

Revolution, State  
Succession,  
International  
Treaties and the  
Diaoyu/Diaoyutai  
Islands



# Revolution, State Succession, International Treaties and the Diaoyu/Diaoyutai Islands

By

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Cambridge  
Scholars  
Publishing



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This book first published 2017

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-4438-9892-9

ISBN (13): 978-1-4438-9892-8

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# INTRODUCTION\*

The purpose of this project is to view the Diaoyu/Diaoyutai<sup>1</sup> Islands dispute from an interdisciplinary perspective, combining the law of treaty with the change in state authorities (if not hastily defined as state succession). In the Introduction, the significance of these two legal regimes in the context of the Diaoyu/Diaoyutai Islands dispute will be identified.

## The Law of Treaty

Beginning in 1842, the Qing Dynasty was confronted, in a forceful manner, with Western demands for China to engage more with the rest of the world. Beginning with commercial matters, the Qing government entered into a large number of treaties with these Western powers, in the course of less than a century. Treaties thus play a critical role in this process that continues to reshape regional order in East Asia.

An initial inquiry here is the role of treaty in territorial disposition in the course of contact with non-Asian countries. While most are European countries, non-European actors, such as the U.S., also joined in, albeit at a slightly later stage in the 19<sup>th</sup> century. Among these various treaties and territorial dispositions, the Shimonoseki Treaty deserves special attention in the context of the ongoing Diaoyu/Diaoyutai Islands dispute. It is significant for two reasons: on the one hand, this treaty is the first document of value in reference to the Diaoyu/Diaoyutai Islands dispute, albeit without explicit inclusion; on the other hand, this treaty was

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\* The political implications of and references to naming are clearly reflected in this dispute. China (PRC), Taiwan (ROC) and Japan have named the Islands differently, to demonstrate their sovereignty claims and administrative effects and ambitions. China (PRC) named it the Diaoyu Islands, whereas Taiwan (ROC) and Japan called it the Diaoyutai and Senkaku Islands. In this discussion, these three names are employed interchangeably, depending on the narrative context and subject of the discourse.

<sup>1</sup> Diaoyu Islands is China's (The People's Republic of China, or the PRC) term, while Taiwan uses the Diaoyutai Islands. These terms will be used interchangeably, depending on the narrative theme and subject.

concluded between two non-Western countries, China and Japan, who both experienced a painstaking process of wrangling with European powers. While it is a premature judgment that China, but not Japan, had failed the learning process, the defeat of China in the First Sino-Japanese War (1894-1895) marked different directions in the national development of the two countries and their rather destructive engagement in the 20<sup>th</sup> century.

After the 1911 Chinese Revolution, amid domestic upheaval and the eruption of the Second Sino-Japanese War, a series of international documents further stirred up the already murky water of the status and attribution of the Diaoyu/Diaoyutai Islands. These documents were: the statement by the Republican government<sup>2</sup> to declare war against Japan in 1941; the Cairo Declaration (1943), reached between three Allied countries that condemned Japanese invasions in China and required its restoration and reparation; the Potsdam Declaration (1945), confirming the Cairo Declaration; the Surrender Instrument of Japan (1945); and the Peace Treaty with Japan in 1951 (also known as the San Francisco Peace Treaty).

The situation was further complicated by the eruption of the Chinese Civil War (1945-1949), leading to split governance across the Taiwan Strait, when both claimed to be the sole legitimate Chinese government in the international community. In the wake of ideological confrontation between Communism and the West, neither China(s) were invited to join the promulgation and signing of the Peace Treaty with Japan in 1951, despite the Republican government later concluding a peace treaty with Japan in 1952. This treaty closely mirrored the wording of and the arrangements in the San Francisco Peace Treaty. Later, in 1971, the reversion of the Okinawa/Ryukyu Islands from the U.S. to Japan was concluded without the participation of China(s), the incorporation of the Diaoyu/Diaoyutai Islands allegedly being implied in Washington's narratives.

This is where the law of treaty comes in. These documents can be studied by following aspects of the law of treaty: the rule of treaty interpretation; fundamental changes in circumstances that justify the termination of treaty; and whether or not third parties' rights and obligations are affected *in absentia* of their participation.

*To summarize, the following issues will be studied in this project in respective chapters:*

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<sup>2</sup> The Republic of China later withdrew to and re-seated its capital in Taiwan in 1949.



- How should the territorial disposition stipulated in the Shimonoseki Treaty be construed? In what way were these territorial arrangements consolidated in the course of regional political and legal order change? For example, did the 1911 Xinhai Revolution in China impact upon these territorial dispositions?
- How did the political movement during the Republican era in the early 20th century shed light on territorial dispositions made in the Shimonoseki Treaty? In this context, were the territorial arrangements stipulated therein, affected?
- Later, in the 1930s, when hostility erupted between China and Japan and was formalized in 1941 when a declaration of war was issued by the then Republican government, did this belligerent status abrogate the Shimonoseki Treaty, thus nullifying territorial arrangements, as claimed by China (PRC) and Taiwan (ROC)?
- How should the territorial disposition in the Treaty of Peace with Japan (SFPT), later stipulated in 1951, be construed? A relevant issue remains: how should the consistent lack of explicit denotation of the Diaoyu/Diaoyutai Islands be explained?
- How should the relationship between the SFPT and a separate peace agreement between Taiwan (ROC) and Japan (The Treaty of Peace between the Republic of China and Japan, also known as Taipei Peace Treaty, or TPT), which nevertheless had almost identical terms, be construed? In particular, how should it be construed in the relevant context of territorial disposition regarding the Diaoyu/Diaoyutai Islands dispute?

After SFPT was signed in 1951, the connection between the Diaoyu/Diaoyutai Islands dispute and the Taiwan issue became realized and was clearly illustrated in the policy discourse and narratives of both China (PRC) and Taiwan (ROC). Because of the level to which this connection elevated this Diaoyu/Diaoyutai Islands dispute, incidents that took place at a macro level should also be considered. It is in this context that Taiwan is discussed.

Several incidents need to be considered. If the Republican government in Taiwan was deprived of Chinese representation in the UN after 1971, was this justifiable grounds on which to terminate the peace treaty with Japan entered into in 1952 (TPT)? If the TPT was nullified, how would it affect the Republican government's governance in Taiwan? Further, how would the uncertain status of the Republican government in Taiwan further impact Taiwan (ROC)'s claim over the Diaoyu/Diaoyutai Islands? If, as China (PRC) claimed, the Chinese case was one of government

succession but not state succession, was China (PRC)'s repudiation of the Treaty of Peace with Japan (SFPT) justified? How would the *de facto* Republican government in Taiwan impact China (PRC)'s succession claim? And have sovereignty claims over the Diaoyu/Diaoyutai Islands by a *de facto* ROC government helped, or attenuated China (PRC)'s claim? Who is deemed the *de jure* government and the sole Chinese representative?

