illustrative of a dispute between two major international powers in the modern era. The relative dearth of relevant cases and the overwhelmingly fact-intensive nature of the few relevant cases that do exist<sup>100</sup> make it challenging for legal analysts to predict, with any degree of certainty, the direction in which a judicial body might lean in a case such as this one.

This is problematic for major powers that stand to lose quite a lot from a judgment contrary to their legal claims. Not only do they risk losing territory—or at least a valid claim to the territory in question—but they also risk undermining the global perception of their political strength and terri-

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95. Koichiro Genba, *supra* note 17.

96. *See id.*

97. *Id.*

98. *Id.*

99. Ramos-Mrosovsky, *supra* note 4, at 913.

100. *See, e.g.*, *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928); *Minquiers and Ecrehos (U.K. v. Fr.)*, 1953 I.C.J. 47 (Nov. 17).

torial breadth. This section of the Note will proceed by looking first to the international conventions and protocols relevant to the dispute, then to the antiquated, but nevertheless valid, customary international law, and finally to various other authorities that tribunals such as the ICJ and PCA might consider.

#### A. Multilateral Conventions and Protocols

Unfortunately for legal parties or potential legal parties in territorial disputes, there is no general international convention on the acquisition of territory or how to assess the value of one nation's claim of sovereignty over another nation's competing claim. Despite the gaping holes in the international law of territorial title, there are international conventions governing island and maritime law once the issue of sovereignty is already settled.<sup>101</sup> Although the existing covenants and protocols on the law of the sea can do little to dispel any doubts or ambiguities about territorial title, they can help to further elucidate the importance of the Senkaku-Diaoyu dispute to both the countries involved, as well as to the international community.

First, the 1958 Geneva Convention on the Continental Shelf (the "GCCS") was the major covenant governing the law of the sea for many years<sup>102</sup> and was still in effect when the dispute over the Senkaku-Diaoyu Islands first began to build steam.<sup>103</sup> The GCCS is a relatively brief and limited document, but is notably clear on the rights to an island's adjoining seabed.<sup>104</sup> Since then, however, the cumbersome two hundred-page United Nations Convention on the Law of the Sea (the "UNCLOS") replaced the Geneva Convention on the Continental Shelf.<sup>105</sup> UNCLOS is now the only convention that currently codifies sovereignty rights for island territories.<sup>106</sup>

An issue of major relevance for nations claiming sovereignty rights to an island is the Exclusive Economic Zone (the "EEZ") surrounding the island.<sup>107</sup> UNCLOS defines an EEZ as "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."<sup>108</sup> Furthermore, "[i]n the exclusive economic zone, the coastal State has . . . sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources . . . of the waters superjacent to the seabed and of the seabed and its subsoil."<sup>109</sup>

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101. See, e.g., UNCLOS, *supra* note 14.

102. Convention on the Continental Shelf, art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (entered into force June 10, 1964).

103. See Ramos-Mrosovsky, *supra* note 4, at 911.

104. Convention on the Continental Shelf, *supra* note 102.

105. See UNCLOS, *supra* note 14.

106. See Ramos-Mrosovsky, *supra* note 4, at 911.

107. *Id.* at 911-12.

108. UNCLOS, *supra* note 14, at art. 55.

109. *Id.* at art. 56.

However, Article 121 of UNCLOS goes on to say that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf,”<sup>110</sup> which seems to be troublesome in light of the Senkaku-Diaoyu Islands’ rock-like characteristics and absence of human settlement.<sup>111</sup> Nevertheless, the prevailing view among legal commentators is that the Senkaku-Diaoyu Islands are indeed islands with full rights to the potentially valuable EEZ circling the islands.<sup>112</sup>

Additionally, the geographical size of the EEZ raises a number of issues. The Convention states that “the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>113</sup> This is a problem in relatively smaller bodies of water less than 400 miles across where there could be substantial overlap between the EEZs of two or more countries. For example, the East China Sea is only 360 miles across at its very widest point.<sup>114</sup> Unfortunately, despite the high likelihood of overlap, UNCLOS is silent about how to resolve such an issue.<sup>115</sup> Thus, it is clear from both the general lack of a convention on territorial acquisition and the ambiguities surrounding UNCLOS that the law in this realm does little to elucidate sovereignty disputes, particularly this one.

## B. Customary Law

As one scholar noted, “Although ‘it cannot be denied that the traditional development of custom is ill suited to the present pace of international relations,’ it is true to say that customary rules of international law still occupy a prominent place among the binding rules of international law.”<sup>116</sup> Historically, five modes of territorial acquisition emerged as mechanisms by which countries legally acquired territory: (1) discovery and occupation, (2) conquest, (3) prescription, (4) cession, and (5) accretion.<sup>117</sup> Many of these methods are similar to common law theories of property, and suggest that there is some overlap between principles of sovereign territorial acquisition and the more pedestrian acquisitions of private domestic property.

First, discovery and occupation are a two-part process of acquisition that requires both elements to be present for a legitimate acquisition of territory.<sup>118</sup> The first element, discovery, largely depends on the absence of prior claims on the territory.<sup>119</sup> Accordingly, the territory must be *terra nullius*, meaning “land belonging to no one.”<sup>120</sup>

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110. *Id.* at art. 121.

111. *See* Pesek, *supra* note 11.

112. *See* Ramos-Mrosofsky, *supra* note 4, at 912.

113. UNCLOS, *supra* note 14, at art. 57.

114. Ramos-Mrosofsky, *supra* note 4, at 911.

115. *See* UNCLOS, *supra* note 14.

116. YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 38 (1965).

117. Ramos-Mrosofsky, *supra* note 4, at 913.

118. *See id.*

119. *Id.* at 912.

120. *Id.* at 913.

