

THE PACIFIC WAR, CONTINUED: DENATIONALIZING
INTERNATIONAL LAW IN THE SENKAKU/DIAOYU ISLAND
DISPUTE

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I. INTRODUCTION

A dispute over a group of small, uninhabited, seemingly insignificant islands in the East China Sea has sparked dangerous international discord in recent years.¹ Known as the Senkaku in Japan and the Diaoyu in China, this cluster of islands (the Islands) is located “roughly 120 nautical miles northeast of Taiwan, 200 nautical miles east of mainland China, and 240 nautical miles southwest of Japanese Okinawa.”² Japan and China bitterly contest sovereignty over the islands, and the dispute has sparked popular nationalist fervor on both sides.³ This mutually virulent animosity has manifested itself over the past several years in a series of headline-grabbing events: (1) the Japanese government’s decision, under pressure from the nationalist governor of Tokyo, to purchase the Islands from private Japanese citizens; (2) the consequent rioting in Mainland China against Japanese businesses and other symbols of Japanese culture; (3) China’s unilateral declaration of an Air Defense Identification Zone (ADIZ) covering the East China Sea; and (4) the U.S. decision to back Japan in the standoff by flying two B-52 bombers over China’s newly declared ADIZ.⁴

¹ See, e.g., Martin Fackler, *Japan Summons China’s Envoy in Latest Escalation of Tension over Disputed Islands*, N.Y. TIMES (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/world/asia/japan-summons-chinas-envoy-after-ships-near-islands.html?_r=0 (describing a meeting between the Japanese deputy foreign minister and the Chinese Ambassador to Japan during which the deputy foreign minister admonished China for a recent “incursion” towards the Islands by Chinese surveillance ships).

² 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); Chi Manjiao, *The Unhelpfulness of Treaty Law in Solving the Sino-Japan Sovereign Dispute over the Diaoyu Islands*, 6 E. ASIA L. REV. 163, 163–64 (2011) (noting that the Islands’ land area is less than seven square kilometers); Carlos Ramos-Mrosovsky, *International Law’s Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT’L L. 903, 903 (2008); Jonathan Adams, *China, Japan Fishing Boat Standoff Deepens Amid Delayed Talks*, CHRISTIAN SCI. MONITOR (Sept. 14, 2010), <http://www.csmonitor.com/World/terrorism-security/2010/0914/China-Japan-fishing-boat-standoff-deepens-amid-delayed-talks>; see also Edward A. Gargan, *Man Drowns During a Protest over Asian Islets*, N.Y. TIMES (Sept. 27, 1996), <http://www.nytimes.com/1996/09/27/world/man-drowns-during-a-protest-over-asian-islets.html>.

³ Frank Ching, *Nationalists Making Waves in Japan-China Ties*, JAPAN TIMES (Sept. 6, 2012), <http://www.japantimes.co.jp/opinion/2012/09/06/commentary/nationalists-making-waves-in-japan-china-ties/#.U1V3koV8PAh>.

⁴ Brian Spegele & Takashi Nakamichi, *Anti-Japan Protests Mount in China*, WALL ST. J. (Sept. 26, 2012), <http://online.wsj.com/news/articles/SB100008723963904437202045780000>

The conflict's recent escalation has coincided with the emergence in 2012 of new Japanese and Chinese governments. The new Chinese President, Xi Jinping, was speculated to have close ties to leaders in the People's Liberation Army even before he came to office.⁵ This assumption was seemingly confirmed by the fact that upon leaving the Presidency, Xi's predecessor Hu Jintao passed his Chairmanship of the Central Military Commission to President Xi, thereby investing Xi with more authority upon taking office than Hu himself initially enjoyed.⁶ President Xi has further expanded his authority by establishing a new National Security Council over which he presides.⁷ He launched an extensive anti-corruption campaign and took the unprecedented step of investigating the former domestic security czar and Politburo Standing Committee member Zhou Yongkang.⁸ In the wake of these developments, news reports reflexively label President Xi the

92842756154?mg=reno64-wsj (describing both the Japanese purchase of the Islands and the riots in China); Thom Shanker, *US Sends Two B-52 Bombers Into Air Zone Claimed by China*, N.Y. TIMES (Nov. 26, 2013), http://www.nytimes.com/2013/11/27/world/asia/us-flies-b-52s-in-to-chinas-expanded-air-defense-zone.html?_r=0 (describing both the Chinese declaration of the ADIZ and the U.S. response).

⁵ Tony Capaccio, *Gates Says China's Xi Has Firmer Grip on Army Than Hu Did*, BLOOMBERG VIEW (Jan. 14, 2014), <http://www.bloomberg.com/news/2014-01-13/gates-says-china-s-xi-has-firmer-grip-on-army-than-hu-did.html> (quoting former U.S. Secretary of Defense Robert Gates as saying that “[b]efore, when the Chinese did something aggressive or risky, you could say that was the PLA acting on their own . . . [n]ow . . . you’ve got to assume President Xi approved [the ADIZ] and is on board”)’ Jane Perlez, *Close Army Ties Of China's New Leader Could Test the U.S.*, N.Y. TIMES (Nov. 3, 2012), <http://www.nytimes.com/2012/11/04/world/asia/chinas-xi-jingping-would-be-force-for-us-to-contend-with.html?pagewanted=all> (speculating that Xi's closeness to the military could result in more aggressive military policies by China).

⁶ *Hu Jintao To Step Down As Military Chief, Making Xi Jinping the Most Powerful*, TIMES OF INDIA (Nov. 12, 2012), <http://timesofindia.indiatimes.com/world/china/Hu-Jintao-to-step-down-as-military-chief-making-Xi-jinping-the-most-powerful/articleshow/17190242.cms?referral=PM> (noting that Hu was forced to wait over a year after assuming the Presidency before his predecessor, Jiang Zemin, relinquished the chairmanship of the Central Military Commission to him); Jane Perlez, *New Chinese Leader Meets Nuclear Officers*, N.Y. TIMES (Dec. 5, 2012), <http://www.nytimes.com/2012/12/06/world/asia/Chinese-leader-xi-jinping-meets-officers-of-military-nuclear-unit.html> (describing a major meeting between Xi Jinping and the leaders of China's nuclear weapons force).

⁷ Jane Perlez, *New Chinese Panel Said to Oversee Domestic Security and Foreign Policy*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/world/asia/national-security-committee-china.html> (noting that President Xi's “position at the helm would serve to increase his already firm grasp on power”).

⁸ Michael Forsythe, Chris Buckley & Jonathan Ansfield, *Investigating Family's Wealth, China's Leader Signals a Change*, N.Y. TIMES (Apr. 19, 2014), <http://www.nytimes.com/2014/04/20/world/asia/severing-a-family-s-ties-chinas-president-signals-a-change.html> (describing the anti-corruption drive that has ensnared Zhou Yongkang).

most powerful Chinese leader since Deng Xiaoping.⁹ Ideologically, Mr. Xi has also asserted himself. In contrast to Mao's concept of a new nation beginning in 1949 with the Chinese Revolution, President Xi has pronounced a nostalgic, nationalistic vision of "China's 'great renewal' and 'great rejuvenation,' [which] requires both looking ahead . . . and reaching back to well before Mao's time to an image of China's earlier greatness, an earlier China that could be renewed and rejuvenated."¹⁰

Similarly, while Japan has suffered from a leadership deficit in recent years, Prime Minister Abe has proved far more adept at remaining in power than his predecessors.¹¹ Meeting some success at the beginning of his term in ameliorating Japan's economic problems, Abe has translated his success in the economic realm into a more assertive foreign policy.¹² The emergence of these two assertive, nationalist leaders suggests that hopes for a prompt resolution to the Islands dispute are dim.

