

**Diayou/Senkaku Islands
Dispute: Japan and China,
Oceans Apart**

William B. Heflin



**Asian-Pacific Law
& Policy Journal**

- - - - -

<http://www.hawaii.edu/aplpj>

Diayou/Senkaku Islands Dispute:¹ Japan and China, Oceans Apart

- I. INTRODUCTION
- II. COMPETING CLAIMS TO THE DIAYOU/SENKAKU ISLANDS
 - A. *China's Claim*
 - B. *Japan's Claim*
- III. CASE LAW GOVERNING TERRITORIAL DISPUTES OF ISLANDS
 - A. *Island of Palmas Case*
 - B. *Clipperton Island Case*
 - C. *Minquiers and Ecrehos Case*
 - D. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) Case*
 - E. *State of the Law Governing Island Disputes*
- IV. LEGAL STATUS OF THE DIAYOU/SENKAKU ISLANDS
 - A. *Legal Status of the Diayou/Senkaku Islands on January 14, 1895*
 - B. *Legal Status of the Diayou/Senkaku Islands after World War II*
 - C. *Contemporary Legal Status of the Diayou/Senkaku Islands*
- V. CONCLUSION

It is true that the two sides maintain different views of this question It does not matter if this question is shelved for some time, say, ten years. 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.²

¹ In the interest of neutrality, this recent development will call the islands the “Diayou/Senkaku Islands” in analysis and discussion, the “Diayou Islands” when dealing only with China’s claim to the islands, and the “Senkaku Islands” when dealing with only Japan’s claim to the islands.

In Chinese, the islands are called either ‘Diayou-tai’ or ‘T’iayou-tai’ depending on the transliteration method. This recent development will use Pinyin Romanization for all Chinese words other than Taiwanese proper names.

² Deng Xiaoping, speaking on the Diayou/Senkaku Islands dispute, *quoted in* CHI-KIN LO, CHINA’S POLICY TOWARD TERRITORIAL DISPUTES: THE CASE OF THE SOUTH CHINA SEA ISLANDS 171-72 (1989). For a similar quote, see BBC SUMMARY OF WORLD BROADCASTS, June 1, 1979.

I. INTRODUCTION

Between Taiwan and Okinawa lie a group of five small volcanic islands and three rocky outcroppings.³ Japan and China each claim that these islands fall under their respective sovereign jurisdiction.⁴ China calls the disputed islands “Diayou-tai” and Japan calls them “Senkaku Gunto.”

The islands are of little economic value; however, the territorial sea and exclusive economic zone (EEZ)⁵ that the islands can generate under the 1982 United Nations Convention on the Law of the Sea (CLOS)⁶ are rich in fishing stock and may be rich in gas and oil deposits. Consequently, both sovereign pride and national economic interests are the driving forces behind China’s and Japan’s dispute over the Diayou/Senkaku Islands.⁷

This paper analyzes China’s and Japan’s competing claims to the Diayou/Senkaku Islands. Section II presents the parties’ respective historic and legal claims to the Diayou/Senkaku Islands. Section III provides an overview of international case law governing territorial disputes of islands, and summarizes the current rule of law for such disputes. Section

³ The islands are located approximately 120 nautical miles northeast of Taiwan and 240 nautical miles south of Okinawa. See Cheng-China Huang, *ICE Case Studies Diayou Islands Dispute, I.4 Location* (visited Aug. 27, 1999) <<http://www.interlog.com/~yuan/evidence.html>> (on file with author). They are on the edge of China’s continental shelf, and are separated from Okinawa by a more than 2270-meter deep trench. See Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over the T’iayoyutai Islets* (Senkaku Gunto), 15 CHINESE Y.B. INT’L L. & AFF. 9 (1996-97), reprinted in 150 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES at 2 (1999).

⁴ The Republic of China (Taiwan) and the People’s Republic of China (China) both make claims to the Diayou Islands. As their claims are based on the same facts, this paper combines Taiwan’s claims with those of the PRC.

⁵ See Convention on the Law of the Sea [hereinafter CLOS], Dec. 10, 1982, reprinted in 516 U.N.T.S. 205, 21 I.L.M. 1261 (1982). Under the CLOS, islands can generate a territorial sea, contiguous zone, and Exclusive Economic Zone (EEZ) as would any other coastal territory. See CLOS art. 121(2). Yet, “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” *Id.* art. 121(3). The ability of the Diayou/Senkaku Islands to generate an EEZ is speculative. This paper treats the Diayou/Senkaku Islands as “islands” that are capable of generating EEZs, since both the parties of the dispute believe them to be able to do so. A territorial sea is twelve nautical miles and is measured from the island in a radius. See *id.* art. 3. A contiguous zone, where the State can exercise some limited territorial sovereignty, extends another twelve nautical miles. See *id.* art. 33(2). An EEZ, extends 200 Nautical miles. Within this radius, the State has complete control over the economic resources of the ocean and seabed. See *id.* art. 57.

⁶ Although China and Japan are parties to CLOS, Taiwan is not.

⁷ A 1968 United Nations-sponsored survey concluded that “the organic matter deposited by the Yellow River and the Yangtse River may make the continental shelf in this region one of the most prolific oil and gas reserves in the world.” Chiu, *supra* note 3, at 4. Some scholars believe that this optimistic survey is an essential factor driving the territorial dispute. *Id.*

IV analyzes the status of the islands and the impact of the parties' actions on ownership. This paper concludes that under currently accepted international law, Japan has a colorable claim to the Diayou/Senkaku Islands.

II. COMPETING CLAIMS TO THE DIAYOU/SENKAKU ISLANDS

A. *China's Claim*

China's claim to the Diayou⁸ Islands has three distinct bases. First, China argues that its acts of prior discovery, use, and ownership of the islands are sufficient to grant it legal title. Second, China points to Japan's prior acknowledgement of China's claim to the islands to estop Japan from claiming possession now. Last, China asserts that Japan specifically ceded the islands to China after World War II.