The second element, effective occupation, consists of two additional sub-elements: first, the nation must exhibit the intention to act as a sovereign, and second, the nation must also exercise actual sovereign authority.<sup>121</sup> As to this second element of occupation, no court has provided a precise list of actions sufficient to establish actual sovereign authority.<sup>122</sup> Activities establishing sovereign authority in the past have included military patrols, investigating criminal activity, establishing national courts, and registering deeds to property.<sup>123</sup> Although the “[p]rivate commercial activity by citizens of a claimant state will not suffice [as evidence of sovereignty,] . . . its regulation by a government will.”<sup>124</sup> Predictably, because many of these activities appear to be relatively undemanding, a group of nations with competing claims may have all exhibited at least some activities associated with “occupation.” Consequently, this second sub-element can be problematic in terms of determining which activities are more indicative of actual occupation.<sup>125</sup> Generally speaking, when multiple countries claim rights to a particular tract of territory, international courts will compare the claims through the framework of a balancing test.<sup>126</sup> In applying the balancing test, courts look to demonstrated acts of sovereignty such as military patrols, judicial proceedings, and infrastructure, among other things.<sup>127</sup>

Furthermore, “the actual, and not the nominal, taking of possession is a necessary condition of occupation.”<sup>128</sup> However, there is some historical disagreement among scholars about the exact definition of actual possession, and whether effective occupation necessarily consists of actual settlement or exploitation regardless of the conditions of the land.<sup>129</sup> According to Professors McDougal, Lasswell, and Vlasic’s “systematic and solid study”<sup>130</sup> of this issue, if an island is barren, the mere intention to occupy over time may be sufficient.<sup>131</sup>

Second, another legal mode of acquiring territory is through conquest.<sup>132</sup> Conquest is generally achieved when one state defeats another in a war or some other act of aggression and the defeated state voluntarily concedes to transferring the territory in question.<sup>133</sup> However, these

121. *See id.* at 914.

122. *See* SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 70–92 (1997).

123. Ramos-Mrosovsky, *supra* note 4, at 914.

124. *Id.* at 915, 915 n.57 (citing Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625, 683 (Dec. 17) (holding that “activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.”)).

125. *See id.* at 915.

126. *Id.*

127. *Id.*

128. Clipperton Island (Fr. v. Mex.), 2 R.I.A.A. 1105 (1931), *translation available at* 26 AM. J. INT’L L. 390 (1932).

129. SHARMA, *supra* note 122, at 64.

130. *Id.* at 65–66.

131. *Id.*

132. Ramos-Mrosovsky, *supra* note 4, at 915.

133. *See* BOLESŁAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 213 (2005).



grounds for territorial acquisition are somewhat dubious in the modern era and seem largely contradictory to the objectives and language of current international conventions.<sup>134</sup> Furthermore, the idea that such a transfer of territory is voluntary is similarly suspect, given that a nation conceding defeat after conflict is presumably likely to feel some pressure to transfer the coveted territory to the victorious country.<sup>135</sup> Third, states may also acquire territories through prescription, a controversial method of territorial acquisition in international law that is similar to the common law doctrine of prescription in property acquisition.<sup>136</sup> Under the theory of prescription in international law, a state may acquire territory through “uninterrupted and uncontested peaceful exercise of state authority which has persisted for an undefined period of time, sufficiently long to legitimize the status of the territory in the eyes of the international community.”<sup>137</sup> If a state does not blatantly object to the other state’s continuous and peaceful occupation, judges and arbitrators may determine that the non-objecting state may have tacitly renounced its claim to the territory.<sup>138</sup> Although there are some similarities between occupation and prescription, occupation only “applies to territory which has not been already in the possession of any territorial entity, [while] prescription refers to title to a territory which has been in possession of some other state, lawfully or unlawfully.”<sup>139</sup>

The legal theory of prescription is a controversial topic in international law.<sup>140</sup> The famed Dutch jurist, Hugo Grotius, argued that, “Prescription is a matter of municipal law; hence it cannot be applied as between kings or as between free and independent nations.”<sup>141</sup> Although the fact that prescription originated in municipal law may seem like an irrelevant technicality, the policy implications of upholding sovereignty under a prescription theory are troubling.<sup>142</sup> For instance, prescription as a tool in the international sphere would incentivize nations to usurp other nation’s rightful territory, introducing a host of new foreign policy crises. Accordingly, judges and arbitrators have decided very few of the modern cases on the basis of prescription.<sup>143</sup>

Not only does the sparing use of prescription as a legal theory suggest that it is no longer valid in the international context,<sup>144</sup> but it also leaves legal practitioners and scholars with little information about how the the-

134. See U.N. Charter art. 39.

135. See SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE*, 123-24 (reprint 2003).

136. Ramos-Mrosovsky, *supra* note 4, at 915-16.

137. BOCZEK, *supra* note 133, at 242.

138. *Id.*

139. SHARMA, *supra* note 1222, at 114.

140. BLUM, *supra* note 1166, at 15.

141. *Id.*

142. *Id.*

143. See, e.g., *Island of Palmas Arbitration*, *supra* note 1000. See also BLUM, *supra* note 116, at 20-29.

144. See BLUM, *supra* note 6, at 20 (arguing that “the persistent silence observed by the tribunals on this point should not be considered as devoid of any legal meaning.”).

ory operates in practice. Accordingly, it is difficult to know precisely what an adequate protest would look like, or how much time must pass without adequate protest before sovereign territory transfers from one nation to another.<sup>145</sup>

Fourth, a relatively infrequent and also possibly defunct manner in which to gain territory is through cession.<sup>146</sup> Cession concerns the transfer of title between two sovereigns.<sup>147</sup> There are two distinct categories of cession.<sup>148</sup> The first results “from the use of force against the state ceding the territory in question, in which case the treaty of cession merely formalized military coercion.”<sup>149</sup> In many ways, this category of cession significantly overlaps with conquest. Again, much like conquest, this seems like an unlikely avenue for official transfer in an era that opposes military campaigns motivated by the acquisition of new territories. The second form of cession is “effected by sale, gift, exchange, or other voluntary transaction.”<sup>150</sup> A familiar example of this form of cession is France’s nineteenth-century sale of the Louisiana Territory to the United States.<sup>151</sup> However, outside of the historical context, there are few, if any, recent examples of a nation purchasing the territory of another nation.<sup>152</sup> Additionally, a less traditional manner of cession is the “relinquishment of a claim to a territory coupled with recognition of the successor state’s sovereignty over the territory.”<sup>153</sup>

Accretion is the fifth way in which a state may acquire territory,<sup>154</sup> but it is the rarest and least controversial manner in which to do so as it requires no state action. Accretion is simply the “addition of new land to the existing territory of a state by operation of nature and without the need of any formal acts on the part of the state.”<sup>155</sup> Examples include lava flows in the state of Hawaii,<sup>156</sup> and the sudden emergence of volcanic rock in the territorial waters of Iceland, resulting in the island of Surtsey.<sup>157</sup>

Therefore, with respect to a common modern perspective of territorial acquisition, accretion, and occupation and discovery are likely the only methods that are almost certainly still good law. Surprisingly, the eroding legality of traditional forms of territorial acquisition has garnered little

145. Ramos-Mrosovsky, *supra* note 4, at 916.

146. *Id.* at 913.