Despite the increasing international prominence of the conflict and the potential for military confrontation, some commentary in the U.S. continues to discount the dispute as either a manufactured political distraction or irrational irredentism run amok.¹³ The reality is more nuanced, implicating

⁹ See, e.g., Jonathan Fenby, *Xi Dreams of Shaking Docile China From Its Slumber*, FIN. TIMES (Apr. 16, 2014), <http://www.ft.com/intl/cms/s/0/64b00cfe-c54e-11e3-89a9-00144feabdc0.html#axzz2zX0ovpEw> ("Mr Xi has emerged as the strongest Chinese leader since Deng."); *China's Xi Amassing Most Power Since Deng Raises Reform Risk*, BLOOMBERG NEWS (Dec. 30, 2013), <http://www.bloomberg.com/news/2013-12-30/china-s-xi-amassing-most-power-since-deng-raises-risk-for-reform.html> ("Xi Jinping today completes his first year as China's leader with the greatest individual sway over his nation since Deng Xiaoping."); *Reform in China: Every Move You Make*, ECONOMIST (Nov. 16, 2013), <http://www.economist.com/news/leaders/21589882-xi-jinping-has-made-himself-most-powerful-leader-deng-xiaoping-probably-good> (claiming that Xi has amassed "more power than any Chinese leader since Deng").

¹⁰ Paul Gewirtz, *China's Search for a Usable Past*, CHINAFILE (Jan. 14, 2014), <https://www.chinafile.com/xi-mao-and-chinas-search-usable-past> (comparing Xi's ideas about Chinese history with those of Mao, who only "selectively emphasized" China's past and to whom the Chinese Revolution "self-consciously marked a new beginning, and . . . defined itself in part in opposition to China's past").

¹¹ Gerard Baker & George Nishiyama, *Abe Says Japan Ready to Counter China's Power*, WALL ST. J. (Oct. 26, 2013), <http://online.wsj.com/news/articles/SB10001424052702304799404579157210861675436> (describing Prime Minister Abe as "one of Japan's most influential prime ministers in decades" and noting his desire for a "more active diplomacy for a country whose global leadership has been crimped by a rapid turnover of weak prime ministers").

¹² *Id.* (noting that Prime Minister Abe "envision[s] a resurgent Japan taking a more assertive leadership role in Asia to counter China's power" and makes "a direct link between his quest for a prosperous Japan, and . . . greater influence in the region and the world").

¹³ Mure Dickie, *Senkaku Spat Reinforces Military Rethink*, FIN. TIMES (Sept. 25, 2012), <http://www.ft.com/cms/s/0/ec105b12-06f1-11e2-92ef-00144feabdco.html>; Niall Ferguson, *All*

arcane international legal rules, deep-seated popular feelings of national pride, and geostrategic and economic interests.¹⁴

This Note will focus particularly on the applicable international legal rules in the context of the rules' interactions with popular nationalism and state interests. Following this brief introduction, Part II sets forth the historical background of the islands, and Part III describes the international law governing the dispute. Part IV analyzes how the applicable international law interacts with nationalism and state interests to the detriment of a peaceful solution.

First, this Note argues that international law has failed to attain the goals of legitimacy and utility because it forces governments to root their respective claims in historical narratives that implicate painful memories of past conflicts. Second, this Note suggests alternative legal rules that could temper the force of popular nationalism and state interests and form the basis for a sustainable resolution to this conflict. Finally, this Note cautions against marginalizing the role of international law in this situation and suggests that reasons for optimism still exist.

II. BACKGROUND

A. Each State's Historical Links to the Islands

The two sides' historical links to the Islands, which will be summarized in turn, are qualitatively different. The following summary is not meant to be exhaustive of all of the historical claims each side has made to the Islands. Rather, it is meant to provide a general impression of those claims such that the interconnection between the parties' historical claims to the Islands and their respective nationalist narratives becomes clear.

China's links to the Islands are purportedly longstanding.¹⁵ Some evidence, contained in Meiji-era Japanese government documents and maps,

the Asian Rage, NEWSWEEK (Sept. 24, 2012), <http://www.thedailybeast.com/newsweek/2012/09/23/niall-ferguson-onhow-china-is-on-the-march-in-asia.html> (portraying the Chinese ire at Japan's government as irrational and threatening); Stephen Walt, *Why doesn't China just buy the Senkaku Islands (updated)*, FOREIGN POL'Y (Sept. 21, 2012), http://www.foreignpolicy.com/posts/2012/09/21/sell_the_senkakus (indicating that the dispute has a simple and obvious solution, and failing to mention the fact that substantial economic interests are at stake).

¹⁴ David Pilling, *Asia-Pacific: Desert Island Risks*, FIN. TIMES (Oct. 1, 2012), <http://www.ft.com/intl/cms/s/o/eobc4358-oba5-11e2-b8d8-00144feabdco.html#axzz2fTL3xM5b>; Ramos-Mrosovsky, *supra* note 2, at 917.

indicates that Japan recognized China as the rightful owner of the Islands before that time.¹⁶ For instance, one of the documents, dating from the 1880s, demonstrates that the Japanese government was hesitant to assert “national markers” over the Islands at that time for fear of “invi[ng] Chinese suspicion.”¹⁷ Further evidence shows that Chinese officials used the Islands as navigation aids while traveling to tributary territories.¹⁸ Qing dynasty documents corroborate Chinese claims of historical links to the Islands. Some of these documents declare that the Islands lay within Chinese borders. Others describe the ship docking capacity of the Islands.¹⁹

Japan explicitly annexed the Islands in 1895 after decisively defeating China in the first Sino-Japanese War.²⁰ Japan now asserts that China had no stake in the Islands up to that point and insists that the Treaty of Shimonoseki, which ended the war and included Chinese cession of lands to Japan, was never the basis for Japanese sovereignty over the Islands.²¹ Further, Chinese textbooks once referred to the Islands as Japanese territory.²² The interim period between the First Sino-Japanese War and World War II saw sustained economic exploitation of the Islands themselves by private Japanese citizens.²³ The Japanese government, in contrast to these private actors, seemed unconcerned with the Islands at this time.²⁴

Japan maintained administrative control over the Islands until the end of World War II. When the San Francisco Treaty of Peace was signed, Japan agreed to cede sovereignty over territories it conquered through aggressive

¹⁵ William B. Heflin, *Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 1 ASIAN-PAC. L. & POL'Y J. 18:1, 3–4 (June 2000) (describing Chinese historical links to the Islands going back to 1372).

¹⁶ Han-yi Shaw, *The Inconvenient Truth Behind the Diaoyu/Senkaku Islands*, N.Y. TIMES (Sept. 19, 2012), http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkaku-islands/?_php=true*_type=blogs&_r=o.

¹⁷ *Id.*

¹⁸ UNRYU SUGANUMA, SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS 102 (2000).

¹⁹ Shaw, *supra* note 16.

²⁰ Ramos-Mrosovsky, *supra* note 2, at 917, 924.

²¹ *Id.* at 924.

²² *Id.* (noting that these textbooks could be found in both the Communist controlled People's Republic of China and the Nationalist-controlled Republic of China).

²³ Martin Fackler, *In Shark-Infested Waters, Resolve of Two Giants Is Tested*, N.Y. TIMES (Sept. 22, 2012), http://www.nytimes.com/2012/09/23/world/asia/islands-dispute-tests-resolve-of-china-and-japan.html?_r=o (private Japanese citizens built a factory on the largest of the Islands to make dried bonito shavings, and hunters “gathered albatross feathers for European fashion boutiques”).

