
Status Quo Post Bellum and the Legal Resolution of the Territorial Dispute between China and Japan over the Senkaku/Diaoyu Islands

Melissa H. Loja*

Abstract

This article ascertains whether Japan's possession of the Senkaku/Diaoyu Islands has a legal basis that is opposable to China. It departs from the traditional approach that focuses on historic titles and ancient maps. It applies an alternative approach that is based on the status quo post bellum or the relative legal position of the parties at the end of armed hostilities. This approach is warranted by the practice of China, Japan and the Allied powers of defining the status quo in the East China Sea as a frame of reference for the future disposition of the islands. Primary records of their conduct in the period 1945–1952 reveal consensus that: (i) the islands are part of Nansei Shoto rather than of Formosa; (ii) they remained under the residual sovereignty of Japan and (iii) they were being claimed by Japan but not China. The conduct of the parties proximate to 1945–1956 indicate that there was no prior existing title to the islands that would contradict the status quo. Rather, during the period 1952 up to the critical date of 1970, the positive acts of the Republic of China and the acquiescence of the People's Republic of China confirmed the status quo.

1 Summary

The dispute over the Senkaku/Diaoyu Islands is often described as intractable. Japan is in possession by virtue of the San Francisco Peace Treaty (Peace Treaty) and the Okinawa Reversion Treaty (Reversion Treaty).¹ China denies the

* PhD candidate under the supervision of Professor Simon Young, Faculty of Law, University of Hong Kong, Hong Kong, China. Email: h1198345@hku.hk.

¹ Treaty of Peace with Japan (Peace Treaty) 1952, 136 UNTS 45; Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Island (Reversion Treaty) 1972, 23 UST 446.

opposability of these treaties for it was not a party to them. China claims a right to possession based on historic title. The question is whether Japan's possession has a legal basis that is opposable to China. Most articles focus on historic titles and ancient maps. However, international tribunals disregard claims to historic title that are not supported by evidence of the exercise of territorial sovereignty by the original title holder. They disregard ancient maps that are not an integral part of an agreement.

This article applies an alternative approach that relies on the *status quo post bellum* (*status quo*). The *status quo* is the relative legal position of the parties at the end of armed hostilities and the starting point of their future international relations. It is a useful tool for resolving territorial disputes. In *Award of the Arbitral Tribunal (Eritrea v. Yemen)* and *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, the *status quo* that prevailed at the end of armed hostilities precluded reversion to ancient title over disputed territory.² In *Dispute Concerning the Beagle Channel (Argentina v. Chile)* and *Case Concerning the Frontier Dispute (Benin/Niger)*, territorial disputes among former colonies were resolved based on *uti possidetis*, which the jurists equated to *status quo post bellum*.³ More importantly, in various instruments, China, Japan and the Allied powers outlined the *status quo* in the East China Sea to guide them in the future disposition of the islands after World War II.⁴

Primary records reveal the following snapshot of the territorial situation of the Senkaku/Diaoyu Islands from 2 September 1945, when the war ended, through 28 April 1952, when the Peace Treaty took effect (1945–1952):

- i. Japan caused the substitution of the term 'Ryukyu Islands south of 29° north latitude' in Article 3 of the Peace Treaty with the term 'Nansei Shoto south of 29° north latitude', thereby extending the area under its residual sovereignty to include the Senkaku/Diaoyu Islands.
- ii. The Allied powers recognized that the islands pertain to Nansei Shoto; that Japan has residual sovereignty over them and that China has no claim to them.
- iii. The Republic of China (ROC) did not object to the foregoing conduct of Japan and the Allied powers. Rather, it performed acts accepting the status accorded to the islands. The People's Republic of China (PRC) also did not object to the foregoing conduct of Japan and the Allied powers despite the opportunity to do so.

² *Award of the Arbitral Tribunal in the First Stage of the Proceedings Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)* (*Eritrea v. Yemen*), Decision of 9 October 1998, reprinted in UNRIIAA, vol. 22, 209; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, 16 March 2001, ICJ Reports (2001) 40.

³ *Dispute between Argentina and Chile Concerning the Beagle Channel (Argentina v. Chile)*, Decision of 18 February 1977, reprinted in UNRIIAA, vol. 21, 53; *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment, 12 July 2005, ICJ Reports (2005) 90.

⁴ The Allied powers are the signatories to the Declaration of the United Nations in 1942, in US Department of State (USDOS), *Foreign Relations of the United States (FRUS)* (1942), vol. 1, at 25–26.

In sum, during the period 1945–1952, there was consensus that the islands were part of Nanshi Shoto over which Japan has residual sovereignty and to which China has no claim.

It is said that consensus is not enough basis to resolve territorial disputes. In *Eritrea v. Yemen* and *Sovereignty over Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore)*, title was awarded based on a 'general opinion' and a 'convergent evolution of ... positions [on territorial title]' as confirmed by the positive acts of the parties, there being no clear and convincing evidence of a subsisting title.⁵ In this article, it is shown that the consensus on the status of the Senkaku/Diaoyu Islands was not at odds with any prior existing title, and it was confirmed by the conduct of the parties after 1945–1952 and before the critical date of 1970.

2 Introduction

A geophysical survey of the East China Sea was conducted by Japan in 1966⁶ and jointly⁷ by Japan and the ROC from 12 October to 29 November 1969.⁸ The survey was sponsored by the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, an intergovernmental body founded by, among others, China and Japan.⁹ The published reports of the surveys included maps of the area where a feature is named simply 'Senkaku' Island.¹⁰ ROC representatives co-authored the 1969 report.¹¹ The PRC did not object to Japanese presence on the islands or to the published maps.¹² There appeared to be no dispute over the islands.

The 1969 report concluded that there was a 'high probability ... that the continental shelf between Taiwan and Japan may be one of the most prolific reservoirs in the world'.¹³ Immediately after this report was released, the competing claims of the PRC¹⁴/ROC¹⁵ and

⁵ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, 23 May 2008, ICJ Reports (2008) 12.

⁶ Emery and Niino, 'Stratigraphy and Petroleum Prospects of Korea Straits and East China Sea', 1 *Technical Bulletin* (1968) 13.

⁷ *Ibid.* Japan was represented by the Japan Petroleum Development Corporation (now Japan National Oil Corporation) through Yushikazu Hayashi and the Republic of China (ROC) was represented by the Chinese Petroleum Corporation (now CPC Corporation, Taiwan) through C.Y. Meng and the National Taiwan University through C.S. Wang.

⁸ Emery *et al.*, 'Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea', 2 *Technical Bulletin* (1969) 3.

⁹ See 'Preface', 1 *Technical Bulletin* (1968).

¹⁰ Emery and Niino, *supra* note 6, at 18, fig. 1; Emery *et al.*, *supra* note 8, at 15, fig. 2.

¹¹ Emery *et al.*, *supra* note 8.

¹² The People's Republic of China (PRC) aired its objection to the joint survey only in 1970. See 'US and Japanese Reactionaries Out to Plunder Chinese and Korean Seabed Resources,' 13 *Peking Review* (1970) 50, at 15–16.

¹³ Emery *et al.*, *supra* note 8, at 41.

¹⁴ 'US and Japanese Reactionaries', *supra* note 12.

¹⁵ See China, 1969–1976: Memorandum of Conversation, 12 April 1971, in USDOS, *FRUS* (1971), vol. 17, at 292.

Japan¹⁶ surfaced. The critical date was 16 September 1970 when ROC Ambassador Chou Shu Kai sent an aide-memoire to US Assistant Secretary Marshal Green protesting Japanese presence in the area.¹⁷

Meanwhile, the USA and Japan signed the Reversion Treaty,¹⁸ which provided for the relinquishment to Japan of the rights to an area of the Nansei Shoto that were granted to the USA under Article 3 of the Peace Treaty.¹⁹ The area includes the Senkaku/Diaoyu Islands, situated at 25°45' N, 123°E.²⁰ The USA emphasized that the rights that it had assumed from Japan under the Peace Treaty were the same rights that it restored to Japan under the Reversion Treaty – it did not add to the rights and interests of Japan nor diminish those of China.²¹

China protested that through the Peace Treaty Japan 'illicitly handed over to the [USA] the [D]iaoyu. ... and the [US] government unilaterally declared that it enjoyed the so-called administrative rights'.²² It felt that through the Reversion Treaty, Japan and the USA had made another 'illicit transfer between themselves of China's territory'.²³ In addition, these islands were integral to Formosa²⁴ and had been 'Chinese territory since ancient times'.²⁵ Japan 'stole these islands'²⁶ when it forced China to

¹⁶ Ministry of Foreign Affairs of the Government of Japan, 'Basic View on the Sovereignty over the Senkaku Islands,' 8 March 1972, in J. Cohen and H. Chiu, *People's China and International Law: A Documentary Study* (1974), vol. 1, at 352.

¹⁷ China, 1969–1976: Memorandum of Conversation, *supra* note 15, n. 6.

¹⁸ Reversion Treaty, *supra* note 1.

¹⁹ Peace Treaty, *supra* note 1.

²⁰ Agreed Minutes to the Reversion Treaty, *supra* note 1, at 475. The parties enclosed the area with the following straight baselines:

North Latitude	East Longitude
28 degrees	124 degrees 40 minutes
24 degrees	122 degrees
24 degrees	133 degrees
27 degrees	131 degrees, 50 minutes
27 degrees	128 degrees, 18 minutes
28 degrees	128 degrees, 18 minutes
28 degrees	124 degrees, 40 minutes

These baselines are based on US Civil Administration of the Ryukyu Islands (USCAR), Proclamation no. 27, 25 December 1953.

²¹ See US Congress, Senate Committee on Foreign Relations, *Okinawa Reversion Treaty: Hearings, 92nd Congress, 1st Session*, 27, 28 and 29 October 1971, at 11, 90–91.

²² 'Statement of the Ministry of Foreign Affairs of the People's Republic of China', 30 December 1971', 15 *Peking Review* (1972) 1, at 12.

²³ *Ibid.*

²⁴ State Council Information Office of the People's Republic of China (SCIO), Diaoyu Dao: An Inherent Territory of China, Part III, September 2012, available at www.go.cn/english/official/2012-09/25/content_2232763.htm (last visited 12 January 2015).

²⁵ Huang Hua's Letter to UN Secretary-General and President of Security Council, UN Doc. S/10653, 26 May 1972.

²⁶ 'Statement of the Ministry', *supra* note 22.

sign the 1895 Shimonoseki Treaty.²⁷ However, in the view of China, its abrogation of the Shimonoseki Treaty and its declaration of war on Japan paved the way for the retrocession of Formosa.²⁸ Retrocession was also agreed to by the Allied powers under the Cairo Declaration²⁹ and the Potsdam Declaration,³⁰ as well as by Japan, under the Instrument of Surrender.³¹ Japan countered that the islands had been under its sovereignty since 1894 and that it had retained sovereignty even after it signed the Instrument of Surrender and Peace Treaty.³² Thus, both China and Japan argue that the Cairo Declaration, the Potsdam Declaration and the Instrument of Surrender (hereafter collectively referred to as the 'instruments') outline the framework for the future disposition of the islands.

