

Issues & Studies® 50, no. 3 (September 2014): 169-196.

Territorial Disputes in the South China Sea under the San Francisco Peace Treaty

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Japan occupied the Paracel and Spratly Islands in 1939 and annexed both islands into the administrative jurisdiction of Taiwan. After World War II, the troops of the Republic of China were responsible for receiving both of the islands upon the surrender of the Japanese army. On April 28, 1952, the San Francisco Peace Treaty came into force and the Sino-Japanese Peace Treaty was signed, with both treaties stipulating that Japan renounce the right, title and claim to the Paracel and Spratly Islands. According to the principle of uti possidetis and occupation, the Republic of China has had the priority right of occupation to hold the right of sovereignty to both islands since that critical date.

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KEYWORDS: San Francisco Peace Treaty; Paracel; Spratlys; Republic of China; South China Sea.

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The South China Sea has been in tumult for more than eighty years. According to the United Nations Convention on the Law of the Sea, each coastal state was to submit claims for the outer limits of its continental shelf before May 13, 2009. The territorial disputes among related countries in regard to the South China Sea flared up again when the continental shelf limits were respectively submitted by the Philippines, Malaysia, and Vietnam. All the countries around the South China Sea claim that they own the sovereignty of the islands or islets in the South China Sea by law, and so it is hard to imagine that this conflict will be resolved.

This paper tries to frame historical records and the concept of international law as the level of analysis. Since WWII, several adjudicate cases by the International Court of Justice (ICJ) have manifested a very important trend regarding the ownership of territorial sovereignty. This trend can be summarized on the basis of two principles; one is the historical claim and title, and the other is the effectivities of governance. For example, a majority decision of judges of the ICJ was based upon the two above-mentioned principles from the Sipandan and Ligitan case, Indonesia vs. Malaysia in 2002, and the Pedra Branca case, Singapore vs. Malaysia in 2008.

There are some scholars whose efforts to clarify the complicated problems of territorial disputes in the South China Sea provide various viewpoints regarding the historical context, international relations and international law in order to untie the knot. Among them, Hungdah Chiu & Choon Ho Park analyzed the territorial disputes from the perspective of history and international law. They emphasized that China has a more affirmative inchoate title for discovering and using the Paracel Islands longer than Vietnam. Based on the principle of prescription, they argued that Vietnam's occupation did "not even approximate the requirement of 'continuous and undisturbed exercise of sovereignty over [a territory].'"

Its actions concerning the Paracels were sporadic and were frequently challenged by China.”¹ They also took the view of Chinese discovery and historic use of or settlement on these islets to rebut the arguments of France and Vietnam regarding the Spratly Islands. Doubtless, their viewpoints in relation to international law are considered by researchers to be more heuristic.

To selectively provide the historic documents, this paper focuses on two significant events which are important to the South China Sea disputes in the conduct of this research. First, Japan occupied the Paracel and Spratly Islands in the prewar period and placed the two island groups under the jurisdiction of Taiwan. Second, Japan renounced the two island groups as a stipulation of the San Francisco Peace Treaty.

In terms of the paragraph of Article 2 of the San Francisco Peace Treaty, September 8, 1951: “Japan renounces all right, title, and claim to the Spratly Islands and to the Paracel Islands.” The treaty came into force on April 28, 1952.

Accordingly, there are three dimensions of the territorial issue, which relate to disputes arising from China, France and Japan. These dimensions are discussed in this paper and involve the use of historic records.

First, a French warship invaded the Paracel Islands in 1925. In 1931, France and China disputed the territorial authority of the Paracel Islands.

Second, starting in 1933, there was a dispute over the territorial authority of the Spratly Islands among Japan, France, and China.

Third, Japan renounced the Paracel and Spratly Islands according to the terms of the San Francisco Peace Treaty in 1951. What does this action on the part of Japan mean under international law? The San Francisco Peace Treaty came into force and the Sino-Japanese Peace Treaty was signed on April 28, 1952. Could the effective date of both treaties as

¹Hungdah Chiu and Choon-Ho Park, “Legal Status of the Paracel and Spratly Islands,” *Ocean Development and International Law Journal* 3, no. 1 (1975): 1-28.

a critical date² be the basic date on which to judge who owns the Paracel and Spratly Islands?