To begin exploring these questions, we need to turn to the law of state succession.

## **The Law of State Succession**

The law of treaty aside, another critical dimension should be considered: the law of state succession and the change in state authorities. In the first chapter, the history, development and current status of the law of succession will be examined. Bearing in mind that its evolution is always vulnerable to external contextual changes, broader political and social vicissitudes will be discussed, to deepen the discussion.

Succession of state remains one scenario in international law in which more effort generates more confusion. Despite academic developments in different parts of the world, scholars are yet to establish a generally recognized analytical framework and have, to date largely attributed this regime to the phenomenal development of decolonization and the subsequent emergence of new states. While not denying the profound to international legal order wrought by decolonization, there are other formats of succession, in both governments and states, that are not specific to this period or process. Events in the Communist bloc in the early 1990s (German reunification and the dissolution of the Socialist Federal Republic of Yugoslavia), as well as the Chinese case, serve as valuable examples here. The Chinese case will be the focus of this project.

Succession of state or government (yet to be clarified) complicates the Diaoyu/Diaoyutai Islands dispute at the following critical points: in 1911, when the First Chinese Revolution led to the establishment of the Republican government; in 1949, when the Chinese Civil War reached its watershed, resulting in split governance (two Chinese governments, ROC and PRC) across the Taiwan Strait; and in 1971, when the Communist government (PRC) acceded into the UN, claiming legitimate Chinese representation.

The Revolution of 1911 led to the establishment of a new Republican government that embraced Western values in its governmental structure and judicial system. This raised questions about the impact these changes in state authority would have on treaties that had been previously entered

into by the Qing government and the ways in which rights and obligations under these numerous treaties would be affected came under the spotlight. This issue was further complicated by the prevailing perception that these treaties were “unequal” and so ought to be repudiated and abolished. Of primary interest is how the “un-equal-ness” of these treaty regimes should be determined. Subsequent to this is the struggle between two sets of values: the legal continuity in upholding these “unequal treaty” regimes; and the transitional justice in the course of paradigm conflict and cultural confrontation. The focus of this project will generally be the Shimonoseki Treaty which allegedly authorized the transfer of the Diaoyu/Diaoyutai Islands. Discussion of other relevant issues, such as the Taiwan (Formosa) Islands and the Okinawa/Ryukyu Islands, will also be pursued.

If we take into account the hardship surrounding a war-stricken China, it is challenging to examine these “unequal treaty” regimes by applying relevant theories without engaging any emotional sentiment. Yet, a second look at the alleged “un-equal-ness” of these treaties is justified as they could be legally implemented in a contractarian regime during an era when the use of force to advance national policy was not forbidden by law. In the wake of prevailing narratives, such as defending national independence and reviving the glory of the Chinese civilization, how these allegedly unequal treaties were examined, and their impact after the 1911 Revolution, deserves careful study.

The second succession took place over the extended time period of 1949 to 1971. The Chinese Civil War reached its critical juncture in 1949, when split governance across the Taiwan Strait created two rival regimes that simultaneously claimed to be the sole Chinese representative in the international community. The Republican government (the Republic of China government, or ROC, that retreated to Taiwan in 1949) held the UN seat until 1971 when the Communist government (the People’s Republic of China government, or the PRC, situated on the Chinese mainland) took it over and seized most of the international recognition. During this period, the Diaoyu Islands dispute was made more difficult by the two China(s) governments adopting varying positions which, in turn, put additional strain on relations. The ROC joined the international community, and recognized the Peace Treaty with Japan (also known as the San Francisco Peace Treaty, or the SFPT) via a separate treaty between the Taiwanese and Japanese authorities (also known as the Taipei Peace Treaty, or the TPT). China (PRC), *ab initio*, repudiated the SFPT regime and uniquely constructed its legal reasoning concerning the Diaoyu/Diaoyutai Islands via a series of international documents, including the Cairo and Potsdam Declarations, the Japanese Surrender Instrument, the Okinawa reversion

agreement, and the normalization of the PRC-Japan relations in 1972. The missing nexus is the SFPT, signed and widely-upheld by the international community and Taiwan.

Here, a review of China (PRC)'s claim is helpful: the Diaoyu/Diaoyutai Islands are essential to the Taiwan issue, while bearing in mind that between 1949 and 1971, the Republican government recognized the SFPT regime by establishing a subsidiary treaty system, the TPT regime. Even if China (PRC) claimed that the succession (and whether it is one of state succession or a change in government remains unsettled) started upon its establishment in 1949, Taiwan (ROC)'s recognition of the SFPT regime was a *fait accompli*, the legal implications of which could not be abrogated simply because of changes in the political situation. It is in this sense that China (PRC)'s continuing repudiation of the SFPT and the TPT is in conflict with the well-established SFPT regime and the corresponding treaty obligations that have become obligations towards the community as a whole, or obligations *erga omnes*. It is also in this context that Taiwan (ROC)'s continuing aspiration for formal statehood may pose a serious threat to China (PRC), particularly in the context of the Diaoyu/Diaoyutai Islands dispute. As suggested, the case of Chinese succession between 1949 and 1971 – which actually has continued to evolve since 1971 – remains an open question, which a full study would help answer.

*That said, this project will study the following issues in respective chapters:*

- Would the repudiation of the SFPT constitute a legal vacuum in China (PRC)'s Diaoyu/Diaoyutai Islands claim? Could this repudiation be justified from the perspective that succession occurred in 1949 and succeeded? Was the succession process concluded?
- How would China (PRC)'s repudiation of the SFPT affect its relations with Japan, despite its normal relations with Japan for more than four decades since 1972?
- How would the *de facto* existence of the ROC government in Taiwan further complicate China (PRC)'s claim over the Diaoyu/Diaoyutai Islands?
- Bearing in mind that the ROC government is still the *de facto* government in Taiwan, what is the legal effect of the ROC government's position, statement and compromises from 1949 to 1971, on China (PRC)'s claims on the Diaoyu/Diaoyutai Islands? What is the impact of the ROC's position and statements since

1971? Has the ROC's claim fortified, or attenuated, the Chinese (PRC)'s positions?

- How, then, should Taiwan (ROC)'s claim over the Diaoyu/Diaoyutai Islands be estimated? Should Taiwan (ROC) amend its claim?