147. BOCZEK, *supra* note 133, at 209.

148. *Id.*

149. *Id.*

150. *Id.*

151. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 44 (2005).

152. However, some scholars argue that there are still some modern instances of cession, such as territory a gift or swap. See, e.g., *id.* at 45 (“A more modern form of cession has been by gift, as one government gives a tract of territory to another state.”).

153. BOCZEK, *supra* note 133, at 209.

154. BOCZEK, *supra* note 133, at 201.

155. *Id.*

156. Robert Thomas, “Accretion” *Hawaii Style*, HAWAII REPORTER (Dec. 12, 2011), <http://www.hawaiireporter.com/accretion-hawaii-style/123>.

157. BOCZEK, *supra* note 133, at 201.

scholarly attention in relation to the Senkaku-Diaoyu Islands. Nevertheless, there is substantial evidence that there has been a gradual wearing down of this historical legal framework.<sup>158</sup> As discussed above, conquest, as well as the more belligerent form of cession, simply cannot coexist with the UN Charter and other multilateral covenants and declarations that restrict the use of force.<sup>159</sup> Furthermore, although the majority of nations have never explicitly outlawed prescription as a form of territorial acquisition,<sup>160</sup> for a number of reasons discussed above, it does not seem to be a method that international courts favor.<sup>161</sup> Consequently, not only is the state of customary law muddled and overlapping, but the law that is still relevant seems limited and relatively unhelpful. Thus, the questions that necessarily arise in a legal investigation pertaining to territorial acquisition are often unanswerable when looking to current customary law.

### C. Other Sources of Law: Bilateral Treaties

Beyond covenants such as UNCLOS and customary law on territorial acquisition, relevant cases often perform a searching review of all the bilateral treaties between the sparring nations, particularly those that relate to the disputed territories.<sup>162</sup> In fact, many cases seem to especially value these treaties above any other source of law.<sup>163</sup> One possible explanation for this emphasis on bilateral treaties is that they provide the relevant countries with an opportunity to expressly state their expectations and understandings concerning the territory in an open and obvious manner. Consequently, decision makers are able to consult a relatively clear memorial of the parties' intentions.

However, looking to bilateral treaties can present several problems in a territorial dispute case. Many of the treaties that pertain to a currently disputed territory are considerably antiquated;<sup>164</sup> after all, if there were current and clear treaties on the matter, there would likely be less of a basis for a dispute in the first place. Although courts do not seem to hesitate in depending on such treaties,<sup>165</sup> looking to older treaties might lead to peculiar results or further complicating questions, since a treaty made in the mid-nineteenth century—or earlier—is likely reflective of a very different era in international politics and diplomacy. Furthermore, bilateral treaties, as political instruments, may delicately circumvent controversial areas in the nations' relationship, ultimately expressing very little sub-

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158. For example, in his paper *International Law's Unhelpful Role in the Senkaku Islands*, Carlos Ramos-Mrosovsky analyzes the dispute under prescription and does not suggest that this mode of acquisition is now, as it likely is, defunct. Ramos-Mrosovsky, *supra* note 4.

159. See *supra* text accompanying note 134.

160. See BLUM, *supra* note 116, at 15–30.

161. See *id.*

162. See, e.g., Clipperton Island Arbitration, *supra* note 128.

163. *Id.*

164. *Id.*

165. See, e.g., Clipperton Island Arbitration, *supra* note 128; Island of Palmas Arbitration, *supra* note 100.

stance. Finally, it is challenging for a judicial actor to consult and analogize from past cases that rely heavily on an idiosyncratic bilateral treaty, pertinent only to a small set of states.

### III. Application of Current Law and Alternatives

Given the ambiguities in the bilateral and multilateral treaties governing the Senkaku-Diaoyu dispute, this Note will now turn to the task of applying the customary legal framework stated above to the facts of the dispute and assess whether China or Japan has the more colorable claim to the islands. Although a number of scholars have explored this subject and determined that Japan has the more colorable claim,<sup>166</sup> this Note argues that, due to (1) the likelihood that prescription and conquest are now defunct and (2) the overwhelming flaws in a discovery and occupation argument from either country, it is next to impossible to determine with any certainty which country would prevail under current law. Furthermore, unlike other scholarly discussions of the Senkaku-Diaoyu dispute, this Note will then consider what alternatives to litigation under the current structure might better help nations such as China and Japan find “a solution acceptable to all.”<sup>167</sup>

#### A. Legal Analysis

Some of the modes of territorial acquisition are less pertinent to the dispute over the islands. Though the islands are volcanic rock formations, accretion is a theory that is unlikely to bolster either China or Japan's claims for sovereignty since all volcanic growth of the Senkaku-Diaoyu Islands probably occurred before any claim to the islands was made.<sup>168</sup> Similarly, the less militant version of cession is also unlikely to be helpful in this context, as there is no evidence that either party offered to sell the islands to the other. Additionally, as discussed above, prescription and conquest are no longer clearly applicable, as courts have refrained from finding acquisition on the basis of these two modes. However, because there is no definitive evidence that these doctrines are no longer relevant, this Note will weigh the value of arguments under both prescription and conquest. Finally, occupation and discovery is the most likely avenue for both countries to claim sovereignty, and thus this Note will first explore this method as a possible basis for a legal claim.

##### 1. *Discovery and Occupation*

Discovery and occupation is likely to be the strongest argument for Japan. Since 1971, Japan has held the islands, as the United States did, in a trusteeship.<sup>169</sup> Thus, whether or not there is possession or occupation in

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166. See, e.g., Heflin, *supra* note 22.

167. See *supra* text accompanying note 6.

168. See Jing-Yi Lin et al., *Distribution of the East China Sea Continental Shelf Basins and Depths of Magnetic Sources*, 57 EARTH PLANETS & SPACE 1063 (2007).