Several kinds of ideas and concepts of international law can be used to analyze the issue of territorial sovereignty. In this paper, in order to concentrate on core theory-building, a “critical date” is selected as a conceptual tool to discern the qualifications of the disputing parties in connection with the historical records used to support the arguments. By using that conceptual tool, the qualification of the disputing party will be determined in the game of the territorial dispute.

The “critical date” is the key date of causing the conflicts among the relevant countries. The action or proof that is provided by each country before the date will be able to become a basis to judge the territorial ownership, and likewise after the date. However, some scholars have argued that action taken after the date is helpful to consolidate the legal position of the territory that is claimed by the country involved, and thus such action should be considered or adopted. As to which date is the critical date should depend on the judge’s decision. The judge has the power to decide which day the critical date should be on.³

However, because both the coming into force of the San Francisco Peace Treaty and the signing of the Sino-Japanese Peace Treaty took place on April 28, 1952, does that day become the critical date or not? What is the legal effect caused by the same day when the Paracel and Spratly Islands were renounced? The legal effect caused by the renouncement of the islands deserves to be given weight. This paper vouches for April 28, 1952 to serve as the critical date, as the foundation of this discussion.

Selecting 28 April 1952 as the “critical date” is based on the following considerations.

²Anthony Aust, *Handbook of International Law* (New York: Cambridge University Press, 2010), 35; Robert Yewdall Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 31.

³Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (The Hague: Kluwer Law International, 2000), 94-95.

First, the San Francisco peace conference was an international conference; its decisions have validity and reliability in terms of international law.

Second, during the conference, there was a dispute over the Paracel and Spratly Islands. The draft of the peace treaty was distributed to the members of the conference before the meeting. The representative of the Soviet Union proposed a motion that the People's Republic of China owned the Paracel Islands and Spratly Islands. However, the motion failed in the voting. Even the representative of Vietnam argued that both islands should belong to Vietnam; there was no discussion or voting on this argument. The representative of France agreed with the UK's idea to stand for renouncement by Japan.

Third, Japan renounced both islands occupied during WWII; that means by doing so those lands should be "terra nullius".

Fourth, due to the conflict of representation between the Republic of China and People's Republic of China, neither country was invited to attend the peace conference. However, the foreign minister of the PRC, Chou Enlai (周恩來), issued a statement on 15 August, which emphasized that both islands belonged to the PRC. On the other hand, the foreign minister of the ROC, George K.C. Yeh (葉公超), on 5 February 1952 informed the press that the future Sino-Japanese Peace Treaty should have the same content as the San Francisco Peace Treaty.⁴ This means that the Sino-Japanese Peace Treaty should include the articles on the Paracel Islands and Spratly Islands. It was realized in the Sino-Japanese Peace Treaty.

Fifth, both France and Vietnam were signatory states to the San Francisco Peace Treaty and indeed arguable parties on the issues of both islands. The ROC and PRC expressed their arguments outside the conference. In terms of international law, these four parties simultaneously became new disputing parties on 28 April, 1952, the date the San Francisco Peace Treaty took effect.

⁴"The ROC Should Take the San Francisco Peace Treaty as a Model of the Sino-Japanese Peace Treaty," *Taiwan minshengri bao* (Taiwanese People's Sound Daily), February 6, 1952, P1.

Since the territorial disputes in the South China Sea are going to involve legal appeals among the disputing parties, for example, the Philippines has brought its dispute with China to the Arbitral Tribunal of the United Nations, clarifying the legal basis will positively contribute to a peaceful resolution in the South China Sea area.