²⁴ *Id.*

war.²⁵ In accordance with these post-war arrangements, the U.S. administered the Islands as part of its administration of the Ryukyu Islands.²⁶ While China considered the entire San Francisco Peace Treaty to be illegal, the Republic of China (ROC) government, which at the time was internationally recognized as the legitimate government of China, failed to object to the U.S.'s administration of the Islands.²⁷

B. A New Dimension to the Dispute: Economic Opportunities Emerge

Neither country seemed overly concerned about the Islands themselves until the late 1960s when a UN-sponsored economic development group conducted geographical surveys that concluded that the sea floor surrounding the Islands could contain “one of the most prolific oil and gas reservoirs in the world.”²⁸ Two years later under the provisions of the 1971 Okinawa Reversion Treaty, Japan reassumed administrative control over the Islands in the face of vociferous protests from both China and the ROC.²⁹

While China and Japan have normalized relations since Japan's reassertion of administrative control over the Islands, tension over the Islands never abated.³⁰ Periodically, private citizens have inserted themselves into the conflict.³¹ For instance, Chinese citizens have made abortive attempts to reach the Islands' shores before being intercepted by the Japanese Coast

²⁵ Dai Tan, *The Diaoyu/Senkaku Dispute: Bridging the Cold Divide*, 5 SANTA CLARA J. INT'L L. 134, 144 (2006).

²⁶ 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, 58 (1982) (emphasizing that the Islands were administered by the U.S. as part of the administration of the Ryukyu Islands, but conceding that under the Okinawa Reversion Treaty between Japan and the U.S., the Islands reverted to Japanese control under the theory that they were part of Okinawa).

²⁷ Han-yi 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 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 95, 155 (2008); SUGANUMA, *supra* note 18, at 125, 153–54 (noting, however, that the ROC stated that its failure to object to the arrangement should not be construed as acquiescence to Japanese sovereignty over the Islands).

²⁸ SUGANUMA, *supra* note 18, at 129–31, 153–54.

²⁹ Raul (Pete) Pedrozo, *The Building of China's Great Wall at Sea*, 17 OCEAN & COASTAL L.J. 253, 265 (2012).

³⁰ Hungdah Chiu, *Selected Recent Foreign Case, Administrative Order and Legal Opinion Concerning the Republic of China*, 5 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 187 (1985).

³¹ Ramos-Mrosovsky, *supra* note 2, at 920.

Guard.³² On the other side, Japanese citizens have landed on the Islands and built structures, such as lighthouses, drawing livid reactions from China.³³

Japan and China have at times appeared inclined to resolve the dispute—even as recently as several years ago.³⁴ For example, substantial progress has been made regarding fishing rights in the disputed areas.³⁵ In 1975, they concluded a “Fisheries Agreement.”³⁶ In 1997, that agreement was superseded by a more comprehensive one that established a “Provisional Measures Zone,” an area wherein the parties would jointly manage fishing resources.³⁷ Both sides agreed in principle to the idea of a joint development zone (JDZ). Modeled on a previous arrangement between Japan and South Korea,³⁸ the agreement would temporarily allow the parties to exploit the massive resources at stake in conjunction with one another, pending the outcome of a more comprehensive agreement.³⁹

Since 2010 when Japan arrested the captain of a Chinese fishing trawler and confiscated his boat after he veered too close to the Islands, the tenor of the conflict has been decidedly negative.⁴⁰ The most recent diplomatic spats resulted from Japan’s planned purchase of the Islands from private Japanese citizens and the ensuing riots and recriminations against Japanese citizens in China.⁴¹ Recent speculation that China might resort to military retaliation highlights just how threatening the situation has become.⁴²

III. INTERNATIONAL LAW GOVERNING THE DISPUTE

A. *Territorial Acquisition and International Rules of Sovereignty*

Under customary international law, there are five recognized methods of territorial acquisition: “discovery-occupation, cession, accretion, subjugation

³² *Id.*

³³ *Id.* at 920–21.

³⁴ Alexander M. Peterson, *Sino-Japanese Cooperation in the East China Sea: A Lasting Arrangement?*, 42 CORNELL INT’L L.J. 441, 473–74 (2009).

³⁵ Michael Sheng-ti Gau, *Problems and Practices in Maritime Delimitation in East Asia: With Special Reference to Taiwan*, 4 J. E. ASIAN & INT’L L. 377, 392 (2011).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 391.

³⁹ *Id.* at 391–94.

⁴⁰ Pedrozo, *supra* note 29, at 259–60.

⁴¹ Spegele & Nakamichi, *supra* note 4.

⁴² Dickie, *supra* note 13.

(or conquest), and prescription.”⁴³ While three of these methods might apply in the legal dispute over the Islands, only two are relevant to the present discussion of how nationalist narratives interact with international law to frustrate solutions: discovery-occupation and cession.⁴⁴

In order to demonstrate discovery and occupation effectively a state must prove that it has satisfied two elements: (1) the intent to occupy (*animus occupandi*) and (2) the actual exercise of sovereignty.⁴⁵ States must demonstrate the actual existence of sovereignty through evidence of historical governmental activity concerning the territory.⁴⁶ In the context of competing state claims, the customary international law requires that a court engage in a balancing test to determine the relative degrees of sovereignty exercised by the respective states.⁴⁷ Particularly relevant in this case is the principle sustained by the International Court of Justice regarding “claims to sovereignty over areas in thinly populated or unsettled countries, ‘very little in the way of actual exercise of sovereign rights . . . might be sufficient in absence of a competing claim.’”⁴⁸

As to cession, transfer of sovereignty is completed through an agreement by the grantor-sovereign state and the grantee-state acquiring sovereignty.⁴⁹ At least according to theory, cession cannot be accomplished through coercion.⁵⁰

⁴³ SUGANUMA, *supra* note 18, at 37.

⁴⁴ Ramos-Mrosovsky, *supra* note 2, at 913–14, 929 (noting that prescription, whereby a country obtains sovereignty through a process mirroring adverse possession in the private property context, might apply in the case of the Islands because of China’s supposed acquiescence to Japanese claims in the post-WWII period).

⁴⁵ *Id.* at 913–14.

⁴⁶ *Id.* at 914–15.

⁴⁷ *Id.* at 915.

⁴⁸ Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 43 (Oct. 16); *see also* Note, *Thaw in International Law? Rights in Antarctica Under the Law of Common Spaces*, 87 YALE L.J. 804, 821 (1978) (describing the idea that minimal control over a territory might be legally sufficient to accord a state sovereignty as nebulous and unworkable).

⁴⁹ Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan’s Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT’L L.J. 357, 360 n.19 (1995).

⁵⁰ *Id.*

B. The United Nations Convention on the Law of the Sea and Exclusive Economic Rights

The propriety of each side's purported territorial acquisition is not the only relevant international legal issue.⁵¹ The United Nations Convention on the Law of the Sea (UNCLOS) was ratified and came into force in 1994, and its provisions on seabed rights began to govern the dispute over the Islands when both China and Japan became parties to it in 1996.⁵² Under UNCLOS's Article 57, whichever country is adjudged to have sovereignty over the Islands could be entitled to an exclusive economic zone (EEZ) with a 200-mile radius extending out from the Islands' coasts.⁵³ But, the existence of such an EEZ is not clear in this case, because UNCLOS's Article 121 provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone."⁵⁴ The dispute over whether certain islands constitute "rocks" and whether they can sustain human habitation or economic life has been vigorously contested, especially in East Asia.⁵⁵ Disputes over Article 121 have become, in some cases, absurd. The Japanese government has gone so far as to assert an exclusive economic zone surrounding Okinotori, two rocks whose peaks over the Pacific Ocean at high tide measure a slight 6.3 inches above sea level.⁵⁶

IV. COMPETING LEGAL CLAIMS AND THE INTERACTION OF INTERNATIONAL LAW, NATIONALIST HISTORY, AND STATE ECONOMIC INTERESTS

A. Problems Raised By the Applicable International Law

It's clear that treaty law and the customary international law of territorial acquisition are detrimental to a resolution of the dispute.⁵⁷ Under the

⁵¹ *Id.* at 906.

⁵² Peterson, *supra* note 34, at 444.

⁵³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁵⁴ *Id.*

⁵⁵ See generally Leticia Diaz et al., *When is a "Rock" an "Island"?—Another Unilateral Declaration Defies "Norms" of International Law*, 15 MICH. ST. J. INT'L L. 519 (2007).

⁵⁶ *Id.* at 521–23.