169. MANYIN, *supra* note 27.

the legal sense, there is clearly some degree of possession or control over the islands in the more general sense and, of course, “possession is nine-tenths the law.”<sup>170</sup> Additionally, the Security Treaty between Japan and the United States, requiring the United States to respond to any invasion of the Senkaku-Diaoyu Islands,<sup>171</sup> further corroborates the fact that Japan has some form of possession of the islands, as no other nation could occupy the islands without first piercing an American military defense. In addition to Japan’s possession of the islands as an administrator, Japan also likely intended to act as a sovereign over the Senkaku-Diaoyu Islands following the transfer of administrative rights; rumblings from all three countries concerning sovereignty over the islands had already begun by the time the islands were transferred to Japan in 1971.<sup>172</sup> Therefore, Japan likely satisfies the first sub-element of occupation. However, as the analysis turns to discovery and the second element of occupation, the strength of Japan’s argument falters.

A number of historical issues exist that may be sufficient to compromise Japan’s claim under discovery and occupation. First, based on the evidence that China had visited the islands on several occasions during the fourteenth century and the records of these visits,<sup>173</sup> it would be a leap for Japan to argue that it actually discovered the Senkaku-Diaoyu Islands. One plausible counterargument would be that the territory was still *terra nullius* because China had not fully occupied the islands; after all, there is no evidence that China established settlements or occupied the islands in a colonizing manner. However, applying Professors McDougal, Lasswell, and Vlastic’s conclusions<sup>174</sup> to the Senkaku-Diaoyu barren and rocky terrain, China probably had to do very little to demonstrate effective occupation.<sup>175</sup> Therefore, unless Japan can show that the Chinese documents regarding the fourteenth-century visits were false or otherwise flawed, and that Japan discovered the Senkaku-Diaoyu Islands when they were still *terra nullius*, it would be challenging to make a claim under discovery. Moreover, because this method of territorial acquisition requires both discovery and occupation, the lack of evidence to support Japan’s claim that the islands were *terra nullius* might alone end the inquiry.

Second, it is unclear whether Japan has truly fulfilled the second requirement of occupation by exercising “actual sovereign authority” over the islands. Japan recently arrested Chinese activists for attempting to land on the islands.<sup>176</sup> If an arrest is sufficient to constitute an investigation of criminal activity or holding judicial proceedings, then a court might hold that Japan had exercised actual sovereign authority. In some past

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170. JOSEPH WILLIAM SINGER, PROPERTY 16 (3d ed. 2009).

171. See *supra* text accompanying notes 73–75.

172. See *supra* text accompanying note 57.

173. See *supra* text accompanying note 26–27.

174. SHARMA, *supra* note 122, at 64.

175. See *supra* text accompanying note 131.

176. Michiyo Nakamoto et al., *Japan Arrests Activists in Senkaku Dispute*, FIN. TIMES (Aug. 16, 2012, 4:02 AM), <http://www.ft.com/intl/cms/s/0/69a7af18-e6c1-11e1-965b-001144feab49a.html#axzz2PFbfeOlm>.

cases, proof of either an investigation of criminal activity or judicial proceedings was sufficient to qualify as exercising sovereign authority.<sup>177</sup> However, the judicial proceedings surrounding these arrests have not taken place on the islands,<sup>178</sup> and it is not clear that detaining citizens constitutes an investigation of criminal proceedings.<sup>179</sup> Similarly, Japan regularly sends government patrols to the islands.<sup>180</sup> Yet, it is not clear how often or with what magnitude a nation must send out patrols to constitute an exercise of actual sovereign authority.<sup>181</sup> Additionally, it is unclear whether Japan's actions with respect to both the arrests and the patrols are merely reflective of Japan's legal status as an administrator, rather than as a sovereign.

Third, an important question to consider is what role the purchase of the islands has on the exercise of sovereign authority. On the one hand, if a court viewed the purchase of the islands as an outright purchase, this would surely diminish Japan's authority as a sovereign as it would suggest that Japan was purchasing sovereign rights that it did not already have. However, based on Japanese Foreign Minister Genba's op-ed,<sup>182</sup> Japan would likely argue that the purchase of the islands was not in fact a purchase of the territory, but rather a nationalization of the islands. In other words, it would be similar to a situation where the United States purchased the Hawaiian island of Lanai. Although all the Hawaiian Islands are American territory, in order to claim the island as government property, the United States would have to purchase the island from its current private owner, Larry Ellison, and nationalize the land.<sup>183</sup> Thus, although Japan has no definitive title to the islands, behaving as the United States would behave in relation to Lanai might demonstrate that Japan was exercising sovereign authority. However, this line of reasoning, if upheld in the context of international territorial disputes, could have deleterious consequences. Any country could simply "nationalize" a hotly contested territory and then claim that it was exercising sovereign authority.

However, even if a court did find that Japan was merely nationalizing the land, there is no indication in the case law that the offer alone to purchase the islands would constitute sovereign authority.<sup>184</sup> Although the actual outcome of nationalizing territory is significant, a simple public announcement that Japan is nationalizing the Senkaku-Diaoyu Islands

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177. Ramos-Mrosovsky, *supra* note 4, at 914-15.

178. Nakamota, *supra* note 176.

179. See Ramos-Mrosovsky, *supra* note 4, at 914.

180. *Id.* at 923.

181. See, e.g., *Island of Palmas Arbitration*, *supra* note 100, at 845-46.

182. See *supra* text accompanying notes 91-95.

183. Adam Nagourney, *Tiny Hawaiian Island Will See if New Owner Tilts at Windmills*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/us/lanai-a-hawaiian-island-faces-uncertain-future-with-new-owner.html?pagewanted=all>.

184. See, e.g., *Island of Palmas Arbitration*, *supra* note 100, at 845-46; *Minquiers and Ecrehos Case*, *supra* note 100.

requires little continued national attention or resources.<sup>185</sup> Arguably, the process of establishing judicial proceedings on the islands or regularly sending out patrols is a much larger investment in terms of time and resources than an announcement. Thus, it is possible that the purchase would fall short of an exercise of actual sovereign authority, at least so far as courts have understood this term in the past.<sup>186</sup>

China's best argument for discovery and occupation lies in the evidence that it discovered the islands and that it then occupied the islands at the time of discovery. Although Japan claimed the Senkaku-Diaoyu Islands in 1895,<sup>187</sup> China could argue that it was still occupying the islands at the time since the islands are, or at least used to be considered "barren and without resources."<sup>188</sup> Therefore, China would have had to do very little to fully occupy them in the legal sense.<sup>189</sup> However, an accusation of illegal territorial acquisition stretching back to the nineteenth century is relatively weak.

