

The Unhelpfulness of Treaty Law in Solving the Sino-Japan Sovereign Dispute over the Diaoyu Islands

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The sovereignty dispute over the Diaoyu Islands between China and Japan is a sensitive issue touching upon various aspects of international law. One of the major claims of both countries is whether the Islands have been ceded to Japan, and if so, have they been reverted to China. Since cession and reversion were completed through a series of treaties, this paper explores the dispute by evaluating treaty law. The paper first outlines three sovereignty claims over the Islands and then provides a chronological review of the pertinent treaties. It then discusses the non-applicability contention and the treaty interpretation contention, two interpretations popular among mainland Chinese scholars. The article concludes that treaty law cannot provide a satisfactory solution to the dispute and suggests that both countries should resort to other international laws of territorial acquisition and strive for more innovative political solutions.

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I. INTRODUCTION

The Diaoyu Islands, also known as the Diaoyutai or Senkaku Islands, are located in the East China Sea, approximately 120 nautical miles east of Fuzhou, China and ninety nautical miles north of Japan's Ryukyu Islands. The islands are composed of five uninhabited islets and three barren rocks, totaling a land area of less than seven square kilometers.¹

Since the early 1970s, the dispute over the Diaoyu Islands has gradually developed into one of the most difficult and sensitive problems between China and Japan and has also caused wide international concerns.² For example, in early September 2010, a Chinese fishing trawler collided with Japanese inspection vessels in the waters off the Islands. The Japanese government detained the trawler and its captain, prompting strong reactions in both countries and sparking widespread nationalist emotions.³ More recently, in early November 2010, U.S.

¹ 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. 221, 221 (1973) (describing the barren state of the Islands); Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute Over the T'iao-yutai Islets (Senkaku Cunto)*, 15 CHINESE (TAIWAN) Y.B. INT'L & AFF. 9, 9-10 (1996) (describing the location, physical characteristics, and economic value of the Diaoyu Islands).

² See Dai Tan, *The Diaoyu/Senkaku Dispute: Bridging the Cold Divide*, 5 SANTA CLARA J. INT'L L. 134, 135-41 (2006) (recounting the political and economic tension that spawns for this dispute).

³ After the incident both countries reiterated their sovereignty over the Diaoyu Islands. Japan argued that its detention of the trawler and its captain was legal under Japanese law. See Press Release, Ministry of Foreign Affairs of Japan, Statement by the Press Secretary/Director-General for Press and Public Relations, Ministry of Foreign Affairs, on the Collision Between Japan Coast Guard Patrol Vessels and a Chinese Fishing Trawler in Japan's Territorial Waters off the Senkaku Islands (Sept. 25, 2010), *available at*

Secretary of State Hillary Clinton announced that the Diaoyu Islands are subject to the jurisdiction of the Treaty of Mutual Cooperation and Security between Japan and the United States (U.S.-Japan Security Treaty),⁴ further escalating the dispute and increasing tension in Sino-American relations.⁵

There are various economic, social, and political reasons that explain why these “tiny islets” are of great importance to China and Japan. First, economic considerations are the major cause of the dispute. These “small isolated islets” did not always have this value, and it was not until the early 1970s, when rich oil resources in the seabed were discovered, that China and Japan claimed sovereignty over the Islands.⁶ Moreover, as the Islands are situated at the edge of the continental shelf of the East China Sea, they are important to the delineation of the boundary between China and Japan.⁷ This factor is particularly important because both

http://www.mofa.go.jp/announce/announce/2010/9/0925_01.html (“The Government of Japan handled the most recent incident duly and strictly under its jurisdiction and in accordance with domestic law as a case involving obstruction of the execution of official duty by a Chinese fishing trawler.”). China rebutted that such detainment was in violation of international law, asserting “China expresses strong dissatisfaction with and grave protest against Japan’s obstinate decision to put the Chinese captain under the so-called judicial procedures, ignoring China’s repeated solemn representations and firm opposition.” Press Release, Ministry of Foreign Affairs of the People’s Republic of China, Foreign Ministry Spokesperson Jiang Yu’s Remarks on Japan Detaining Captain of the Chinese Fishing Boat (Sept. 13, 2010), *available at* <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t751900.htm>.

⁴ *Clinton Tells Maehara Senkaku Subject to Japan-U.S. Security Pact*, JAPAN ECON. NEWSWIRE, Sept. 23, 2010.

⁵ See Press Release, Ministry of Foreign Affairs of the People’s Republic of China, Foreign Ministry Spokesperson Ma Zhaoxu’s Remarks (Nov. 2, 2010), *available at* <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t766758.htm> (“[T]he Diaoyu Island[s] . . . are China’s inherent territory It is extremely erroneous . . . that the Diaoyu Island[s] fall[] within . . . the U.S.-Japan Treaty of Mutual Cooperation and Security. What the U.S. should do is to immediately correct its wrong position.”).

⁶ See Cheng, *supra* note 1, at 221–22 (describing the “oil rush” that commenced between China and Japan after a petroleum deposit was discovered in the continental shelf running through the Islands); Chiu, *supra* note 1, at 10–11 (explaining that the Islands were thought to have little economic value before the discovery of oil); Selig S. Harrison, *Seabed Petroleum in Northeast Asia: Conflict or Cooperation?*, WOODROW WILSON INT’L CENTER FOR SCHOLARS 5–6 (2005) (estimating the value of petroleum in the reserve); Victor H. Li, *China and Off-Shore Oil: The Tiao-yu Tai Dispute*, 10 STAN. J. INT’L STUD. 142, 155–56 (1975) (discussing China’s expanding claim of sovereignty in reaction to the discovery of sea-bed oil near the Islands); Peter N. Upton, *International Law and the Sino-Japanese Controversy over Territorial Sovereignty of the Senkaku Islands*, 52 B.U. L. REV. 763, 764 (1972) (discussing Japan’s interest in the petroleum reserves as the world’s largest importer of petroleum byproducts).

⁷ See Carlos Ramos-Mrosovsky, *The International Law’s Unhelpful Role in The Senkaku Islands*, 29 U. PA. J. INT’L L. 903, 912 (2008) (explaining the importance of the Islands in boundary delimitation between China and Japan); Steven W. Su, *The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation Between China and Japan*, 3 CHINESE J. INT’L L. 385, 385–91 (2004) (discussing the United Nations Convention on the

Japan and China are parties to the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), which states that the Islands are a decisive factor for claiming the Exclusive Economic Zone (EEZ) privileges that are necessary to obtain rights to the natural resources.⁸ Second, over the years the Islands have become closely intertwined with the national identity of the two countries and have incited nationalist sentiments.⁹ Third, the dispute is unique because it affects Sino-American and cross-Straits diplomacy, both sensitive issues.¹⁰ Thus, the dispute also profoundly affects the regional peace and security in East Asia.¹¹

In light of the above reasons, it is necessary to address the dispute. Admittedly, the dispute touches upon various aspects of international law, especially the law of territory acquisition,¹² law of the sea,¹³ and treaty law,

Law of the Sea's lack of specific delimitation of maritime boundaries between China and Japan in the East China Sea); Thomas R. Ragland, Note, *A Harbinger: The Senkaku Islands*, 10 SAN DIEGO L. REV. 664, 664–67 (1973) (locating of the islands and the state sovereignty dispute over them). See generally Jin-Hyun Paik, *The U.N. Convention on the Law of the Sea and Boundary Delimitation Issues in East Asia*, 24 KOREAN J. COMP. L. 125, 125 (1996) (describing the boundary dispute between China and Japan).