⁵⁷ Ramos-Mrosovsky, *supra* note 2, at 934–39 (arguing that international law incentivizes provocative behavior in the dispute over the Senakakus); *id.* at 915–16 (describing how "[a] state failing to protest another's invasion of its sovereign rights may be deemed to have acquiesced to a rival's sovereignty"); Manjiao, *supra* note 2, at 163; Advertisement, *Diaoyu Islands Belong to China*, N.Y. TIMES, at A16–A17 (Sept. 28, 2012) (exemplifying China's

provisions of UNCLOS, parties may choose from a menu of four possible dispute resolution mechanisms through written declaration: according to the Law of the Sea's Part XV, Section 287, on dispute resolution, if the parties fail to come to a peaceful agreement, any of the claimants may (1) file the case with the International Tribunal for the Law of the Sea or the International Court of Justice or (2) they may opt for arbitration according to the procedures set forth in UNCLOS Annex VII.⁵⁸ But, even if the parties were to seek an adjudication of the dispute in a judicial forum, such as the International Court of Justice or in a quasi-judicial proceeding like arbitration, whether these decision makers could secure compliance is uncertain.⁵⁹ Not only are the conflicting state interests valuable, but the governments themselves would likely be subject to popular pressure to disregard the diktat of a foreign body as has occurred in similar contentious territorial disputes.⁶⁰ This pressure is especially concerning as international law and international courts are dependent on perceptions of legitimacy.⁶¹

B. The Roots of the Conflict in the Sino-Japanese Wars

The international law of territorial acquisition, as described above, relies largely on a historical accounting of a state's official contacts with a territory. In the case of the Islands, such an inquiry necessarily ties in with the most emotionally wrought times in modern Chinese and Japanese history. In analyzing official and unofficial statements by government officials in both countries, two problems become clear. First, it is impossible for the governments to make historical arguments as required by international law without drawing in extremely delicate nationalist sensitivities. Second, because these nationalist sensitivities are drawn in and are reflected by the states' legal positions, international law encourages states to marshal nationalist passions to shore up their domestic political support rather than to risk a judicial decision which might undercut that support.

efforts to publicize its legal positions regarding the Senkakus—in this case, by running a full-page ad in the New York Times).

⁵⁸ Julie A. Paulson, *Melting Ice Causing the Arctic to Boil Over: An Analysis of Possible Solutions to a Heated Problem*, 19 *IND. INT'L & COMP. L. REV.* 349, 365 (2009).

⁵⁹ Ramos-Mrosovsky, *supra* note 2, at 939–40.

⁶⁰ Achara Ashayagachat, *Surapong Wary of Temple Ruling*, *BANGKOK POST* (Jan. 4, 2013), <http://m.bangkokpost.com/topstories/329264> (discussing the International Court of Justice's case involving the Preah Vihear Temple dispute between Cambodia and Thailand, and popular pressure exerted on the Thai government not to comply with any adverse ruling).

⁶¹ THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 26 (1995).

China's position is, more obviously than the Japanese position, rooted in a nationalist historical narrative. Hyperbolically, state media in China routinely trumpets the idea that China has owned the Islands since "ancient times."⁶² To contextualize the place of the Islands within Chinese nationalist history, China stated its position while reacting to the Okinawa Reversion treaty:

Back in the Ming dynasty, these islands were already within China's sea defence area; they were islands appertaining to China's Taiwan . . . fishermen from Taiwan have all along carried out productive activities on the [D]iaoyu . . . During the 1894 Sino-Japanese War, the Japanese government stole these islands and in April 1895 it forced the government of the [Q]ing Dynasty to conclude the unequal "Treaty of Shimonoseki" by which "Taiwan together with all islands appertaining to Taiwan" . . . were ceded. Now, the Sato government has gone to the length of making the Japanese invaders' act of aggression of seizing China's territory in the past a ground for claiming that Japan has the so called "title" to the [D]iaoyu.⁶³

The Foreign Ministry's blistering statement, delivered with such conviction, is in reality historically dubious. First, the idea that China obtained title to any lands appertaining to Taiwan "[b]ack in the Ming dynasty" touches on a sensitive area for China—especially in light of the movement for Taiwan's independence.⁶⁴ In reality, while successive Chinese imperial dynasties had links with Taiwan, Taiwan was not a part of China during the Ming Dynasty.⁶⁵ Yet, because the Chinese claim to

⁶² Press Release, Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on Sept. 10, 2012, *available at* <http://www.fmprc.gov.cn/eng/xwfw/S2510/2511/1469024.shtml>.

⁶³ Zhang Zuxing, *A Deconstruction of the Notion of Acquisitive Prescription and Its Implications for the Diaoyu Islands Dispute*, 2 *ASIAN J. INT'L L.* 323 (2012) (citing to *Statement of the Ministry of Foreign Affairs of the People's Republic of China*, Dec. 30, 1971, [1972] *IS Peking Review* [Beijing Zhauba] 12).

⁶⁴ *Id.* at 334.

⁶⁵ Tonio Andrade, *Taiwan on the Eve of Colonization*, in *HOW TAIWAN BECAME CHINESE: DUTCH, SPANISH, AND HAN COLONIZATION IN THE SEVENTEENTH CENTURY* 6, 20–24 (*available at* <http://www.gutenberg-e.org/andrade/andrade01.html>) (demonstrating that Chinese from Fujian province did have trade links with Taiwan during the Ming dynasty. But, these links were

sovereignty over the Islands are partially related to its claims regarding Taiwan, any international adjudication could incidentally injure China's claims to Taiwan itself.

Further, even if there were some activities that could be construed as exercises of sovereignty over Taiwan in the sixteenth century, the existence of Chinese sovereignty over Taiwan clearly does not date back to "ancient" times.⁶⁶ Given the aforementioned reluctance on both sides to submit the Islands dispute to an international forum, the possibility that such an adjudication could negatively impact China's claims to Taiwan renders that route a nonstarter for China.

Further, the Foreign Ministry's statement raises the specter of the "unequal" Treaty of Shimonoseki, signed in 1895 after Japan routed the Qing dynasty in the First Sino-Japanese War. The statement's description of the Treaty of Shimonoseki as an "unequal treaty" (Chinese: *bupingdeng tiaoyue*) recalls the resistance efforts of the nationalist Chinese hero Sun Yat Sen, who coined the term.⁶⁷ The concept of "unequal treaties" is interesting in that when the treaties were signed the concept had no legal definition; China succeeded in introducing it into the international law discourse.⁶⁸ In conjunction with these practical legal efforts, use of the phrase indicates an effort by China to present Japanese assertions of sovereignty over the Islands as a direct affront to the nationalist struggles of both Sun and Mao Zedong, who also used the phrase in his 1920s propaganda.⁶⁹ Sun described the cancellation of the "unequal treaties" as essential to his vision of a redeemed Chinese nation, arguing that under the unequal treaties, Chinese workers had become "slaves of world powers."⁷⁰ The rhetoric used in Foreign Ministry's statements on the Islands dispute demonstrates the degree to which its international legal claims coincide with Chinese nationalist historiography.

inhibited by an imperial ban on foreign trade that existed until 1567. After lifting the ban on foreign trade, "the Ming still only tolerated overseas adventurism; they did not support it.")

⁶⁶ *Id.* at 26 (pointing to the existence of "two Chinese villages during the earliest years of Dutch settlement" in Taiwan); Press Release, *supra* note 62.

⁶⁷ Dong Wang, *The Discourse of Unequal Treaties in Modern China*, 76 PAC. AFF. 399, 400, 405–06 (2003); *id.* at 401.

⁶⁸ *Id.*

⁶⁹ *Id.* at 407; *Hu Jintao Claims the Communist Party is Sun Yat-sen's Most Faithful Successor*, CHINASCOPE (Oct. 9, 2011), <http://www.chinascope.org/main/content/view/3970/106> (demonstrating that although Sun was the founder of the ROC, the Chinese Communist Party has also enthusiastically embraced his legacy).

⁷⁰ Wang, *supra* note 67, at 408.