## **Chapter One**

Chapter 1 will focus on the two legal scenarios in international law relevant to the Diaoyu/Diaoyutai Islands dispute: the law of treaty and of state succession. There will be a critical examination of China's understandings and practices of these international treaties, and the implications of such on the Diaoyu/Diaoyutai Islands dispute. The law of state succession, and of changes of governments, will also be studied. The Chinese case of 1911, as well as the later situation in 1949 (which is still not complete and continues to evolve to the present day), will also be studied. In a nutshell, the political status of the two Chinese governments, across the Taiwan Strait, is a key issue in the future development of the Diaoyu/ Diaoyutai Islands dispute.

## **Chapters Two to Five**

Chapters 2 to 5 will be dedicated to the study of treaties settling territorial disposition between the late Qing period to the 20<sup>th</sup> century. The focus of the discussion will be the Shimonoseki Treaty, the Peace Treaty with Japan in 1951 (SFPT) between the international community and Japan, and a separate peace treaty (TPT) between the Republican government in Taiwan and Japan in 1952. Further, two significant episodes, the 1911 Chinese Revolution, and the war declaration in 1941, and their impact upon the Shimonoseki Treaty, will be studied. From an interdisciplinary perspective, this complex structure will be viewed from the angles of the law of treaty and of state succession.

In **Chapter Two**, the Shimonoseki Treaty will be studied. Its significance lies not only in its status as an initial statement allegedly facilitating the territorial disposition of the Diaoyu Islands, but also in its milestone implication that Asian countries, (in this context China and Japan,) had learnt to utilize treaties directly to define and regulate their relations. That said, the Shimonoseki Treaty sheds light on this transformation, in both normative and pragmatic dimensions, in the following ways. On the one hand, the Shimonoseki Treaty reveals that different types of territorial sovereignty can be distinguished, however

abnormal/abstract their manifestation to a Western perspective. The cession of the Taiwan Island, allegedly with the incorporation of the Diaoyu Islands, constitutes a major category of territorial cession that can be understood as the transformation of a property from one title holder to another. In other words, the cession of Taiwan refers to the transfer of a part of China's territory, however peripheral, to Japan.

On the other hand, the Shimonoseki Treaty also showed that another type of territorial relinquishment was possible in what was then East Asia: the cession of territory concerning the moving of a jurisdictional boundary that is metaphorically "suspended above" or "over" the communities and territory subjected to the change. This type of territorial transfer refers not so much to exact transmission of rights and obligations from one sovereignty to another, as to (particularly in the context of the tributary system in East Asia respecting the Chinese empire as the overlord,) a simultaneous extension and diminution of sovereign competence for the two sovereigns concerned.

Article 1 of the Shimonoseki Treaty provides that the Qing government thereby recognized the Kingdom of Great Joseon (in the Korean Peninsula) as a full and independent sovereign, which thereby would not be subjugated under the tributary system established by the Qing government. Starting therefrom, Joseon became a full sovereign, independent from China's tributary political hierarchy, and was forced into being a Japanese protectorate in 1905, and was formally annexed to Japan in 1910.

The tributary system was tinged with the hierarchy of the political status of states in East Asia. Relations/exchanges were defined by their constructed identities within this framework that was embedded with the Confucianist concept of allegiance to the common overlord, China. This recognition of Joseon, a close vassal state, as an independent sovereignty that was no longer a member of this system can, therefore, be regarded as a hard punch to the war-stricken, devastated Chinese Qing government.

In this sense, the Shimonoseki Treaty reconfirmed, in black and white, that the tributary system established and led by the Chinese empire was at a critical juncture of transformation, particularly as the other treaty party was the non-Western, non-Christian country of Japan, which was then a nation state, newly-transformed from its historical background of Confucianism and the breeding of the Chinese civilization.

**Chapter Three** will study the following impacts: The Chinese Revolution that led to the establishment of the Republican government; the embracing of the Western values of a modern nation state; the Shimonoseki Treaty (in the group classified as "unequal treaties" between

China and foreign countries before 1911). These will be examined in the wake of prevailing political narratives that unequal treaties, as the Shimonoseki Treaty is counted, should be abrogated. It should be noted that the term “unequal treaties” is not for precise academic reference, but an instrument expedient for raging public sentiment, as it may reflect a one-sided perception with a tinge of victimhood mentality.

In the 19<sup>th</sup> century, numerous treaties were entered into between the Qing government and Western countries, which involved territorial disposition and the management of trade exchanges. Some granted further extra-territorial jurisdiction that shielded citizens of these Western countries, when present in China, from China’s sovereign jurisdiction. It is not uncommon that intertemporal practices between states tend to rely on treaties to handle their relations in a post-conflict era. From a strictly legal perspective, these treaties, however uneven in terms of the conceded privileges, rights and obligations, constitute contractarian regimes under which implementation is legally justified. Nevertheless, from the Chinese perspective, as a losing country whose interests were largely unduly compromised, these treaties were “unequal” and were the first target of repudiation once the country gained independence. Yet, whether this Chinese perspective focused more on political considerations and how its repudiation could be better confirmed and supported legally, requires a more comprehensive study.

These treaties remained in place after the Revolution of 1911, despite the efforts of the succeeding government, (the Republic of China), to re-address and fine-tune them to better serve the new country’s interests. Further, a sequence of disputes between warlords, the ensuing Second Sino-Japanese war (1941-1945), and Chinese Civil War (1945-1949), largely consumed the Republican government’s attention and resources. Thus, **Chapter Four** will examine the 1941 declaration of war and the Republican government’s subsequent repudiation of the Shimonoseki Treaty. When the Republican government declared war against Japan in 1941, it repudiated all treaties therewith. Whether the war declaration triggered the nullification of these unequal treaties, particularly the Shimonoseki Treaty, and if this nullification is *ab initio* in effect, would be critical to China’s reasoning and justification of its Diaoyu Islands claim.

The story does not end there. The later development of the Chinese Civil War that resulted in split governance across the Taiwan Strait, further complicated regional order, as well as the Diaoyu/Diaoyutai Islands dispute. Amid this continuing split governance, the international community entered into the Peace Treaty with Japan (SFPT) in 1951. **Chapter Five** will be dedicated to the Peace Treaty with Japan (SFPT), to

which neither of the Chinese governments across the Taiwan Strait were invited, due to the rising ideological confrontation between the West and Communism.

By 1949, the Chinese Civil War had led to the withdrawal of the Republican government to Taiwan, and to split governance, with two governments claiming to be the sole Chinese representative. Changes of government occurred again, providing even thornier challenges for international legal scholars. The Chinese case has yet to be settled: whether it is a case of government succession, or a mixed episode combining constitutional changes in government with revolutionary characteristics that resulted in the extinction of the original state and emergence of a new one. Undoubtedly, this uncertainty overshadows China (PRC)'s Diaoyu Islands claim. Even by claiming that the Chinese (PRC) government succeeded the Republican government (*de facto* in Taiwan), there remains a certain vulnerability in China (PRC)'s claim, should the Taiwan (ROC) government gain formal statehood and an independent legal identity in the future. This will be the threat for China (PRC), and a remote opportunity for Taiwan (ROC), should it continue its Sisyphean aspirations to statehood and formal recognition.