⁸ Pursuant to Articles 55, 56, and 57 of the UNCLOS, a state may establish its EEZ “beyond and adjacent to the territorial sea” which may be extended to up to “200 nautical miles from the baseline from which the breadth of the territorial sea is measured,” and is entitled to various rights including the right to the natural resources within the EEZ. United Nations Convention of the Law of the Sea arts. 55, 56, 58, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Though some argue that the Islands are “rocks” and only territorial sea that can not generate EEZ, it is undisputed that the Islands can bring rich resources to the sovereign state can establish title. See, e.g., DOUGLAS M. JOHNSTON & MARK J. VALENCIA, *PACIFIC OCEAN BOUNDARY PROBLEMS: STATUS AND SOLUTIONS* 113 (Shigeru Oda ed., 1991) (outlining five options to delineate the boundary between China and Japan); MARK J. VALENCIA ET AL., *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* 41–45 (Shigeru Oda ed., 1997) (discussing whether the Sparty Islets have the capacity to generate EEZs under Article 121 of UNCLOS); Jon M. Van Dyke, *North-East Asian Seas—Conflicts, Accomplishments and the Role of the United States*, 17 INT’L J. MARINE & COASTAL L. 397, 399–401 (2002) (stating that China asserts that the islands cannot be an EEZ because they are just “rocks.”); Jon M. Van Dyke et al., *The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?*, 25 SAN DIEGO L. REV. 425, 425 (1988); Jon M. Van Dyke & Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources*, 12 OCEAN DEV. & INT’L L. 265, 265 (1983).

⁹ See Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PAC. RIM L. & POL’Y J. 63, 91 (2002) (discussing nationalism as a cause of flare-ups in the Dispute); Ramos-Mrosovsky, *supra* note 7, at 920 (claiming that if either country yields on the Island dispute it will come across as “betraying the nation”).

¹⁰ The purpose of the paper is not to discuss the cross-Straits relations. The use of the Republic of China (ROC) is for clarity of discussion and does not necessarily mean recognition of the ROC as a sovereign state under international law.

¹¹ See Mark J. Valencia, *The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions*, 31 ASIAN PERSP. 127, 130–31 (2007) (describing how competition for gas resources is hampering Sino-Japanese relations, and how the dispute implicates this competition).

¹² See, e.g., Peter N. Upton, *supra* note 6, at 767–86; Cheng, *supra* note 1.

yet, the dispute has not been sufficiently explored from a treaty law perspective. Therefore, the main purpose of this paper is to explore the dispute by analyzing pertinent treaties and discover if treaty law can achieve a satisfactory solution.

Part II of this article summarizes three major claims over the Diaoyu Islands under international law and explains why a treaty law perspective is adopted. Part III then provides a brief review of various treaties pertaining to the Islands in chronological order and discusses their legal significance as they relate to the dispute. Part IV analyzes China's two major contentions in respect to the dispute: the non-applicability contention and the treaty interpretation contention. Part VI concludes that treaty law cannot provide a satisfactory solution to the dispute and submits that both China and Japan should explore other rules of international law on territorial acquisition and take innovative political efforts to solve the dispute.

II. A BRIEF REVIEW OF THE THREE MAJOR LEGAL CLAIMS

Though the dispute may be approached from different legal perspectives, the central issue of is one of sovereignty; therefore, it is most effective to discuss the dispute by focusing on international laws of territorial acquisition. It is generally agreed that customary international law recognizes five major methods of territory acquisition: occupation, prescription, cession, accretion, and conquest.¹⁴ The first three methods are relevant to the dispute.¹⁵

Occupation refers to a situation where a state gains the sovereign right over a territory which was previously *terra nullius* by exercising effective occupation with an intent and will to act as the sovereign.¹⁶

¹³ See, e.g., Ragland, *supra* note 7, at 665–69 (discussing sovereignty of the Senkaku Islands in terms of control over the natural resources in the seabed of the surrounding vicinity).

¹⁴ See SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW, 35–40 (1997) (explaining the framework of the current acquisition process of territory); Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 1–2 (2000) (describing the methods of territorial acquisition).

¹⁵ See Ramos-Mrosovsky, *supra* note 7, at 913 (covering the customary international law relevant to territorial acquisition).

¹⁶ See *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933, P.I.C.J. (ser. A/B) No. 53, at 45 (Apr. 5) (discussing Denmark's ability to exercise sovereignty over Greenland); *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 43 (Oct. 16) (describing how occupation was effectuated in the context of western saharan countries); Ramos-Mrosovsky, *supra* note 7, at 913–14 (“Occupation is the usual means for a state to gain sovereignty over a territory that was previously *terra nullius*, that is, territory belonging to no sovereign”).

Japan claims that it discovered the Diaoyu Islands and incorporated them into its territory as *terra nullius* in 1894. China argues Chinese fishermen first discovered and used the Islands and that the Islands have been incorporated into China's territory since the Ming dynasty in the 15th century.¹⁷

Prescription is when a state that fails to contest another state's assertion of sovereignty over its territory loses its sovereign right because it failed to insist upon them.¹⁸ Under international law, shift of sovereignty cannot be recognized unless the prescribing state's occupation has been public, peaceful, and uninterrupted.¹⁹ In this respect, Japan argues that China acquiesced to its occupation of the Islands since China did not raise any objection until the 1970s. However, China's silence was understandable due to the Cold War and its alliance with the U.S.²⁰

Cession refers to a state's voluntary grant of its sovereign rights in a territory to another state.²¹ This often takes place within the framework of a peace treaty following a war.²² Japan asserts that China ceded the Islands to it in the Treaty of Shimonoseki of 1895 after the Sino-Japanese War. China, by contrast, argues that the Islands were reverted to China after Japan was defeated in World War II through a series of international declarations and treaties.²³

Each of these three claims merits a lengthy discussion, but this paper does not aim to provide a comprehensive study on all three claims. Instead, it focuses on the third claim of whether the Islands were ceded to Japan, and if so, whether they have been restored to China under international law. Because the alleged cession and restoration at issue results from a series of territorial disposition provisions in various treaties, this article takes a treaty law perspective.

¹⁷ See Steven W. Su, *The Territorial Dispute over Diaoyu/Senkaku Islands: An Update*, 36 OCEAN DEV. & INT'L L. 45, 48–49 (2005) (discussing China's historical use of the Islands, including use of the Islands as coastal defense in the 16th century); Comment, *The East China Sea: The Role of International Law in the Settlement of Disputes*, 1973 DUKE L. J. 823, 848 (1973) (discussing Japan's annexation of the Islands in the Sino-Japanese war of 1895).

¹⁸ SHARMA, *supra* note 14, at 118–19.

¹⁹ Upton, *supra* note 6, at 774.

²⁰ Su, *supra* note 17, at 48–49 (explaining that the Islands were under the U.S. administration and that there was little reason no occasion or urgency for the Chinese to raise any question about them).

²¹ SHARMA, *supra* note 14, at 136–41.

²² MALCOM N. SHAW, INTERNATIONAL LAW 420 (5th ed., 2003).

²³ See William B. Heflin, *Diaoyou/Senkaku Islands Disputes: Japan and China, Oceans Apart*, 1 ASIAN PAC. L. & POL'Y J. 1, 3–9 (2000) (discussing China's historical claim to entitlement of the Island following World War II with the Cairo Conference, San Francisco Peace Treaty of 1951, and the Sino-Japanese Peace Treaty of 1952).

III. A REVIEW OF TREATIES PERTAINING TO THE DIAOYU ISLANDS

First, it is necessary to conduct a brief chronological review of the treaties relevant to the dispute as well their legal significance.

A. *The Treaty of Shimonoseki (1895)*

After Japan defeated China in the Sino-Japanese War, China ceded Formosa together with “all islands appertaining or belonging to the said island of Formosa” to Japan under the terms of the Treaty of Shimonoseki.²⁴ Although this treaty did not clearly mention the Diaoyu Islands, it did note that “China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon The island of Formosa, together with all islands appertaining or belonging to said island of Formosa.”²⁵ Such wording may lead to the understanding that the Diaoyu Islands had been ceded to Japan.