Governing of the Paracels

On May 15, 1909, during the Qing Dynasty, the then governor-general of Yuè (Guangdong) Province, Chang Renjun (張人駿), sent General Lee Jun (李準), a Guangdong naval commander, to patrol, name the islands, and draw a map of the Paracel Islands. Afterwards, the Paracel Islands were governed by Yat (崖) county, Guangdong Province.⁵ France challenged the sovereignty of the Paracels with a note verbale to China in 1931. The Chinese government rebutted the arguments put forward by France and disagreed with this dispute by means of a submission to the Permanent Court of Arbitration. The French Governor-General of Indochina in June 1938 gave an order which was to establish the Paracel Islands Representative Office (*Délégation des Paracels*) that would be administered by Thua Thien province.⁶ Japan occupied the Paracels in March 1939 and placed it under the jurisdiction of the Japanese Taiwan authorities.

After Japan's surrender, the authority of the South China Sea Islands was put under the jurisdiction of the Taiwan Executive Office of the Governor from December 1945 to July 12, 1946.⁷ In July 1946, the Chinese Executive Yuan decided to transfer the authority of the Spratlys

⁵Tian Shi Chen, *Compilation of Files of the Paracel and Pratas Islands, Files of the Paracel Islands* (Shanghai: The Commercial Press LTD, 1928), 3-4.

⁶The Republic of Vietnam Embassy in Taipei, "Sovereignty of Vietnam over the Paracel Islands," *Vietnamese News*, no. 9, March 15, 1959, 1-7; Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, 110.

⁷Academia Historica, "Not Delimited Island Case," *File of Taiwan Province Administrative Official Government*, Collection No. 00315800010001, July 12, 1946, http://163.29.208.22:8080/adminShowImage/connect_img.php?s=496100350003&e=2.

and Paracel Islands to Guangdong Province. On January 7, 1947, China announced that they had taken over the Paracel Islands and the Spratlys. However, the French Embassy in China protested against the announcement by China.

On February 18, 1947, the Viet Minh, an executive parties alliance of the Democratic Republic of Vietnam, broadcasted through the media that the French Premier proclaimed that the agreement between France and Vietnam was abrogated on March 6, 1946, and claimed that it was impossible for the Viet Minh to take part in the French Union government and that they would fight for Vietnamese independence. The Viet Minh also denounced the action taken by France to compete for the Paracel Islands as unjustifiable.⁸

When the Chinese Communist Party established its regime on October 1, 1949, soldiers of the Republic of China retreated from the Paracel Islands to Taiwan on May 8, 1950 out of tactical considerations. However, the Republic of China did not renounce its authority over the Paracel Islands at that time or later.

Governing of the Spratly Islands

Japan was the second country⁹ to investigate the phosphorous guano on the Spratly Islands in 1917, including Itu Aba Island, the Northeast and Southwest Islands, West York Island, and Thitu Island, respectively. On May 13, 1919, two businessmen, Keisaburo Hashimoto (橋本圭三郎) and Wuluji Kamiyama (神山閔次), petitioned the Japanese Foreign Minister, Kosai Uchida (内田康哉), that the Spratly Islands should be annexed into

⁸“Vietminh Broadcasts to Fight Forever for Independence and Refutes the Irrational Contest for the Paracel Islands,” *People News*, February 19, 1947, P1.

⁹The first country was the United Kingdom which exploited the phosphorous guano in Spratly Island and Amboyna Cay in 1877. See “Spratley (or Storm) Island and Amboyna Cay Island, Borneo: Establishment of British Claim to Sovereignty,” *National Archives of the United Kingdom*, date range: January 1, 1931-December 31, 1933, Reference: TS 27/808.

the domain of Japan with the aim of exploitation.¹⁰ On June 10, 1919, the Laza Island Phosphorous Mine Corporation registered with the Tokyo District Court in order to obtain the mining rights for the islands. It was the first time that the Spratly Islands came under Japanese administrative jurisdiction. In particular, the permission for mining was granted by the Japanese government.