Under the Instrument of Surrender, Japan undertook 'to carry out the provisions of the Potsdam Declaration ... and take whatever action may be required by the Supreme Commander for the Allied Powers [SCAP] or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration'.³³ Article 8 of the Potsdam Declaration segregated Japanese territories into three categories:

- i. 'the islands of Hokkaido, Honshu, Kyushu and Shikoku ... [to which] ... Japanese sovereignty shall be limited',³⁴
- ii. 'such minor islands as [the Allied powers] determine ... [to which] ... Japanese sovereignty shall be limited'³⁵ and
- iii. territories that are subject to 'the terms of the Cairo Declaration'.³⁶

One of the terms of the Cairo Declaration was the restoration of 'all territories Japan has stolen from the Chinese, such as ... Formosa ... to the [ROC]'.³⁷ It is clear that under the foregoing instruments, China, Japan and the Allied powers outlined the *status quo* in the East China Sea to serve as a frame of reference for the future disposition of the islands in the area. The natural starting point for resolving the conflicting claims to the Senkaku/Diaoyu Islands would be to determine their *status quo*.

²⁷ *Hertslet's China Treaties* (1908), at 362.

²⁸ Declaration of War on Japan, 1941, in USDOS, *FRUS* (1941), vol. 5, at 550–551.

²⁹ 'Diplomatic Papers: The Conferences at Cairo and Tehran, 1943' (Cairo Declaration), Press Communiqué, 1 December 1943, in USDOS, *FRUS*, (1943), at 448–449.

³⁰ Proclamation Calling for the Surrender of Japan, Approved by the Heads of Government of the United States, China, and United Kingdom (Potsdam Declaration), 26 July 1945, in USDOS, *FRUS*, (1945), vol. 2, at 1474–1475.

³¹ Surrender of Italy, Germany and Japan, World War II (Instrument of Surrender) (1946), at 6, 12. 'Statement by Chou En-lai, Foreign Minister of the People's Republic of China, Refuting Truman's Statement of 27 June 1950', in *Important Documents Concerning the Question of Taiwan (Important Documents)* (1955), at 13.

³² Cohen and Chiu, *supra* note 16, at 351–352. See also Letter from the Permanent Representative of Japan to the United Nations Addressed to the President of the Security Council (Letter from the Permanent Representative), Doc. S/10661, 24 May 1972.

³³ Instrument of Surrender, *supra* note 31.

³⁴ Potsdam Declaration, *supra* note 30.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Cairo Declaration, *supra* note 29, at 448.

There is no mention of the Senkaku/Diaoyu Islands in any of the instruments. There is no mention also in the Peace Treaty, which merely declares Japan's renunciation of rights to Formosa³⁸ and the relinquishment of administration over Nansei Shoto.³⁹ The *status quo* of the islands would have to be ascertained from primary records of the conduct of China, Japan and the Allied powers in negotiating, interpreting and applying the instruments during the period 1945–1952. This article undertakes the task in five parts, including the summary and this introduction.

The third part of the article discusses the concept of *status quo post bellum*. According to this concept, the termination of war through the simple cessation of armed hostilities signifies a tacit recognition by the parties that their relative legal positions form the reference point of their future international relations. China, Japan and the Allied powers did abide by this concept in the various instruments and in their post-war conduct. The fourth part examines the primary records to determine the *status quo* of the Senkaku/Diaoyu Islands after the war. The focus is not on historic title or ancient maps, which generally have not been dispositive of territorial disputes. However, the conduct of the parties in the periods proximate to 1945–1952 is also considered since it might indicate the existence of a 'convincing alternative title' or confirm the *status quo*.⁴⁰ The tribunal in *Eritrea v. Yemen* awarded title of the Mohabakkahs to Eritrea based on the presumption in the Lausanne Treaty that at the end of the war all islands within the territorial sea of a coastal state belong to that state.⁴¹ The presumption in favour of Eritrea prevailed because Yemen did not produce a 'convincing alternative title' to the islands.

Based on the discussion in the fourth part of the article, the fifth part responds to the question raised at the outset on the opposability of the legal basis of Japan's possession of the Senkaku/Diaoyu Islands. It reaches the conclusion that upon cessation of armed hostilities, there was consensus among China, Japan and the Allied powers that the islands are part of Nansei Shoto over which Japan had residual sovereignty and that China had no claim to them. This consensus is confirmed by the subsequent conduct of the parties.

The purpose of this article is to demonstrate that it is possible to resolve the territorial dispute between China and Japan over the Senkaku/Diaoyu Islands based on international law. Although China did not consent to the Peace Treaty or the Reversion Treaty, its relations with Japan in regard to the islands are governed by the consensus underlying the *status quo post bellum* and confirmed by their subsequent conduct. This approach is discussed in the following section.

³⁸ Peace Treaty, *supra* note 1, Art. 2.

³⁹ *Ibid.*, Art. 3.

⁴⁰ See *Eritrea v. Yemen*, *supra* note 2, at 472.

⁴¹ *Ibid.* Note that the Mohabakkahs are within 12 nautical miles from the Eritrean coast. When the 1923 Lausanne Treaty adopted the presumption that islands within the territorial sea of a coastal state should belong to that state, the prevailing practice was the three-nautical-mile territorial sea. Nonetheless, the tribunal applied the presumption because in 1953 Eritrea enacted a law declaring a 12-nautical-mile territorial sea.

3 Alternative Approach Based on the *Status Quo Post Bellum*

The approach adopted in this article is to determine consensus on the status of the Senkaku/Diaoyu Islands in 1945–1952 and to verify whether factors proximate to that period contradict or confirm it. The first section discusses why this alternative approach is preferred over the approach applied in most articles, which is to rely solely on historic titles and ancient maps. The second section explains that this alternative approach is subscribed to by China, Japan and the Allied powers in regard to the islands in the East China Sea.

A Historic Titles and Ancient Maps

Most articles dealing with the Senkaku/Diaoyu Islands focus on which state – China or Japan – has the longer historic title⁴² or older map.⁴³ They assess Japan's claim based on evidence of the incorporation of the islands into the Okinawa prefecture in 1894⁴⁴ compared to China's claim based on the following evidence: (i) ancient literature that refers to the islands by name;⁴⁵ (ii) records of voyages in which imperial envoys of the Ming and Qing Courts to the Ryukyu Tributary described the islands;⁴⁶ (iii) records of the Ryukyu Kingdom that the islands are outside its boundary as compared to records of the Qing dynasty that the islands are within China's boundaries⁴⁷ and (iv) Chinese and foreign maps from the 14th century to the 19th century indicating that the islands were under the coastal defence of the Ming and Qing courts.⁴⁸

- ⁴² Cheng, 'The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition', 14 *Virginia Journal of International Law* (1973) 221, at 248–249, 254–261; Chiu, 'An Analysis of the Sino-Japanese Dispute over the T'iao-yutai Islets (Senkaku Gunto)', 15 *Chinese Taiwan Yearbook of International Law and Affairs (CTYILA)* (1996–1997) 9, at 11–18; Shaw, 'Revisiting the Diaoyutai/Senkaku Islands Dispute Examining Legal Claims and New Historical Evidence under International Law and the Traditional East Asian World Order', 26 *CTYILA* (2008) 95 at 103–113; Upton, 'International Law and the Sino-Japanese Controversy over the Territorial Sovereignty of the Senkaku Islands', 52 *Boston University Law Review* (1972) 763, at 767–768; Li, 'China and Off-Shore Oil: The Tiao-yu Tai Dispute', 10 *Stanford Journal of International Studies* (1975) 143, at 148–149; Yongming, 'An International Law Analysis of China's Sovereignty over the Diaoyu Islands', 1 *China Legal Science* 56 (2013) 57, at 71–80; Wu and Zhang, 'Territorial Issues on the East China Sea: A Chinese Position', 3 *Journal of East Asia and International Law* (2010) 137, at 142–144; Zhang, 'A Deconstruction of the Notion of Acquisitive Prescription and Its Implications for the Diaoyu Islands Dispute', 2 *Asian Journal of International Law* (2012) 323, at 334–338.
- ⁴³ H. Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan*, Maryland Series in Contemporary Asian Studies (1999), at 90–93; U. Suganuma, *Historical Justifications of Sovereign Right over Territorial Space of the Diaoyu/Senkaku Islands: Irredentism and Sino-Japanese Relations* (1996), at 131–203.

- ⁴⁴ Ministry of Foreign Affairs, The Senkaku Islands, March 2013, at 3, available at www.mofa.go.jp/region/asia-paci/senkaku/pdfs/senkaku_en.pdf (last visited 12 January 2015); Note verbale of the Permanent Mission of Japan to the United Nations, 24 September 2012, available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn89_2012_jpn.pdf (last visited 12 January 2015).

- ⁴⁵ SCIO, *supra* note 24.

- ⁴⁶ *Ibid.*

- ⁴⁷ *Ibid.*

- ⁴⁸ Guo Jiping, Ironclad Evidence Shows That Diaoyu Dao Is Chinese Territory, available at <http://ls.chineseembassy.org/eng/zt/tiodd/t984933.htm> (last visited 12 January 2015).

There are presently well-defined standards to test claims to historic title. In *Sovereignty over Pulau Ligitan (Indonesia/Malaysia)*, Malaysia based its claim to historic title to Pulau Ligitan and Pulau Sipadan on the tribal allegiance bestowed upon the Sultan of Sulu by the fishing tribes that frequented the islands. This was found to be insufficient basis for territorial title because the sultan did not exercise sovereignty over the particular disputed islands.⁴⁹ The territorial disputes in *Island of Palmas (US v. Netherlands)*,⁵⁰ *Legal Status of Eastern Greenland (Denmark v. Norway)*,⁵¹ *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*,⁵² *Eritrea v. Yemen*,⁵³ *Western Sahara Advisory Opinion*⁵⁴ and *Land and Maritime Boundary (Cameroon v. Nigeria)*⁵⁵ reached the same outcome – no historic title vested in the claimants for lack of evidence that a central authority exercised sovereignty over the particular disputed territory. Mere discovery without effective occupation,⁵⁶ settlement by private individuals having no territorial allegiance to a central authority,⁵⁷ vicarious possession through fishing tribes⁵⁸ and ancient maps⁵⁹ are not constitutive of territorial title.