B. *The Wartime Declarations (the 1940s)*

After the Allied Powers defeated Japan in World War II, the United States, United Kingdom, and Republic of China, in pursuance of the Cairo Communiqué (Cairo Declaration) issued on December 1, 1943, requires that:

Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China.²⁶

This point was reiterated in the ensuing Proclamation Defining Terms for Japanese Surrender (Potsdam Declaration) issued on July 26, 1945, “[t]he 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.”²⁷ Shortly after World War II, the People’s Republic of China (PRC) was established

²⁴ Treaty of Shimonoseki, China-Japan, art. 2 (b), Apr. 17, 1895, *reprinted in* 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894–1919 18, 19 (John V. A. MacMurray ed., 1929).

²⁵ *Id.* art 2.

²⁶ Cairo Declaration, Dec. 1, 1943, 3 U.S.T. 858.

²⁷ Potsdam Declaration, para. 8, July 26, 1945, 3 U.S.T. 1204.

on October 1, 1949. To build the legitimacy of the new regime, the PRC deemed itself as the sole legal representative of China even though the UN did not recognize it until October 25, 1971.²⁸ The establishment of the PRC complicated the dispute both politically and legally. On the one hand, both the PRC and ROC shared sovereignty claim over the Diaoyu Islands; on the other hand, the PRC refused to recognize the treaties concluded or recognized by the ROC after 1949.²⁹

C. *The San Francisco Treaty (1951)*

On September 8, 1951, the Allied Powers and Japan signed the Treaty of Peace with Japan (San Francisco Treaty). China (ROC and PRC) was not a party to this agreement. This treaty clearly aims at restoring China's sovereignty and defining the post-war territory of Japan, substantially codifying the principles expressed in the Wartime Declarations. Since the San Francisco Treaty effects the final disposition of the territories in East Asia after World War II, it should be regarded as the starting point for discussion of the dispute.³⁰ Though the San Francisco Treaty did not expressly require Japan to revert the Diaoyu Islands to China, two of its provisions are closely connected with the dispute: the restoration provision and trusteeship provision. The restoration provision provides that Japan renounces all right, title, and claim to Formosa and the Pescadores.³¹ According to the "trusteeship provision," the Diaoyu Islands were put under U.S. trusteeship.³²

The ROC and PRC differed in their reaction towards the San Francisco Treaty. The ROC did not raise objection to the treaty because it was preoccupied with the civil war with the PRC and it did not want to cross the United States, its ally and partner in a mutual defense treaty.³³ Taking a contrary position, the PRC strongly objected to the treaty on various occasions. On August 15, 1951, Premier Zhou Enlai criticized the negotiation and conclusion of the San Francisco Treaty, declaring it was a "most absurd" and "unilateral" act of United States. His rhetoric implied that the PRC would not recognize the treaty, but rather based its claim to

²⁸ Restoration of the Lawful Rights of the People's Republic of China in the United Nations, G.A. Res. 2578 (XXVI) (Oct. 25, 1971). Before this date, the ROC was the legal representative for China in the United Nations.

²⁹ See K. T. Chao, *East China Sea: Boundary Problems Relating to the Tiao-Yu-T'ai Islands*, 2 CHINESE TAIWAN Y.B. INT'L L. & AFF. 45, 45 (1982).

³⁰ Lee, *supra* note 9, at 70 (asserting the importance of the San Francisco Treaty).

³¹ Treaty of Peace with Japan, art. 2 (a), Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter San Francisco Treaty].

³² *Id.*, art. 3 ("Japan will concur in any proposal of the United States to the United Nation to place under its trusteeship system, with the United States as the sole administering authority").

³³ Chiu, *supra* note 1, at 24-25.

the Islands on the Declaration by United Nations, the Cairo Declaration, the Yalta Agreement and the Potsdam Declaration, as well as the basic policies adopted by the Far East Committee.³⁴ Shortly afterwards, Premier Zhou clarified the PRC's position in the Declaration on the Issue of Peace Treaty with Japan on September 18, 1951. The Premier expressly challenged the legality of the San Francisco Treaty and its binding force on China, declaring that a peace treaty without participation of the People's Republic of China is neither complete nor genuine in its entirety and that the Central People's Government deems the treaty illegal, invalid and thus absolutely unacceptable.³⁵

Indeed, had the San Francisco Treaty expressly addressed the legal status of the Diaoyu Islands, the dispute would have been resolved. Although "the careful drafting of the San Francisco Treaty could have put an end to the territorial disputes over [the Diaoyu] islands," the Allied Powers intentionally chose to omit the issue of the Diaoyu Islands when concluding the treaty.³⁶ In this respect, a careful examination of all previous drafts of the San Francisco Treaty and a wide range of other related agreements and documents supports the idea that the drafters failed to account for the Diaoyu Islands.³⁷

D. *The Sino-Japanese Peace Treaty (1952)*

After the San Francisco Treaty, the Treaty of Peace Between the Republic of China and Japan was concluded on August 5, 1952 (1952 Sino-Japanese Peace Treaty). This treaty heavily relies on the San Francisco Treaty and clearly reaffirms Japan's obligation to China under the San Francisco Treaty. Two provisions of this Treaty are related to the Diaoyu Islands, which can be roughly classified as the restoration provision and the nullification provision. The former aims at restoring China's sovereignty over certain islands prescribed in the San Francisco Treaty, while the later aims to nullify Sino-Japanese treaties governing the issue of territorial disposition that were signed before 1941. The restoration provision states:

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the

³⁴ XIANDAI GUOJI GUANXISHI CANKAO ZILIAO (现代国际关系史参考资料) [MATERIALS ON THE HISTORY OF MODERN INTERNATIONAL RELATIONS] (1951–1953) 556 (Guoji Guanxi Xueyuan (国际关系学院) [University of International Relations] ed., 1960).

³⁵ *Id.* at 632.

³⁶ Lee, *supra* note 9, at 144 (citing Memorandum of Conversation, Canberra Conference on Japanese Peace Treaty, State Department Decimal File No.740.0011 PW (PEACE)/10-647, State Department Records, Record Group 59 (Oct.6, 1947)).

³⁷ Lee, *supra* note 9, at 144–45 ("Territorial provisions of the San Francisco Peace Treaty largely reflected the Allied Powers' policy in East Asia, which failed to give serious consideration to the rival claims to title over specific territories.").

United States of America on September 8, 1951 [], Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.³⁸

The nullification provision recognizes that “all treaties, conventions and agreements concluded before December 9, 1941 between China and Japan have become null and void as a consequence of the war.”³⁹

In a sense, the conclusion of the 1952 Sino-Japanese Peace Treaty provided a chance for the ROC to clarify the vagueness of the San Francisco Treaty. Surprisingly, the 1952 Sino-Japanese Peace Treaty touched upon neither the sovereignty nor the trusteeship over the Diaoyu Islands; however, the silence of the ROC was understandable because the ROC and the United States were allies at that time and it was unnecessary for the ROC to resist U.S. trusteeship.⁴⁰ Besides, when the treaty was concluded, it was impossible for the ROC to predict that the United States would “revert” the Islands to Japan some twenty years later.⁴¹

Unsurprisingly, the PRC strongly opposed the 1952 Sino-Japanese Peace Treaty. On May 5, 1952, Premier Zhou stated that the PRC firmly objects to the peace treaty between the Chiang Kai-Shek regime and the Yoshida government which openly humiliates and is hostile towards the Chinese people.⁴² Despite its objection, the PRC did not raise any clear sovereignty claim over the Diaoyu Islands. Considering that the newly established PRC was isolated from the international community, it would have been infeasible for China to claim sovereignty over the Islands because such a claim could be deemed as a hostile act against the United States and would place China in a precarious situation.⁴³

E. *The Okinawa Agreement (1971)*

U.S. trusteeship over the Diaoyu Islands was terminated upon the conclusion of the Agreement Between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands on June 17, 1971 (Okinawa Agreement). Though the Okinawa Agreement explicitly

³⁸ Treaty of Peace Between the Republic of China and Japan, China-Japan, art. II, Apr. 28, 1952 138 U.N.T.S. 38 [hereinafter 1952 Sino-Japanese Peace Treaty].