## Chapters Six to Eight

It is in this context that state succession, the role of treaty, and the Chinese interpretation and practice influence the future development of the Diaoyu/Diaoyutai Islands dispute. In particular, after 1949, the two rival Chinese governments adopted varying positions on certain key international treaties, such as the Peace Treaty with Japan (SFPT) signed in 1951. This is a document which directly influences the Diaoyu/Diaoyutai Islands dispute, in the sense that the Republican government recognized this treaty, which directly established the security alliance system in East Asia. The returning of the Diaoyu/Diaoyutai Islands by Washington to Tokyo occurred within this alliance system, in which the Republican government's objections were mitigated, as security concerns were then a prioritized issue. Yet, for the international community, the Peace Treaty with Japan (SFPT) was a critical nexus that stabilized post-war order in East Asia.

The Republican government in Taiwan (ROC), which held the Chinese representative seat in the UN until 1971, joined this system, standing in line with the international community. The Communist government (PRC) that took over the Chinese representative seat in 1971, repudiated this system, taking its unique legal reasoning from the Cairo and Potsdam



Declaration, the Surrender Instrument of Japan, and the Sino-Japanese statement that was issued in 1972 when relations were normalized. These two lines of reasoning conflicted with each other. The Chinese (PRC) position can be understood within this unique line of reasoning but before the issue of a split Chinese governance across the Taiwan Strait is ultimately settled, any future development of the Diaoyu/Diaoyutai Islands dispute has thereby continuously been overshadowed. At a time when the world comes to celebrate the 70<sup>th</sup> anniversary of the end of World War Two, it is a good time to further explore all these issues that represent the heart of the Diaoyu/Diaoyutai islands dispute, and the long-running antagonism between China (PRC) and Japan.

Following this theme, **Chapters Six to Eight** will study, from a micro perspective, the Chinese interpretation of the Peace Treaty with Japan and the impact on the Chinese (PRC) claim over the disputed islands. Taiwan (ROC)'s claim will be explored in **Chapter Seven**, while the Okinawa issue will be studied in **Chapter Eight**.

# CHAPTER ONE

## INTERNATIONAL TREATY, TERRITORIAL DISPOSITION AND STATE SUCCESSION: AN OVERVIEW\*

### Prologue

The vicissitudes of the Chinese empire shook regional order in East Asia, both in terms of the demise of a single country and as a terminal juncture, at a time when this part of Asia was having thrust upon it a set of Westphalian rules that later reshaped the political and legal framework in this region. One most contested issue, which is today still vehemently debated, is the maritime disputes between China and its various neighboring countries. The Diaoyu/Diaoyutai Islands<sup>1</sup> dispute in the East China Sea remains a thorn in the side of regional order. Efforts to identify the root of related structural issues could help seasoned observers and policy-makers gain a more detailed picture of the difficulties of resolution.

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\* The political implications and references to naming are clearly reflected in this dispute. China (PRC), Taiwan (ROC) and Japan named the Islands differently, to demonstrate their sovereignty claim and administrative effects and ambitions. China (PRC) named it the Diaoyu Islands, whereas Taiwan (ROC) and Japan called it the Diaoyutai and Senkaku Islands. In this discussion, these three names are employed interchangeably, depending on the narrative context and subject of the discourse.

<sup>1</sup> Different terms are used by China (People's Republic of China, PRC), Taiwan (Republic of China, ROC) and Japan, respectively as the Diaoyu, Diaoyutai and Senkaku Islands. For the convenience of discussion, the Islands will be used in due course. At times, these three terms will be used interchangeably, depending on the narrative context and subject.

## I. The Law of Treaty

### I). International Treaty and Territorial Dispositions in East Asia

Taken at face value, the Diaoyu/Diaoyutai Islands dispute is a territorial one. Three stakeholders<sup>2</sup>, each asserting respective sovereign claims, have quarreled over it since the early 1970s. However, an in depth reconsideration shows that the difficulty has actually arisen from the intertwining of various legal regimes in international law. The intractable nature of this dispute lies with the following: the law of treaty, alongside with the contexts that impact the operation and validity of these treaty regimes; the law regarding changes of authorities in the state (if not hastily classified as state succession); and further, conflicts between different paradigms of legal interpretations. Profound legacies have since continued to shape the mindset of all those involved regarding how sovereignty should be defined, territoriality practiced and, as a corollary, how national identity should be understood and re-configured.

From the Chinese (People's Republic of China, PRC) perspective, the Islands were ceded to Japan, together with the Taiwan Islands, in the Shimonoseki Treaty in 1895. Nevertheless, there is no explicit denotation of the Islands in the text of the treaty. Rather, the issue-linkage between the Islands and the Taiwan issue was not further affirmed until sometime after World War Two<sup>3</sup>. It was not until as late as 1970 that the two China(s)<sup>4</sup> raised objections to the incorporation of the Diaoyu/Diaoyutai

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<sup>2</sup> China (PRC), Japan and Taiwan (ROC) have laid sovereign claims upon the Diaoyu/Diaoyutai/Senkaku Islands. In this book, Taiwan (ROC)'s claim will be carefully examined independently from that of China (PRC).

<sup>3</sup> In the first two decades (1951-1971) after the signing of the Peace Treaty with Japan (also known as San Francisco Peace Treaty, or SFPT), the Republican government in Taiwan, led by the Chiang Kai-Shek administration, had expressed concerns and had not taken a tough position regarding territorial disposition of these islets. Several islets in the D/S Islands group were used by U.S. troops stationed in Japan as test grounds for bombing, before the reversion of the Okinawa Islands in 1972. Communist China also paid attention to the Diaoyu/Diaoyutai Islands issue and issued protests in the late 1970s against the inclusion of the Diaoyu/Diaoyutai Islands in the U.S.-Japan Okinawa reversion. A piece in Beijing's Review issued by the Foreign Affairs Ministry of the PRC demonstrated the clear connection between the D/S issue and the Taiwan issue. "Statement of the Ministry of Foreign Affairs of the People's Republic of China", *Peking Review*, 15:1 (January 1972), at 11.

<sup>4</sup> Two governments across the Taiwan Strait lay sovereign claims over the Diaoyu/Diaoyutai Islands. The claims held by China (People's Republic of China,

Islands within the reversion deal of the Okinawa Islands<sup>5</sup>. History repeated itself and the Diaoyu/Diaoyutai Islands were again subject to territorial disposition by an international treaty, albeit with one unchanging feature: that there lacked explicit reference to incorporating the Diaoyu/Diaoyutai Islands into the disputed subject. In actuality, this vague articulation in the text of various treaties, that allegedly imply the incorporation of the Diaoyu/Diaoyutai Islands, is a critical factor in defining the circumstances under which rights and obligations in treaty regimes are construed and impacted.