In contrast, in *Malaysia/Singapore*, the tribunal recognized the ancient title of the Sultan of Johore based on evidence of the latter's acts of sovereignty over Pedra Branca/Pulau Batu Puteh and Middle Rocks and on the recognition accorded to the sultan by the maritime powers in the region.⁶⁰ The acts of sovereignty performed by the Sultan consisted of protesting Netherland's seizure of junks on the disputed islands and ceding the islands to Great Britain.

Thus, at the minimum, claims to historic title must be supported by evidence that the original title holder was a central authority who exercised territorial sovereignty over the particular disputed territory. Set against this minimum standard, China's evidence would indicate a geographical awareness of, but not the actual exercise of, sovereignty over the particular disputed islands.⁶¹ Nonetheless, such geographical awareness casts a cloud over Japan's claim to title based on discovery and occupation *terra nullius* in 1894. Moreover, China's evidence indicates the existence of a claim by another sovereign state at the time when Japan allegedly consolidated title to the islands through continued control up to World War II. Thus, on the balance, the

⁴⁹ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 17 December 2002, ICJ Reports (2002) 625, at 110.

⁵⁰ *Island of Palmas (Netherlands v. US)*, Decision of 4 April 1928, reprinted in UNRIIAA, vol. 2, at 845–846.

⁵¹ *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 PCIJ Series A/B, No. 53, at 27.

⁵² *Qatar v. Bahrain*, *supra* note 2, at 82–87.

⁵³ *Eritrea v. Yemen*, *supra* note 2, at 444–447.

⁵⁴ *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, at 148–149, 162.

⁵⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303, at 205–207.

⁵⁶ *Netherlands v. US*, *supra* note 50.

⁵⁷ *Denmark v. Norway*, *supra* note 51.

⁵⁸ *Qatar v. Bahrain*, *supra* note 2.

⁵⁹ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Reports (1999) 1045, at 84.

⁶⁰ *Malaysia/Singapore*, *supra* note 5, at 54–56.

⁶¹ *Indonesia/Malaysia*, *supra* note 49, at 136.

evidence of China and Japan are comparable, and neither could establish in a clear and convincing manner the existence of a prior historic title.⁶²

Maps also are a weak basis of territorial claims. They are not a source of title unless annexed to an agreement⁶³ or recognized as the authoritative interpretation of a boundary agreement.⁶⁴ At best, they are corroborative evidence of title already existing on another basis,⁶⁵ provided they meet the criteria of neutrality and certainty of provenance.⁶⁶ The only map of value to the resolution of the dispute over the Senkaku/Diaoyu Islands is the one annexed to the Shimonoseki Treaty. Under Article 2, China ceded to Japan '(b) [t]he Island of Formosa, together with all islands appertaining or belonging to the said Island of Formosa'.⁶⁷ Under Article 3, '[t]he alignment of the frontiers' of Formosa and its appurtenant islands were supposed to be verified and demarcated according to 'the annexed map'.⁶⁸ This annexed map would definitively establish whether the Senkaku/Diaoyu Islands are among the islands appurtenant to Formosa that were ceded under the treaty. However, according to Sir Edward Hertslet, no map was published with the treaty,⁶⁹ and Article 3 was subsequently suppressed by Article 1 of the 1895 Convention for the Retrocession by Japan to China of the Southern Portion of the Province of Fengtien.⁷⁰

In sum, this section has shown that the focus on whether China or Japan has the longer historic title or older map is misplaced. The evidence relied upon by China and Japan does not establish in a convincing manner the existence of historic title. As discussed in the next section, the alternative approach applied in this article is based on the *status quo post bellum*.

B Status Quo Post Bellum

International tribunals have allowed the territorial status prevailing after an armed conflict to supersede a nascent historic title. In *Qatar v. Bahrain*, the *status quo* in the Persian/Arabian Gulf brokered by Great Britain prevented the Sheikh of Bahrain from perfecting whatever title he may have held in the 18th century over Zubarah.⁷¹ In

⁶² See J. Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (2009), at 152–154; U. Suganuma, *Historical Justification of Sovereign Right over Territorial Space of the Diaoyu/Senkaku Islands: Irredentism and Sino-Japanese Relations*, Geography Dissertations Paper 42 (1996), at 330; Memorandum from John H. Holdridge of the National Security Council Staff to the President's Assistant for National Security Affairs (Kissinger), 13 April 1971, in USDOS, *FRUS* (1969–1976), vol. 17, at 296–297.

⁶³ *Netherlands v. US*, *supra* note 50, at 852–854; *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, ICJ Reports (1986) 554, at 54–62, 93; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, ICJ Reports (2007) 659, at 218.

⁶⁴ *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, 15 June 1962, ICJ Reports (1962) 6, at 26–27, 32–33.

⁶⁵ *Malaysia/Singapore*, *supra* note 5, at 272; *Burkina Faso/Mali*, *supra* note 63, at 53–56.

⁶⁶ *Cambodia v. Thailand*, *supra* note 64, at 21.

⁶⁷ Hertslet's *China Treaties*, *supra* note 27.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, at 371.

⁷¹ *Qatar v. Bahrain*, *supra* note 2.

Eritrea v. Yemen, the *status quo* of indeterminacy agreed upon by the parties to the Treaty of Lausanne at the end of World War I precluded reversion to Yemen's ancient title over the disputed islands in the Red Sea.⁷² Moreover, like China, which did not consent to the Peace Treaty, Yemen did not consent to the Treaty of Lausanne, yet it was bound by the *status quo* created by the treaty – its lack of consent was immaterial for it held no interest in the islands at that time.⁷³

Based on their own arguments, China and Japan have accepted that the territorial status of the Senkaku/Diaoyu Islands at the end of the war would determine whether these reverted to China's historic title or remained in Japan's possession. To recall, the premise of China's claim is that the islands belong to the third category of stolen territory, and so reverted to its possession because of historic title,⁷⁴ whereas for Japan, they belong to the second category of territory which the Allied powers decided to maintain under Japanese sovereignty.⁷⁵ The *status quo* of the islands after the war is decisive.

1 Nature of Status Quo Post Bellum

The *status quo post bellum* is 'the status which exists at the time of cessation of hostilities [and which] becomes silently recognized through such cessation ... [as] ... the basis of the future relations of the parties'.⁷⁶ It has been equated to *uti posseditis juris*,⁷⁷ which is a view that, at the end of the wars of independence from colonialism, the existing administrative boundaries of the former colonies are retrospectively invested with the force of international boundaries.⁷⁸ The presumption that disputants will recognize the *status quo* as the reference point for their future relations arises from the reality that, according to Emer de Vattel:

[e]ach of the belligerent powers maintains that he has justice on his side – and as their pretensions are not liable to be judged by others – whatever state things happen to be in at the time of the treaty (of peace) is to be considered as their legitimate states; and if the parties intend to make any change in it, they must expressly specify it in the treaty.⁷⁹

Coleman Phillipson adds that the presumption is for the convenience of third states for whom a contrary rule would be 'fraught with greater difficulties'.⁸⁰ If there are

⁷² *Eritrea v. Yemen*, *supra* note 2, at 445–446.

⁷³ *Ibid.*, at 152–154.

⁷⁴ SCIO, *supra* note 24.

⁷⁵ Cohen and Chiu, *supra* note 16.

⁷⁶ L. Oppenheim, *International Law: A Treatise*, vol. 2 (1920), at 358.

⁷⁷ Y. Blum, *Historic Titles in International Law* (1965), at 341–342, Appendix; H. Wheaton and C. Phillipson, *Wheaton's Elements of International Law* (1916), at 806–807; M. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), at 160–161, 265; *Benin/Niger*, *supra* note 3, at 23; *Burkina Faso/Mali*, *supra* note 63, at 24; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, 11 September 1992, ICJ Reports (1992) 351, at 40. See, however, S. Lalonde, *Determining Boundaries in a Conflicted World* (2002), at 18–19, 22–23.

⁷⁸ *El Salvador/Honduras*, *supra* note 77, at 43.

⁷⁹ E. Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1834), book 4, at 439.

⁸⁰ C. Phillipson, *Termination of War and Treaties of Peace* (1916), at 7.

unresolved claims, their resolution should be sought within a reasonable period from the cessation of hostilities.⁸¹

It could be argued that a limitation of the *status quo post bellum* is that its main element is acquiescence.⁸² Acquiescence consists of refraining from the positive act of objecting to a prevailing status despite having a right and being impelled by the occasion to so object.⁸³ In *Eritrea v. Yemen* and in *Malaysia/Singapore*, title was awarded based on a 'general opinion'⁸⁴ and on a 'convergent evolution of ... positions ... regarding title',⁸⁵ respectively, as reinforced by the positive acts of the parties.⁸⁶ These were not matters of acquisitive prescription *contra legem*, for there were no subsisting prior titles involved.⁸⁷ Similarly, in *Cambodia v. Thailand*, the award in favour of Cambodia was based on Thailand's acquiescence when it failed to protest an official map that ascribed the disputed territory to Cambodia.⁸⁸ Acquiescence was reinforced by Thailand's positive acts confirming that the map was an official interpretation of their boundary treaty.⁸⁹

Accordingly, while the focus of the fourth part of this article is on the *status quo* of the Senkaku/Diaoyu Islands, it will also determine whether the conduct of the parties after 1945–1952 contradict or confirm the *status quo*. It is said that restoration of the territorial situation before the hostilities (*status quo ante bellum*) or as it ought to be (*status quo de jure*) is the more just arrangement.⁹⁰ However, jurists like Lassa Oppenheim note that there is more extensive state practice in *status quo post bellum*.⁹¹ For the purpose of this article, it is more important that, as will be shown presently, China, Japan and the Allied powers purposely outlined the *status quo* in the East China Sea to guide them in the future disposition of the islands.

⁸¹ *Ibid.*

⁸² Y. Zhou and R. Bernhardt, *History of International Law Foundations and Principles of International Law Sources of International Law of Treaties* (2014), at 441.

⁸³ See R. Jennings, *The Acquisition of Territory in International Law* (1963), at 36.

⁸⁴ *Eritrea v. Yemen*, *supra* note 2, at 480.

⁸⁵ *Malaysia/Singapore*, *supra* note 5, at 276.

⁸⁶ In particular, a Malaysian official formally responded to Singapore's query that Malaysia does not claim the islands (*ibid.*, at 196, 277). In *Eritrea v. Yemen*, *supra* note 2, at 481, Eritrea awarded offshore petroleum contracts that encompassed the area, and Yemen did not protest.

⁸⁷ *Eritrea v. Yemen*, *supra* note 2, at 480; *Malaysia/Singapore*, *supra* note 5, at 273–277.

⁸⁸ *Cambodia v. Thailand*, *supra* note 64, at 26–28.