³⁹ *Id.* art. IV.

⁴⁰ Chiu, *supra* note 1, at 24–25.

⁴¹ See Agreement Between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands, U.S.-Japan, June 17, 1971, 23 U.S.T. 447 [hereinafter Okinawa Agreement] (terminating U.S. trusteeship over the Diaoyu Islands and “reverting” the Islands to Japan).

⁴² XIANDAI GUOJI GUANXISHI CANKAO ZILIAO, *supra* note 34, at 662.

⁴³ See Cheng, *supra* note 1, at 242.

required the United States to “relinquish in favor of Japan all rights and interests under Article 3” of the San Francisco Treaty, it did not expressly mention the Diaoyu Islands.⁴⁴ The pertinent part of this agreement reads:

With respect to the Ryukyu Islands and the Daito Islands, as defined in paragraph 2 below, the United States of America relinquishes in favor of Japan all rights and interests under Article 3 of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, effective as of the date of entry into force of this Agreement. Japan, as of such date, assumes full responsibility and authority for the exercise of all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of the said islands.⁴⁵

Against the opposition of both the ROC and PRC, the United States “reverted” the Diaoyu Islands to Japan. On June 11, 1971, right before the conclusion of the agreement, the ROC’s Ministry of Foreign Affairs issued a formal statement commenting on the agreement and expressly claimed sovereignty over the Islands:

With respect to the United States’ statement that it intends to transfer the Diaoyu Tai Islands, together with the Ryukyu Islands, to Japan, the government of the Republic of China especially feels surprised and startled. . . . The Islands are affiliated with the Province of Taiwan and constitute a part of the territory of the Republic of China.⁴⁶

Likewise, right after the PRC resumed legal representation of China in the UN, the PRC’s Ministry of Foreign Affairs also raised objections to the conclusion of the Okinawa Agreement, claiming sovereignty over the Islands and denying the effect of the Agreement on China:

[The conclusion of the Okinawa Agreement is] an evident violation of Chinese sovereignty and territories, and it would not be tolerated by the Chinese people. The United States and Japan included the Diaoyu Islands in the regions of reversion, but that was illegal, and would never

⁴⁴ Okinawa Agreement, *supra* note 41, at 449.

⁴⁵ *Id.*, art. I (1).

⁴⁶ *Statement of the Ministry of Foreign Affairs of the Republic of China on the Ryukyu Islands and the Diao-Yu-Tai Islands*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (June 11, 1971), <http://www.mofa.gov.tw/webapp/ct.asp?xItem=40531&ctNode=2038&mp=1>.

change the sovereignty of the People's Republic of China over the Diaoyu Islands.⁴⁷

Pitifully, facing the objections of both the ROC and the PRC, the United States took an ambiguous and straddling position that intentionally left the dispute to China and Japan. The United States responded that the Okinawa Agreement only dealt with the transfer of administrative rights, not sovereignty, over the Diaoyu Islands.⁴⁸

F. The Four Treaties Between the PRC and Japan (the 1970s onwards)

Though the PRC resumed the seat of China in the UN in 1971, it still faced great pressure to obtain wider international recognition. To normalize and promote bilateral relations with Japan, the PRC concluded several important treaties with Japan after the 1970s, namely, the *Joint Declaration Between the People's Republic of China and Japan* concluded on September 29, 1972 (1972 Sino-Japan Joint Declaration),⁴⁹ the *Treaty of Peace and Friendship Between the People's Republic of China and Japan* concluded on August 12, 1978 (1978 Sino-Japanese Peace Treaty),⁵⁰ the *Joint Declaration Between the People's Republic of China and Japan on Establishing Peaceful and Developing Friendly Cooperative Partnership Relations* concluded on November 26, 1998 (1998 Sino-Japanese Joint Declaration),⁵¹ and the *Joint Declaration on Comprehensively Promoting Strategic Mutual Beneficial Relations*

⁴⁷ Shi Yan, *Sovereignty Beyond Doubt*, CHINA DAILY, Oct. 11, 2010, http://www.chinadaily.com.cn/opinion/2010-10/11/content_11392428.htm.

⁴⁸ See, e.g., S. REP. NO. 92-10 (1971) (“[T]he United States . . . merely received rights of administration, not sovereignty. Thus, United States action in transferring its rights of administration to Japan does not constitute a transfer of underlying sovereignty . . . nor can it affect the underlying claims of any of the disputant”).

⁴⁹ Zhonghua Renmin Gongheguo he Ribenguo Zhengfu Lianhe Shengming (中华人民共和国和日本国政府联合声明) [Joint Declaration Between the People's Republic of China and Japan], available at http://news.xinhuanet.com/ziliao/2002-03/26/content_331579.htm.

⁵⁰ Zhonghua Renmin Gongheguo he Ribenguo Heping Youhao Tiaoyue (中华人民共和国和日本国和平友好条约) [Treaty of Peace and Friendship Between the People's Republic of China and Japan], available at http://news.xinhuanet.com/ziliao/2002-03/26/content_331587.htm.

⁵¹ Zhongri Guanyu Jianli Zhiliyu Heping yu Fazhan de Youhao Hezuo Huoban Guanxi de Lianhe Xuanyan (中日关于建立致力于和平与发展的友好合作伙伴关系的联合宣言) [Joint Declaration Between the People's Republic of China and Japan on Establishing Peaceful and Developing Friendly Cooperative Partnership Relations], available at http://news.xinhuanet.com/ziliao/2002-03/26/content_331597.htm.

between People's Republic of China and Japan concluded on 7 May 2008 (2008 Sino-Japanese Joint Declaration).⁵²

These four treaties nullified the 1952 Sino-Japanese Peace Treaty and formed the foundation of Sino-Japanese relations. Even though China and Japan could have clarified the legal status of the Diaoyu Islands when concluding these treaties, they did not make the move. The silence in these treaties was not negligent, but rather a reflection of the PRC's policy towards Japan. In fact, the PRC intentionally shelved the Diaoyu Islands dispute to allow both countries to focus on improving relations. It has been suggested that "[i]nitially both countries tried to play down the Islands dispute while still making clear their legal claims" and that the Diaoyu Islands dispute "was raised by Japanese leaders in 1972 and 1978, but in both cases the Chinese leaders, Zhou Enlai and Deng Xiaoping respectively, proposed not to deal with it."⁵³ Premier Zhou proposed shelving the dispute for future settlement to prepare for the normalization of the diplomatic relations with Japan, while Vice Premier Deng said that "it does not matter if this issue [the Diaoyu Islands dispute] is put off for some years" in order to smoothen the negotiations of the 1978 Sino-Japanese Joint Declaration.⁵⁴

However, the status quo approach taken by Chinese leaders did not work as expected in practice. In fact, since the 1970s, China and Japan have reinforced their respective claims over the Islands and intensified the dispute by taking various administrative, legislative, and other acts.⁵⁵ For instance, in order to rebut Japan's claim over the Diaoyu Islands, the PRC adopted the Law of Territorial Sea and Contiguous Zone on February 25, 1992, expressly prescribing the Diaoyu Islands as part of Chinese land territory.⁵⁶ In 2010, Sino-Japanese relations suffered further

⁵² Zhongri Guanyu Quanmian Tuijin Zhanlue Huhui Guanxi de Lianhe Shengming (中日关于全面推进战略互惠关系的联合声明) [Joint Declaration on Comprehensively Promoting Strategic Mutual Beneficial Relations Between People's Republic of China and Japan], available at http://news.xinhuanet.com/newscenter/2008-05/07/content_8123814.htm.

⁵³ Reinhard Drifte, *Japanese-Chinese Territorial Dispute in the East China Sea—Between Military Confrontation and Economic Cooperation* 1 (a) (Asia Research Ctr., London Sch. of Econ. and Political Sci. Asia Research Ctr., Working Paper No. 24, 2008), available at <http://eprints.lse.ac.uk/20881>; see also Zhongqi Pan, *Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective*, 12 J. CHINESE POL. SCI. 71, 74–77 (2007).