Ultimately, China has a much greater challenge in presenting instances of recent actual sovereign authority, and the evidence that at least some Chinese maps placed the Senkaku-Diaoyu Islands beyond the Chinese border<sup>190</sup> further undermines a Chinese claim under occupation. It is important to note, though, that China's absence as a sovereign authority may be due to the fact that Japan, and not China, is an administrator to the islands and the United States have covenanted to secure the islands against aggression.<sup>191</sup> A major determination, then, is whether it is permissible to argue that a nation was exercising sovereign authority when no other country feasibly could have acted as a sovereign without confronting considerable military obstacles.

In summary, there are a number of points that would bolster a Japanese claim under discovery and occupation, such as Japanese possession of the islands and intent to act as a sovereign. However, China's discovery of the islands, if fully verified, would terminate the inquiry before even addressing whether there was complete occupation, particularly if China can show that there was some exercise of sovereignty, rendering the islands something other than *terra nullius*. Additionally, even if a tribunal found that Japan had discovered the islands, the measures Japan has taken in relation to the islands seem relatively modest compared to actions courts have determined to constitute sovereign authority in the past. Moreover, Japan's role as an administrator may tarnish a claim that it undertook such activities as a sovereign. Nevertheless, China is also unlikely to make a

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185. See China Warns of Consequences as Japan Announces Purchase of Disputed Islands, THE GUARDIAN (Sept. 11, 2012), <http://www.guardian.co.uk/world/2012/sep/11/china-warns-japan-disputed-islands?INTCMP=SRCH>.

186. See, e.g., Island of Palmas Arbitration, *supra* note 100, at 845-46; Minquiers and Ecrehos Case, *supra* note 100.

187. See *supra* text accompanying note 32.

188. See *supra* text accompanying note 126.

189. *Id.*

190. See *supra* text accompanying notes 48-50.

191. See *supra* text accompanying notes 73-74.

strong argument under discovery and occupation, because whatever steps Japan has taken to exercise sovereign authority, China necessarily has taken less because of the US-Japan Security Treaty and its incorporation in the Okinawa Reversion Treaty.

## 2. *Conquest or Belligerent Cession*

There is a strong presumption in modern international law that states may not acquire territory through aggressive military means.<sup>192</sup> However, for the purposes of argument, this section will consider what claims for sovereignty might exist if conquest or the more belligerent form of cession were still appropriate avenues for acquiring territory.

For instance, Japan might argue that it gained sovereignty over the islands when it defeated China in the Sino-Japanese War and China ceded Taiwan and all appertaining islands to Japan under the Treaty of Shimonoseki. Accordingly, Japan might argue that the 1951 San Francisco Peace Treaty's reference to an American trusteeship did not explicitly include the Senkaku-Diaoyu Islands<sup>193</sup> and, thus, Japan retained the territory it conquered. However, it seems that there was a general consensus that Nansei Shoto included the Senkaku-Diaoyu Islands and that the United States was the official administrator of the islands for twenty years following the treaty's enactment.<sup>194</sup> Furthermore, several draft versions of the 1951 San Francisco Peace Treaty suggest that the Allied powers shared a general desire to strip Japan of all territory stemming from its imperial campaigns in the late nineteenth century.<sup>195</sup> For example, a draft version of the treaty, dated March 19, 1947 stated, "[t]he territorial limits of Japan shall be those existing on January 1, 1894 . . . . [T]hese limits shall include the four principal islands of Honshu, Kyushu, Shikoku and Hokkaido and all minor offshore islands."<sup>196</sup> Therefore, as Professor Seokwoo Lee suggests, since "Japan did not claim the Senkaku Islands until the Cabinet Decision of January 14, 1895, the drafters of the San Francisco Peace Treaty did not envision Japan as the rightful owner of the Senkaku Islands."<sup>197</sup>

Similarly, China's claims under conquest or cession are relatively weak. China and Japan signed a treaty following the end of World War II returning much of Japan's imperial holdings to China, including Taiwan and various other islands.<sup>198</sup> However, the 1951 San Francisco Peace Treaty's inclusion of Nansei Shoto in Article III and the absence of an express agreement to return the Senkaku-Diaoyu Islands or Nansei Shoto to China in the China-Japan Peace Treaty,<sup>199</sup> suggests that there is little

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192. See MOHAMMAD TAGHI KAROUBI, *JUST OR UNJUST WAR: INTERNATIONAL LAW AND UNILATERAL USE OF FORCE BY STATES AT THE TURN OF THE TWENTIETH CENTURY* 117-18 (2005).

193. See *supra* text accompanying notes 42-43.

194. See *supra* text accompanying note 44.

195. See *supra* text accompanying notes 36-41.

196. Lee, *supra* note 22, at 123-24.

197. *Id.* at 124.

198. Treaty of Peace, Japan-China, art. III, Apr. 28, 1952.

199. See *supra* text accompanying notes 42-43.



evidence that the Senkaku-Diaoyu Islands were actually transferred directly back to China. Furthermore, Chinese maps during the American trusteeship of the islands refer to the islands by their Japanese name,<sup>200</sup> suggesting that China did not believe that it had ownership of the islands directly following World War II. Thus, even if the UN Charter's prohibition on the use of force was not determinative here, which it likely is, neither Japan nor China has a very strong argument under either conquest or the more belligerent form of cession.<sup>201</sup>

### 3. Prescription

Like the theory of conquest, prescription is a controversial method of territorial acquisition,<sup>202</sup> but this section will nevertheless weigh the strength of Japan's claims<sup>203</sup> under this theory. First, Japan might have had a reasonable argument under prescription if it was not for its official role as an administrator to the Senkaku-Diaoyu Islands, the presence of the U.S.-Japan Security Treaty, and its recent purchase of the islands. After all, no country has attempted to forcibly seize title from the Japanese nationals who, until recently, owned the islands.<sup>204</sup> Thus, there was at least something of an uninterrupted peaceful exercise of authority over the islands by a Japanese national.<sup>205</sup> Moreover, a number of Chinese maps predating the 1960s refer to the Senkaku-Diaoyu Islands by their Japanese name.<sup>206</sup> Consequently, the Japanese argument should be that China, at some point in its history, acquiesced to Japanese sovereignty over the islands. Finally, Japan would likely argue that China only really began to show an interest in the territory when experts stated that the seabed surrounding the islands may contain valuable hydrocarbons.<sup>207</sup>

In spite of the evidence to support a claim of Japanese sovereignty under prescription, the role of both the United States and Japan as admin-

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200. See *supra* text accompanying notes 51-53.