⁸⁹ *Ibid.*

⁹⁰ R. Phillimore, *Commentaries upon International Law*, vol. 3 (1879), at 797; L. Stoddard and G. Frank, *Stakes of the War; Summary of the Various Problems, Claims, and Interests of the Nations at the Peace Table* (1918), at 16–18; L. May, *After War Ends: A Philosophical Perspective* (2012), at 183–189; Lalonde, *supra* note 77; Yongming, *supra* note 42, at 71–80; Wu and Zhang, *supra* note 42; M. Lohmeyer, 'The Diaoyu/Senkaku Islands Dispute Questions of Sovereignty and Suggestions for Resolving the Dispute' (MA thesis, University of Canterbury, 2008), at 71–84; Zhang, *supra* note 42.

⁹¹ Phillipson, *supra* note 80, at 141, 191, 221–222, citing the practice of the USA in its war with Spain over the Philippines and the practice of the parties to the Treaty of Munster, Treaty of Breda, Treaty of Aix-la-Chapelle, Treaty of The Hague, 1669 and Treaty of Gulistan; J. Westlake, *The Transvaal War* (1899), at 23–25, citing the practice of Germany and England; E. Satow, *A Guide to Diplomatic Practice*, vol. 1 (1922), at 168–170, citing the practice of France and England; E. Choiseul, *An Historical Memorial of the Negotiation of France and England, from the 26th of March, 1761, to the 20th of September of the Same Year, with the Vouchers* (1761), at 11–17, 24–25; Jennings, *supra* note 83, at 102, citing the practice of Spain and the Netherlands. Zhou and Bernhardt, *supra* note 82, at 439–441.

2 General Practice

China invoked the concept of *status quo* against Japan during the negotiations for armistice and peace in 1895.⁹² Japan had demanded as a precondition to armistice that its troops be allowed to occupy Taku, Tientsin and Shau-hai-kuan.⁹³ It had also demanded that the Shimonoseki Treaty provide for the cession of Formosa.⁹⁴ China objected that such demands are not sustained by international practice because Japan's 'armies have not yet reached Taku, Tientsin or Shan-hai-kuan'.⁹⁵ In regard to Formosa, China again interposed the *status quo* against Japan's demand for cession:

Plenipotentiary Viceroy Li Hung-Chang (H.E. Li): Formosa and the Pescadores have not been taken by your (Japanese) forces. Why do you demand these places?

Plenipotentiary Count Ito (H.E. Ito): It is a question of cession by treaty irrespective of military occupation.

H.E. Li: What if we refuse?

H.E. Ito: If military occupation is to be the ground of concession what will you do should our forces penetrate into the heart of Shantung and other provinces?

H.E. Li: Japan is taking an entirely new departure. No Western nation has ever demanded whatever territory it was able to occupy, and by doing so you will incur the disapproval of Western Powers.⁹⁶

For China, Japan was not in the position to demand the cession of Formosa as 'no Japanese soldier ha[d] as yet set foot' on the island.⁹⁷ However, if only to spare Formosa from the ravages of an invasion, China was forced to agree to the occupation of the island by Japan as the pre-arranged reference point of the terms of cession under the Shimonoseki Treaty.⁹⁸

A more contemporary conduct also involved Formosa after World War II. The ROC had pressed the Allied powers for a common understanding that if Formosa was liberated by an Allied force, the liberating forces should allow the ROC to position itself as the occupant of the island.⁹⁹ Accordingly, the USA directed its forces to turn over the island to the ROC if and when Japan surrendered it.¹⁰⁰ By 1945, the reality was that the ROC hardly could control the liberated areas in the China theatre.¹⁰¹ The USA physically transported the ROC's troops to Formosa,¹⁰² thereby contriving a starting

⁹² H. Li, *Verbal Discussions during Peace Negotiations, between the Chinese Plenipotentiary Viceroy Li Hung-Chang, and the Japanese Plenipotentiaries Count Ito and Viscount Mutsu, at Shimonoseki, Japan, March-April, 1895* (1895).

⁹³ *Documentary History of the Peace Negotiations between China and Japan, March-April, 1895: With Text of the Treaty of Peace (Documentary History)* (1895), at 4.

⁹⁴ Japan's First Draft of the Treaty of Peace, 1 April 1895, in *ibid.*, at 11, Art. II.

⁹⁵ Second Interview, 21 March 1895, in *Documentary History*, *supra* note 88, at 5.

⁹⁶ Fourth Interview, 10 April 1895, in *Documentary History*, *supra* note 88, at 15.

⁹⁷ China's last protest and appeal, 12 April 1895 in *Documentary History*, *supra* note 93, at 24.

⁹⁸ Fifth and Last Interview, 15 April 1895, in *Documentary History*, *supra* note 93, at 10, 21–23.

⁹⁹ Ambassador in China (Gauss) to the Secretary of State, 25 July 1944, in USDOS, *FRUS* (1944), vol. 6, at 1165; Ambassador in China (Hurley) to the Secretary of State, 9 May 1945, in USDOS, *FRUS* (1945), vol. 7, at 1483–1484.

¹⁰⁰ Joint Chiefs of Staff to the Commanding General, United States Forces, China Theater (Wedemeyer), 10 August 1945, in USDOS, *FRUS* (1945), vol. 7, at 527–528.

¹⁰¹ J. Schnabel, *History of the Joint Chiefs of Staff*, vol. 1 (1996), at 186–188.

¹⁰² Commanding General, United States Forces, China Theater (Wedemeyer) to the Chief of Staff (Marshall), 19 August 1945, in USDOS, *FRUS* (1945), vol. 7, at 532–534.

point of future international relations in which the island was under the occupation of the ROC rather than the PRC or any other power.¹⁰³ The PRC was prevented from manoeuvring into a position of relative control of Formosa prior to the San Francisco Peace Conference.¹⁰⁴ Thus, with respect to the Senkaku/Diaoyu Islands, China, Japan and the Allied powers subscribed to the *status quo post bellum*, as the discussion below will show.

3 Particular Practice

In 1942, the Chinese public had urged their government to ensure 'the restoration of Formosa ... [and] ... the Ryu Kyu Islands'.¹⁰⁵ This prompted the USA to inquire about China's post-war plans.¹⁰⁶ The director of the Eastern Asiatic Affairs Department of China downplayed the 'exaggerated statements by private individuals concerning war aims' involving the Ryukyu Islands. He clarified that 'the truth of the matter was that ... the Liuchius (Ryukyu Islands) ... which had only been tributary to China, had been entirely separated from it for almost eighty years ... and that they were now in effect an integral part of Japan'.¹⁰⁷

However, Chinese Foreign Minister V.T. Soong announced that China would recover the Ryukyu Islands after the war.¹⁰⁸ Soong inquired with the USA and Great Britain regarding their understanding of the post-war territorial situation.¹⁰⁹ The USA expressed the understanding that 'the views of the Chinese, the British and the US Governments were very much in accord ... that the Japanese people must be restricted to their own main islands ... [and] that Formosa must be returned to China'.¹¹⁰

At the Cairo Conference, one of the questions involved 'the arrangements to be made for Chinese participation in the occupation of Japan and the recapture of Chinese territory'.¹¹¹ China's position was that Formosa should be returned to it¹¹² and that Japanese territory should be administered by the army of occupation.¹¹³

¹⁰³ Statement by the President on the Situation in Korea, 27 June 1950, *Public Papers of the Presidents, Harry S. Truman*, available at <http://trumanlibrary.org/publicpapers/index.php?pid=800&st=&st1=> (last visited 12 January 2015); Foreign Minister Chou En-lai's Telegram to the 9th United Nations General Assembly, 10 October 1954, in *Important Documents*, *supra* note 31, at 151.

¹⁰⁴ Ambassador to China (Hurley) to the Secretary of State, 23 August 1945, in USDOS, *FRUS* (1945), vol. 7, at 514–515.

¹⁰⁵ Ambassador in China (Gauss) to the Secretary of State, 22 June 1942, in USDOS, *FRUS* (1942), at 732; see also Ambassador in China (Gauss) to the Secretary of State, 6–7 January 1943, in USDOS, *FRUS* (1943), at 842–843, citing the president of the Legislative Yuan.

¹⁰⁶ Memorandum by the Third Secretary of Embassy in China (Service) to the Ambassador in China (Gauss), 17 June 1942, in USDOS, *FRUS* (1942), at 732.

¹⁰⁷ *Ibid.*, at 733.

¹⁰⁸ Ambassador in China (Gauss) to the Secretary of State, 5 November 1942, in USDOS, *FRUS* (1942), at 174.

¹⁰⁹ Memorandum of Conversation by the Under Secretary of State (Welles), 29 March 1943, in USDOS, *FRUS* (1943), at 845.

¹¹⁰ *Ibid.*

¹¹¹ See Agenda in Paper Prepared by the Joint Staff Planners, in USDOS, *FRUS*, at 246; Discussion in Minutes of the President's Meeting with the JCS, 19 November USDOS, *FRUS* (1943), at 257–258.

¹¹² Memorandum of the Chinese Government, 24 November 1943, in USDOS, *FRUS* (1943), at 388.

¹¹³ *Ibid.*, at 387.

On the question of the Ryukyu Islands, US President Franklin D. Roosevelt ‘inquired more than once whether China would want Ryukyu’.¹¹⁴ Generalissimo Chiang Kai-shek ‘replied that China would be agreeable to joint occupation of the Ryukyus by China and the US and, eventually, joint administration by the two countries under the trusteeship of an international organization’.¹¹⁵ China reiterated its position in a memorandum seeking the retrocession of Formosa¹¹⁶ and the establishment of a Joint Council that would control Japan’s territory, including the Ryukyus.¹¹⁷ The final text of the Cairo Declaration confined itself to the disposition of Formosa and omitted reference to Japanese territory. Nonetheless, the exchange of views preceding it clearly indicates the intention to outline the *status quo* in the East China Sea.

In 1944, China reiterated its proposal for joint occupation of Japanese territory.¹¹⁸ It sought an understanding with the USA and the United Kingdom (UK) that upon liberation of Formosa China would immediately administer the islands and that upon occupation of Japan China would be involved in the territory’s administration by the occupying force.¹¹⁹ The USA proposed that, consistent with the Cairo Declaration, Formosa should be administered by China, but the four main islands (Honshu, Hokkaido, Kyushu and Shikoku) and ‘such adjacent minor islands as they determine’ shall remain under Japanese residual sovereignty,¹²⁰ with the understanding that the Ryukyu Islands are ‘minor islands’.¹²¹ The final text of the Potsdam Declaration adopted the US proposal,¹²² and China signed it.¹²³ Thereafter, consistent with the desired *status quo*, Formosa was occupied by the ROC, upon the surrender of Japan,¹²⁴ while the minor islands, including the Ryukyus, were occupied by the USA.¹²⁵

In sum, the third part of this article has shown that recourse to the alternative approach based on the *status quo* was warranted by the practice of China, Japan and the Allied powers in the East China Sea. Based on their own arguments, China and Japan considered the status of the Senkaku/Diaoyu Islands at the end of the war as the starting point to the resolution of their claims. The fourth part turns to this very question.