⁵⁴ Heflin, *supra* note 23, at 1.

⁵⁵ See Drifte, *supra* note 53, at 1 (c) (reviewing Chinese domestic legislation on the issue).

⁵⁶ Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, art.2 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992, effective Feb. 25, 1992), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf ("The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands, the Penghu Islands, the Dongsha Islands, the Xisha

setbacks over diplomatic conflicts involving Japan's detention of a Chinese fishing trawler and its captain. In the same year U.S. involvement in the Islands dispute, by way of an American push for multilateral mediation, was rejected by China.⁵⁷ These events appear to strongly suggest that the Diaoyu Islands have quickly become a minefield for both countries, and that leaving the dispute unresolved will complicate the future of Sino-Japanese relations.

G. *The U.S.-Japan Security Treaty (1960)*

The U.S.-Japan Security Treaty was concluded on January 19, 1960. Although China is not bound by its terms because it is a nonsignatory, the potential impact of the treaty on the Diaoyu Islands should not be ignored. Though the Islands are not expressly mentioned in the treaty, the terms recognized that “[e]ach Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.”⁵⁸ In light of such provision, it is generally understood that the treaty imposes an obligation on the United States to protect Japan if the Diaoyu Islands were “attacked” by China. Naturally, China has consistently objected to the U.S.-Japan Security Treaty. On November 2, 2010, for instance, after the U.S. Secretary of State announced that the Diaoyu Islands fell within the ambit of the treaty, a Chinese Foreign Ministry Spokesperson rebutted that “[i]t is extremely erroneous for the U.S. to repeatedly claim that the Diaoyu Island falls within the scope of the U.S.-Japan Treaty of Mutual Cooperation and Security. What the U.S. should do is to immediately correct its wrong position.”⁵⁹

H. *Summary of Treaty Analysis*

Islands, the Zhongsha Islands and the Nansha Islands as well as all the other islands belonging to the People's Republic of China.”)

⁵⁷ See *Clinton Urges Japan and China to Return to Talks over Disputed Islands*, CNN (Oct. 30, 2010), http://articles.cnn.com/2010-10-30/world/vietnam.clinton.visit_1_senkaku-islands-diaoyutai-islands-diaoyu-islands?_s=PM:WORLD (noting that U.S. Secretary of State Hillary Clinton sought to defuse tension between China and Japan by offering to have the United States serve as a mediator in the dispute).

⁵⁸ Treaty of Mutual Co-operation and Security, U.S.-Japan, art. V, Jan 19, 1960, 373 U.N.T.S. 179.

⁵⁹ Remarks of Ma Zhaoxu, Spokesperson, Ministry of Foreign Affairs of the People's Republic of China, Nov. 2, 2010,

<http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t766758.htm> (last visited May 14, 2011).

Several observations can be drawn from the past treaties. First, although several treaties are dedicated to defining Japan's post-war territorial boundaries and purportedly deal with the legal status of the Diaoyu Islands, none of them expressly mentioned the Islands. Notwithstanding these agreements, it is a fact that China lost control over the Diaoyu Islands in 1895, and the Islands were actually under either Japanese control (1895-1951 and 1971- present) or under U.S. trusteeship (1951-1971).

Second, the dispute dates back to the late 19th century, and has carried on through several eras of Chinese history: the Qing Dynasty, the Republican era, and now the PRC. Although the PRC was recognized in 1971 by the UN as the sole legal representative of China, it is undeniable that the ROC still exists today and maintains diplomatic relations with many countries in the world.⁶⁰ Complicating matters, the ROC arguably shares with the PRC a sovereign claim over the Diaoyu Islands.⁶¹ Because of the overlapping claims of both the ROC and PRC, the dispute inevitably involves the highly sensitive cross-Strait relations. Though cross-Strait relations are beyond the scope of this article, this unique factor makes the dispute different from other territorial disputes.

Third, U.S. involvement in the Diaoyu Islands is another factor complicating the dispute. Such involvement is mainly demonstrated by the alliance stemming from the U.S.-Japan Security Treaty. Although this treaty is not *per se* binding on China and does not expressly address the Diaoyu Islands, the treaty's reference to "the territories under the administration of Japan" in Article 5 does imply that the Diaoyu Islands are covered by the treaty. Consequently, as the treaty *de facto* applies to the Diaoyu Islands, it raises a strange triangular relationship that involves Japanese, American, and Chinese interests.

IV. THE NON-APPLICABILITY CONTENTION AND ITS FLAWS

Mainstream PRC scholars often argue that treaties made without China's participation, specifically the San Francisco Treaty, are not binding on China.⁶² This non-applicability contention is grounded in

⁶⁰ See Bangjiaoguo (邦交國) [States that Recognize Taiwan], ZHONGHUAMINGUO WAIJIAOBU (中華民國外交部) [MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA], <http://www.mofa.gov.tw/webapp/np.asp?ctNode=1143&mp=1> (listing twenty-three states that maintain diplomatic relations with the ROC) (lasted visited May 14, 2011).

⁶¹ According to the Ministry of Foreign Affairs for the Republic of China (Taiwan), it has issued 21 statements claiming sovereignty over the Diaoyu Islands on various occasions since 1971. For a list of these statements, see <http://www.mofa.gov.tw/webapp/ct.asp?xItem=40531&ctNode=2038&mp=1>.

⁶² See, e.g., Kong Fanyu (孔繁宇), Cong Zhongguo Zhengfu Wuci Shengming deng Waijiao Wenjian kan 《Jiujinshan Heyue》 dui Huazhi Falü Xiaoli (从中国政府五次声明

treaty law and general principles of international law, namely the illegality argument and the non-party argument. The illegality argument concludes that the San Francisco Treaty is *per se* illegal under international law according to the 1942 Declaration by the United Nations (UN Declaration) and the Wartime Declarations. The non-party argument concludes that China, as a non-party to the San Francisco Treaty, is not bound by its terms.

A. *The Illegality Argument and Its Flaws*

The UN Declaration reads: “[e]ach Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.”⁶³ The plain language of this provision appears to impose an obligation on the Allied Powers, including the United States, not to conclude any peace treaty with Japan that excludes other victorious countries, including China. The argument follows that because the San Francisco Treaty was concluded in the absence of China, it constitutes a “separate peace with the enemy” and is consequently a violation of the UN Declaration.

This contention is not convincing because such an interpretation of the UN Declaration provision is problematic. Although the UN Declaration prohibits “separate” armistices with the Axis powers, it is neither explicit in the number of states needed to legally conclude a peace treaty nor requires a peace treaty be concluded with the presence of all victorious states. Thus, there must be treaty interpretation in order to determine the circumstances that constitute a “separate armistice or peace.” Moreover, it is a fact that the San Francisco Treaty was accepted and signed by forty-eight countries, including the United States and the United Kingdom. In light of this, it is doubtful that the mere absence of China’s assent to the agreement would render the San Francisco Treaty illegal under international law.

Some PRC scholars also contended that the San Francisco Treaty constitutes a violation of the Wartime Declarations. According to the Cairo Declaration, the leading Allied Powers agreed that all territories Japan annexed from China, such as Formosa, must be restored to the ROC. The Potsdam Declaration reaffirmed the terms of the Cairo Declaration. The San Francisco Treaty was a *de facto* codification of these Wartime

等外交文件看《旧金山和约》对华之法律效力), 30 INNER MONGOLIA SOC. SCI. 32, 32–33 (2009); Wang Zelin (王泽林), Riben yü Linguo Lingtu Zhuquan Zhengrui de Guojifa Fenxi (日本与邻国领土主权争端的国际法分析), 18 NORTHEAST ASIA FORUM 12, 16 (2009); Xiao Aihua (肖爱华), Guanyu 《Jiujinshan Heyue》 de Xiaoli (关于旧金山和约的效力), 8 J. CHONGQING U. SCI. & TECH. (SOC. SCI. EDITION) 64, 67 (2009).