China supports its claim that it discovered, used, and owned the Diayou Islands before Japan in two ways. First, as early as 1372, Chinese Imperial Envoys used the islands as a navigational aide to journey to the Ryukyu (Okinawan) Islands to receive tribute from China's Okinawan vassal.⁹ Second, China used the Diayou Islands as a source of *shi cong yong* (statice arbuscula), a rare medicinal herb.¹⁰ In 1893, the Dowager Empress Ci Xi issued a Special Edict granting the Diayou Islands to Dr. Sheng Xuan-hui for services rendered in gathering this rare herbal remedy from the islands to treat her illness.¹¹ China therefore, argues that it has used the

⁸ Here, this recent development uses "Diayou," rather than Daiyou/Senkaku to avoid textual inconsistencies between this note and the materials supporting China's (and Taiwan's) claim to the islands. See *supra* note 1.

⁹ See Tao Cheng, *The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 253-256 (1974). See also Fung Hu-hsiang, *Evidence beyond Dispute: Tiaoyutai (Diaoyutai) is Chinese Territory!* (Bevin Chu trans.) (visited Aug. 27, 1999) <<http://www.interlog.com/~yuan/evidence.html>> (on file with author), at ¶ 1.

¹⁰ See Cheng, *supra* note 9, at 257. The name of the herb in the article is *shish-ts'ung yung*. The recent development converted the Wade-Giles transliteration into the Pinyin system according to the information found in *Library of Congress Pinyin Conversion Project-New Chinese Romanization Guidelines* (visited June 18, 2000) <<http://lcweb.loc.gov/catdir/pinyin/romcover.html>> [hereinafter "*LOC Pinyin Conversion*"] (on file with author).

¹¹ See Fung, *supra* note 9, ¶ 8. The name of the Dowager Empress in the article is Tse-Hei, and the name of the Doctor is Sheng Hsuan-hui. The recent development converted the Wade-Giles transliteration to the Pinyin system according to the information found in *LOC Pinyin Conversion*, *supra* note 10.

Diayou Islands for centuries for the only purposes for which they are suited, as a navigational aide and source of medicinal herbs.

Second, China argues that Japan has acknowledged, explicitly and implicitly, China's sovereignty over the islands. China claims that Japan acquiesced to China's ownership of the islands through the late nineteenth century. For example, in 1785, Japan published a map using the same color for the Diayou Islands and China, while using a different color for the Kingdom of Okinawa.¹² Further, the Japanese government's official "Complete Ryuku Islands Map" and "Okinawan Chronicles," published in 1874 and 1877 respectively, did not include the Diayou Islands.¹³

Only in the 1890s did the Japanese government begin to express an interest in the islands. In early 1894, the Japanese Interior Minister petitioned Okinawa Prefecture to erect national markers on the Diayou Islands.¹⁴ The Japanese Foreign Minister rejected this action, replying that such an act "would attract the attention of [China]," and therefore, Japan "should wait for a more opportune time" to do so.¹⁵ Later in 1894, the Sino-Japanese War broke out and Japan won a decisive victory in October by sinking a Chinese fleet opposing them and then occupied the Liaotung Peninsula near Beijing.¹⁶ Then in January 1895, the Japanese Cabinet passed a resolution to erect markers claiming the Diayou/Senkaku Islands.¹⁷ Thereafter, Japan forced China to sign the Treaty of Shimonoseki in April 1895.¹⁸ Article II, Section (b) of the treaty ceded to Japan, Taiwan and all islands appertaining or belonging thereto.¹⁹ In China's view, the phrase, "all the islands appertaining to or belonging to [Taiwan]" included the Diayou Islands.²⁰

¹² See Fung, *supra* note 9, ¶ 4.

¹³ See *id.* ¶¶ 7-8.

¹⁴ See *id.* ¶ 9.

¹⁵ See *id.*

¹⁶ See Chiu, *supra* note 3, at 13 n.28.

¹⁷ See *infra* notes 33-34 and accompanying text.

¹⁸ See Chiu, *supra* note 3, at 13 n.28.

¹⁹ Article II of the Treaty of Peace reads:

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

In 1931, during Japan's occupation of Taiwan, Taipei County and Okinawa Prefecture quarreled over control of the Diayou Islands. The Tokyo High Court found in favor of Taipei County, and held that the islands historically belonged to Taiwan.²¹ Therefore, Japan in an official capacity acknowledged Taiwan's traditional sovereignty over the Diayou Islands.

Finally, China believes that Japan was legally bound to return and relinquish all rights to the Diayou Islands at the end of World War II. The Cairo Conference of 1943 and Potsdam Conference of 1945,²² which were superceded by the San Francisco Peace Treaty of 1951, compelled Japan to relinquish its claims to Taiwan and all its appurtenant islands.²³ Moreover, Article IV of the 1952 Sino-Japanese Peace Treaty states that "[a]ll treaties, special accords, agreements concluded prior [to this treaty] as a consequence of the conclusions of the war, [are] hereby null and void."²⁴ This treaty obligated Japan to return all previously seized Chinese territories, which, according to China, included the Diayou Islands because the 1895 Treaty of Shimonoseki included all islands appurtenant or belonging to Taiwan.²⁵ Thus, China, based on its reading of the applicable Conference and Treaty language, concludes that Japan specifically ceded its claim to the Diayou Islands to China at the end of World War II.

To buttress their argument that the Diayou Islands reverted back to China after World War II, China points to the fact that during the Cold War, when U.S. forces used the Diayou

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

Cheng, *supra* note 9, at 259 (quoting E. HERTSLET, HERTSLET'S CHINA TREATIES 363 (3d ed., 1908)) (emphasis added).

²⁰ See Chiu, *supra* note 3, at 8, 10.

²¹ See Fung, *supra* note 9, ¶ 11.

²² The 1943 Cairo Declaration reads in part, ". . . all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China." Cheng, *supra* note 9, at 259 (1974) (quoting U.S. DEP'T. OF STATE, FOREIGN RELATIONS OF THE U.S., DIPLOMATIC PAPERS, THE CONFERENCES AT CAIRO AND TEHRAN 1943 448 (1961)). The Potsdam Proclamation of July 26, 1945, reads in part: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." Cheng, *supra* note 9, at 260 (citing U.S. DEP'T. OF STATE, OCCUPATION OF JAPAN, POLICY AND PROGRESS 54 (1946)).

²³ See Fung, *supra* note 9, ¶ 11.

²⁴ *Id.* ¶ 15.