¹¹⁴ Roosevelt-Chiang Dinner Meeting on 23 November 1943, in USDOS, *FRUS* (1943), at 324.

¹¹⁵ *Ibid.* It is noted that the record of the Roosevelt-Chiang dinner meeting was furnished by the Chinese embassy in Washington. See *ibid.*, editorial note.

¹¹⁶ Memorandum of the Chinese Government, *supra* note 112, at 389.

¹¹⁷ *Ibid.*, at 388.

¹¹⁸ Ambassador in China (Gauss) to the Secretary of State, Chungking, 25 July 1944, in USDOS, *FRUS* (1944), vol. 6, at 1165–1166.

¹¹⁹ Exchange of Views between the US and China Regarding the Administration of Liberated Areas, in USDOS, *FRUS* (1944), vol. 6, at 1165–1170.

¹²⁰ Secretary of War (Stimson) to the President, 2 July 1945, in USDOS, *FRUS* (1945), vol. 1, at 889–894.

¹²¹ Department of State Memorandum, undated, in USDOS, *FRUS* (1945), vol. 1, at 1287.

¹²² Potsdam Declaration, *supra* note 30.

¹²³ Telegram from the Ambassador in China (Hurley) to the President and the Secretary of State, Chungking, 26 July 1945, in USDOS, *FRUS* (1945), vol. 2, at 1282–1283.

¹²⁴ Directive by President Truman to the Supreme Commander for the Allied Powers in Japan (MacArthur), 15 August 1945, in USDOS, *FRUS* (1945), vol. 7, at 530; Supreme Commander for the Allied Powers Instructions (SCAPIN) Directive no. 1, in 3 *Digest International Law* 488; Council of International Affairs, *The Chinese Year Book, 1944–1945* (1968), at 371–377, 1019.

¹²⁵ A. Fisch, *Military Government in the Ryukyu Islands, 1945–1950* (1987), at 74–76.

4 The Status Quo Post Bellum in Relation to the Senkaku/Diaoyu Islands: 1945–1952

The primary records of the conduct of China, Japan and the Allied powers in 1945–1952 were examined to ascertain the status of the Senkaku/Diaoyu Islands. Consensus on the following points was relevant: (i) whether the islands were part of Formosa or part of the Ryukyus or Nansei Shoto; (ii) whether the islands remained subject to Japan's interest and (iii) whether the islands were claimed by Japan alone or also by China. These points provide the structural organization of this discussion, and the consensus will be assessed against the conduct of the parties before the critical date.

A Identity of the Senkaku/Diaoyu Islands

This section shows that China, Japan and the Allied powers understood that the Senkaku/Diaoyu Islands were part of the Ryukyu Islands/Nansei Shoto rather than of Formosa. This is based on two main findings: (i) China's occupation of Formosa did not extend to the Senkaku/Diaoyu Islands, whereas the US military and civilian governments for the Ryukyu Islands extended their jurisdiction to the islands and (ii) Japan purposely caused the insertion of the phrase 'Nansei Shoto south of 29° north latitude' in Article 3 of the Peace Treaty, thereby ensuring that the Senkaku/Diaoyu Islands were placed under its residual sovereignty.

1 Occupation of Formosa and the Ryukyu Islands

To recall the discussion in the third part of this article, it was agreed that pursuant to the Cairo Declaration and the Potsdam Declaration Formosa would be occupied by the ROC, and the minor islands, including the Ryukyus, would be occupied by the USA. To determine consensus on whether the Senkaku/Diaoyu Islands were part of Formosa or part of the Ryukyus, the extent of China's acts of occupation of Formosa and the USA's occupation of the Ryukyus were determined.

Upon taking over Formosa and other liberated areas in the Chinese theatre, the ROC, as the existing government of China,¹²⁶ adopted a constitution in 1946.¹²⁷ Article 4 of this constitution defines the national territory as the 'territory of the Republic of China according to its existing national boundaries'.¹²⁸ China had had several constitutions¹²⁹ where the national territory was described simply as 'the dominion heretofore existing' (1913);¹³⁰ that 'which continues to be the same as the former Empire'

¹²⁶ Note that the PRC acknowledges that the ROC was the 'Chinese government ... [at the] ... time' when the ROC accepted the surrender of Japanese forces in Formosa. See Letter from the Permanent Representative, *supra* note 32, at 151.

¹²⁷ Constitution of the Republic of China and Additional Articles, adopted by the National Assembly on 25 December 1946 and effective from 25 December 1947.

¹²⁸ *Ibid.*

¹²⁹ The constitutions in draft, provisional and complete forms are appended to P. Wei-tung, *The Chinese Constitution; A Study of Forty Years of Constitution-Making in China* (1945).

¹³⁰ Temple of Heaven Draft, 13 October 1913, reprinted in Wei-tung, *supra* note 129, at 157, Art. 2.

(1914)¹³¹ or ‘that which originally belonged to the Republic’ (1923).¹³² These constitutions refer back to the 1912 Constitution that states that the ‘territory of the Chinese Republic consists of 22 Provinces, Inner and Outer Mongolia, Tibet and Chinghai’.¹³³ In contrast, the Constitutions of 1925,¹³⁴ 1931¹³⁵ and 1934¹³⁶ provide a more precise limitation of the national territory. The 1934 Constitution, which immediately precedes the 1946 Constitution, provides a detailed description of the national territory:

Art. 4. The territory of the Republic of China consists of areas originally constituting Kiangsu, Chekiang, Anhwei, Kiangsi, Hupeh, Hunan, Szechwan, Hsakang, Hopie, Shantung, Shansi, Honan, Shensi, Kansu, Chinghai, Fukien, Kwantung, Kwangsi, Yunnan, Kweichow, Liaoning, Kirin, Heilungkiang, Jehol, Chahar, Suiyuan, Ninghsia, Singkiang, Mongolia and Tibet.¹³⁷

If the foregoing provision of the 1934 Constitution would be considered the basis of the clause ‘existing national boundaries’ in Article 4 of the 1946 Constitution, then it would be difficult to imagine the Senkaku/Diaoyu Islands as being integral to China.

While the 1946 Constitution is vague on the extent of the national territory, the *Chinese Year Book, 1944–1945*,¹³⁸ issued by the Council of International Affairs of the ROC, includes Formosa in the territory of China and situates it ‘somewhere between 22° N. and 25° N.’,¹³⁹ with the Ryukyu Islands situated ‘less than 150 miles to the north’.¹⁴⁰ As described, Formosa does not include the Senkaku/Diaoyu Islands, which are situated at ‘25°45’ N., 123°E... about 80 miles northward of Sakishima Gunto’.¹⁴¹

On the other hand, even before the surrender of Japan, the USA had established military control of ‘Nansei Shoto and adjacent waters’.¹⁴² After the surrender of Japan, the Imperial Japanese government continued to administer Japan proper, consisting of the four main islands and:

the approximately 1,000 smaller adjacent islands,¹⁴³ including Tsushima islands and the Ryukyu (Nansei) Islands north of 30° North Latitude (excluding Kuchinoshima Island); and excluding ...
(b) the Ryukyu (Nansei) Islands south of 30° North Latitude (including Kuchinoshima Island).¹⁴⁴

¹³¹ Constitutional Compact, 1 May 1914, reprinted in Wei-tung, *supra* note 129, at 170, Art. 3.

¹³² Constitution, 10 October 1923, reprinted in Wei-tung, *supra* note 129, at 191, Art. 3.

¹³³ Provisional Constitution, 11 March 1912, reprinted in Wei-tung, *supra* note 129, at 150, Art. 3.

¹³⁴ Draft Constitution, 11 December 1925, reprinted in Wei-tung, *supra* note 129, at 214, Art. 3.

¹³⁵ Provisional Constitution of the Political Tutelage Period, 1 June 1931, reprinted in Wei-tung, *supra* note 129, at 247, Art. 1.

¹³⁶ Revised Draft of Constitution, 16 October 1934, reprinted in Wei-tung, *supra* note 129, at 263. It was adopted by the Legislative Yuan on 16 October 1934.

¹³⁷ *Ibid.*

¹³⁸ *Chinese Year Book*, *supra* note 124, at 16–30.

¹³⁹ *Ibid.*, at 19.

¹⁴⁰ *Ibid.*, at 16.

¹⁴¹ US Hydrographic Office, *Sailing Directions for Japan*, vol. 2 (Southern Part) (1943), at 329.

¹⁴² Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, Political Directive, 1 March 1945, reprinted in Fisch, *supra* note 125, at 263.

¹⁴³ Supreme Commander of the Allied Powers, Directive no. 2, 3 September 1945, reprinted in Supreme Commander for the Allied Powers, *Political Reorientation of Japan, September 1945 to September 1948*, vol. 1 (1949), at 445; Authority of General MacArthur as Supreme Commander for the Allied Powers, 6 September 1945, reprinted in *ibid.*, at 427.

¹⁴⁴ SCAPIN 677, Memorandum for the Imperial Government, 29 January 1946, reprinted in Supreme Commander for the Allied Powers, *supra* note 143, vol. 2, at 477.

However, the military government for the Ryukyus remained in control of 'Nansei Shoto and adjacent waters south of 30° North Latitude'.¹⁴⁵

In 1950, the military government for the Ryukyu Islands was replaced by the US Civil Administration for the Ryukyu Islands (USCAR).¹⁴⁶ The boundaries of the 'area of political and geographical jurisdiction' of the USCAR were defined in Ordinance no. 68.¹⁴⁷ The boundaries were reiterated in USCAR Proclamation no. 27.¹⁴⁸ The Senkaku/Diaoyu Islands were found within these limits. There is no record of objection by China to the USA's extension of its jurisdiction to the Senkaku/Diaoyu Islands – not even as incidental to China's complaints against the USA's military invasion of Formosa.¹⁴⁹ Other Allied powers did not object.¹⁵⁰ Instead, it appears that China (ROC) entered into relations with the US military government for the Ryukyus in the form of the purchase of scrap metal under the China Bulk Sale Agreement¹⁵¹ and the training of health workers.¹⁵²

In sum, based on the foregoing records, it can be stated that China did not regard its occupation of Formosa to extend to the Senkaku/Diaoyu Islands, while the USA regarded its occupation of the Nansei Shoto south of 29 degrees north latitude to extend to the Senkaku/Diaoyu Islands.