⁶³ *The United Nations Declaration*, HISTORY OF THE CHARTER OF THE UNITED NATIONS (Jan. 1, 1942), <http://www.un.org/aboutun/charter/history/images/declarationun.jpg>.

Declarations. Based on this understanding, the San Francisco Treaty cut against the Wartime Declarations because the treaty did not clearly require Japan to restore the Diaoyu Islands to China.

Similarly, this contention is unpersuasive. Notwithstanding their purpose of restoring China's sovereignty, the Wartime Declarations did not expressly mention the Diaoyu Islands. Thus, it is hasty to conclude that the Wartime Declarations requires Japan to revert the Islands to China. Rather, any such claim should only be ascertained by interpreting the Wartime Declarations. Consequently, the silence of the San Francisco Treaty is unlikely to make the treaty either incompliant with the Wartime Declarations or in violation of international law.

B. *The Non-Party Argument and Its Flaws*

An alternative argument raised by the PRC and many of its scholars is that the San Francisco Treaty is not binding on China since it is a non-party to the treaty.⁶⁴ This argument has two parts. The first part relies on the basic principle of treaty law of *pacta tertiis nec nocent nec prosunt*, which holds that a state is not bound by a treaty to which it is not a party and codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).⁶⁵ This principle has also been applied frequently by International courts and tribunals have frequently applied this principle.⁶⁶ The VCLT defines third state as “not a party to the treaty,”⁶⁷ and further provides that “[a] treaty does not create either obligations or rights . . . without its consent.”⁶⁸ Under these provisions, China must be not be bound by the San Francisco Treaty since it is a “third party” to it.

The second part of the argument proposes that treaty law exceptions included in the VCLT cannot be invoked. Under the VCLT, there are certain exceptions where a non-party state is nevertheless bound by a treaty. For a third party to be bound by a treaty provision, two conditions must be met: (1) the parties must intend a provision to afford a

⁶⁴ See, e.g., Pan, *supra* note 53, at 79 (“China believes the San Francisco Peace Treaty in question lacks any finality on the issue because neither China mainland nor Taiwan was a signatory.”).

⁶⁵ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 627 (7th ed., 2008); Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, 6 MAX PLANCK Y.B. U.N. L. 37, 38 (2002) (“[P]acta tertiis nec nocent nec prosunt . . . has been recognized in states’ practice as fundamental, and its existence has never been questioned.”).

⁶⁶ See, e.g., The German Interests in Polish Upper Silesia, *PCIJ, Series A*, No.7, at 28; Chorzow Factory Case, *PCIJ, Series A*, No.17, at 45; Austro-German Customs Union Case, *PCIJ, Series A/B*, No.41, at 48.

⁶⁷ Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter VCLT].

⁶⁸ *Id.* art. 34.

right to the state in question; and (2) the third party state must assent.⁶⁹ The San Francisco Treaty did not meet either of these conditions. Because it did not explicitly require Japan to restore the Diaoyu Islands to China, but rather put the Islands under U.S. trusteeship, it is doubtful whether the treaty intended to create a sovereign right for China. Moreover, even if that the treaty intended to give China sovereignty over the Diaoyu Islands, the PRC's consistent objections to the treaty indicates that it did not assent to the treaty's provisions.

For these two reasons, the San Francisco Treaty is not binding on China as a non-party. Although the non-party contention appears reasonable as a matter of law, it potentially weakens China's claim to the Diaoyu Islands. This is because, although the treaty did not clearly mention the Diaoyu Islands, it did have the clear purpose of defining Japan's post-war territory and restoring China's sovereignty over those territories annexed by Japan. The treaty is thus pertinent to the dispute because it not only serves as a codification of the Wartime Declarations but also provides a basis for the ensuing treaties.

In light of this background, the San Francisco Treaty appears to be favorable to China in a general sense, and denying its applicability would potentially hurt China's claim. Yet, notwithstanding the significance and purpose of the San Francisco Treaty, the PRC refuses to recognize it and attempts to ground its claim chiefly on the Wartime Declarations. The political circumstances of the times provides a reasonable explanation for this decision, as the PRC deemed itself the sole legal representative of China beginning in 1949 rather than its after UN recognition in 1971; therefore, to justify its legitimacy, the PRC does not recognize any post-1949 treaties by the ROC on behalf of China.

V. TREATY INTERPRETATION AND ITS UNHELPLESSNESS

The non-applicability contention should be disregarded because the illegality and non-party arguments are both flawed. An alternative contention may be raised instead. Given that the general object and purpose of these treaties is favorable to China, it is advisable for the PRC to recognize them, particularly the San Francisco Treaty, in addition to the Wartime Declarations. As these treaties did not clearly mention the Diaoyu Islands, an analysis of possible interpretations is needed. This Part will examine how treaty interpretation potentially affects China's claim over the Islands.

⁶⁹ *Id.* art. 35 (“An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.”); *see also* Fitzmaurice, *supra* note 65, at 47–48 (explaining the requirements of satisfying a non-party exception).

A. *Principle of Treaty Interpretation*

For the purposes of this article, it is unnecessary to develop thorough and elaborate analysis of treaty interpretation. A brief discussion of the principles of treaty interpretation articulated in the VCLT is sufficient. It is widely held that the relevant provisions of the VCLT not only represent “the culminating achievement of a decade-long effort” by International Law Commission (ILC) to establish a method for treaty interpretation,⁷⁰ but also provide a guide to basic principles that were already entrenched in customary international law.⁷¹

The VCLT deals with two basic aspects of treaty interpretation: (1) the general methods of interpretation; and (2) the data to be used in interpretation.⁷² Professor Fitzmaurice classified the methods of interpretation into three basic types: the subjective, the textual, and the teleological.⁷³ The subjective approach looks at the actual intent of the parties at the time of the adoption of the final text of a treaty. The textual approach stresses the actual words of the treaty unless they are ambiguous or lead to obviously absurd or unreasonable conclusions. The teleological approach looks to the treaty’s objectives and purpose to interpret a treaty.⁷⁴

To discern a treaty’s objective it may neither be necessary nor possible to produce an exhaustive list of materials to consult because the VCLT provides a wide range of sources that may be used for interpretative purposes.⁷⁵ As pointed out by Professor Brownlie, the VCLT considers various sources of data which include, *inter alia*, the

⁷⁰ Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 437 (2004).

⁷¹ Territorial Dispute (Libya/Chad), Judgment, 1994 I.C.J. 6, 21–22 (Feb. 3); Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 1995 I.C.J. 6, 18 (Feb. 15); Oil Platforms (Iran v. U.S.), Judgment, 1996 I.C.J. 1996 (II) 803, 812; Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1045, 1059; Sovereignty over Pulau Litigan and Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. 625, 632.

⁷² See ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 7 (2007) (discussing the use of VCLT articles and interpretation data in treaty interpretation).

⁷³ See G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 1951 BRIT. Y.B. INT’L L. 1, 1 (detailing three main schools of thought in treaty interpretation).

⁷⁴ See Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT’L & COMP. L.Q. 318, 319 (1969) (explaining modern approaches to interpretation).

⁷⁵ *Law of Treaties*, 29 AM. J. INT’L L. 657, 948 cmt. (1935) (commenting on Article 19 of the Draft Convention on the Law of Treaties by stating that “[a]n exhaustive list of such materials cannot, perhaps, be made; they will vary in nature, amount and probative value with the individual case.”).

context, the subsequent practice of parties to the treaty, the practices of certain organizations, particularly the International Court of Justice, and the preparatory work of the treaty.⁷⁶

The rules of treaty interpretation are found in Articles 31–33 of the VCLT. Article 31(1) lays out the fundamental principles of treaty interpretation, expressly providing that a treaty term shall be interpreted in good faith, accordance with the ordinary meaning, in context, and with respect to its object and purpose.⁷⁷ Though the principles seem to provide four methods of treaty interpretation, international adjudication suggests that ordinary meaning should be deemed as the starting point for treaty interpretation. For instance, in *Case of Polish Postal Service in Danzig*, the Permanent Court of International Justice held that “[i]t is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.”⁷⁸ The International Court of Justice also elaborated on the relationship between ordinary meaning and the other methods of interpretation:

The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.⁷⁹

According to the ILC, by emphasizing ordinary meaning in Article 31(1), the VCLT opts for a textual approach.⁸⁰ In order to decipher the ordinary meaning of a treaty term, Article 31(2) provides a

⁷⁶ See BROWNLIE, *supra* note 65, at 631–36.