In 1929, the mining industry was greatly influenced by the world economic recession, and so the Laza Corporation terminated its mining activity and sent back three officers and one hundred and thirty workers to Japan.¹¹ As a consequence, the Laza Corporation withdrew its mining business from the Spratly Islands. On April 13, 1930, the French gunboat “Malicieuse” occupied Spratly Island (*de La Tempete*) and nearby reef islands. The French Ministry of Foreign Affairs did not approve the occupation originally, but finally they were forced to accept the fact.¹² On July 15, 1933, France announced that it had occupied nine islands of the Spratly Islands, including Caye d, Amboine, Spratly, Itu Aba, Namyit, Loaita, Lan Kian Cay, Thitu, N. E. Caye, and S. W. Caye. On July 26, France published the information regarding the annexed islands in the *Journal Officiel de la Republique Francaise*. On December 21, France decided to put those annexed islands under the administration of Baria Province, Cochinchina.¹³ The Chinese government and the Japanese government

¹⁰Tatsuo Urano, ed., *Materials System of Political and Social History of Asia-Africa International Relations* (in Japanese), Vol. 2, No. 5i (Tokyo: Babirus Publishing, 2007), 4820. http://rnavi.ndl.go.jp/mokuji_html/000008525365.html; http://www.jacar.go.jp/DAS/meta/listPhoto?IS_STYLE=eng&ID=M2006092115163839910.

¹¹For the activities of the Japanese in the Spratly Islands, please see Wun-iji Yamamoto (山本運一), ed., *Shinnan Islands* (Taipei: Ichi Susumu Printing, 1939), 9-11; Toyosei Fujii (藤井豊政), “The Possession of Shinnan Islands,” *Chuokoron* (中央公論) (Tokyo) 5, no. 622 (June 1939): 154-58; Chieushi Wakabayashi (若林修史), “Past and Present of the Shinnan Islands,” *Taiwan Times Pao*, no. 234 (May 1939): 190-203; Taro Yamashita (山下太郎), “The Records of Exploration in the Shinnan Islands (I)” *Taiwan Times Pao*, no. 235 (June 1939): 190-95; Taro Yamashita (山下太郎), “The Records of Exploration in the Shinnan Islands (II),” *Taiwan Times Pao*, no. 236 (July-August 1939): 165-75.

¹²Stein Tønnesson, “The South China Sea in the Age of European Decline,” *Modern Asian Studies* 40, no. 1 (February 2006): 5.

¹³Ulises Granados, “As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937,” *Pacific Affairs* 78, no. 3 (Fall 2005): 451.

made an official announcement reacting to the occupation by France.

On December 21, 1934, the Review Board of the Water and Land Map of China passed a resolution that confirmed that the Spratly Islands and the Paracels belonged to China and published a formal map of four island groups in the South China Sea, its domain of the southernmost part being located at James Shoal.¹⁴

Japan dispatched troops to occupy the Spratly Islands on January 7, 1939. France demanded that the dispute be submitted to the Permanent Court of Arbitration, but Japan did not approve the proposal. Besides, Japan, in light of its planned policy, decided to transfer the administration of the Spratly Islands to the Office of the Governor-General of Taiwan.¹⁵

On March 30, the No. 122 official notice posted by the Governor-General of Taiwan stated that the Spratly Islands were under the administration of the Office of the Governor-General of Taiwan and were named the Shinnan Islands (Spratly Islands) District, Kaohsiung City, Kaohsiung County. The scope of the Spratly Islands is encircled by the longitude and latitude listed below: (1) 12°N, 117°E; (2) 9°N, 117°30'E; (3) 8°N, 116°E; (4) 7°N, 114°E; (5) 7°N, 111°30'E; (6) 9°N, 111°30'E; (7) 12°N, 114°E.¹⁶ The Spratly Islands is composed of thirteen main islands and islets: North Danger S. W.; North Danger N. E.; West York; Flat; Thi Tu; Loaita; Itu Aba; Spratly; Amboyna; Nam-yit; Sin Cowe; Sand Cay; Nanshan.¹⁷