²⁵ See Chiu, *supra* note 3, at 18; Fung, *supra* note 9, ¶ 15.

Islands as bombing targets, they applied to the Taiwanese government²⁶ for permission.²⁷ Also, in 1955, Taiwanese troops retreating from Tachen Island were temporarily garrisoned on the Diayou Islands and while there, they fired upon Japanese ships to drive them away.²⁸

In summary, China feels that it has proven legal ownership of the Diayou Islands in three ways. First, China discovered the Diayou Islands before Japan, and historically China used the islands as a navigational aide and a source of medicinal herbs, the only purposes for which the islands could be used. Second, the remarks of Japan's Foreign Minister prove Japan's acknowledgement of China's prior claim to the islands before the Sino-Japanese War. Last, under the Cairo and Potsdam conferences and the San Francisco Peace Treaty, Japan specifically ceded the islands back to China after World War II.

B. *Japan's Claim*

Japan's claim to the Senkaku²⁹ Islands also has three distinct bases, also. First, Japan claims legal possession of the islands. Second, it has peacefully and continuously exercised sovereignty over the islands for over one hundred years.³⁰ Last, Japan feels that China acquiesced to Japan's sovereignty over the islands.

Japan claims that it gained legal possession of the Senkaku Islands in 1895 based on official Japanese government surveys of the Senkaku Islands conducted in 1887 and 1892 that found the islands uninhabited and without a trace of Chinese ownership.³¹ Using this information, the Japanese Government made a Cabinet Decision on January 14, 1895, to erect a marker on the islands to incorporate them formally into the territory of Japan as *terra nullius*

²⁶ The Republic of China, the Nationalist government of China based on Taiwan.

²⁷ See Fung, *supra* note 9, ¶ 13.

²⁸ See *id.* ¶ 14.

²⁹ Here, this recent development uses "Senkaku," rather than Daiyou/Senkaku to avoid textual inconsistencies between this note and the materials supporting Japan's claim to the islands. See *supra* note 1.

³⁰ "Peaceful and continuous exercise of sovereignty" is one of the legal requirements to prove occupation. See *infra* note 60 and accompanying text.

³¹ See Cheng, *supra* note 9, at 246 (citing Okuhara, *Senkaku Retto no ryoyuken jizaku mondai - Taiwan no shucho to sono hi han* [The Problem of Territorial Rights over the Senkaku Islands – Taiwan's Claim and Its Refutation], 3 ASAHI ASIAN REV. 21 (1972)).

(free territory)³² per international law of the time.³³ Since then, the Senkaku Islands have remained an integral part of the Nansei Islands, which are Japanese territory.³⁴ Therefore, the Japanese do not view the Senkaku Islands as a part of Taiwan or its appertaining islands that China ceded to Japan in the Treaty of Shimonoseki in 1895.³⁵

Furthermore, after taking possession over the Senkaku Islands, the Japanese exercised sovereignty over them. In 1896, Japan leased the Senkaku Islands to Tatsuhiko Koga, who built transportation facilities and imported scores of seasonal workers to the islands each year.³⁶ After Koga died in 1918,³⁷ his son continued the business, and when the lease expired in 1926, he received title to the land.³⁸ Koga continued operations until the beginning of World War II, when he abandoned the business.³⁹ From 1958, the American Civil Administration in the Ryukyu Islands paid rent to Mr. Koga for occasionally using the islands.⁴⁰

Other actions evincing Japan's continuous exercise of sovereignty over the Senkaku Islands before and during World War II include formal incorporation of the islands into Japan's local government,⁴¹ surveys of land by government agencies, police investigation of a plane crash on the islands, and the building of weather stations.⁴² In 1968, while the United States

³² *Terra nullius* means "unclaimed territory," which refers to land which is not claimed by any person or state. This does not necessarily mean "undiscovered," because territory discovered may no longer be claimed by a sovereign. See *infra* note 54 and accompanying text.

³³ See *The Basic View on the Sovereignty over the Senkaku Islands* (visited Aug. 27, 1999) <<http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html>> (on file with author).

³⁴ See *id.*

³⁵ See *id.*

³⁶ His businesses consisted of fish and bird canning, as well as collecting bird feathers and guano. See Cheng, *supra* note 9, at 246.

³⁷ See *id.* at 247.

³⁸ See *id.*

³⁹ See *id.* His son received subsequent leases. See *id.*

⁴⁰ See *id.* When the American Civil Administration stopped making these payments, if ever is unknown. Tao Cheng's article was written in 1974. See *id.*

⁴¹ See *id.* The Senkaku Islands were incorporated into Okinawa Prefecture. See *id.*

⁴² See *id.*

administered the islands, the U.S. and Okinawan governments took many joint steps to govern and patrol the islands to prevent illegal entry.⁴³ Since the U.S. returned the Senkaku Islands in 1972, Japan has continued to exercise sovereignty over the Senkaku Islands by its Self-Defense Forces patrolling the waters and by permitting the erection of a heliport and navigational lighthouses.⁴⁴

Finally, Japan believes that China acquiesced to its occupation of the Senkaku Islands. China expressed no objections or reservations to Japan's earlier surveys in 1887 and 1892,⁴⁵ nor to Japan's numerous uses of the Senkaku Islands from January 14, 1895. In 1920, the Chinese Counsel stationed in Nagasaki implicitly acknowledged Japan's ownership of the Senkaku Islands by sending a letter to the Japanese Government thanking it for the rescue of Chinese fisherman near one of the Senkaku Islands.⁴⁶

Later, after Japan was defeated in World War II, China did not object to U.S. administration of the islands.⁴⁷ In fact, not until the possibility of developing petroleum resources on the continental shelf near the Senkaku Islands was raised in the 1970s did the Governments of China and Taiwan begin to question the ownership of the islands.⁴⁸

Japan feels that it has proven legal ownership of the Senkaku Islands in three ways. First, Japan believed that the Senkaku Islands were *terra nullius* when Japan erected its markers claiming the islands in 1895 based on prior official surveys and tours of the islands before that found no evidence of China's occupation or control over the islands. Second, Japan has peacefully and continuously occupied the Senkaku Islands for more than 100 years. Japan has exploited the islands for business purposes, erected a heliport and lighthouse, and continuously exerted control over the islands by patrolling their Self-Defense Forces. Last, Japan believes that China acquiesced to Japan's sovereignty over the islands. For more than seventy years until the

⁴³ See *id.*

⁴⁴ See *id.* Japan erected a lighthouse in 1978 and a helicopter port in 1979. See *Diayou Islands Belong to China* (visited Aug. 27, 1999) <<http://ahkcus.org/diayou/>> (on file with author).