⁷⁷ VCLT, *supra* note 67, arts. 31, 32; LINDERFALK, *supra* note 72, at 7 (believing that Articles 31–33 inform appliers of the provisions how to correctly proceed from the viewpoint of international law).

⁷⁸ *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16).

⁷⁹ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3).

⁸⁰ *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, at 1, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l Law Comm'n 220, U.N. Doc. A/CN.4/191 (noting that by interpreting terms according to their ordinary meaning, the Law of Treaties takes the view that “the text must be presumed to be the authentic expression of the intention of the parties[.]”).

non-exhaustive list of materials to consult, including, *inter alia*, the text, preamble, annexes, agreement, or instrument relating to the treaty. It is important to note that each of these contexts should be considered in an integrated manner and must not be construed as to have laid down “a legal hierarchy of norms in the interpretation of treaties.”⁸¹ In addition to context, Article 31(3) also provides that subsequent agreement, practice, or relevant rules of international law relating to the treaty or the application of the treaty should also be taken into account in treaty interpretation. In order to avoid a situation where the ordinary meaning produced by the above data is “ambiguous or obscure” or “manifestly absurd or unreasonable,” Article 32 allows the use of “supplementary means of interpretation” to confirm the ordinary meaning by resorting to the preparatory work of the treaty and the circumstances of its conclusion. Last, but not least, due weight should also be given to the good faith principle of treaty interpretation.

B. *The Dispute and Treaty Interpretation*

Several treaty provisions are relevant to the Diaoyu Islands. In order to determine whether these provisions obligate Japan to return the Diaoyu Islands to China or otherwise define the legal status of the Islands, their we should explore the ordinary meaning within the VCLT framework. Such provisions can be roughly classified into two categories depending on whether they directly deal with the issue of territorial disposition between China and Japan. The clauses that relate to territorial disposition include:

- (1) “China cedes to Japan . . . all islands appertaining or belonging to the island of Formosa.”⁸²
- (2) “[A]ll the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China.”⁸³
- (3) “Japan renounces all right, title and claim to Formosa and the Pescadores.”⁸⁴
- (4) Japan will concur . . . trusteeship system, with the United States as the sole ministering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands).⁸⁵

The clauses that deal with treaty disposition include:

⁸¹ *Id.*

⁸² Treaty of Shimonoseki, *supra* note 24, art. 2.

⁸³ Cairo Declaration, *supra* note 26.

⁸⁴ San Francisco Treaty, *supra* note 31, art. 2 (b).

⁸⁵ *Id.* art. 3.

(5) “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.”⁸⁶

(6) “[A]ll treaties, conventions and agreements concluded before December 9, 1941, between Japan and China have become null and void as a consequence of war.”⁸⁷

The first question explores whether the Diaoyu Islands can be deemed as “appertaining or belonging to” Formosa and thus whether they were ceded to Japan under the Treaty of Shimonoseki.⁸⁸ Even though it is undisputed that Japan took control of Formosa and of the Diaoyu Islands after the treaty was concluded, the treaty neither expressly mentioned the cession of the Islands nor defined the term “appertaining or belonging to.” According to some Chinese literature, there was no practical need to clearly address the Islands in the treaty since they were small and of little economic value.⁸⁹ Unfortunately this explanation for the treaty’s silence lacks legal relevance because neither land mass nor economic value of a territory are decisive factors in determining sovereignty over a territory. They also do not constitute legally justifiable grounds to neglect the status of such a territory in a treaty.

In contrast to the Chinese view mentioned above, which considers the Islands have passed implicitly from China to Japan via the Treaty of Shimonoseki, a close examination of the context of the treaty suggests two reasons that the term “appertaining or belonging to” does not include the Diaoyu Islands. First, though the Pescadores Islands are approximately thirty nautical miles from Formosa, the treaty clearly mentions them by name and in ceding them to Japan precisely describes their geographic location instead of using vague terms such as “appertaining or belonging to.”⁹⁰ Thus, it is be unlikely that more distant Diaoyu Islands are “appertaining or belonging to” Formosa, but the closer Pescadores Islands are not.⁹¹ Moreover, the Diaoyu Islands are located around ninety nautical miles from both the Chinese island of Formosa of China and the Ryukyu Islands of Japan, which makes it difficult to explain why they are

⁸⁶ Potsdam Declaration, *supra* note 27, para. 8.

⁸⁷ 1952 Sino-Japanese Peace Treaty, *supra* note 38, art. 4.

⁸⁸ Treaty of Shimonoseki, *supra* note 24, art. 2 (b).

⁸⁹ Pan, *supra* note 53, at 81.

⁹⁰ San Francisco Treaty, *supra* note 31, art. 2 (c).

⁹¹ See Erdem Denk, *Interpreting a Geographical Expression in a Nineteenth Century Cession Treaty and the Senkaku/Diaoyu Islands Dispute*, 20 INT’L J. MARINE & COSTAL L. 97, 100–02 (2005) (discussing different interpretations of “appertaining or belonging to[.]”).

“appertaining or belonging to” Formosa but not Ryukyu.⁹² Such analysis suggests that the Diaoyu Islands should not be deemed to be “appertaining or belonging to” Formosa, and as a corollary, that the Islands were not ceded to Japan by the Treaty of Shimonoseki.

A second question whether Japan “stole” the Diaoyu Islands from China in the Treaty of Shimonoseki, thus requiring their return under the Cairo Declaration, is in part a historical and in part a legal issue. To determine whether such a “theft” took place, one has to decide whether the Diaoyu Islands already belonged to China. The logic is simple—Japan could not have stolen the Islands from China if China did not own them. This question turns not on rules of cession, but on international laws of occupation and prescription, which are beyond the scope of this article.

A third question rests on the relationship between the Potsdam Declaration and the Cairo Declaration, inquiring whether the Cairo Declaration required Japan to restore the Diaoyu Islands to China or otherwise define their legal status. The answer here is contingent upon that of the answer to the second question.

A fourth question inquires whether the Diaoyu Islands are *per se* a part of Formosa. The San Francisco Treaty only expressly requires Japan to revert Formosa to China, neither clearly mentioning the Islands nor employing such term as “appertaining or belonging to” as the Treaty of Shimonoseki did. Thus, to establish that the San Francisco Treaty imposes an obligation on Japan to revert the Diaoyu Islands to China, “Formosa” must be interpreted either as an equivalent to the Islands or as naturally including the Islands in an ordinary reading of the word. Such an interpretation is tenuous because: (1) neither China nor Japan has ever referred to the Diaoyu Islands as an equivalent to Formosa, and (2) it is at best arguable whether the Diaoyu Islands are a naturally indispensable part of Formosa.⁹³

A fifth question inquires whether the Diaoyu Islands are located within the scope of “Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands)” as written in the San Francisco Treaty.⁹⁴ The answer is affirmative, yet it must be noted that this provision only established U.S. trusteeship over the Islands rather than sovereignty. This understanding is corroborated by the subsequent actions of the United States: when the Okinawa Agreement terminated trusteeship in 1971, the United States “reverted” the Diaoyu Islands to Japan but clearly declared that it was only transferring the rights of

⁹² *Id.*

⁹³ See *supra* notes 88–92 and accompanying text.