But while China's legal claims coincide with its preferred nationalist ideology, they are complicated by the fact that just over a century ago, "principles [such] as national independence, national sovereignty, and national equality, upon which modern international law is built, were meaningless for the Chinese; they were repugnant to their sense of a universal state and civilization. The boundaries in the Chinese world order were strictly cultural . . ." ⁷¹ As a result, some argue that to apply the international law standards of territorial acquisition to China without taking into account its historical detachment from Western legal traditions would unjustly prejudice its claims. ⁷² This contention, based on a principle of fairness, is reflected in the moral outrage of the Foreign Ministry's statements. ⁷³ Given that intent to occupy is an inalienable element of the discovery-occupation mode of acquisition, it is difficult to see how a government could intend to occupy a territory for purposes of international law when the government's agents have no concept of delimited territories. ⁷⁴

China should not be exempted from the strictures of international law simply because its boundaries were considered cultural rather than national. Nationalism as a political doctrine was not an essential basis of international law as originally conceived. ⁷⁵ Multi-national empires continued to exist in Europe itself well into the twentieth century. For instance, the Austro-Hungarian Empire rejected the idea that "the political and the national unit should be congruent," casting doubt on the premise that European conceptions of international law were inherently dependent on nationalism. ⁷⁶

⁷¹ SUGANUMA, *supra* note 18, at 101 (quoting SAMUEL S. KIM, CHINA, THE UNITED NATIONS, AND WORLD ORDER 23 (1979), wherein Kim argues that "principles [such] as national independence, national sovereignty, and national equality" were the foundations of modern international law).

⁷² *Id.*

⁷³ See generally Press Release, *supra* note 62.

⁷⁴ Ramos-Mrosovsky, *supra* note 2, at 914.

⁷⁵ ERIC HOBBSBAM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 14–19 (1990) (arguing that the present definition of a nation differs markedly from those that appeared several hundred years ago, when national populations were distinguished solely by their locations within the borders of a state rather than any other criteria such as language, religion, etc.).

⁷⁶ Stephen Schwartz, *Modern Islam and Democracy*, 6 REGENT J. INT'L L. 375, 379–80 (2008) (quoting an Austro-Hungarian politician, Karl Renner, as saying that "[n]ations should organize, not according to territorial units but as associations of persons, not as States but as peoples"); ERNEST GELLNER, NATIONS AND NATIONALISM 1 (1983).

Rather, the international law system has depended on the concept of state sovereignty that has existed at least since the Peace of Westphalia.⁷⁷ The truer reason for the moral outrage imbuing the Foreign Ministry's statement is that its past governments lacked the power, if not the will or intent, to exercise control over its far-flung territories, and that the memory of this failure is a primary driver of Chinese nationalism. The period from 1839, the date of the First Opium War, and 1949, the culmination of the Chinese Revolution, has been popularly dubbed the "Century of Humiliation."⁷⁸ About a decade prior to the American Civil War, China played host to an exponentially more devastating civil conflict: the Taiping Rebellion.⁷⁹ A heterodox Christian named Hong Xiuquan led a rebellion against the Qing dynasty.⁸⁰ Contemporary estimates are that approximately twenty million people were killed in the strife.⁸¹ The Qing government was defeated twice by powers seeking to impose their access to and control over Chinese ports by force.⁸² Japan subsequently defeated the Qing dynasty.⁸³ Further, the Chinese government lost effective control of the Boxer Rebellion in the late nineteenth century, and a "general breakdown in public order" followed.⁸⁴

After the 1911 Nationalist Revolution, China became what some claimed to be the first true republic on the Asian continent.⁸⁵ However, that revolution did not mark the emergence of a powerful Chinese state. The

⁷⁷ Marcilio Toscano Franca Filho, *Westphalia: A Paradigm? A Dialogue between Law, Art, and Philosophy of Science*, 8 GER. L.J. 955, 955 (2007) (describing the widespread notion of the Westphalian system as one "representing the beginning of modern international society established in a system of states" and instilling a strong respect for state sovereignty in international law).

⁷⁸ Alison Adcock Kaufman, *The "Century of Humiliation," Then and Now: Chinese Perceptions of the International Order*, 25 PAC. FOCUS 1, 1–2 (2010).

⁷⁹ John Newsinger, *The Taiping Peasant Revolt*, 82 MONTHLY REV.: AN INDEP. SOCIALIST MAG. 29, 29–30 (2000).

⁸⁰ *Id.*

⁸¹ Orville Schell, *Unheavenly Kingdom*, N.Y. TIMES (Feb. 4, 1996), <http://www.nytimes.com/1996/02/04/books/unheavenly-kingdom.html> (reviewing JONATHAN D. SPENCE, *GOD'S CHINESE SON: THE TAIPING HEAVENLY KINGDOM OF HONG XIUQUAN* (W.W. Norton & Co., 1997)).

⁸² John H. Matheson, *Globalization With Chinese Characteristics: China's Use of Merger, Acquisition and Investment Policy In Its Economic Development Strategy*, 15 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 10–11 (2007).

⁸³ *Id.* at 11.

⁸⁴ JOSEPH W. ESHERICK, *THE ORIGINS OF THE BOXER UPRISING* 301 (1988).

⁸⁵ Chiang Kai-Shek, *The First Asian Republic*, 28 VITAL SPEECHES OF THE DAY 34 (Nov. 1, 1961) (claiming the distinction of the First Asian Republic for the ROC after it was forcibly removed from mainland China and settled on Taiwan).

period after the Revolution, from 1916 through 1928, has been labeled the “warlord period,” aptly describing the disorganization of the state.⁸⁶

Japan’s stated position on the Islands is equally dogmatic, but its statements are not marked by the same moral outrage. Japan has insisted that no territorial dispute over the Islands exists.⁸⁷ More specifically, Japan argues that the Islands were unclaimed territory, or *terra nullius*, until 1895 and subject to acquisition by discovery and occupation.⁸⁸ Japan adamantly asserts that its acquisition of the Islands was entirely separate from the Treaty of Shimonoseki that concluded the first Sino-Japanese War.⁸⁹ In light of the evidence outlined by Han-Yi Shaw, it is arguable that the Japanese acquisition actually occurred through a coerced cession, which, as discussed above, would make it void under the San Francisco Treaty of Peace.⁹⁰ The Japanese position attempts to skirt rather than directly confront the role that Japanese militarism played in Japan’s acquisition of the Islands. In other words, Japan’s position is that some of its territorial expansion in the late nineteenth century was legitimate rather than aggressive. This position preserves both a legitimate historical legacy for Japan’s imperial period as well as legitimate title to certain lands that otherwise should have reverted to China and other countries under the San Francisco Treaty of Peace.⁹¹

The Japanese political system has been dominated in the decades since World War II by a pacifist approach to foreign policy, an attitude embedded in the post-war Constitution.⁹² This attitude has coexisted uneasily with Japan’s growth into an international economic power, and many Japanese

⁸⁶ Zhongping Chen, *The May Fourth Movement and Provincial Warlords: A Reexamination*, 37 MOD. CHINA 135, 136 (2011) (questioning the traditional dichotomy between popular nationalism and anti-warlordism and arguing that in some cases warlords promoted popular nationalism).

⁸⁷ Andrew Quinn & Paul Eckert, *U.S. Call for “Cool Heads” in China-Japan Island Dispute Goes Unheeded*, REUTERS, Sept. 28, 2012, available at <http://www.reuters.com/article/2012/09/28/us-china-japan-usa-idUSBRE88Q1ZL20120928>.

⁸⁸ Ramos-Mrosovsky, *supra* note 2, at 917.

⁸⁹ *Id.* at 924.

⁹⁰ Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT’L L. 1, 20 (2000) (stating that many believe the Islands to have been part of Taiwan at the time of the 1895 Treaty of Shimonoseki, at which point Taiwan was ceded to Japan, and that if it were, the Islands should have returned to Chinese sovereignty along with all others returned under the San Francisco Treaty of Peace).