201. Despite the UN Charter's relatively clear language on the matter of use of force, conquest or belligerent cession might be possible avenues when the conquest occurred far in advance of the enactment of the Charter. However, this Note argues that because the Charter was written around the time of the 1951 Treaty, which expressly strips Japan of most of the territory it acquired by aggressive means, the acquisition of the Senkaku-Diaoyu Islands by force likely falls within the window of time that the Charter would apply. Furthermore, although territory that a nation has held for centuries may survive under conquest, it seems unlikely that a major international tribunal would uphold a late nineteenth century acquisition of territory solely on the basis of conquest. See KAROUBI, *supra* note 192, at 117-18.

202. See BLUM, *supra* note 116.

203. China likely has no claim under prescription because China, even more so than Japan, has not held the islands in an "uninterrupted and uncontested peaceful exercise of state authority." BOCZEK, *supra* note 133, at 242. No national of China lives on the islands and if China attempted to place a national on the islands in a permanent capacity, the Security Treaty between Japan and the United States guarantees that the United States would attempt to prevent this from happening. See *supra* text accompanying notes 72-74.

204. See *supra* text accompanying notes 81-82.

205. See *id.*

206. See *supra* text accompanying notes 48-53.

207. See *supra* text accompanying notes 54-56.

istrator to the islands suggests that Japan's control over the islands would not have been an open exercise of state authority. Therefore, China would have had no notice that, in failing to protest a Japanese presence around the islands, China had effectively acquiesced to Japanese sovereignty. While the United States was the administrator, China arguably had no clear incentive to protest, as it was not entirely clear what the United States ultimately intended to do with the islands.<sup>208</sup> Additionally, when the United States transferred these administrative duties to Japan, the United States was abundantly clear that "a return of administrative rights over those islands to Japan, from which the rights were received, can in no way prejudice underlying claims."<sup>209</sup> Furthermore, although the private owner of the islands was a Japanese national and Japan has engaged in patrols and other possible sovereign-like actions concerning the islands,<sup>210</sup> there is no direct evidence that such behavior is not simply that of an administrator or trustee, rather than that of a sovereign.<sup>211</sup>

Next, even if Japan was behaving as a sovereign rather than an administrator, Article II of the Okinawa Reversion Treaty between Japan and the United States is likely to have significantly impacted China's ability to aggressively protest an open exercise of Japan's sovereignty; the formidable power of the U.S. military would likely force most nations to take pause before testing the strength of Article II. Furthermore, at the time of the transfer, the United States and China were in the process of repairing their political relationship, and, in the interests of Cold War security,<sup>212</sup> China likely prioritized its tenuous relationship with the United States above an aggressive campaign to reclaim the islands. Additionally, on several occasions throughout the period following transfer of administrative rights to Japan, China has vocally stated that there is a dispute over the islands.<sup>213</sup>

208. Lee, *supra* note 22, at 90.

209. MANYIN, *supra* note 27.

210. Ramos-Mrosovsky, *supra* note 4, at 923.

211. This argument assumes that when Japan transferred rights to the United States in the 1950s, it transferred all its rights over the islands and did not retain any form of sovereignty. Thereby, when the United States transferred administrative rights back to Japan, it was granting Japan *only* the rights to administer. If the alternative was true and Japan retained some form of sovereignty from 1951 to 1971, Japan may still not have full sovereignty rights over the islands under prescription because the relevant treaties never openly discussed any retention of rights. See *supra* text accompanying notes 62-64. Thus, again, there was no notice to China that it should protest Japan's sovereignty, or otherwise acquiesce. Nevertheless, the recurring rhetoric from Washington has been that Japan holds the islands in, and *only in* an administrative capacity. Secretary of State Hillary Clinton said recently: "We acknowledge [the Senkaku-Daiyou Islands] are under the *administration* of Japan and we oppose any unilateral actions that would seek to undermine Japanese *administration*." Atsushi Matsuura, *Clinton Sends Warning to China Over Senkakus*, DAILY YOMIURI (Jan. 20, 2013), <http://www.yomiuri.co.jp/dy/national/T130119003412.htm> (emphasis added).

212. See *supra* text accompanying notes 66-67.

213. See, e.g., Hao Wang, Letter to the Editor, *Senkaku Islands - A Dispute Put in Perspective*, N.Y. TIMES, May 30, 1971, at E12 ("On April 10, 3,000 people representing a wide cross-section of Chinese from all over the United States gathered in Washington to protest the support of Japan's claims by the United States, which had stated its neutrality on [the Senkaku-Dioayu dispute]."); Edward A. Gargan, *Isle Furor Stirs Chinese National-*

Finally, Japan's purchase of the islands may, under some interpretations, suggest that ownership was not constant and uninterrupted. If a court held that Japan's purchase of the islands was a complete purchase akin to cession or a similar theory, then this might suggest that prior to the purchase Japan was not yet functioning in a sovereign capacity.

#### 4. General Assessment

Modern nations are justifiably wary of submitting territorial disputes to a tribunal that will apply the anachronistic patchwork of customary law. Assuming that tribunals no longer uphold sovereignty claims based on prescription, conquest, or belligerent cession, the only persuasive argument either nation can make for sovereignty, outside of accretion perhaps, is under discovery and occupation. However, the requirement that a nation have both discovered and occupied a disputed territory may present a host of problems in the modern world, particularly when that territory is minute and seemingly unimportant. Furthermore, the jurisprudential boundaries of the occupation element are so vague that a nation, even with a seemingly strong claim, would likely be hesitant to submit a case to the ICJ or PCA.

Specifically, the outcome of a contentious legal case concerning sovereignty over the Senkaku-Diaoyu Islands would be very close. Some scholars suggest that Japan has the more colorable claim.<sup>214</sup> However, the considerable flaws, both legal and policy-based, in Japan's arguments suggest that China may actually have the upper hand under discovery and occupation; at least at one point, China had both discovered and occupied the Senkaku-Diaoyus, arguably, as much as a nation can occupy such a small set of islands.<sup>215</sup> As the outcome is indeterminable, it is unlikely that either Japan or China would submit themselves to a tribunal's jurisdiction. Of course, many legal disputes are gambles and litigants cannot always be entirely certain that their case will carry the day, but few litigants face losing such an important and politically charged possession as sovereign territory.