⁹⁴ San Francisco Treaty, *supra* note 31, art. 3. The Nansei Shotō, literally the Southwest Archipelago, is another name for the Ryukyu Islands. The Daito Islands lie east of Okinawa.

administration. As this provision does not address the sovereignty issue, there is no need to interpret it further.

A final question concerns whether the legal status of the Diaoyu Islands has been addressed in any “treaties, conventions and agreements concluded before 9 December 1941 between Japan and China.” The Treaty of Shimonoseki is the only qualified treaty that may be relevant. According to the nullification provision of the 1952 Sino-Japanese Peace Treaty, if the Treaty of Shimonoseki cedes the Diaoyu Islands to Japan or otherwise confirms Japan’s occupation, the treaty should be nullified and Japan should restore the Islands to China; however, since it cannot be established that the Treaty of Shimonoseki cedes the Diaoyu Islands to Japan, it is moot to interpret this nullification provision further. Furthermore, because the PRC nullified the 1952 Sino-Japanese Peace Treaty, any contentions it derives from this treaty, even if favorable, cannot be invoked.

The above interpretation of the six provisions relies on the context of their respective treaty; however, these provisions are also closely interrelated and should be considered in an integrated manner to form a larger whole.⁹⁵ This is particularly necessary since some of these provisions are not self-sufficient and their meaning is contingent on interpretation of other treaties.⁹⁶ Indeed, interpreting these provisions as a larger whole is implicit in Article 31 (3) of the VCLT, which states that subsequent agreements, practices, or relevant rules of international law shall be taken into consideration for interpretative purpose.⁹⁷

Following the Article 31 (3) approach, one is likely to observe that the above six interpretation is confirmed and enhanced. China based its claim on the Diaoyu Islands chiefly using the Wartime Declarations, but the Declarations did not expressly mention the Islands. The San Francisco Treaty codified the Declarations, but rather than clarify its vagueness it put the Islands under U.S. trusteeship. Thus, the San Francisco Treaty, deemed by Japan as a “subsequent agreement” to the Declarations under Article 31 (3), suggests that the terms “Formosa” and “islands appertaining or belonging to Formosa” are not interpreted to cover the Diaoyu Islands. Moreover, although China did have opportunities to rectify the vagueness of the San Francisco Treaty, none of the ensuing treaties between China and Japan expressly touched upon the

⁹⁵ See generally LINDERFALK, *supra* note 72, at 151 (“[T]he interpreted treaty provision and the context together form a larger whole, a system.”).

⁹⁶ For instance, the Potsdam Declaration did not directly touch upon the territorial issue but referred to a provision of the Cairo Declaration. Similarly, the 1952 Sino-Japanese Peace Treaty did not clearly address the territorial issues but dealt with it by nullifying past agreements between Japan and China. As the meaning and enforcement of the provisions of the Potsdam Declaration and the 1952 Sino-Japanese Peace Treaty are contingent on other treaties, they are not self-sufficient in the common sense of the word.

⁹⁷ VCLT, *supra* note 67, art. 31 (3).

Diaoyu Islands. China's silence in concluding these treaties, deemed by Japan as "subsequent practice" under Article 31 (3), also suggests that the San Francisco Treaty could not be interpreted to cover the Diaoyu Islands.

C. *The Unhelpfulness of Treaty Interpretation*

Multiple treaties seek to dictate the territorial status of the Diaoyu Islands, yet none clearly address the issue. These treaties need to be interpreted within the VCLT framework to determine whether they impose an obligation on Japan to revert the Islands to China. Furthermore, because these treaties are closely interrelated, they should be interpreted in an integrated manner. On the one hand, the Treaty of Shimonoseki cannot be interpreted to cede the Islands to Japan; on the other hand, the interpretation of the Cairo Declaration, the Potsdam Declaration, the San Francisco Treaty, and the 1952 Sino-Japanese Peace Treaty also failed to provide a clear determination the legal status of the Islands. Obviously, despite the significance of these treaties in territorial disposition between China and Japan, their legal implications in determining the sovereignty over the Diaoyu Islands should not be overstated.

It is fair to conclude that treaty law cannot provide a satisfactory solution to the dispute. In the legal sense, the unhelpfulness of treaty law suggests that the international law rules of occupation and prescription, but not the rules of cession, should govern the sovereignty of the Diaoyu Islands. Therefore, it would also be practically unnecessary for China to raise the claim of reversion.

VI. CONCLUSION

Due to complicated economic, political, and social reasons, the dispute is not only a priority in Sino-Japanese relations, but also attracts profound international concern. Considering the importance China attaches to the cross-Strait relations and Sino-American relations, the dispute is extremely tough and sensitive. Given the complexity, sensitivity, and peculiarity of the dispute and China's strong reluctance to submit the dispute to international adjudication,⁹⁸ maintaining the status

⁹⁸ After China's accession to the World Trade Organization (WTO) in 2001, however, China's attitude towards international adjudication has gradually changed. China's active participation in the WTO dispute settlement illustrates this point. So far China has been involved in 107 WTO cases: 8 as complainant, 21 as a respondent, and 78 as a third party. *Disputes by Country/Territory: China*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited July 4, 2011). Given this fact, it should also be noted that the WTO mainly deals with trade issues and China is still hesitant to submit public international law disputes to international adjudication. For example, China refuses to accept ICJ compulsory jurisdiction. *See*

quo of the Islands seems to be a tentatively feasible solution for the Chinese. Yet there is a hidden danger of this solution is that this approach will make the dispute unworkable.

Today, China faces an urgent and real need to settle the dispute because the maintenance of the status quo by recent generations of Chinese leaders, serving as the guiding principle for China's strategy on the dispute since the 1970s, has practically failed. The frequent diplomatic conflicts between China and Japan in recent years illustrates that the dispute is increasingly growing into a dangerous minefield for both countries.

This article, by analyzing the relevant treaties, presents a somehow pessimistic picture. Although the purpose of the pertinent treaties was generally favorable to China, they failed to provide a solution to the dispute. Such failure suggests that the international law on cession may not be able to provide a valid legal basis for both countries to claim sovereignty over the Diaoyu Islands; however, it must be noted that recognizing the unhelpfulness of treaty law does not mean that China has a weaker claim over the Islands *vis-à-vis* Japan. As a matter of law, it may not be wise to ground China's claim on the international law on cession, but other international law rules on territorial acquisition, such as occupation and prescription, may provide legal alternatives.

The dispute is unique for the PRC because it invites cross-Straits relations and Sino-Americans relations, which are both volatile issues. The PRC attaches great significance to Sino-US relationship and deems the Taiwan issue as the "most sensitive and most important issue" between the two countries.⁹⁹ For such reason, it would be politically risky for the PRC to submit the dispute to any type of international adjudication. Given these considerations, the PRC has little maneuvering space in dealing with the dispute.

Nonetheless, both sides of the Straits should demonstrate more political flexibility and jointly work on a shared claim over the Diaoyu Islands. Understandably, such cooperation would be especially hard for the Mainland because it may damage its image as the sole legal representative of China in the international community and signal

Aloysius P. Llamazon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUROPEAN J. INT'L L. 815, 850 n. 240 (2008) ("Today, of the five permanent members of the Security Council, only Great Britain has accepted compulsory jurisdiction: France, China, the U.S., and Russia have not (nor has Germany).").

⁹⁹ See, e.g., Su Ge, *Sino-American Relations: Climbing High to See Afar*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION (Sept. 2001), http://www.uscc.gov/researchpapers/2000_2003/pdfs/sino.pdf; Chen Bingde (陳炳德), Zaimei Yanjiang: Taiwan Wenti shi Zhongguo Hexin Liyi Suozai (在美演讲: 台湾问题是中國核心利益所在), CHINA.COM (May 20, 2011), <http://news.china.com/international/1000/20110520/16551639.html>.

recognition of Taiwan. That said, one should not be too hasty to dismiss such cooperation if the “One China” framework is properly construed. Given the PRC’s extremely cautious attitude on this issue, how and at what pace China and Japan approach and settle the dispute remains to be seen.