2 Nansei Shoto South of 29 Degrees North Latitude

From 1946 to 1951, various drafts of the Peace Treaty were produced,¹⁵³ but only the following drafts benefited from the comments of various states, including the ROC: (i) the provisional US draft of the Japanese Peace Treaty, dated 23 March 1951 (provisional draft);¹⁵⁴ (ii) the US–UK Draft Peace Treaty, dated 3 May 1951 (joint draft)¹⁵⁵ and (iii) the text of the proposed treaty, dated 13 August 1951 (final draft).¹⁵⁶

The provisional draft and the joint draft provided for administration by the USA of the 'Ryukyu Islands south of 29° north latitude'.¹⁵⁷ A copy of the provisional draft

¹⁴⁵ Supreme Commander for the Allied Powers, *supra* note 143, at 2–3.

¹⁴⁶ Memorandum Approved by the Joint Chiefs of Staff, 4 October 1950, in USDOS, *FRUS* (1950), vol. 6, at 1313.

¹⁴⁷ See Fisch, *supra* note 125, at 320.

¹⁴⁸ USCAR, *supra* note 20.

¹⁴⁹ See Complaint of Armed Invasion of Taiwan/Formosa, UN Doc. S/1921, 30 November 1950.

¹⁵⁰ It is noted that the former Soviet Union generally objected to the presence of the USA in the Nansei Shoto but only because it wanted the immediate return of the islands to Japan. See Consultant to the Secretary (Dulles) to the Commander in Chief of the United Nations Forces (MacArthur), 15 November 1950, in USDOS, *FRUS* (1950), vol. 6, at 1349–1350.

¹⁵¹ Fisch, *supra* note 125, at 141; Negotiations with China Regarding the Disposition of Surplus Property, in USDOS, *FRUS* (1946), vol. 10, at 1035.

¹⁵² USCAR, Report for the Period 1 July 1967 to 30 June 1968 (1968), vol. 16, at 131 and 305.

¹⁵³ See J. Dulles, *The San Francisco Peace Conference on Proposed Japanese Peace Treaty*, Department of State Bulletin, vol. 25 (1951), at 346–348.

¹⁵⁴ Provisional US Draft of the Japanese Peace Treaty (Provisional Draft), 23 March 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 944.

¹⁵⁵ US–UK Draft Peace Treaty (Joint Draft), 3 May 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1024.

¹⁵⁶ Draft Peace Treaty (Final Draft), reprinted in *Department of State Bulletin*, vol. 25 (1951) 5, at 349.

¹⁵⁷ Provisional Draft, *supra* note 154, ch. 3, para. 4; Joint Draft, *supra* note 155, ch. 2, Art. 3.

was received by the ROC¹⁵⁸ as a member of the Far Eastern Commission (FEC),¹⁵⁹ while a copy of the provisional draft was informally given by the UK to the PRC.¹⁶⁰ The ROC commented on the provisional draft¹⁶¹ and the joint draft¹⁶² but did not refer to the provision on the Ryukyu Islands.¹⁶³ The PRC commented that, under the joint draft, US ‘trusteeship over the Ryukyu Islands’ is virtually a ‘continued occupation of these islands, whose separation from Japan has never been provided for in any previous international agreement’.¹⁶⁴

The joint draft had undergone several revisions,¹⁶⁵ one important revision being the substitution of the geographical description ‘Ryukyu Islands south of 29° north latitude’ with ‘Nansei Shoto south of 29° north latitude’.¹⁶⁶ This substitution was sought by Japan purposely to include other islands not encompassed by the Ryukyu Islands south of 29 degree north latitude:

TOPAD 123. For Dulles. Under date July 12 Jap Govt submitted fol ‘observations’ on July 3 draft treaty:

Begin text: 1. Art. 3

Your attention is requested to (a) of our observations dated 3 April 1951. While ‘Nansei Islands’ includes all islands south of 29 degrees north latitude, ‘Ryukyu Islands’ do not.¹⁶⁷

Indeed, as early as 3 April 1951, in its comment to the provisional draft, Japan sought the substitution of the term ‘Ryukyu Islands’ with ‘Nansei Shoto’:

¹⁵⁸ Provisional Draft, *supra* note 154, n. 1. See, however, Joint Draft, *supra* note 155, n. 1, which states that this draft was not formally circulated. Nonetheless, various states commented on it. See Japanese Peace Treaty: Working Draft and Commentary Prepared in the Department of State (Working Draft), 1 June 1951, in USDOS, *FRUS* (1951), vol. 6, at 1055–1104.

¹⁵⁹ Moscow Conference of Foreign Ministers, in USDOS, *FRUS* (1945), vol. 2, at 817.

¹⁶⁰ Memorandum of Conversation by the Deputy to the Consultant (Allison), 12 April 1951, in USDOS, *FRUS* (1951), vol. 6, at 978, n. 3.

¹⁶¹ Memorandum of Conversation by the Consultant to the Secretary (Dulles), 29 May 1951, in USDOS, *FRUS* (1951), vol. 6, at 1050–1053.

¹⁶² Japanese Peace Treaty: Working Draft, *supra* note 158, at 1056, 1059–1060.

¹⁶³ Those states that commented on this provision were in favour of either the restoration of the islands to Japan (India) or the long-term administration by the USA (Canada and New Zealand). See Japanese Peace Treaty: Working Draft, *supra* note 158, at 1061–1062.

¹⁶⁴ Foreign Minister Chou En-lai’s Statement on US-British Draft Peace Treaty with Japan and the San Francisco Conference, 15 August 1951, in ‘Distribution of Chinese Newspapers and Periodicals’, *Supplement to People’s China*, vol. 4, no. 5, 1 September 1951, UK Archives, FO 371/92350 (1951), at 223–224. The PRC’s view that the Ryukyu Islands should not be separated from Japan is in contrast to its insistence that Spratly and Paracel Islands be restored to China. See Notes on the Nanwei and Sisha Islands, in ‘Distribution of Chinese Newspapers and Periodicals’, *Supplement to People’s China*, vol. 4, no. 5, 1 September 1951, UK Archives, FO 371/92350 (1951), at 227.

¹⁶⁵ Revised US–UK Draft of a Japanese Peace Treaty, 14 June 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1119; Secretary of State to Certain Diplomatic Offices, 3 July 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1174.

¹⁶⁶ Secretary of State to Certain Diplomatic Offices, 18 July 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1199–1200.

¹⁶⁷ US Political Adviser to SCAP (Sebald) to the Secretary of State, 15 July 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1196.

1. Jap Govt highly appreciates thoughtfulness on part of Govt of US in sending to it provisional draft for Jap Peace Treaty. While welcoming present draft ... Jap Govt desires suggest slight modifications of draft text with respect to fol points:

(a) *Chapter III, 4.*

Ryukyu Islands south of 29 degrees north latitude.

It is suggested to have phrase revised to read:

Nansei Islands south of 29 degrees north latitude.

Amami Island group, which belongs not to Ryukyu Islands but to Satsunan Islands, lies south of 29 degrees north latitude, while Nansei (south-western) Islands include both Satsunan and Ryukyu groups, that is, all islands between Kyushu and Formosa.¹⁶⁸

The US State Department verified with the Special Adviser on Geography, Samuel Boggs, whether there was factual basis to Japan's foregoing proposal. The State Department reported the following outcome of its verification:

Mr. Boggs ... looked into the matter and found the following in a U.S. Hydrographic report:

'The Nansei Shoto extends in an area from off the northeastern coast of Taiwan to the southern end of Kyushu ...'

Mr. Boggs pointed out that this confirmed the Japanese Government position ... He thought that 'Nansei' was the more accurate term and should be used. I pointed out that ... it was possible that the Japanese had suggested 'Nansei' ... as a reminder in future years of Japan's ownership. Mr. Boggs nevertheless said that 'Nansei' was technically more accurate.¹⁶⁹

Hydrographical materials from 1910 to 1945 use the term Nansei Shoto¹⁷⁰ (Nansei Islands or Nansei Group)¹⁷¹ to mean collectively the southwestern group of islands of Japan, between Kyushu and Formosa (Taiwan).¹⁷² As the special adviser explained,¹⁷³ the Nansei Shoto includes the Sakishima Gunto, Okinawa Gunto, Amami Gunto, Tokara Gunto and Osumi Gunto.¹⁷⁴ The first and second groups are commonly referred to as the Ryukyu Islands, while the last three groups are the Satsunan Islands.¹⁷⁵ Senkaku/Diaoyu Islands are described as 'a detached group, about 80 miles northward of Sakishima Gunto'¹⁷⁶ or 'a group of islets situated about 90 miles northward'

¹⁶⁸ Memorandum for Mr. Dulles, 2 April 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 958, 961. In the mind of the USA, the Ryukyus Islands refers to 'Okinawa Prefecture ... including ... Sento Islands'. *Ibid.*, at 961, n. 1.

¹⁶⁹ USDOS, Memorandum from Fearey to Allison on Nansei Shoto, folder Ryukyus-Old, box 4, ONA Records, RG 59, serial no. 694.001/4-551. Attached to the memorandum is a map where Fearey drew straight lines around Formosa and encircled groups of islands within Nansei Shoto. Fearey placed the Senkaku/Diaoyu Islands within the Sakishima Group of Nansei Shoto.

¹⁷⁰ 'Shoto' means archipelago; 'gunto' and 'retto' means island group. See US Hydrographic Office, *supra* note 141, at vii.

¹⁷¹ US Hydrographic Office, *Asiatic Pilot* (1909-1917), at 31, 540-541; US Hydrographic Office, *Asiatic Pilot*, vol. II: *The Japanese Archipelago* (1930), at 17.

¹⁷² US Hydrographic Office, *Japan: Including Karafuto, Chishima Retto (Kuril Islands), Nanpo Shoto (Southern Islands) and Nansei Shoto (Southwestern Islands)* (1945), at 334; US Hydrographic Office, *supra* note 141, at 317.

¹⁷³ US Political Adviser to SCAP, *supra* note 167.

¹⁷⁴ US Hydrographic Office, *supra* note 172.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, at 442.

of the Sakishima Gunto.¹⁷⁷ The islands are part of Nansei Shoto.¹⁷⁸ This last point was confirmed by the US Joint Chiefs of Staff (JCS), which, in its memorandum on the future disposition of the Nansei Shoto, specifically stated that the ‘Nansei Shoto, to include ... Sento Shosho [Senkaku/Diaoyu Islands]’ were strategic areas that must be placed under the exclusive control of the USA.¹⁷⁹

Although the State Department insisted that ‘[Nansei Shoto] means in [its] min[d] exactly the same as [Ryukyu Islands],’¹⁸⁰ in the interest of clarity, it adopted the Japanese proposal and revised Article 3 of the joint draft by deleting ‘Ryukyu Islands south of 29° north latitude and substitute[ing] Nansei Shoto south of 29° north latitude’.¹⁸¹ A copy of the revised joint draft dated 20 July 1951 was received by the ROC.¹⁸² The ROC did not object to this draft; instead, it informed the USA that its bilateral peace treaty with Japan would be of the same tenor.¹⁸³ As noted earlier, the PRC objected to the separation of the Ryukyu Islands from Japan.¹⁸⁴ The final draft, which was voted upon at the San Francisco Peace Conference, used the geographical description ‘Nansei Shoto south of 29° north latitude’.¹⁸⁵ No delegate at the conference questioned the scope of this geographical description.¹⁸⁶

Hence, based on its conduct, Japan sought to place all of the Nansei Islands, including the Senkaku/Diaoyu Islands, south of 29 degrees north latitude, within the area under its residual sovereignty. The foregoing discussion indicates a consensus that the Senkaku/Diaoyu Islands were part of the Nansei Shoto/Ryukyu Islands under the American administration and not part of Formosa under Chinese occupation. The next subsection focuses on whether it was further agreed that the islands would remain subject to Japan’s interest.