### **i. The Shimonoseki Treaty**

In the context of the Shimonoseki Treaty, vague articulation sheds some light on regional players' perspective on how regional order should, and actually was, being operated (or, orders under the Heaven, "Tianxia zhixu"). The connection between the Taiwan issue and the Islands dispute did not surface until the early 1970s and it is, therefore, true that this vacuum in the Shimonoseki Treaty should not be overestimated. Nevertheless, this vacuum deserves some credit because it connotes one fact: a large portion of these territorial dispositions were tackled in treaty regimes. Accompanying them were references to a variety of influences and implications that had an impact on a still-nascent concept, "territorial sovereignty" in East Asia, despite its consistent development and transformation until the present day.

In the Shimonoseki Treaty, different types of territorial sovereignty can be distinguished, however abnormal their manifestations may appear to the Western perspective. The cession of the Taiwan Islands, allegedly with the incorporation of the Diaoyu/Diaoyutai Islands, constitutes a major category of territorial cession that can be understood as the transformation of a property from one title holder to another. In other words, the cession

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PRC) and Taiwan(Republic of China, ROC) are almost identical, except in terms of the holder country to which the Islands should be attributed.

<sup>5</sup> Diplomatic archives later declassified show that the Chiang administration required the returning of the D/S Islands and had objected to include such in the Okinawa arrangement. Washington was well informed of Taipei's requirement and had asked two alliances, Tokyo and Taipei, to enter into negotiations. Ivy Lee and Fang Ming, "Deconstructing Japan's Claim of Sovereignty over the Diaoyu/Senkaku Islands", *The Asia-Pacific Journal* 10, 53:1 (December 2012). "Archives Declassified: Washington Wanted Taiwan-Japan Talks on Diaoyutai Islands", *The United Daily*, April 08, 2013.

of Taiwan refers to the transfer of a part of China's territory, however peripheral, to Japan.

However, the issue-linkage between the Taiwan issue and the Diaoyu/Diaoyutai Islands did not emerge until the early 1970s. Whether the Qing authority had developed this position (that the Diaoyu/Diaoyutai Islands constituted a part appertaining to Taiwan) remained an open question. In this sense, the lack of explicit denotation of the Diaoyu/Diaoyutai Islands in the territorial disposition in the Shimonoseki Treaty sends a different message.

Without direct denotation in either the text of the treaty or in official archives, the Shimonoseki Treaty showed that another type of territorial relinquishment was also possible in East Asia: the cession of territory concerning the moving of a jurisdictional boundary that is metaphorically "existed above" or "over" the communities and territory subjected to the change<sup>6</sup>. This type of territorial transfer referred not so much to the exact transmission of rights and obligations from one sovereignty to another, but to the context of the tributary system in East Asia that respects the Chinese empire as the overlord. This is simultaneously an extension and diminution of the sovereign competence of the two sovereignties concerned. In other words, sovereign influences from the Chinese empire might extend to vassal polities in the tributary system. Meanwhile, the vassal polities could experience varying extents of diminutions, if not limitations, because of these issues of sovereign competence. One particular issue was that such diminution was not secured by military threats or other substantial methods of force or menace. Rather, it was motivated by the self-consciousness of these vassal polities as members of the tributary system, so that respect paid to the overlord (China) was deemed to be a responsibility contingent with their admiration of the potency and sublime nature of Chinese culture.

The cession of the Diaoyu/Diaoyutai Islands fitted into this prescription. In this sense, unlike the case of the cession of the Taiwan Islands, which represents a loss of a definite piece of territory, the loss of the Diaoyu/Diaoyutai Islands was of a more symbolic nature.

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<sup>6</sup> This refers to the notion that views territory as "competence" of national states. See generally, Malcolm Shaw, "Title to territory in Africa: International Legal Issues" (Clarendon Press, Oxford, 1986), 13-14; Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed. (Geneva: Librairie Droze 1968), 4; Also, *General Theory of Law and State*, by Hans Kelsen, translated by Anders Wedberg (20th Century Legal Philosophy Series: Volume I) (Harvard University Press, Cambridge, 1945).

Another example that lends support to this symbolic territoriality in East Asia at that time is the unique provision concerning the status of the Kingdom of Great Joseon in the Korean Peninsula.

The Shimonoseki Treaty provided, in Article 1<sup>7</sup>, that the Qing government thereby recognized the Kingdom of Great Joseon (in the Korean Peninsula) as a full and independent sovereignty, which thereby would not be subjugated under the tributary system established by the Qing government. Starting therefrom, Joseon became a full sovereign state, independent from China's tributary political hierarchy, and it was forced to become a Japanese protectorate in 1905, being formally annexed to Japan in 1910.

Bearing in mind that the tributary system was tinged with the hierarchy of the political status of polities in East Asia, and that their relations/exchanges were defined by their constructed identities within this framework, that was embedded with the Confucianist concept of allegiance to the common overlord (China), this recognition of Joseon as an independent sovereignty that was no longer a member of this system could be regarded as a hard punch to the war-stricken and devastated Chinese Qing government.

In this sense, the Shimonoseki Treaty clearly reconfirmed that the tributary system, established and led by the Chinese empire, was at a critical juncture of transformation, particularly as the other treaty party was the non-Western, non-Christian country of Japan, which was then a nation state, newly-transformed from its historical background of Confucianism and the breeding of the Chinese civilization.

Further, the significance of the Shimonoseki Treaty can be highlighted in the following two ways. On the one hand, this treaty is the first document of value in reference to the Diaoyu/Diaoyutai Islands dispute. On the other hand, this treaty is concluded between two non-Western countries (China and Japan) who both experienced a painstaking process of wrangling with European powers. While it is premature to judge that China, but not Japan, failed the learning process of modernization (more controversially, westernization) and industrialization, the defeat of China in the First Sino-Japanese War (1894-1895) indeed marked different directions for the national development of the two countries and their rather destructive engagement in the 20th century.