⁴⁵ See Cheng, *supra* note 9, at 246.

⁴⁶ See *id.*

⁴⁷ As one of the victorious allies in World War II, China would have presumably objected if it had viewed the islands as Chinese. See Cheng, *supra* note 9, at 250-252.

⁴⁸ See Chiu, *supra* note 3, at 4-9.

late 1960s when the possibility of rich oil and gas deposits became known, China, though it was a victorious ally at the end of World War II, made no attempt to exert control over the islands, allowing the U.S. to administer them until 1972.

III. CASE LAW GOVERNING TERRITORIAL DISPUTES OF ISLANDS

Today, parties to a territorial dispute must actively “seek a solution by . . . peaceful means of their own choice.”⁴⁹ In the past, through mutual agreement by the parties involved, neutral third parties, such as the Permanent Court of Arbitration (PCA) or a head of state, arbitrated the dispute, because there was no judicial body with jurisdiction. These arbitrators looked to settled international law concepts and case law to guide them in their decisions. In the post World War II era, the International Court of Justice (ICJ) has applied earlier case law in adjudicating territorial disputes. Four earlier cases established the modern rules for analyzing island disputes.

A. *Island of Palmas Case*⁵⁰

The *Island of Palmas Case* is the seminal case dealing with island disputes. It involved a sparsely inhabited island twenty nautical miles off the southwest coast of the Philippines. The United States and the Netherlands contested ownership of the island.⁵¹ The United States claimed the Island of Palmas based on two legal theories. First, Spain’s earlier “discovery” of the island, which had given Spain “original title,”⁵² passed to the United States when the United

⁴⁹ The U.N. Charter states:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

U.N. CHARTER art. 33, para. 4.

⁵⁰ (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm Ct. Arb. 1928).

⁵¹ See *id.* at 831. The case was heard by the Permanent Court of Arbitration (PCA) and arbitrated by Judge Max Huber. See Phillip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT’L L. 735, 736 (1928).

⁵² See *id.* at 837. Spain first discovered and colonized the Philippines in the early sixteenth century. See *id.*

States defeated Spain in the Spanish-American War and the United States took possession of the Philippines.⁵³ Second, the United States claimed Palmas Island due to the contiguity of the island to the Philippines.⁵⁴ When Spain first discovered the Island of Palmas in the sixteenth century, international law arguably granted absolute title to islands that were *terra nullius*⁵⁵ to the discoverer. The United States, therefore, argued that this law, the law at the time of discovery, should apply⁵⁶ and international law at that time granted title to *terra nullius* to its discoverer.

On the other hand, the Netherlands claimed the island because the Netherlands had had contact with the region,⁵⁷ and they contended that the island was a “tributary of native princes, [who were] vassals of the Netherlands Government.”⁵⁸ Moreover, regarding the applicable law, the Netherlands countered the United States’ argument of the United States regarding applicable law by stating that, “[t]he changed conceptions of law developing in later times cannot be ignored in judging the continued legal value of relations which, instead of being consummated and terminated at one single moment, are of a permanent character.”⁵⁹

The arbitrator agreed with the Netherlands’ positions. First, he found that contemporary international law controlled island disputes, stating that

a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act

⁵³ See *id.* at 735.

⁵⁴ See *id.* at 742. The United States inherited Spain’s interests in the Philippines following its victory in the Spanish-American War in 1898. See *id.* at 735.

⁵⁵ The question of which law applies at what time to disputes in the present refers to what is known as “intertemporal” law. Intertemporal law deals with “the problem of changing conditions related to particular principles of international law, in other words, the relevant time period at which to ascertain the legal rights and obligations in question.” MALCOLM N. SHAW, *INTERNATIONAL LAW* 294 (3d ed., 1991). For criticism of the use of intertemporal time in the Palmas Island arbitration dispute, see Jessup, *supra* note 54, at 739-740 and Cheng, *supra* note 9, at 228.

⁵⁶ See *Island of Palmas Case*, 2 R.I.A.A. at 843. The arbitration judge acknowledged this view and stated that, “[a] judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.” *Id.* at 845.

⁵⁷ The Netherlands then controlled present day Indonesia as its own colony, the Dutch East Indies. See Jessup, *supra* note 50, at 735.

⁵⁸ See *id.*

⁵⁹ Netherlands Counter-Memorandum at 21, quoted in Jessup, *supra* note 54, at 739.

creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.⁶⁰

The arbitrator then held that though the U.S. had inchoate title to the Island of Palmas, based on its ascension to possession of the Philippines through earlier Spanish discovery, the Netherlands had actual title to the island because it had peacefully and continuously displayed authority over the island.⁶¹ Next, although the Island of Palmas was much closer to the Philippines than Indonesia, the court rejected the United States' "contiguity" claim, concluding that international law did not support such a principle.⁶² Consequently, the rule in international law stated that discovery, without any further display of authority or occupation of an island, did not demonstrate ownership where another State exercised actual authority over the same islands.⁶³

B. *Clipperton Island Case*⁶⁴

The *Clipperton Island Case* involved a dispute between Mexico and France over a small, uninhabited island 600 miles southwest of Mexico.⁶⁵ Mexico claimed the island based on Spanish discovery several hundred years earlier.⁶⁶ France argued that it obtained title in November 1858 after a French naval ship discovered the island, and its commanding officer later published France's claim in a newspaper.⁶⁷

⁶⁰ *Island of Palmas Case*, 2 R.I.A.A. at 845.

⁶¹ *See id.* at 845-846. The Netherlands' "peaceful and continuous" display of authority over the Island of Palmas was arguably only a few years old at the time of the dispute. Jessup, *supra* note 54, at 746.

⁶² *Island of Palmas Case*, 2 R.I.A.A. at 893-894.

⁶³ *See id.* at 845-846.