⁹¹ Heflin, *supra* note 15, at 6–7 (describing Japan’s preferred narrative of its acquisition of the Islands through discovery and occupation).

⁹² Hudson Hamilton, *Emergence of the Right to Live in Peace in Japan*, 12 AUSTRALIAN J. ASIAN L. 35, 35 (2010).

politicians advocate the idea that Japan should abandon its solely defensive military posture in order to become a “normal” country.⁹³ The ruling Liberal Democratic Party of Japan has proposed revising the Constitution so as to increase the role of the Emperor and to provide the Self-Defense Forces with a new name (National Defense Army) and wider latitude.⁹⁴

Related to their desire to make Japan a “normal” country, Japanese nationalists aim to redeem the Japanese government’s conduct from the late nineteenth through the mid-twentieth centuries. This goal has been symbolically demonstrated by nationalist Japanese officials’ decisions to visit the Yasukuni Shrine, which commemorates Japan’s war dead—especially those from the wars with China and the U.S.—and includes convicted war criminals.⁹⁵ Each such visit inevitably raises the hackles of China, but China’s reactions have been particularly heated in the present context of heightened tensions over the Islands.⁹⁶

Japan’s self-appointed citizen-defenders of the Islands appear to have similarly retrospective attitudes: for example, on one relatively recent voyage, Japanese nationalists from the “Association to Protect Our Children’s Future From Chinese Intimidation” attempted to land on the Islands before being stopped.⁹⁷ The organization’s name, while sounding somewhat belligerent itself, does at least convey an attitude concerned more with the future than the past. Its actions, though, appeared equally geared toward the past: before the nationalists abandoned their mission to the Islands under pressure from the Japanese Coast Guard, their flag-bearer

⁹³ Patrick Cronin, *Japan’s Rightward Shift*, CNN.COM (Oct. 1, 2012), <http://globalpublicsquare.blogs.cnn.com/2012/10/01/japans-rightward-shift/>.

⁹⁴ Martin Fackler, *Japan Election Returns Power to Old Guard*, N.Y. TIMES (Dec. 16, 2012), http://www.nytimes.com/2012/12/17/world/asia/conservative-liberal-democratic-party-nearing-a-return-to-power-in-japan.html?_r=0; *LDP’s Constitutional Revision Eyes New Role for Emperor, SDF*, ASAHI SHIMBUN (Feb. 28, 2012), http://ajw.asahi.com/article/behind_news/politics/AJ201202280020; Masami Ito, *Constitution Again Faces Calls for Revision to Meet Reality*, JAPAN TIMES (May 1, 2012).

⁹⁵ *Japan’s Yasukuni Shrine*, BBC NEWS (Oct. 18, 2012), <http://www.bbc.com/news/world-asia-19987251> (describing political tensions both within Japan and between Japan and its neighbors over Japanese officials’ visits to the shrine).

⁹⁶ Michiyo Nakamoto, *Japan’s Abe Visits Yasukuni Shrine*, FIN. TIMES (Oct. 17, 2012), <http://www.ft.com/ems/s/o/e864691a-1829-11e2-80e9-00144feabdco.html#axzz2xXyLjCHL> (reporting on a visit to Yasukuni by the now-presumptive Prime Minister of Japan, Shinzo Abe, and quoting China’s state media’s reaction, which placed the visit in the context of “the stubbornness of Japan’s right-wing forces towards history... [and] the international community’s recent concerns over Japan’s increasing tilt to the right”).

⁹⁷ Fackler, *supra* note 23.

turned toward the coast guard sailors and “crisply saluted in the style of Japan’s prewar military.”⁹⁸

These analyses demonstrate that the international law of territorial acquisition undermines the goal of peacefully adjudicating international territorial disputes. It does so by requiring parties to construct and rely on nationalistic historical narratives and by providing a framework to decide which state’s nationalist myth is more sympathetic. In the past, international legal bodies have emphasized the claimants’ respective assertions of sovereignty over territory, attempting to draw sharp distinctions between legal claims based on “irredentist history and ancient documents” and those based on direct evidence.⁹⁹ In the case of the Islands, while the evidence of governmental control on both sides might be weak, not all of it descends to the level of “indirect presumptions deduced from events in the Middle Ages” that have been rejected by the International Court of Justice in the past.¹⁰⁰ Additionally, any resolution to the dispute over the Islands would require the Court to make sweeping judgments about the past two centuries of Chinese history and Japanese history and their relation to international law. That the parties would engage in nationalistic pandering is unsurprising, and international law has not truly given the parties an incentive to back away from “irredentist” history. As has been demonstrated above, the Islands are currently uninhabited and both states have scant evidence of involvement with them. Yet, despite the weakness of the respective claims in absolute terms, international law encourages the sides to ground their claims in historical narratives that evoke powerful emotions among their citizens. Instead of setting the ground for an equitable solution to the dispute, international law renders the dispute insoluble.

V. ALTERNATIVE RULES THAT MIGHT PROVIDE MORE STABLE GROUNDS FOR RESOLUTION OF THE DISPUTE

The UNCLOS provision distinguishing “rocks” from “islands” has been a bone of contention since the treaty’s inception.¹⁰¹ The parties to the treaty

⁹⁸ *Id.*

⁹⁹ Ramos-Mrosovsky, *supra* note 2, at 915.

¹⁰⁰ The *Minquiers and Ecrehos Case* (U.K. v. Fr.), 1953 I.C.J. 47, 57 (Nov. 17) (rejecting France’s legal argument that a thirteenth century war could have any bearing on its territorial dispute with the United Kingdom in the twentieth century).

¹⁰¹ Benjamin K. Sibbett, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 *FORDHAM INT’L L.J.* 1606, 1619–21 (1998) (clarifying that the UNCLOS fails to define the “economic life” and “human habitation” that must be sustained

were especially concerned with the idea that insignificant “protuberances” would grant states grounds to claim massive economic resources.¹⁰² The final language was, as discussed above, particularly vague.¹⁰³

Because territorial disputes do not remain static and new problems constantly arise involving UNCLOS, it is worth exploring how alternative rules could help guide a solution to the dispute. Further driving the need for a new set of rules is the fact that the current formulation seems ripe for manipulation.

Even, for instance, if a court were to clarify that territories unable to sustain habitation and economic life of their own are automatically deemed rocks, that might not preclude a state from introducing manmade innovations, such as desalination plants, that would make habitation and human life sustainable even though only introduced for purposes of manipulating the rule.¹⁰⁴ Presumably, increasing technological advancement will make artificial enhancement of islands that have historically been practically unsustainable more feasible.

On the other hand, if the rule were interpreted differently, and states were precluded from exercising territorial sovereignty over islands simply because they could not sustain habitation and economic life on their own, that might present other problems. An island twenty-five miles off of the coast (outside of both the territorial sea and the so-called “contiguous zone”) that had traditionally been sustained by trade with the mainland might be excluded from the UNCLOS definition.¹⁰⁵ The gaps in the treaty language therefore have major implications for both states.

Outrage in reaction to blatant manipulations of the UNCLOS rules must be tempered by the fact that parties entered the Convention with clear eyes and probably did not expect that they were sacrificing any rights they

on a territory to distinguish it as an island and also that it fails to indicate whether such habitation or economic life must be viable independent of outside support).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Phil Haas, *Status and Sovereignty of the Liancourt Rocks: The Dispute Between Japan and Korea*, 15 GONZ. J. INT’L L. 2 (2011) (discussing the possibility of installing desalination plants on islands in order to satisfy the requirements of UNCLOS). See also Paulson, *supra* note 58, at 349–50 (stating that technological changes are not the only factors that threaten to drown the rules set forth in UNCLOS and pointing to environmental changes, such as the melting of the arctic ice caps and the ensuing drive by states to access newly accessible energy resources under the melted caps, as major threats to UNCLOS).