In the context of the Diaoyu/Diaoyutai Islands dispute, a series of international documents can be identified from the late 19<sup>th</sup> century to the

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<sup>7</sup> Treaty of Shimonoseki, China-Japan, 17 April, 1895, reprinted in *Treaties and Agreements with and Concerning China: 1894-1919*, John MacMurray (ed.), vol.1 (Oxford University Press, New York, 1921), 18-19.

beginning of the 21<sup>st</sup> century<sup>8</sup>. These include the Shimonoseki Treaty, which settled the initial territorial transfer of the Taiwan Islands, with which the Diaoyu/Diaoyutai Islands was allegedly included<sup>9</sup>; the war declaration statement that repudiated “unequal treaties” between China and Japan<sup>10</sup>; the Cairo and Potsdam Declaration, which confirmed that the Japanese invasion into China should be outlawed<sup>11</sup>; the Japanese Surrender Instrument;<sup>12</sup> and the Treaty of Peace with Japan (also known as the Peace Treaty with Japan, the San Francisco Peace Treaty, the SFPT

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<sup>8</sup> The initial event, when traced back after the dispute emerged in the 1970s, was the first Sino-Japanese War in 1894, and the Shimonoseki Treaty that wrapped it up in 1895. The most recent event was the Nationalization Plan of the Noda administration in Japan and the white paper issued by the State Council in the People’s Republic of China in September, 2012. “UPDATE: Noda government to buy Senkaku Islands for 2 billion yen”, The Asahi Shimbun, 05 September, 2012. State Council Information Office, The People’s Republic of China, “Diaoyu Dao, an Inherent Territory of China”, 25 September, 2012, available on Xinhua News, 25 September, 2012, [http://news.xinhuanet.com/english/china/2012-09/25/c\\_131872152.htm](http://news.xinhuanet.com/english/china/2012-09/25/c_131872152.htm).

<sup>9</sup> Treaty of Shimonoseki, see note 7.

<sup>10</sup> The formal document is kept by the Republican government in Taiwan and has not been officially published. Nevertheless, it is argued that the Cairo Declaration, later reached among leaders of the Allied countries (The United Kingdom, The United States, and China (ROC)) in 1943, secured the Republic of China’s position regarding its renunciation of all treaty relations with Japan in the war declaration statement made in 1941. Se-hwa Wu, Fang-sang Lu and David Lin, *The Significance and Impact of the Cairo Declaration* (Chengchi University Press, Taipei, 2014).

<sup>11</sup> The U.S. Department of State, Archives, “The Cairo Conference, 1943”, last visited 20 January, 2015, <http://2001-2009.state.gov/r/pa/ho/time/wwii/107184.htm>. Also, see the white paper of the Diaoyu Islands, State Council Information Office, The People’s Republic of China, “Diaoyu Dao, an Inherent Territory of China”; The U.S. Department of State, Office of the Historian, “Milestones: 1937–1945, The Potsdam Conference, 1945”, last visited 20 January, 2015, <https://history.state.gov/milestones/1937-1945/potsdam-conf>. Cairo Declaration, 01 December, 1943, 3 U.S. T. 858; Potsdam Declaration, 26 July, 1945, 3 U.S.T. 1204.

<sup>12</sup> U.S. National Archives and Records Administration, “Featured Documents: Japan Surrenders”, last visited 20 January, 2015, [http://www.archives.gov/exhibits/featured\\_documents/japanese\\_surrender\\_document/](http://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/). Also see, Taiwan Document Project, “First Instrument of Surrender, 2 September, 1945”, last visited 20 January, 2015, <http://www.taiwandocuments.org/surrender01.htm>.

hereafter)<sup>13</sup> that relinquished Japan's rights to and interests in the territories obtained via war and the unlawful use of force; and the statement pertaining to the normalization of relations between China (PRC) and Japan in 1972<sup>14</sup>.

One common feature of most of the documents from the 20<sup>th</sup> century but before the 1970s (a period when the dispute was on the table and under formal consideration), is the lack of direct denotation of the Diaoyu/Diaoyutai Islands in the subject of the documentation. Always deemed to be a major subject of these documents<sup>15</sup>, stipulations on the territorial dispositions of the Diaoyu/Diaoyutai Islands actually appear to be negligible in these various treaty regimes. The lack of explicit reference has posed challenges regarding the interpretation of the terms of the treaties when attempts have been made to more cogently justify the lack of explicit naming of the Diaoyu/Diaoyutai Islands. Further dilemmas have been faced by dedicated Chinese scholars who have made considerable efforts, through official archives and navigation logbooks, to unearth historical evidence that demonstrates the connection between these remote barren islands and the folkloric activities of Taiwanese residents<sup>16</sup>. Nevertheless, this vacuum supports, in a cyclical manner, the observation that a sovereignty claim which requires control and administration in a relatively exclusive manner actually creates more problems than it solves when looked at, for example, from the perspective of frequent external travelers of navigation routes through these waters.

Another issue that invites the application of the law of treaty is whether third parties' rights and interests would be impacted in the absence of their participation and presence in the treaty-making process. There are two

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<sup>13</sup> Treaty of Peace with Japan (also known as the San Francisco Peace Treaty), 08 September, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

<sup>14</sup> 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], 29 September, 1972, the document is available at Xinhua News, [http://news.xinhuanet.com/ziliao/2002-03/26/content\\_331579.htm](http://news.xinhuanet.com/ziliao/2002-03/26/content_331579.htm), last visited 20 January, 2015.

<sup>15</sup> The Diaoyu/Diaoyutai Islands is seen as appertaining to the Taiwan Islands, by China (PRC), and to the Okinawa Islands, by Japan.

<sup>16</sup> Tao Cheng, "The Sino-Japanese Dispute over the Tiao-Yu-Tai (Senkaku) Islands and the Law of Territorial Acquisition", *Virginia Journal of International Law*, 14:2 (1973): 221-266; Hongdah Chiu, "An Analysis of the Sino-Japanese Dispute Over the Tiaoyutai Islets (Senkaku Cunto)", 14 *Chinese (Taiwan) Yearbook of International Law & Affairs*, 9(1996): 9-31; Steven W. Su, "The Territorial Dispute over Diaoyu/Senkaku Islands: An Update", *Ocean Development & International Law*, 36:1 (2005): 45-61;



documents that should be examined with reference to inevitable impact on third parties: the Peace Treaty with Japan (SFPT), signed in 1951 and put into force in 1952; and the agreement mandating the transfer of the Okinawa Islands from the U.S. to Japan in 1971<sup>17</sup>.

The two Chinese governments, China (PRC) and Taiwan (Republic of China, ROC hereafter), were not invited to either the promulgation or the signing of the first document<sup>18</sup>. Indeed, Taiwan (ROC) concluded a separate Peace Treaty with Japan<sup>19</sup> (also known as the Taipei Peace Treaty, the TPT hereafter), immediately following the conclusion and the putting into force of the SFPT in 1952. Yet, both the TPT (which largely mirrored the wording in the SFPT) and the SFPT itself, suffered from one major flaw: the lack of presence and participation of a third party whose interests were apparently at stake because of these documents. An important observation is that in the SFPT, the two Chinese governments constituted the critical, yet absent, third parties<sup>20</sup>. In the TPT, China (PRC) was the absent third party.