⁶⁴ (Fr. v. Mex.) (1931), reprinted in 26 AM. J. INT'L L. 390 (1932).

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* Jon Van Dyke & Robert A. Brooks, *Uninhabited Islands and the Ocean's Resources: The Clipperton Islands Case*, 40 EAST-WEST ENV'T & POL'Y INST. 351 (1979).

After “discovering” Clipperton Island and publishing notice of the discovery in a Hawai’i newspaper, France took no further action to assert her sovereignty until 1897, thirty-nine years later, when a French naval ship found three Americans collecting guano on the island.⁶⁸ France protested to the United States, which responded that it made no claim to the island.⁶⁹ A month later, Mexico, believing that Clipperton Island was under its possession, and having heard about the same guano exploration, dispatched a naval ship to investigate.⁷⁰ The ship found the same three Americans on the island and Mexican soldiers raised the Mexican flag.⁷¹ France protested Mexico’s action, and both sides engaged in an acrimonious debate over ownership of the island, until both parties agreed to have their dispute arbitrated by Emperor Victor Emmanuel III of Italy in 1909.⁷² Victor Emmanuel, however, would not issue his ruling on the case for twenty-two years, until 1931.⁷³

The Emperor awarded Clipperton Island to France, stating that “the proof of an historic right of Mexico’s is not supported by any manifestation of her sovereignty over the island, a sovereignty never exercised until the expedition of 1897[.]”⁷⁴ In his decision, the Emperor appeared to have followed the holding in the *Island of Palmas Case*, stating that “taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.”⁷⁵ Yet, he added that where

a territory, by virtue of the fact that it was completely uninhabited is, from the first moment when the occupying state makes its appearance there, at the absolute

⁶⁸ See *id.* at 359.

⁶⁹ See *id.* at 360.

⁷⁰ See *id.* at 359.

⁷¹ See *id.*

⁷² See *id.* at 360.

⁷³ See *id.* at 361. “It is not known exactly why it took him twenty-two years to render an award, but it is speculated by some scholars that the delaying factors included the European war, the rise of Fascism, other pressing Italian problems, and the seeming unimportance of the Clipperton controversy.” *Id.* See also JIMMY M. SKAGGS, CLIPPERTON, A HISTORY OF THE ISLAND THE WORLD FORGOT 148 (1984) (referring to an alleged Italian fascist plot to trade the award of Clipperton Island to France for naval concession in the Mediterranean Sea).

⁷⁴ *Clipperton Islands Case*, *supra* note 64, at 393.

⁷⁵ *Id.*

and *undisputed* disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.⁷⁶

Therefore, Mexico lost its presumptive inchoate title to the island, because it did not adequately protect its title against others, i.e., by not having *disputed* France's first claim in 1858. By proclaiming its intent to occupy Clipperton Island in 1858 and by its later attempts to preserve its claim by protesting the actions of other claimants, France earned actual title to the island, which trumped Mexico's inchoate title.

The *Clipperton Island Case* is an important case to the regime of island disputes for two reasons. First, it follows the distinction in the *Island of Palmas Case* between inchoate title through discovery and actual title through effective occupation and exercise of state authority.⁷⁷ Second, it provides a lower occupation requirement to prove actual title where the territory claimed is an uninhabited island.⁷⁸ Yet, sovereigns must still actively protect their claims from prescription, though the requirement is lower for uninhabited islands.⁷⁹

C. *Minquiers and Ecrehos Case*⁸⁰

The *Minquiers and Ecrehos Case* concerned two groups of disputed rocks and islets located in the English Channel between the United Kingdom and France.⁸¹ Both sides presented extensive documentary evidence to support their claims dating back to the Norman Conquest of England in 1066.⁸² A Chamber of the ICJ found the ancient and documentary materials to be

⁷⁶ *Id.* at 394 (emphasis added).

⁷⁷ *See supra* note 74 and accompanying text.

⁷⁸ *See id.* at 394.

⁷⁹ "Prescription" means "a manner of acquiring the ownership of property, or discharging debts, by the effect of time, under the conditions regulated by law." BLACK'S LAW DICTIONARY 1183 (6th ed. 1990). "Prescription" is similar to "adverse possession," which "consists of actual possession with intent to hold solely for possessor to exclusion of others and is denoted by exercise of acts of dominion over land including making of ordinary use and taking of ordinary profits of which land is susceptible in its present state." *Id.* at 53.

⁸⁰ 1953 I.C.J. 47.

⁸¹ It is unknown if these islands were inhabited or uninhabited at the time of the controversy. They, however, have been definitely inhabited on and off for centuries. The court noted that each group contained, "two or three habitable islets . . ." *Id.* at 53.

⁸² *See generally id.* at 49-57.

inconclusive and unimportant, but found actual displays of authority by the parties since the nineteenth century more relevant to determining ownership. Echoing the *Island of Palmas Case* and the *Clipperton Island Case*, the ICJ chamber stated that “[w]hat is of *decisive importance* . . . is not indirect presumptions deduced from events in the Middle Ages, but evidence which relates directly to the *possession* of the Ecrehos and Minquiers groups.”⁸³ The United Kingdom submitted evidence that the Jersey⁸⁴ courts had exercised criminal jurisdiction of the Ecrehos and Minquiers Islands during the nineteenth and twentieth centuries.⁸⁵ Further, the few habitable houses that periodically existed on the islets were required to pay property taxes and file deeds with the Jersey courts.⁸⁶ In fact, Jersey officials built custom houses and visited Ecrehos to license boats, collect census data, and build maritime safety facilities.⁸⁷ From this evidence, the ICJ awarded the islets to the United Kingdom, because through its courts on Jersey, the United Kingdom demonstrated that it exercised State jurisdiction over the islets.⁸⁸

The *Minquiers and Echeros Case* is significant for two reasons. First, the ICJ chamber followed the legal reasoning of the *Island of Palmas Case*. Further, the case stands for the proposition that documentary evidence or ancient, inchoate claims to islands do not necessarily confer actual title to a sovereign unless the sovereign exercises actual occupation, and the peaceful and continuous exercise of its jurisdiction over the territory in question.⁸⁹

⁸³ *Id.* at 57 (emphasis added).