What is perhaps even more troublesome is the likelihood that these defects in the opposing parties' sovereignty claims are probably not a feature unique to the Senkaku-Diaoyu Islands dispute. Rather, it seems instead that the overarching uncertainty in this case study is a product less of the facts and more of the state of customary law that no longer reflects current attitudes and objectives in international relations. Because an important purpose of the ICJ and other international courts is to provide a more attractive forum for conflict resolution than the battlefield, the seri-

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ism in Hong Kong, N.Y. TIMES (Oct. 8, 1996), <http://www.nytimes.com/1996/10/08/world/isle-furor-stirs-chinese-nationalism-in-hong-kong.html> (“[T]his explosion of nationalist fervor has brought tens of thousands of people onto the streets and launched flotillas of boats toward the disputed islands, known as the Senkakus to the Japanese . . .”).

214. See, e.g., Ramos-Mrosovsky, *supra* note 4, at 929-30; Heflin, *supra* note 22.

215. See *supra* text accompanying notes 124-126.

ous disadvantages that the law of territorial acquisition presents to potential litigators is a major failure in both international law and international relations.

#### B. Alternatives to Pursuing International Litigation or Arbitration

Rather than risk losing potentially valuable and nationally significant territory in an exceedingly uncertain trial, Japan and China face a few additional alternatives to litigating their claims in court.

First, both countries can allow the acts of aggression to become gradually more and more pronounced to the point that war will inevitably grip the region. On the one hand, this alternative would allow both countries to pursue their immediate personal interests and permit each to entirely forgo negotiated compromise. However, the Sino-Japanese War cast a long shadow across East Asia,<sup>216</sup> and a major conflict would almost certainly undo much of the economic development and political cooperation in the region following World War II.<sup>217</sup> Accordingly, neither Japan nor China should be eager to pursue armed conflict with each other. Additionally, damaging would be the inevitable spillover of this particular regional conflict into the international sphere. As the United States has agreed to support Japan in an armed invasion of the Senkaku-Diaoyu Islands,<sup>218</sup> a spiral of Japanese-Chinese military hostilities could force the United States to confront an increasingly powerful China. Moreover, Chinese-initiated armed conflict would be a blatant violation of the UN Charter's prohibition on the use of force,<sup>219</sup> an action that would likely further mobilize the international community and international organizations such as NATO.<sup>220</sup> Thus, not surprisingly, war would be even less desirable than bringing a legal claim invoking current customary law.

A more reasonable alternative would be to engage in bilateral diplomatic negotiations in order to establish some form of joint management of the islands. Negotiation would avoid the uncertainties of adjudication and an arbitrary outcome based on anachronistic law. Furthermore, both par-

216. See Odd Arne Westad, *In Asia, Ill Win Runs Deep*, N.Y. TIMES (Jan. 6, 2013) <http://www.nytimes.com/2013/01/07/opinion/why-china-and-japan-cant-get-along.html>.

217. See *id.* ("China today has much more to gain from cooperation with Japan than from conflict. Harping about past sins and inflaming the dispute over the islands do little good. If China is to become the predominant power in the region, it can only do so with Japan, not against it.")

218. MANYIN, *supra* note 27.

219. U.N. Charter art. 39. Of course a country may claim self-defense under the United Nations Charter Article 51. However, self-defense is a relatively limited legal provision and an argument based on preemptive self-defense is likely to fail as sufficient grounds for an invocation of Article 51. See Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, AM. SOC'Y INT'L L. 11-13 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

220. U.S. Representative Mike Honda, *Preventing a China-Japan War Over the Islands: What America Must Do*, HUFFINGTON POST (Oct. 5, 2012), [http://www.huffingtonpost.com/rep-mike-honda/preventing-a-china-japan\\_b\\_1942138.html](http://www.huffingtonpost.com/rep-mike-honda/preventing-a-china-japan_b_1942138.html) (arguing that the United States should engage in the event of Chinese aggression, not only because it said it would as it pivoted its foreign relations focus toward the Asia-Pacific, but because it is in the United States' financial and diplomatic interests).

ties may even manage to retain some rights to the islands,<sup>221</sup> thereby reducing the risk to either party if they litigated the dispute.

Similarly, negotiations would obviously avoid the casualties and political trepidations of an armed conflict. The United States, especially, has an incentive to bring both parties to the negotiation table. As it happens, the U.S. State Department's official stance thus far has been a clear and unwavering call for negotiations between Japan and China.<sup>222</sup> China similarly has an incentive to meet in the middle as it currently has far less control over the islands than Japan. Additionally, China, unlike Japan, could face not just one, but two countries if it were to aggressively occupy the islands. Accordingly, China has appeared increasingly, although somewhat intermittently, willing to discuss negotiations.<sup>223</sup>

In spite of these calls for compromise, Japan and its new Prime Minister Shinzō Abe appear to be taking a hard line.<sup>224</sup> Japan, arguably, has the most to lose since it is still the sole administrator of the islands. Similarly, unlike the United States or China, Japan has somewhat less of an incentive to swiftly resolve the conflict since Article II provides a certain amount of insurance against attack. Finally, Prime Minister Abe came to power on a platform of increasing Japan's military strength and global influence;<sup>225</sup> to quickly retreat from the warpath would surely illicit career-damaging criticism from supporters as well as political rivals.<sup>226</sup> In fact, the former Japanese Prime Minister, Yukio Hatoyama, recently confronted overwhelming criticism from the new administration when he met with a high-ranking Chinese official and agreed that negotiation would be a positive step for the two nations.<sup>227</sup> Therefore, given the current political climate in Japan,

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221. For example, the two nations could divide ownership between the two or seek some other compromise. See generally, M. Taylor Fravel, *Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes*, 30 INT'L SECURITY 46, 46 (2006) ("Yet China has also frequently used cooperative means to manage its territorial conflicts, revealing a pattern of behavior far more complex than many portray. Since 1949, China has settled seventeen of its twenty-three territorial disputes. Moreover, it has offered substantial compromises in most of the settlements, usually receiving less than 50 percent of contested land.").