Yet, this issue of third party participation in territorial disposition in treaty regimes becomes further complicated for two reasons. In both the SFPT and TPT regimes, the meticulously crafted phrasing made the

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<sup>17</sup> Agreement Between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands, U.S.- Japan, 17 June, 1971, 23 U.S.T. 447.

<sup>18</sup> William Helfin, "Diaoyu/Senkaku Islands Disputes: Japan and China, oceans Apart", *Asian Pacific Law & Policy Journal*, 1:18 (June 2000): 1-22; Seokwoo Lee, "The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia", *Pacific Rim Law & Policy Journal*, 11:1 (2002): 63-146; Seokwoo Lee and Jon M. Van Dyke, "The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo", *The Chinese Journal of International Law*, 9:4 (2010): 741-762.

<sup>19</sup> Treaty of Peace Between the Republic of China and Japan, China-Japan, 28 April, 1952, 138 U.N.T.S. 38.

<sup>20</sup> The third party issue, is explored in, perhaps, mostly known, Case Concerning East Timor (Portugal v Australia), in 1995. See, Case Concerning East Timor (Portugal v Australia) I.C.J. Rep. 1995. Rebecca Kavanagh, "Oil in Troubled Waters: The International Court of Justice and East Timor: Case Concerning East Timor (Australia v Portugal)", *Sydney Law Review*, 18: 1 (1996): 87-96; Christine Chinkin, "East Timor Moves into the World Court", *European Journal of International Law*, 4 (1993): 206-222; Lars Kirchhoff, *Constructive Interventions: Paradigms, Process and Practice of International Mediation* (Kluwer Law International, 2008), 97-99. This East Timor case raises third party issues of intervention, procedural standing and indispensable parties in a particularly clear way, because several third party interests were involved: that of a third party State, Indonesia; that of a third party without statehood, the East Timorese; and the wider interests of the international community in the substantive issues of the case.

territorial disposition of several subjects an open question. Japan had renounced its right, title and claim upon these disputed territories<sup>21</sup>, most of which had been seized via war and invasion. However, no explicit counterparty could be identified in the context of the Japanese renunciation. This open-ended text inevitably left unanswered questions about who the recipient was. In the case of the Diaoyu/Diaoyutai Islands dispute, the situation was exacerbated after the eruption of the Chinese Civil War (1945-1949) between the Republican government and the Communist government.

## ii. The Changing Geo-Political Context

Before delving into the second issue of the law of state succession, some observations about the fluctuating geo-political context would help clarify why this vague articulation eventually made its way into the treaty text in 1951.

On the one hand, it is worth bearing in mind that amid the rising hostility and ideological confrontation between the West and Communism, a Japanese renunciation of rights that did not explicitly identify a receiving country, may have shielded the international community from being directly ensnarled in the ongoing Chinese Civil War, and to some extent, postpone the devastating confrontation between the two ideological camps. In this sense, the “anonymous” Japanese renunciation appeared to be the greatest unifying factor among then divided members of the international community<sup>22</sup>.

One the other hand, the downside should not be easily underestimated either. By not directly addressing who the receiving countries were, open-ended texts actually fueled the debates surrounding whether or not these territories became *terra nullius*: territories that belong to no one. Whilst the concept of the “*terra nullius*”, which originated in Europe and has evolved over time<sup>23</sup>, deserves a full study that goes beyond this project, its

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<sup>21</sup> The Treaty of Peace with Japan, Article 2(b), see note 12.

<sup>22</sup> John Price, “Cold War Relic: The 1951 San Francisco Peace Treaty and the Politics of Memory”, *Asian Perspective*, 25:3 (2001): 31-60.

<sup>23</sup> Rendall Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription”, *European Journal of International Law*, 16:1 (2005): 25-58; Surya Prakash Sharma, *Territorial Acquisition, Disputes, and International Law* (Martinus Nijhoff, 1997): 40-51; Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy* (Martinus Nijhoff, 2006), 72-77, arguing that a close reading of the Permanent Court of International Justice judgment in the *Legal Status of*

development demonstrates that this “international” law has undergone a socialization process, which in turn has generated some genuine benefits of the internationality of this European law, and has made it more “localized” on the one hand and genuinely “internationalized” on the other. The Taiwan Islands is a clear example of this. The related Diaoyu/Diaoyutai Islands issue is another exemplary case. Both have suffered from this lack of clarity and the difficulties in the interpretation and scope of the terms of these treaties.

The second point that makes the situation more complex is the clarification of relations between China (PRC) and Taiwan (ROC). In other words, the split governance that resulted in two competing Chinese governments, holds the key to solving the Diaoyu/Diaoyu Islands dispute. The ways in which relations between China (PRC) and Taiwan (ROC) could be legally resolved helps to dismiss doubt in the following issues: who is the absent, yet indispensable, third party in the SFPT? Who is the recipient country of Japan’s renounced rights and interests? And who is to be attributed with the sovereignty of the Taiwan Islands, to which the Diaoyu/Diaoyutai Islands constitutes an appertaining part? Going one step further, once the legal status of the ROC government, *de facto*, that has existed in Taiwan for more than six decades (1949-2016), is settled, the legal status, validity and implications of the SFPT, TPT and of the systems that were created thereunder<sup>24</sup> can also be tackled. This aspect is often a

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Eastern Greenland case (Denmark v. Norway) indicates that it would be inappropriate to describe forcible subjugation of such territories as conquest, since “conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty passes from the loser to the victorious State”. Legal Status of Eastern Greenland (Denmark v. Norway), Permanent Court of International Justice, 4 April, 1933, serial A/B no.53.

<sup>24</sup> The Treaty of Peace between the Republic of China and Japan (also known as the Taipei Peace Treaty, TPT) was signed in 1952, and was put into force in August 1952. By closely analyzing the wording in the San Francisco Peace Treaty (SFPT), it can be seen that the TPT established a system of rights and obligations subsidiary and supplementary to the SFPT system. The TPT system continued to operate even after Japan unilaterally repudiated it in 1972, right after Japan established formal ties with the People’s Republic of China. Two points support this argument. First, neither the rest of the world, nor Japan, had objected to the rights and obligations obtained by the Republic of China government under the TPT system, mostly reflected in its administration over the Formosa (Taiwan) and Pescadores Islands. Secondly, Japan also maintained substantial and close exchanges with the Republic of China government, only unofficial in name.

neglected issue, even though it is of critical importance to China (PRC)'s position.