⁸⁴ Jersey is a relatively large, inhabited neighboring island to Minquiers and Echeros controlled by the United Kingdom. See DEAN AND KATHLEEN HAMMOND ET AL., HAMMOND ATLAS OF THE WORLD 70 (2d ed. 1999).

⁸⁵ 1953 I.C.J at 65.

⁸⁶ See *id.* at 65-66.

⁸⁷ See *id.*

⁸⁸ See *id.* at 67.

⁸⁹ See *supra* note 82 and accompanying text.

D. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) Case*⁹⁰

The *Land, Island and Maritime Dispute (El Salvador/Honduras: Nicaragua intervening) Case* (also known as the “*Gulf of Fonseca Case*”) involved, in part, the disputed ownership of several small inhabited and uninhabited islands in the Gulf of Fonseca. The islands are near the intersecting boundaries of El Salvador, Honduras, and Nicaragua. A Chamber of the ICJ heard the case in which each nation claimed ownership through succession to Spanish discovery.⁹¹

Since the controversy in the case was not possession of *terra nullius*,⁹² the ICJ focused on which states actually occupied and administered “state” functions over the disputed islands,⁹³ as well as at what point the other states acquiesced to another state’s authority.⁹⁴ Thus, the effective occupation of territory and the degree to which other states acquiesced to this exercise of state authority were the decisive factors.

Accordingly, the ICJ chamber awarded the island of El Tigre (inhabited) to Honduras, because Honduras had occupied the island for more than one hundred years and during that period El Salvador had acquiesced to the Honduran occupation.⁹⁵ Similarly, the ICJ chamber then awarded Meanguera (inhabited) and Meanguerita (uninhabited) islands to El Salvador,

⁹⁰ 1992 I.C.J. 351.

⁹¹ *See id.* at 565. Spain once governed all of what is now Central American until it lost its colonies to the newly independent Federal Republic of Central America. *See id.* at 380. The new nations roughly correspond to administrative sub-units within the former Spanish Empire. *See id.* at 356.

⁹² The court noted, “[t]he difficulty with application to the present case of principles of law in this category is however that they were developed primarily to deal with the acquisition of sovereignty over territories available for occupation, i.e., *terra nullius*.” *Id.* at 564.

⁹³ The court noted,

[t]he islands were not *terra nullius*, and in legal theory each island already appertained to one of the . . . states surrounding the Gulf . . . so that acquisition of territory by occupation was not possible; but the effective possession by one of the Gulf States of any island of the Gulf could constitute an *effectivité* Possession backed by the exercise of sovereignty may be taken as evidence confirming the *uti possidetis juris* title.

Id. at 565.

⁹⁴ *See id.* at 566-579.

⁹⁵ *See id.* at 566-70.

because El Salvador had occupied and exercised effective control over them since 1854, and because Honduras had not meaningfully protested El Salvador's actions.⁹⁶

As the most recent island dispute case decided by a chamber of the ICJ, the *Gulf of Fonseca Case* is important because it sets out what has become accepted as international law regarding island disputes. The actual occupation or effective control over territory is key to proving actual title over disputed territory. The ICJ chamber quoted what they termed "classic dictum" for deciding island disputes from Judge Huber, the arbitrator in the *Island of Palmas Case*: "[P]ractice as well as doctrine, recognizes--though under different legal formulae and with certain differences as to the conditions required--that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as a title."⁹⁷

E. *State of the Law Governing Island Disputes*

The above four cases provide a framework in which to analyze claims to disputed islands such as the Diayou/Senkaku Islands. Generally, discovery of *terra nullius* alone does not grant actual title to the discoverer. Discovery only conveys inchoate title, which requires more concrete acts of actual occupation or exercise of authority to demonstrate sovereignty over an island. A state that has inchoate title over territory, may lose sovereignty over an island to another state by prescription if the other state actually occupies or exercises state authority over the territory in controversy.⁹⁸

The subsequent case law refined the *Island of Palmas* rule. First, though claims to uninhabited islands require exercising less authority over the island to maintain title than an inhabited island,⁹⁹ a sovereign must still timely protest the acts of other competing sovereign that constitute occupation or the exercise of state functions, or that sovereign risks losing title altogether.¹⁰⁰ Second, no amount of historical or documentary evidence will trump the actual

⁹⁶ See *id.* at 570-79.

⁹⁷ *Id.* at 563 (citations omitted).

⁹⁸ See *supra* notes 74-75 and accompanying text.

⁹⁹ See also Advisory Opinion on Western Sahara, 1975 I.C.J. 12, 43 (the ICJ agreeing that for uninhabited or thinly populated areas, less formal displays of sovereignty suffice).

¹⁰⁰ See *Clipperton Island Case*, *supra* notes 64-79 and accompanying text.

long-term, peaceful occupation or the exercise of state authority over a territory in controversy.¹⁰¹ Last, besides actual occupation, the ICJ or an arbitrator will also consider whether the parties involved essentially acquiesced to the other state's occupation of an island.¹⁰²

IV. LEGAL STATUS OF THE DIAYOU/SENKAKU ISLANDS

A. *Legal Status of the Diayou/Senkaku Islands on January 14, 1895*

In January of 1895, the Diayou/Senkaku Islands were not *terra nullius*, because China had a long-standing inchoate claim to the Diayou/Senkaku Islands. China had long used the Diayou/Senkaku Islands as a navigational aide and a source of medicinal herbs, and had exercised some sovereignty over the islands by granting a deed to them to one of its citizens.¹⁰³ Under international law, however, a state that has inchoate title over territory may lose that title if another state actually occupied or exercised state authority over the territory in question.

China's inchoate claim to the Diayou/Senkaku islands had not solidified into actual title, because China did not peacefully and continuously display adequate authority over the islands. In particular, China did not protect its claim against the actions of other sovereigns. For example, Japan conducted official surveys of the Diayou/Senkaku Islands in 1887 and 1888,¹⁰⁴ and made a Cabinet Decision on January 14, 1895 to erect a marker on the islands and to incorporate them formally into Japan.¹⁰⁵ China did not protest any of these actions. Therefore, though China did peacefully use the Diayou/Senkaku Islands, they did not exercise continuous authority over the islands.

¹⁰¹ See *Minquiers and Ecrehos Case*, *supra* notes 80-89 and accompanying text.