222. Martin Fackler, *U.S. Calls for "Cooler Heads" in Dispute Over Asian Islands*, N. Y. TIMES (Jan. 17, 2013), <http://www.nytimes.com/2013/01/18/world/asia/american-envoy-calls-for-cooler-heads-in-asian-island-dispute.html>.

223. Elizabeth Yuan, *Former Japanese Prime Minister Slammed as "Traitor" at Home*, CNN (Jan. 18, 2013), <http://www.cnn.com/2013/01/18/world/asia/japan-hatoyama-china/>.

224. Richard Smart, *Japan's Leader Takes a Hard Line on Disputed Islands*, THE TIMES (Dec. 18, 2012), <http://www.thetimes.co.uk/tto/news/world/asia/article3634090.ece>.

225. Hiroko Tabuchi, *Former Prime Minister in Japan Elected to Lead Opposition Party*, N.Y. TIMES (Sept. 26, 2012), [http://www.nytimes.com/2012/09/27/world/asia/japans-opposition-picks-shinzo-abe-as-leader.html?\\_r=0](http://www.nytimes.com/2012/09/27/world/asia/japans-opposition-picks-shinzo-abe-as-leader.html?_r=0) ("Speaking to reporters on Wednesday, Mr. Abe promised to take a strong stand in the dispute with Beijing over the islands, even as he referred to Japan's strong economic ties with China. He said he would also seek to strengthen Japan's defense cooperation with the United States by taking a more active military role.").

226. *Id.*

227. Yuan, *supra* note 223.

the probability that bilateral negotiation at this stage would be productive seems low.

Finally, Stephen M. Walt proposed a less practical, but nevertheless interesting, solution to the conflict.<sup>228</sup> Walt suggests that Japan should resolve the situation by selling the islands to China for a large sum.<sup>229</sup> Selling disputed territory to the highest bidder injects an almost Posnerian view of property rights into the realm of sovereignty.<sup>230</sup> There are certainly advantages of allowing nations to auction off disputed property; this would solve many problems with respect to efficiency and would help ensure that the nation that acquires the territory is the one that values it most. Furthermore, this would likely produce a permanent solution to an otherwise endless disagreement over the Senkaku-Diaoyu Islands. However, allowing states to outbid one another for disputed territory would necessarily give the wealthier states the upper hand. Although this is less of a problem between Japan and China, two relatively wealthy nations, in a more general sense this proposal raises concerns of further empowering the wealthier of two states in a dispute. Moreover, in this specific case study, the underlying emotional attachment both countries have to the Senkaku-Diaoyus would likely foreclose the possibility that either one would sell the islands. Additionally, neither country would likely buy the islands, as it would signal, as perhaps Japan unintentionally did, that sovereignty was lacking in the first place. Therefore, despite the number of flaws in the customary law on territorial acquisition, the current political climate suggests that peaceful resolution is likely only attainable through litigation or arbitration.

## Conclusion and Suggestions

Perhaps what the Senkaku-Diaoyu problem best illustrates is that this acrimonious dispute is not just a failure at a regional level or a result of a historical fumble in post-World War II geo-politics. Rather, it is also a failure of contemporary international law. The law of territorial title is outmoded, and yet it is an increasingly crucial alternative to war in a world of nuclear weapons. In light of the failure of existing customary law on territorial acquisition, this Note urges international actors to construct and sign a multilateral treaty on territorial acquisition. Forming a universal treaty on territorial acquisition would give actors an opportunity to consider how nations can and should rationally resolve territorial disputes in the modern world. The treaty's authors could also directly address whether the current customary law is still valid, while also defining issues that are unclear, such as the second element of occupation. Although it is a modest

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228. Stephen M. Walt, *Why Doesn't China Just Buy the Senkaku Islands?*, FOREIGN POL'Y (Sept. 21, 2012), [http://walt.foreignpolicy.com/posts/2012/09/21/sell\\_the\\_senkakus](http://walt.foreignpolicy.com/posts/2012/09/21/sell_the_senkakus).

229. *Id.*

230. E. RICHARD GOLD, BODY PARTS: PROPERTY RIGHTS AND THE OWNERSHIP OF HUMAN BIOLOGICAL MATERIALS 168 (1996) ("[T]o ensure an economically efficient result, Posner argues that property rights to goods ought to be allocated to those individuals who value them the most.").

proposition, it is one that would certainly assist China and Japan in understanding the true legal implications of a case in an international forum.

Furthermore, reaching a broad consensus on how nations can acquire territory and preserve their own sovereign boundaries—forming a clear definition of what it means to be an administrating state, rather than a pure sovereign state—should be a priority. Much of the scholarship and political discussion on the territorial dispute between China and Japan over the Senkaku-Diaoyu Islands either neglects the administrative-sovereign distinction entirely or assumes that they are one and the same.<sup>231</sup> However, there is abundant evidence, such as the carefully worded Okinawa Reversion Treaty and public statements that Washington officials have made on the issue,<sup>232</sup> to suggest that at least some countries, including the United States, recognize a distinction. The lack of international legal guiding principles on the difference between administrative powers and sovereign powers fosters greater confusion on the issue and encourages some countries to implicitly suggest that there is no distinction at all.<sup>233</sup> A precise discussion of administrative rights in such a multilateral treaty would go a long way towards ensuring that sparring nations cannot overreach and claim rights that they may lack.

There is a justifiable concern that the inherent political nature of such an important multilateral treaty and the inevitable myopic lobbying that would take place during negotiations for the treaty would stultify any progress, and, therefore, there is no point in forging such an initiative. However, given what is at stake, the concern that nations will promote their own political agendas cannot be the sole motivation to avoid work on a convention to elucidate territorial disputes, as this argument would excuse inaction on any number of important international legal issues. After all, nations have come together before to embrace even more controversial covenants, such as the Rome Statute creating the International Criminal Court.<sup>234</sup> In summary, such a proposal would likely not assist Japan and China in the difficult days ahead, but by clarifying the law and making it easier for world powers to litigate issues with greater certainty, it would surely help prevent similar escalations between neighbors in the future.

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231. See, e.g., Ramos-Mrosovsky, *supra* note 4.

232. See *supra* text accompanying notes 68-70.

233. See *supra* note 17 (suggesting that Japan interprets its role as administrator to be similar to—or even the same as—a sovereign).

234. See Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L. J. 825, 825 (1999) (“Amid much controversy, the members of the conference finally adopted such a statute, with 120 countries voting in favor of it, seven against it, and twenty-one abstaining.”).