¹⁰⁵ Carol Elizabeth Remy, *U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection*, 16 FORDHAM INT’L L.J. 1208, 1221–22 (1992–1993).

previously claimed. Had the provisions been any more specific, the parties might have backed out of the treaty for fear of waiving their claims to the Islands. Therefore, deliberate vagueness could be seen to bolster the legitimacy of the rules in the eyes of governments and their peoples at the outset—at least before any adjudication is made in reliance upon them. However, the vagueness of the rules and the understanding that neither state would have consented to the treaty knowing that it impinged on their claims would render any international decision on the matter somewhat arbitrary. Such a decision would lack legitimacy, and without willingness from either state to submit the dispute to an international forum, the rules are deprived of utility and can serve only to inflame nationalist anger.

The failure of the international law in the dispute, wrought by its imprecision and sensitivity to manipulation, might drive international actors devising and revising treaties to embrace much more specific rules that would more explicitly set forth the tests of sovereignty and the conditions for establishing EEZs. Doing so might provide greater clarity in resolving disputes.

Here again, however, the more specific the rules the less likely that states with disputes will ratify them if they fear that their interests could be negatively impacted. For example, if the UN proposed a rule whereby a certain number of inhabitants must continuously occupy the island or if the current rule were more specifically interpreted such that independent economic sustainability were required in order to establish an EEZ, then the more likely that a negatively impacted state would view the rule as illegitimate and reject it. Just because general rules might seem illegitimate due to their vagueness, they might seem equally illegitimate for their arbitrariness in the case of the UN's proposal or their anti-democratic nature (if an international tribunal such as the International Court of Justice were to develop a more specific reading of the current rule).

Other problems are associated with the laws of territorial acquisition. While the rules might seem reasonable in most contexts, the absolute quality of the sovereignty that they accord in the context of UNCLOS can, as has been mentioned, produce ridiculous claims.¹⁰⁶ The possibility that states could attempt to manipulate the UNCLOS definitions is no idle concern.¹⁰⁷ The aforementioned Okinotori Island (meaning “remote bird island,” which

¹⁰⁶ Diaz et al., *supra* note 55.

¹⁰⁷ Alicia P.Q. Wittmeyer, *The Even Smaller Rocks Japan and China Are Fighting Over*, FOREIGN POL'Y BLOG (Sept. 24, 2012, 2:15 PM), http://blog.foreignpolicy.com/posts/2012/09/24/the_even_smaller_rocks_japan_and_china_are_fighting_over.

gives some indication of its capacity for human habitation) has been the subject of continuous protection and enhancement by Japan.¹⁰⁸ For instance, Japan has taken pains to “plant extra coral around [the Islands] in an attempt to beef them up and protect them from erosion.”¹⁰⁹ Tokyo has backed up its claim with money: \$600 million has been spent on “encasing parts of the islets in concrete and steel” in hopes of keeping them from disappearing permanently—rather than just at high tide.¹¹⁰

Further, even if the rules are deemed to be legitimate by states and their populations on the principle of state assent, that does not mean that states or their citizens will deem an international tribunal or an arbitration panel’s interpretations of those rules to be legitimate. A disconnect exists between the legitimacy of international law and organizations in the abstract, where legitimacy is often inferred theoretically through factors such as “formality, determinacy, [and] assent.”¹¹¹ The enforcement of international law can be popularly viewed as illegitimate for the simple reason that it counters the accepted nationalist narrative.¹¹² Optimally, an alternative rule would promote state and popular assent both to international rules and to international tribunals enforcing them.

All of this commentary is to indicate that while it is quite necessary to criticize the current UNCLOS rules and to analyze their negative impacts, developing an alternative, even for prospective application only, is not a simple proposition with ready-made prescriptions. However, there can be a balance between the sometimes conflicting qualities of specificity and vagueness, on the one hand, and legitimacy and utility on the other.

Finally, the overriding concern in the case of the dispute over the Islands is to fashion rules that tamp down nationalist prejudices and provides the underpinnings for a settlement to which both parties would be amenable. The primary goal of the proposed rules is, therefore, to remove the dispute,

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; see also *Sino-Japanese Maritime Disputes: Islands Apart: There Is More Than Meets the Eye To The Countries’ Tense Stand-off*, *ECONOMIST* (Sept. 12, 2012), <http://www.economist.com/node/21562987>.

¹¹¹ Harlan G. Cohen, *From Fragmentation to Constitutionalization*, 25 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 381, 387 (2012).

¹¹² See generally Jean d’Aspremont & Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34 *FORDHAM INT’L L.J.* 190, 192–93, 216–17 (2011) (differentiating between the legitimacy of international organizations in their creation, which is often based on state assent, and their legitimacy in practice, which “is often generally considered illegitimate”).

in any way possible. The proposed rules below attempt to mitigate unnecessary emotional sources of conflict between the parties and to redirect the focus of conflict from retrospective angst towards the original crux of the dispute: economics.

None of the rules that follow are intended to be exclusive of one another. Instead, they provide a framework that could work together to provide states with more incentives to compromise.

A. Exclusive Economic Zones: Flexibility over Brittleness

This section explores how to craft a rule that is at once specific, legitimate, and flexible. Therefore, in the case of UNCLOS's Article 57 that provides for the 200-mile EEZ, the UNCLOS parties might propose changing the rule so that where islands have either sporadic or non-existent human populations, territorial sovereignty is only one factor of several in determining where maritime boundaries are drawn. Because resources are at stake, the rules could take into account the practical need each respective population has for those resources. Japan, for instance, is known to be energy starved.¹¹³ Its citizens also use far more energy per-capita than China's.¹¹⁴ These could be factors militating in its favor. On the other hand, China's much larger population and accelerated economic growth, both of which demand greater access to resources, might count in its favor.¹¹⁵

Further, instead of the historical evidence of each states' respective involvement with the Islands themselves, whose inherent geographical virtues are admittedly not at the heart of the dispute, the rules might include as a factor the states' historical uses of the sea-lanes above which the resources are to be found. Even though China famously prohibited foreign trade after the remarkable expeditions of Zheng He in the early 1400s, the evidence recounted above indicates that China continued to maintain ocean-going vessels for more local maritime voyages.¹¹⁶ By inquiring as to each

¹¹³ Yoko Wakatsuki, *Japan Set to Power Up Nuclear Reactor Amid Protests*, CNN.COM (June 27, 2012), <http://www.cnn.com/2012/06/27/world/asia/japan-nuclear-power/index.html>.

¹¹⁴ COUNTRY COMPARISON: ELECTRICITY CONSUMPTION PER CAPITA, <http://www.indexmundi.com/g/r.aspx?v=81000> (last visited Dec. 12, 2013).

¹¹⁵ COUNTRY COMPARISON: POPULATION, <http://www.indexmundi.com/g/r.aspx?v=21> (last visited Dec. 12, 2013); COUNTRY COMPARISON: GDP---REAL GROWTH RATE, <http://www.indexmundi.com/g/r.aspx?v=66> (last visited Dec. 12, 2013).

¹¹⁶ *What We Can Learn From Zheng He's Epic Voyages*, SHANGHAI STAR (July 21, 2005), <http://aa1.chinadaily.com.cn/star/2005/0721/v02-2.html> (describing the voyages of Zheng He, a Chinese Admiral of the Ming Dynasty who traveled throughout the coasts of Southeast Asia,

states' use of the sea-lanes surrounding the Islands rather than solely relying on their assertions of sovereignty over the territory, the rule would provide a more practical basis for sea-bed exploitation rights. Such a rule would inherently provide a tribunal or arbitral panel with more evidence with which to impose an equitable solution, because any evidence of sea-lane use would necessarily be combined with evidence of use of the territory. The current rule, whereby the Court can only weigh the very scant evidence relating to contacts with the territory in deciding the relative merits of each states' involvement with the territory itself is more speculative. As discussed above, this rule is inflammatory. Including sea-lane use as a factor might at least dampen the recent nationalist excesses. Use of the sea in itself is not linked to any of the sensitive topics discussed above—the unequal treaties, the Treaty of Shimonoseki, the First Sino-Japanese War, or the link that China has made between its rights to Taiwan and its rights to the Islands.