¹⁷⁷ US Hydrographic Office, *supra* note 171, at 317.

¹⁷⁸ *Ibid.*; US Hydrographic Office, *supra* note 172, at 442.

¹⁷⁹ US Joint Chiefs of Staff, Strategic Control by the U.S. of Certain Pacific Areas, SWNCC 249/1, 21 January 1946, reprinted in M. Claussen (ed.), *State-War-Navy Coordinating Committee Policy Files, 1944–1947* (1977).

¹⁸⁰ Circular Telegram from Secretary of State to Certain Diplomatic Officers, 18 July 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1200, n. 3.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*, at 1199, n. 1.

¹⁸³ Telegram from the Chargé in the Republic of China (Rankin) to the Secretary of State, 14 August 1951, in USDOS, *FRUS* (1951), vol. 6, part 1, at 1267–1268. There is no mention of the islands in the Treaty of Peace between the Republic of China and Japan 1952, 138 UNTS 38.

¹⁸⁴ Foreign Minister Chou En-lai’s Statement, *supra* note 164.

¹⁸⁵ Final Draft, *supra* note 156.

¹⁸⁶ Only Egypt commented on the provision but solely to suggest that the matter of placing Nansei Shoto under international trusteeship should be left to the UN General Assembly. See Conference for the Conclusion and Signature of the Peace Treaty with Japan San Francisco California, September 1951, in *Record of Proceedings* (1951), vol. 1, at 144. It is noted that USCAR Proclamation no. 27 was issued after the Peace Treaty took effect and by the authority designated to administer the Ryukyus. It is an authoritative interpretation of the meaning of ‘Nansei Shoto south of 29° north latitude’ in the Peace Treaty, *supra* note 1, Art. 3. China did not object to the proclamation.

B Residual Sovereignty over the Senkaku/Diaoyu Islands

Having shown that there has been consensus that the islands belong to the second category of minor islands rather than to the third category of stolen territory under the Potsdam Declaration and the Cairo Declaration, it will be examined next whether there was also consensus that they should remain under Japan's sovereignty. Even before the surrender of Japan, the USA already had established a military government over Nansei Shoto as part of its military operations to destroy 'Japan's power of aggression'.¹⁸⁷ After the surrender of Japan, the military government continued to administer the Nansei Shoto south of 30 degrees north latitude.¹⁸⁸ One of its first acts was to impose a separation from the Japanese Imperial government by prohibiting the latter to 'exercise governmental or administrative authority' within the area.¹⁸⁹ However, the USA described the governmental separation as a mere suspension of the powers of the Japanese Imperial government rather than as a relinquishment of sovereignty.¹⁹⁰ Before the signing of the Peace Treaty, the USA replaced the military government with a civilian government to administer Nansei Shoto south of 29 degrees north latitude 'until such time as the ultimate international status of the islands is determined'.¹⁹¹

Negotiations on the ultimate international status of the islands were given form along two baselines: first, Japanese concurrence was needed if the USA was to place the islands under its sole administration under a trusteeship arrangement and, second, Japanese concurrence was needed if the USA was to exercise exclusive control of the islands during the period that it had yet to propose trusteeship or receive a decision on its proposal.¹⁹² The necessity for Japanese concurrence was based on the principle that Japan had not relinquished sovereignty over the islands, notwithstanding that the USA exercised exclusive control over them.¹⁹³ These baselines for negotiation were explained in the only official document that discusses the concept of residual sovereignty.

John Foster Dulles as a consultant to the state secretary had prepared a memorandum¹⁹⁴ on the Ryukyu Islands or Nansei Shoto to convince the Department of Defense to support the joint US–UK draft.¹⁹⁵ The memorandum identified two important

¹⁸⁷ Commander in Chief, *supra* note 142, para. 5.

¹⁸⁸ Supreme Commander for the Allied Powers, *supra* note 143, at 430.

¹⁸⁹ SCAPIN 677, *supra* note 144.

¹⁹⁰ US Civil Administration of the Ryukyu Islands, *The Ryukyu Islands at a Glance* (1953), at 10.

¹⁹¹ Memorandum Approved by the Joint Chief of Staff, 4 October 1950, in USDOS, *FRUS* (1950), vol. 6, at 1313.

¹⁹² Provisional Draft, *supra* note 154, ch. III, para. 4; Joint Draft, *supra* note 155, Art. 3; Final Draft, *supra* note 156, Art. 3. For the comments of various states, see Working Draft, *supra* note 158.

¹⁹³ Secretary of State to the Secretary of Defense (Johnson), 7 September 1950, in USDOS, *FRUS* (1950), vol. 6, at 1294, 1296; Secretary of State to the Secretary of Defense (Marshall), 13 December 1950, in USDOS, *FRUS* (1950), vol. 6, at 1363–1364, 1367.

¹⁹⁴ Memorandum by the Consultant to the Secretary (Dulles), 27 June 1951, in USDOS, *FRUS* (1951), vol. 6, at 1152.

¹⁹⁵ *Ibid.*, n. 1. Note that according to the editor this memorandum might not have been used for the meeting between the State Department and Defense Department. In any event, the subsequent position taken by the Defense Department on the joint treaty indicates that it supported the idea of residual sovereignty. See Secretary of Defense (Marshall) to the Secretary of State, 28 June 1951, in USDOS, *FRUS* (1951), vol. 6, at 1157.

elements of the concept of residual sovereignty. First, the USA would not acquire sovereignty over the islands, for such action would be in contravention of its national policy and the United Nations (UN) Declaration. However, with the consent of Japan, the USA would exercise administration, legislation and jurisdiction over the territory while awaiting affirmative UN action on the matter of trusteeship.¹⁹⁶ Second, such exclusive control of the islands by the USA would be effective only for ‘so long as Japan is sovereign’.¹⁹⁷ If Japan were made to renounce sovereignty over the islands in favour of no one, there would be insurmountable legal difficulty to the retention by the USA of control of the islands precisely because the ‘victors in the war [on] Japan, including the USSR, have an inchoate right to sovereignty of these islands’.¹⁹⁸ The rights to the islands that Japan had granted to the USA will be impaired for Japan as the grantor would itself be without any title.¹⁹⁹

The foregoing basic principle regarding Japan’s territory was set out in a joint memorandum by the US State Department and the Defence Department, which was approved by the US president and circulated to the FEC members, including the ROC.²⁰⁰ The ROC informed Dulles that it was in accord with ‘[US] trusteeship of the Ryukyu’.²⁰¹ Moreover, around this time (1950–1951), the PRC had filed with the UN Security Council complaints against the US for encroaching into its territory.²⁰² Its complaints did not refer to the US presence in the Ryukyu Islands or the retention of sovereignty by Japan over the islands. In sum, there was consensus that the Senkaku/Diaoyu Islands, as part of the second category of minor islands, remained under Japan’s residual sovereignty. The question addressed below is whether there were other claimants to the islands.

C Absence of Other Claimants to the Islands

It was cited earlier that China vacillated on its claims to the Ryukyu Islands.²⁰³ In 1948, the Legislative Yuan of the ROC passed Resolution no. 196 calling for the return of the Ryukyus (Nansei Shoto) to China.²⁰⁴ However, the USA dismissed the call as a mere ‘sign of lively apprehension among many Chinese that the US may be engaged in restoring Japan’s military potential’.²⁰⁵ Despite the 1948 resolution of the Legislative Yuan, the ROC did not formalize a claim to the islands. Instead, it

¹⁹⁶ Memorandum by the Consultant to the Secretary (Dulles), 27 June 1951, in USDOS, *FRUS* (1951), vol. 6, at 1152.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, para. 2.

¹⁹⁹ *Ibid.*, para. 3.

²⁰⁰ Secretary of Defence to the Secretary of State (Johnson), *supra* note 195.

²⁰¹ Memorandum of Conversation, by the Consultant to the Secretary (Dulles), 19 December 1950, in USDOS, *FRUS* (1950), vol. 6, at 1372–1373.

²⁰² Repertoire of the Practice of the Security Council (1946–1951), ch. VIII, at 359–360, 407.

²⁰³ See section 3.B.3 in this article.

²⁰⁴ Ambassador in China (Stuart) to the Secretary of State, 2 June 1948, in USDOS, *FRUS* (1948), vol. 6, at 799–800.

²⁰⁵ *Ibid.*

expressed its accord to Japan's residual sovereignty.²⁰⁶ More importantly, its separate peace treaty with Japan referred to territories to which it had pending claims,²⁰⁷ such as the Spratly Islands and the Paracel Islands, but not to the Senkaku/Diaoyu Islands or Nansei Shoto.²⁰⁸

On the part of the PRC, it had complained against the impairment of its territorial sovereignty over Formosa.²⁰⁹ Its complaints did not extend to the USA's presence in, or Japanese retention of sovereignty over, the Senkaku/Diaoyu Islands. What might be considered a challenge to the residual sovereignty of Japan came within the US government itself, specifically the JCS and the SCAP. The JCS saw the Senkaku/Diaoyu Islands as a strategic area that must be placed under the exclusive control of the USA.²¹⁰ The SCAP believed that Japan should cede the islands to the USA²¹¹ for it was 'intolerable ... for the US to spend hundreds of millions of dollars transforming Okinawa only to give the islands up'.²¹²

Among the Allied powers, Canada and New Zealand favoured the cession of the islands to the USA.²¹³ For Japan, US trusteeship was acceptable provided 'these islands ... [are] returned to Japan as soon as the need of trusteeship disappears'.²¹⁴ It is important to emphasize that Japan made a 'plea ... that [its] sovereignty should not be renounced'.²¹⁵ For the former Soviet Union, US trusteeship over the Nansei Shoto was in violation of the Potsdam Declaration for the islands should remain under Japanese sovereignty.²¹⁶ India suggested that the return of the islands to Japan be resolved at the peace conference rather than left to the discretion of the USA.²¹⁷ The UK also favoured a US trusteeship,²¹⁸ provided that the Peace Treaty expressly adopt

²⁰⁶ Memorandum of the Chinese Government, *supra* note 112.