A clarification of their relations would also help to prevent the very real risk that, despite the prevailingly-upheld "one China" policy, the *de facto* existence of ROC government in Taiwan poses a considerable threat to China (PRC)'s Diaoyu/Diaoyutai Islands claim. Should Taiwan (ROC) realize its aspiration to formal statehood and should it maintain its Sisyphean efforts to wrestle with China (PRC) for legitimate Chinese representation, the identical sovereignty claims over the Diaoyu/Diaoyutai Islands would generate fierce competition and cause a war between Scylla and Charybdis to both Beijing and Taipei. In this sense, the question of which government constitutes the indispensable third party in the territorial disposition of the Diaoyu/Diaoyutai Islands, requires considerable thought.

The China (PRC)-Taiwan (ROC) dilemma was also a feature of the agreement mandating the reversion of the Okinawa Islands by the U.S. to Japan. Washington claimed that the transfer regarded only the administration and jurisdiction power, while it took no official position on the sovereignty of the Islands<sup>25</sup>. However, official archives and later declassified records, including testimonies made in several parliamentary sessions, all demonstrated the strong preference of the U.S. authority which, it was implied, was the transfer of sovereignty to Japanese authority<sup>26</sup>. This raises questions about whether or not the interests of the

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<sup>25</sup> During Senate deliberations on whether to consent to the ratification of the Okinawa Reversion Treaty, Department of State officials asserted that reversion of administrative rights to Japan did not prejudice any claims to the islets. The State Department officials included Robert Starr, Acting Assistant Legal Adviser for East Asian and Pacific Affairs; Harrison Symmes, Acting Assistant Secretary of State for Congressional Relations; and Howard McElroy, Country Officer for Japan. When asked by the chairman of the Senate Foreign Relations Committee how the Okinawa Reversion Treaty would affect the determination of sovereignty over the Senkakus (Diaoyu/Diaoyutai), Secretary of State William Rogers answered: "this treaty does not affect the legal status of those islands at all." Mark Manyin, "Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations", Congressional Research Service, 22 January, 2013, R42761, 4-5, available at <https://www.fas.org/sgp/crs/row/R42761.pdf>, last visited 20 January 2015.

<sup>26</sup> China (PRC) takes a critical view of U.S. practices, which it sees as supporting, albeit implicitly, Japan's position. One reason is the security alliance relations between the two. It is vociferously criticized by China (PRC), that Japan, with tacit support from the U.S., has included the Diaoyu Islands in its self-defence application in the 1997 amendments of the Self-Defence Guidelines of Japan. See, Jing Sun, "Japan-Taiwan Relations: Unofficial in Name Only", *Asian Survey*, 47:5 (September/October, 2007), 790-810. Another reason is the U.S. re-focus in the

Chinese government, either China (PRC) or Taiwan (ROC), would be affected by this agreement being reached in the absence of their participation.

Again, clarification of relations between China (PRC) and Taiwan (ROC) is a pre-condition of the search for a legally-justified, reasoned and reasonable answer to this question of impact, even *in absentia*. Despite the prevailing recognition of the “one China” policy, a sustainable answer would be helpful, not only to the Taiwan issue, but also to provide a cogent solution to the long-running territorial spats between these three neighbors.

It thus becomes apparent that the relations between China (PRC) and Taiwan (ROC) constitute a critical nexus to the Diaoyu/Diaoyutai Islands dispute. After all, a political consideration such as the “one China” policy makes the biggest contribution in contexts which feature great uncertainty and which are fluid in their nature, as well as ensuring issue-driven national interests for limited periods. Rather, a legal answer would be sustainable and would benefit the Taiwan Strait and the region as a whole.

It is in this context that the law of state succession, or the changes in state authorities, comes in. Put frankly, the yet to be clarified Chinese case of succession, to which this failure could be further attributed due to the overwhelmingly strong political power, is the crux of the pending Diaoyu/Diaoyutai Islands dispute.

Summing up, the first part mainly addressed the law of treaty. The following issues will be studied in this project in respective Chapters:

- How the initial lack of wording to incorporate the Diaoyu/Diaoyutai Islands in the Shimonoseki Treaty should be construed.
- Whether the Xinhai Revolution in 1911 impacted on treaty regimes between China (Qing) and Japan (Meiji), and in particular, the Shimonoseki Treaty.
- How should the relations between the Cairo and Potsdam Declarations and the Treaty of Peace with Japan (SFPT) be construed, and what differentiates the position thereto between China (PRC) and the international community? It is worth noting that this gap may explain why the solo commemoration by China of

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Asia-Pacific region, by pushing through the “Pivot to Asia” and later, “Rebalancing” policy in the Obama administration. The increasing U.S. efforts and attentions in the East China Sea fuels China (PRC)’s suspicions, which keeps a wary eye on its future development.

the Cairo Declaration in 1913 appeared rather abrupt and received a tepid response from the international community.

- If the Treaty of Peace with Japan (SFPT), signed in 1951 and put into force in 1952, affected the rights and obligations of China (which China, the ROC or PRC) to the Taiwan Islands (from China's perspective, to which the Diaoyu/Diaoyutai Islands constitutes an appertaining part). Judging that China has repudiated the SFPT since 1951, how would this peace treaty regime which is highly regarded by the international community, affect China's position in the Diaoyu/Diaoyutai Islands dispute?
- If, as claimed by the U.S., by including the administration authority over the Diaoyu/Diaoyutai islands in the reversion of the Okinawa/Ryukyu Islands, the rights of the Republican government in Taiwan as an absent third party and the legitimate Chinese representative in the UN, were affected.
- If the fact that the Republican government in Taiwan was deprived of Chinese representation in the UN after 1971 constituted grounds to terminate the Peace Treaty with Japan entered into in 1952 (TPT). If the TPT was nullified, what effect would this have had on the Republican government's governance in Taiwan? Further, how would this uncertain status of the Republican government in Taiwan further impact Taiwan (ROC)'s claim over the Diaoyu/Diaoyutai Islands? If, as China (PRC) claimed, the Chinese case is one of governmental changes (government succession), but not one of state succession, was China (PRC)'s repudiation against the Treaty of Peace with Japan (SFPT) justified? How has the *de facto* existence of the Republican government in Taiwan impacted China (PRC)'s succession claim? And have sovereignty claims over the Diaoyu/Diaoyutai Islands by a *de facto* ROC government helped, or attenuated China (PRC)'s claim? Who is deemed the *de jure* government and the sole Chinese representative?

To answer these complex questions, we also need to look at the law of state succession.

## II. The Law of State Succession and Relevant Issues

In the wake of the worldwide expansion of European presence, beginning in the 18<sup>th</sup> and 19<sup>th</sup> centuries, one phenomenon that had a profound impact on the non-European world was the concept and corresponding emergence of the "nation state". This nascent concept