¹⁰² See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) Case*, *supra* notes 90-97 and accompanying text.

¹⁰³ See *supra* notes 9-11 and accompanying text.

¹⁰⁴ See *supra* note 28 and accompanying text.

¹⁰⁵ See *supra* note 30 and accompanying text. Although it may be argued that it is unrealistic for China to have known, let alone protest Japan's surveys and claim to the island, it is probable that an international court using *stare decisis* would engage in the legal fiction that China was on notice to a competing claim to the Diayou/Senkaku Islands. See *Clipperton Island Case*, *supra* note 64, at 357 (arbitrator finding that France's publication of an article in *The Polynesian* newspaper in Honolulu, Hawai'i was sufficient legal notice to Mexico that another sovereign claimed their territory). This finding is arguably inequitable because *The Polynesian* was published on one of the most remote archipelagos in the world, and because there was no determination whether Mexico had ever actually learned of France's claim to the island thirty-nine years earlier. See *Clipperton Island Case*, *supra* note 63, at 392. (discussing France's publication). See also Van Dyke & Brooks, *supra* note 67, at 357.

Notwithstanding Japan's claim to the Diayou/Senkaku Islands in January 1895, China could argue that Japan actually seized the Diayou/Senkaku Islands in May 1895 as part of its settlement after the Sino-Japanese War, because in 1931, the Tokyo High Court found that the Diayou/Senkaku Islands were appurtenant to Taiwan.¹⁰⁶ Because the Treaty of Shimonoseki, which ended the Sino-Japanese War, awarded Taiwan and its appurtenant islands to Japan,¹⁰⁷ Japan should have returned the islands at the end of World War II as settled in the Cairo Declaration, the Potsdam Proclamation, and the San Francisco Peace Treaty of 1951.¹⁰⁸

Although China has a strong argument that the Diayou/Senkaku Islands were included in the Treaty of Shimonoseki, Japan, nevertheless, can argue that the islands became Japan's territory before the treaty, because of its acts on January 14 1895, four months before the Treaty of Shimonoseki went into affect.¹⁰⁹ Regardless, the Diayou/Senkaku Islands were unquestionably Japanese sovereign territory during the fifty years, from 1895-1945, either because Japan had previously incorporated the islands into its territory¹¹⁰ or because China relinquished the islands after the Sino-Japanese War.¹¹¹ Research has not shown any proof of China protesting Japan's exercise of authority over the Diayou/Senkaku Islands from 1895-1945.

B. *Legal Status of the Diayou/Senkaku Islands after World War II*

Analyzing the legal status of the Diayou/Senkaku Islands after World War II is much more difficult. China argues that since Japan stole the Diayou/Senkaku after the Sino-Japanese War, the islands are territory that Japan was obligated to return after World War II.¹¹² Japan

¹⁰⁶ See *supra* note 19 and accompanying text.

¹⁰⁷ See *supra* note 17 and accompanying text.

¹⁰⁸ See *supra* note 20 and accompanying text.

¹⁰⁹ See *supra* notes 30-34 and accompanying text.

¹¹⁰ See *id.*

¹¹¹ See *supra* note 18 and accompanying text.

¹¹² China believes that Japan was required to do so by the Cairo and Potsdam Conferences, as well as the San Francisco Peace Treaty. See *supra* notes 19-22 and accompanying text.

claims that it incorporated the Diayou/Senkaku Islands before the Treaty of Shimonoseki,¹¹³ and therefore the islands are an integral part of Japan and not subject to the conferences and treaties that obligate Japan to return all lands stolen from China.

The acts or omissions of the respective parties further cloud the issues. After World War II ended, China did not make any claims to the Diayou/Senkaku Islands until the possibility of exploitable hydrocarbon deposits was announced almost twenty-five years later.¹¹⁴ Furthermore, China did not significantly peacefully or continuously exercise authority over the islands during this period. China's only claims in this regard are: 1) the request by the United States to use the Diayou/Senkaku Islands as bombing targets during the Cold War; and 2) an incident in 1955 when retreating Taiwanese troops erected a temporary garrison on the islands and fired upon approaching Japanese ships.¹¹⁵ In comparison, Japan jointly patrolled and administered the Diayou/Senkaku Islands with the United States,¹¹⁶ and after 1972, Japan continued to patrol the Diayou/Senkaku Islands unilaterally, and built and maintained a heliport and navigational lighthouses.¹¹⁷

Although China has a plausible argument that the Diayou/Senkaku Islands reverted to it after World War II, its actions in the twenty-five years immediately following the end of the war do not demonstrate a sovereign exercising authority over its territory. From 1945 to 1970, though a time of great political unrest in China,¹¹⁸ China neither expressly claimed the

¹¹³ See *supra* note 30 and accompanying text.

¹¹⁴ See *supra* note 7 and accompanying text.

¹¹⁵ See *supra* notes 24-25 and accompanying text.

¹¹⁶ See *supra* note 42 and accompanying text.

¹¹⁷ See *supra* note 39 and accompanying text.

¹¹⁸ Though during this period, China suffered from a civil war, famine, and the Cultural Revolution (see generally ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (1992) at 23-33), arguments that during this time period China could not protest foreign occupation of the Diayou/Senkaku Islands will probably not be persuasive, because political unrest has not excused the lack of exercise of authority in the past. For example, from the period 1858 to 1897, Mexico fought a civil war, defended against a foreign invasion by the soldiers of Emperor Napoleon III (see Kerry R. J. Tattersall, *Maximilian of Mexico* (visited May 25, 2000) <<http://www.austrian-mint.com/e/maxhist.html>> (copy on file with author)), and had internal revolts. See ROBERT H. JACKSON, LIBERALS, THE CHURCH AND INDIAN PEASANTS 37 (1992). In the *Clipperton Island Case*, the arbitrator considered none of these factors.

Diayou/Senkaku Islands nor objected to Japan's exercise of authority over them.¹¹⁹ Only after the possibility of hydrocarbon deposits was first published did China begin to make an open claim to the Diayou/Senkaku Islands. To award the islands to China would ignore the fact that Japan has peacefully and continuously exercised authority over the islands since either 1895 or 1945.