B. Minimal Contacts Baseline and Binding Arbitration

In cases such as this, where both governments have limited, at best, historical contact with the disputed Islands, UNCLOS could be amended to provide that neither party's claim to exclusive sovereignty will be recognized unless the parties submit the dispute to binding arbitration. This alternative is much preferred to allowing a court or arbitral panel to come up with an essentially arbitrary reading of the terms "rocks," "islands," "economic life," and "habitation." Instead, the treaty should expand on the work already done by the parties in negotiations. For instance, it might mandate that where reasonable readings of the UNCLOS provisions do not require a tribunal to conclude that one party should prevail, the parties must choose one of three courses: negotiate between themselves a Joint Development Zone, submit themselves to binding arbitration such that an arbitral panel can develop an equitable solution, or have the International Court of Justice or the International Tribunal on the Law of the Sea perform a similar function in fashioning an equitable solution.

Ultimately, it seems unlikely that any rule will have legitimacy if it grants full sovereignty over the seabed rights to either party. Both parties have demonstrated contacts with the Islands, but neither side's argument is

India, Africa, and Arabia, and the subsequent ban by the Ming Dynasty of all foreign trade); SUGANUMA, *supra* note 18 (describing Chinese use of the Islands during the Qing Dynasty as navigational markers in their journeys to the tributary Ryukyu Islands).

decisive. Both governments are constrained by their domestic publics, and, as a result, neither can submit to international adjudication because of the risk that they will lose and incur either international isolation for disregarding the ruling or domestic antipathy for complying. The situation is one in which international law should provide a stabilizing basis for the parties to negotiate, but instead it complicates them.

C. The "Condominium" Alternative

Condominium is defined in public international law as a situation wherein two states "exercise joint sovereignty over a territory."¹¹⁷ The condominium concept has firm roots in history, stretching back to feudal and even Roman times.¹¹⁸ Many international law scholars, however, have rejected the condominium concept as antiquated and incompatible with the modern state sovereignty system.¹¹⁹

However, in a dispute such as this, where neither party has substantial historical connections to the territory itself and all negotiations between the parties have envisioned the joint exploitation of resources as a conceptual solution, the condominium has potential application.¹²⁰ Therefore, in the interest of prompting adversary states to negotiate and settle their differences, the UNCLOS might be amended to require that, in cases such as this, that there be certain baselines without which absolute sovereignty cannot be exercised. The absence of any population could serve as such a baseline. Alternatively, the construction of substantial permanent structures on the territory could be another. At some point, UNCLOS could require that in the event of conflicting territorial claims, and absent sufficient historical contacts with the territory, sovereignty over surrounding seas can only be asserted through a condominium arrangement in the absence of a negotiated solution. Currently, UNCLOS only allows for sovereignty over

¹¹⁷ See generally Joel H. Samuels, *Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution*, 29 MICH. J. INT'L L. 727, 728 (2008) (providing historical and contemporary examples of condominium arrangements in international law, rebutting criticisms of the practice, and suggesting that such arrangements provide for more durable solutions to boundary disputes than alternative arrangements).

¹¹⁸ *Id.* at 730–31.

¹¹⁹ *Id.*

¹²⁰ Sheng-ti Gau, *supra* note 35, at 393–94.

the seas as an extension of full territorial sovereignty.¹²¹ Under such a revised rule, by contrast, the states' rights would depend on their maritime boundaries notwithstanding the Islands. Therefore, the Chinese claims would extend from either the mainland or Taiwan, and the Japanese claims would extend from the Ryukyu Islands.

Some scholars validly point out that ensuring cooperation in a condominium can be problematic.¹²² Obviously, it would be difficult for parties to a territorial dispute to adhere to the mandate of an international court that requires them to cooperate in administering a territory. However, the condominium could be presented as an option for states seeking compromise. States rejecting this option could instead be incentivized to delineate a compromise maritime boundary by the flexible EEZ rules outlined in the previous section. Samuels argued that the presence of a population that must abide by laws jointly conceived by the two states complicates the possibility of a condominium, but that problem does not exist here because the Islands are not inhabited.¹²³

Given the parties' previous assent to a Joint Development Zone, the possibility of a condominium arrangement might not be so far-fetched.

A condominium arrangement has only been imposed by the International Court of Justice once, in the Gulf of Fonseca case.¹²⁴ But, Antarctica has been viewed, at least by claimant states, as a potential site of a condominium for the purposes of resource exploitation.¹²⁵ Currently, Antarctica is governed jointly by the international community and states are banned from asserting national claims.¹²⁶ Except for the fact that these non-claimant

¹²¹ Christina A. Hoefsmit, *Southern Ocean Shakeup: Establishing Sovereignty In Antarctica and the Consequences For Fishery Management*, 15 ROGER WILLIAMS U. L. REV. 547, 548 (2010).

¹²² Samuels, *supra* note 117, at 730 (noting the critics of condominiums who insist that if states cannot come to an amicable resolution in the first place, they probably cannot cooperate in the daily administration of a territory under a condominium).

¹²³ *Id.* at 776 (noting that condominia have been most successful in cases where the territories at issue contained small populations).

¹²⁴ Faraz Sanei, *The Caspian Legal Regime, Pipeline Diplomacy, and the Prospects For Iran's Isolation From the Oil and Gas Frenzy: Reconciling Tehran's Legal Options With Its Political Realities*, 34 VAND. J. TRANSNAT'L L. 681, 802–03 (2001).

¹²⁵ Allan Young, *Antarctic Resource Jurisdiction and the Law Of the Sea: A Question of Compromise*, 11 BROOK. J. INT'L L. 45, 52 (1985) (describing how the U.S. proposed a condominium arrangement in Antarctica among claimant states and how this proposal was rejected by non-claimant states that nevertheless wanted to participate in administering Antarctica).

¹²⁶ Samuels, *supra* note 117, at 767.

states have interests in Antarctica, it would appear to be a similar situation to the Islands. The continent is uninhabited, several states have had minimal contact with it throughout history, and it is thought to have the potential for vast resources.¹²⁷ If a condominium has been considered in the case of Antarctica, there is no reason not to consider it in the case of the Islands.

VI. CONCLUSION

Undoubtedly, a superficial application of international relations theory might tempt us to believe that the parties' relentless pursuits of objective national interests will determine the course of the conflict. The questions of international law explored above, which have not even been directly applied to the dispute in any judicial process, could easily be seen only as window-dressing for a hardnosed showdown between two states desperate to tap a sea of vast economic resources. This Note has demonstrated not only that international interests are equally matched by domestic political concerns in both countries, but also that the applicable international law frames the domestic political discourse in a destructive way.

While acknowledging that the dispute is extremely volatile and prone to escalation at any moment, reason to hope for a peaceful resolution persists. However, in order to create the conditions necessary for such a resolution, the plane of conflict needs to be shifted: the parties must be unfettered insofar as possible from their past nationalist animosities and instead coaxed into concentrating on the future economic opportunities presented by the East China Sea. Heretofore, the applicable international law has shackled the parties to the stale narratives of the past.

Undoubtedly, nationalist provocateurs on both sides are also culprits. But, nationalist fervor has been fitful, and past negotiations (such as those in 2007, when the concept of a Joint Development Zone was agreed to) have demonstrated that when such emotions have subsided, the parties have found broad areas for agreement that belie their strident public declarations. While the current, tense situation might appear to fit squarely in the arenas of domestic politics and international geopolitics rather than international law, this Note has attempted to demonstrate how those factors coincide to the detriment of a peaceful solution. Hopefully, international rules can be

¹²⁷ Colin C. Diehl, *Antarctica: An International Laboratory*, 18 BC ENVTL. AFF. L. REV. 423, 427 (1991) (describing the potential mineral wealth of Antarctica); Young, *supra* note 125, at 69 n.114 (describing the continent not only as uninhabited, but uninhabitable).

implemented which will complement each other and prove conducive to a mutually agreeable solution.