²⁰⁷ Treaty of Peace between the Republic of China and Japan 1952, 138 UNTS 38.

²⁰⁸ *Ibid.*, Art. 2.

²⁰⁹ Repertoire of the Practice of the Security Council, *supra* note 202.

²¹⁰ Claussen, *supra* note 179.

²¹¹ Memorandum of Conversation by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs, 27 January 1951, in USDOS, *FRUS* (1951), vol. 6, at 821.

²¹² *Ibid.*

²¹³ Working Draft, *supra* note 158, at 1061–1062.

²¹⁴ Undated Memorandum by the Prime Minister of Japan (Yoshida), 1951, in USDOS, *FRUS* (1951), vol. 6, at 833. Though these views were expressed by the prime minister in his personal capacity, the USA reacted that under the Potsdam Declaration the matter of whether the Nansei Shoto as minor islands should remain with Japan depends solely on the discretion of the Allied powers. See Memorandum by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs, 31 January 1951, in USDOS, *FRUS* (1951), vol. 6, at 836.

²¹⁵ Secretary of State to the United States Political Adviser to SCAP (Sebald), 22 August 1951, in USDOS, *FRUS* (1951), vol. 6, at 1235.

²¹⁶ Consultant to the Secretary (Dulles) to the Commander in Chief of the United Nations Forces (MacArthur), 15 November 1950, in USDOS, *FRUS* (1950), vol. 6, at 1350; Memorandum of Conversation by Colonel Stanton Babcock of the Department of Defense, 26–27 October 1950, in USDOS, *FRUS* (1950), vol. 6, at 1334.

²¹⁷ India's Preliminary Views on U.S. Memorandum on Peace Treaty as Attachment to Memorandum of Conversation by the Office of the Director of Northeast Asian Affairs (Allison), 21 December 1950, in USDOS, *FRUS* (1950), vol. 6, at 1380, 1382.

²¹⁸ Memorandum by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs, 30 January 1951, in USDOS, *FRUS* (1951), vol. 6, at 831, n. 2.

such an arrangement.²¹⁹ Australia, France and the Philippines also favoured trusteeship.²²⁰ These views of the Allied powers presupposed that there was no claimant to the islands other than Japan.

Based on the foregoing discussion, it is clear that in the period 1945–1952 there was a general agreement that the islands were not subject to any territorial claim other than that of Japan. China had initially entertained a claim to the islands but did not pursue it. The more serious claim came from within the US Defense Department. At this point, it is important to turn to the question of China's lack of consent to Article 3 of the Peace Treaty – that is, the disposition of Nansei Shoto south of 29 degrees north latitude. To recall, in *Eritrea v. Yemen*, the disposition of the Red Sea islands by virtue of the Lausanne Treaty was opposed by Yemen on the ground that it did not consent to the treaty.²²¹ Thus, Yemen's situation could be likened to that of China in regard to Article 3 of the Peace Treaty. Moreover, like China, Yemen immediately protested the Lausanne Treaty as *res inter alio acta*.²²² However, these factors did not prevent the status of the Red Sea islands under the Lausanne Treaty from binding Yemen. The tribunal held:

The Imam was not a party to the Treaty of Lausanne and in that technical sense the Treaty was *res inter alios acta* as to Yemen. If title had lain with Yemen at that time, the parties of the Treaty of Lausanne could not have transferred title elsewhere without the consent of Yemen. But, as indicated above, title still remained with Turkey. Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.²²³

Similarly, as it was shown that China had no claim to the Senkaku/Diaoyu Islands at the time of the adoption of the Peace Treaty, its consent was not *sine qua non* to the validity of Article 3 on the disposition of the islands. In fact, when the ROC entered into a separate peace treaty with Japan, it did not see fit to refer to Nansei Shoto south of 29 degrees north latitude, whereas it made express provision for the Spratly Islands and the Paracel Islands.²²⁴

To summarize the fourth part of this article, there was consensus that the islands belonged to the second category of minor islands whose fate was to be decided by the Allied powers; that the islands remained under the residual sovereignty of Japan and that the islands were not being claimed by China. To recall, the alternative approach applied in this article not only focuses on the *status quo* but also considers the conduct

²¹⁹ British Embassy to the Department of State, Aide-Memioire, 12 March 1951, in USDOS, *FRUS* (1951), vol. 6, at 909–910.

²²⁰ Memorandum of Conversation by the Officer-in-Charge Indi, Nepal, and Ceylon Affairs (Witman), 14 August 1951, in USDOS, *FRUS* (1951), vol. 6, at 1269.

²²¹ *Eritrea v. Yemen*, *supra* note 2, at 152–153.

²²² *Ibid.*

²²³ *Ibid.*, at 153.

²²⁴ Treaty of Peace between the Republic of China and Japan, *supra* note 207.

of the parties proximate to 1945–1952, as these might contradict or confirm the *status quo*. It was stated in the third part of this article that the evidence of China and Japan failed to establish in a convincing manner the existence of a prior title. In the following section, it is ascertained whether the conduct of the parties after 1952 and before 1970 contradicts or confirms the *status quo*.

D Subsequent Conduct of the Parties (1952–1970)

To be clear, the term ‘conduct of the parties’ in this part of the article does not mean *effectivites* or the continued display of authority.²²⁵ To resolve territorial disputes based on *effectivites*, it must be shown that there was an actual exercise of authority with the intention and will to act as sovereign.²²⁶ Moreover, it must be shown that the *effectivites* are not challenged by another sovereign²²⁷ and that they are not *contra legem* – that is, contrary to an existing title based on treaty,²²⁸ unless the holder of the prior existing title acquiesced to such *effectivites*.²²⁹

In regard to the Senkaku/Diaoyu Islands, from 1952 up to the reversion of the islands in 1972, the USA alone exercised exclusive control under Article 3 of the Peace Treaty.²³⁰ China does not dispute this fact.²³¹ As for the period before the war, Japan was in possession, but any *effectivites* it may have accumulated were superseded by its acceptance of the terms of the Potsdam Declaration, the Instruments of Surrender, and the Peace Treaty, which left the fate of the islands to the will of the Allied powers.²³² Indeed, when it signed the Instruments of Surrender, Japan expressly agreed to carry out the territorial provisions in these instruments ‘as required by the SCAP’.²³³

For the purpose of verifying whether the *status quo* in 1945–1952 was contradicted or confirmed by subsequent conduct, it suffices to refer to certain key conduct of both the ROC and the PRC. The conduct of Japan is immaterial as it was the USA that had exclusive control of the islands from 1952 to 1970. First, China accepted that ‘[f]or regional security considerations the [Government of the Republic of China] ha[d] hitherto not challenged the U.S. military occupation of the Senkakus under Article 3 of the San Francisco Peace Treaty’.²³⁴ Second, as the signing of the Reversion Treaty drew near, the ROC government pressed the USA to keep the final status of the islands open²³⁵ for it regarded the issue as ‘a measure of the [it’s] ability to protect itself’.²³⁶ When the

²²⁵ *Denmark v. Norway*, *supra* note 51, at 45–46; *Nicaragua v. Honduras*, *supra* note 63, at 172–174

²²⁶ *Indonesia/Malaysia*, *supra* note 49, at 136.

²²⁷ *Nicaragua v. Honduras*, *supra* note 63, at 172–174.

²²⁸ *Burkina Faso/Mali*, *supra* note 63, at 63; *Cameroon v. Nigeria*, *supra* note 55, at 70.

²²⁹ *El Salvador/Honduras*, *supra* note 77, at 80–81, 102.

²³⁰ See USCAR, Civil Administration of the Ryukyu Islands Reports for the Periods 1917–1968, 1968–1969 and 1969–1970.

²³¹ China, 1969–1976: Memorandum of Conversation, *supra* note 15, at 296.

²³² Potsdam Declaration, *supra* note 30, para. 8.

²³³ Instrument of Surrender, *supra* note 31, para. 6.

²³⁴ China, 1969–1976: Memorandum of Conversation, *supra* note 15, at 296.

²³⁵ *Ibid.*, at 292, n. 6.

²³⁶ *Ibid.*

USA asked the ROC to clarify this position, the ROC's foreign minister, Chou Shu-kai replied that the ROC did not want the islands; it only wanted them to be neutral:

Chou: The next issue I would like to raise with you is the handling of the Senkaku Islands ... We have a difficult domestic political situation regarding the Islands.

Kissinger: We will raise it with the Japanese.

Chou: We hope to keep them quiet about it.

Kissinger: You don't want the Islands back; you just want to avoid a big fuss about them, is that right?

Chou: Yes, that's right. It is like Outer Mongolia. The Japanese have an interest in Outer Mongolia. If we were on the Mainland, we might be over-sensitive about Outer Mongolia and Tibet. The important thing is that they remain politically autonomous.²³⁷

The foregoing statements confirm the elements of the *status quo* that the ROC had no claim to them. With regard to the PRC, it issued a statement on 5 May 1952 questioning US trusteeship as an enslavement of Japan and its transformation 'into a U.S. military base and dependency'.²³⁸ To sum up, the foregoing acquiescence of the ROC and the silence of the PRC is conduct prior to the critical date that confirms, rather than contradicts, the *status quo* of the Senkaku/Diaoyu Islands in 1945–1952.

5 Conclusion

This article has set out to determine whether the current possession by Japan of the Senkaku/Diaoyu Islands has a legal basis that is opposable to China. Most articles deal with this question by focusing on historic titles and ancient maps. Such an approach is severely limited because international tribunals have set a standard that claims to historic title must be supported by evidence of the exercise of territorial sovereignty. The evidence of the parties hardly meets this standard.

This article applies an alternative approach based on the *status quo post bellum* or the prevailing territorial situation at the end of armed hostilities. Recourse to this approach is warranted by various instruments in which China, Japan and the Allied powers outlined the *status quo* that would serve as frame of reference for the future disposition of the islands in the East China Sea. Applying the alternative approach to the Senkaku/Diaoyu Islands, this article has shown that at the end of armed hostilities there was consensus among China, Japan and the Allied powers that the islands were part of Nansei Shoto, over which Japan had residual sovereignty, and that China had no claim to them. This consensus was confirmed by the subsequent conduct of the parties. The consensus underlying the *status quo post bellum* and confirmed by the subsequent conduct of the ROC and the PRC provide a legal basis to the current possession by Japan of the Senkaku/Diaoyu Islands. This legal basis is opposable to China.

²³⁷ *Ibid.*, 30 December 1971, 631–632.

²³⁸ Text of Chou En lai's Statement of 5 May, 1952 on San Francisco Treaty with Japan, New China News Agency Bulletin no. 530, UK Archive, FO 371/99264, at 8.