C. *Contemporary Legal Status of the Diayou/Senkaku Islands*

Today, Japan continues to exercise actual sovereignty over the Diayou/Senkaku Islands by its maintenance of a navigational lighthouse and by actively patrolling and administering the islands and the Diayou/Senkaku Islands' surrounding EEZ. China continues to insist that the Diayou/Senkaku Islands are its sovereign territory and demands that Japan give up its illegal occupation.

Both sides present extensive documentary evidence to prove title to the islands and appear unwilling to negotiate any compromise. Under currently accepted international law, however, the controlling legal principle regarding sovereignty over an uninhabited island is the peaceful and continuous exercise of authority.¹²⁰ Under a variety of different guises, Japan has maintained authority over the Diayou/Senkaku Islands for over a century. Although historically inequitable, Japan appears to have a more persuasive case merely by its peaceful and continuous exercise of authority over the islands, which China did not timely protest.

V. CONCLUSION

Under currently accepted international case law,¹²¹ Japan has a colorable claim to the Diayou/Senkaku Islands, because, as the Chamber of the ICJ has repeatedly demonstrated over

¹¹⁹ Taiwanese forces firing on Japanese vessels in 1955 during an isolated incident does not likely constitute the exercise of state authority over the Diayou/Senkaku Islands. *See supra* note 25 and accompanying text.

¹²⁰ *See supra* Part III.

¹²¹ *See Isle of Palmas Case, supra* Part III.A; *Clipperton Island Case, supra* note Part III.B; *Minquiers and Ecrehos Case, supra* Part III.C; *Gulf of Fonseca Case, supra* Part III.D. This conclusion differs from that of many scholars such as Chiu, who conclude that the Diayou/Senkaku Islands were included in the territory that China lost after the Sino-Japanese War and, therefore, should have been returned to China after World War II. *See generally* Chiu, *supra* note 3. Although this is a compelling argument, it fails to take into account the rulings of international arbitral bodies concerning island disputes. *See id.*

the years, the exercise of sovereign authority over island territories is the key factor in determining ownership of islands.¹²² Therein lies the strength of Japan's claim. Japan has exercised sovereignty over the islands peacefully and continuously since 1952,¹²³ if not for more than a century.¹²⁴ Unfortunately for China, even if she could excuse her inaction in defending her claims to the islands in the post-War period due to extreme hardship caused a civil war and nearly twenty years of civil unrest, the Chamber of the ICJ hearing the dispute would not likely consider such extreme hardship as a valid excuse, because in the jurisprudence of territorial disputes over islands to date, neither civil unrest nor civil upheaval has been used to excuse omissions in defending territorial claims to islands.¹²⁵ Therefore, if Japan and China submitted their dispute over the Diayou/Senkaku Islands to the ICJ, the adjudicating Chamber of the ICJ would primarily look to the recent historical record of the exercise authority by each sovereign over the islands.¹²⁶ Though inequitable in a historical context, under the current law governing

¹²² See *supra* note 83 and accompanying text.

¹²³ This recent development chooses 1952 to mark the commencement of Japan's peaceful and continuous exercise of sovereign authority over the islands. To begin, though Japan claims that it took possession of the islands before it and China signed the Treaty of Shimonoseki that ended the Sino-Japanese War, the fact remains that the Cabinet decision to set markers on the islands (see *supra* note 33 and accompanying text) came during the Sino-Japanese War (1894-95). See *Japan, Restoration of Imperial Rule* (visited June 29, 2000) <<http://www.fwkc.com/encyclopedia/low/articles/j/j013000138f.html>> ("The struggle for control of Korea became the next step in Japanese expansion. Conflict with China in Korea resulted in the Sino-Japanese War of 1894-95..."). Therefore, Japan's claim that the islands were not part of the treaty is tenuous, because Japan exercised authority over the islands during the same war that the treaty concluded. Consequently, erring on the side of prudence, this recent development assumes that the islands were included in the Treaty of Shimonoseki.

Assuming that the Diayou/Senkaku Islands were included in the Treaty of Shimonoseki, at the earliest, Japan could have begun exercising authority over the islands in 1951 when the San Francisco Peace Treaty of 1951 came into effect and compelled Japan to relinquish its claims to Taiwan and all its appurtenant islands. See *supra* notes 22-23 and accompanying text. Whether the islands are appurtenant to Taiwan, however, is disputed. Therefore, 1952, the year in which Japan and China concluded the 1952 Sino-Japanese Peace Treaty, which stated that "[a]ll treaties . . . concluded prior [to this treaty] as a consequence of the conclusions of the war, [are] hereby null and void" (see *supra* notes 24-25 and accompanying text), shows that the Treaty of Shimonoseki is null and void. As discussed in the paragraph above, because Japan claimed the islands during the Sino-Japanese War, Japan's position that the islands were not part of the Treaty of Shimonoseki is weak. Because the Diayou/Senkaku Islands were arguably part of the 1895 treaty, the 1952 Sino-Japanese Treaty returned the islands to the Chinese. Consequently, the "safest" date to establish from which Japan began to exercise peaceful and continuous sovereign authority over the islands is 1952.

¹²⁴ See *supra* Part II.B.

¹²⁵ See *supra* note 118.

¹²⁶ See *supra* notes 82, 89, 92-94 and accompanying text.

territorial disputes over islands,¹²⁷ the ICJ would likely find that Japan's post-War peaceful exercise of actual authority over the islands had extinguished China's long historical claim.¹²⁸

William B Heflin¹²⁹

¹²⁷ *See supra* Part III.E.

¹²⁸ Although Japan has a better legal claim to the Diayou/Senkaku Islands than China under international case law, in the interests of amity and international co-operation, both sides would best be served by sitting down and finding an equitable solution to jointly exploit the economic resources of the Diayou/Senkaku Islands. Such a model of co-operation already exists in East Asia in the Republic of Korea-Japan Joint Development Area. The Republic of Korea-Japan Joint Development Area is an area south of the Republic of Korea and south-west of Japan near the Diayou/Senkaku Islands where both countries have jointly agreed to share the resources of the sea in an area where both countries' maritime zones overlap. *See* CHOON-HO PARK AND JAE KYU PARK EDS., *THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE* 180 (1987).

¹²⁹ Class of 2001, University of Hawai'i, William S. Richardson School of Law.