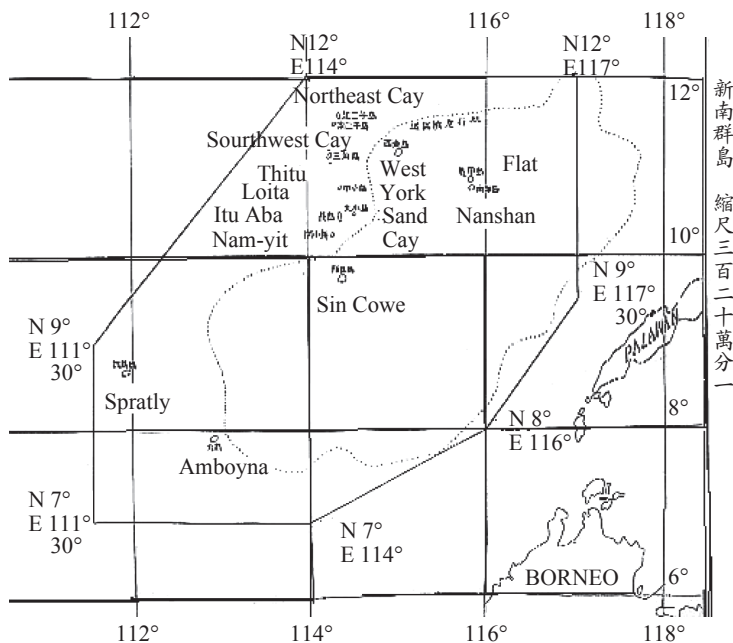
On March 31, the Japanese government informed the French Embassy stationed in Japan of its annexation of the Spratly Islands. However, France and the United Kingdom were against this annexation.

¹⁴Jindai lishi shang Zhongguo zhengfu wei Nanhai zhudao mingming de qingkuang” (The naming of islands of South China Sea by the Chinese government in modern history), *Duowei xinwen* (DWnews), June 16, 2011, <http://history.dwnews.com/big5/news/2011-06-16/57814793.html>.

¹⁵The Kashima Peace Research Institute, ed., *A History of Japan Diplomacy*, Vol. 22, (Tokyo: The Society of Publication of the Kashima Peace Research Institute, 1975), 27-32.

¹⁶“Stationed Army in the Paracel and Spratlys,” Ministry of Interior, Republic Of China, No.404.12/1, Tsun Lu No.14164, April 17, 1947, Appendix: Brief introduction of Shinnan Islands, Showa Year 14, July 17, Report Book.

¹⁷Fujii, “The Possession of Shinnan Islands,” 154-58.

Map 1**The Spratly Islands under the Taiwan Administrative District in 1939**

Source: Ministry of Interior, Republic of China, “Forward into the Parcel and Spratly Islands,” File No. 404.13/1, Lu Sen Fu Min No. 64650, September 13, 1947.

After WWII, the Chinese government dispatched, on December 9, 1946, the warships “Tai-pin” and “Chong-yeh” to the Spratly Islands, and the warship “Tai-pin” landed on Itu Aba Island and patrolled Loaita Island, Thitu Island, Northeast and Southwest Cay, and Triton Island. On December 1, 1947, the Chinese government proclaimed the reintegration of the Spratly islands and the Paracels into its administrative jurisdiction.

An Analysis of Renouncement

The director’s special assistant, Robert A. Fearey, of the Office of

Northeast Asian Affairs, Bureau of Far Eastern Affairs of the U.S. State Department, referred to how to deal with the territorial problem of Japan's occupation in a memorandum which A. Fearey sent to the deputy chief of the same Bureau, John M. Allison, on October 26, 1950. The memorandum noted the following:

“The central and southern Ryukyus, the Bonins, including Roario Island, the Volcanos, Parece Vela and Marcus would be placed under the trusteeship system of the United Nations with the United States as the administering authority. Because of the considerable population of the Ryukyus and the virtual certainty that strategic trusteeships would be vetoed by the Soviet Union, the United States would seek ordinary trusteeships for these islands. Japan would accept the United Nations Security Council action of April 2, 1947 extending the trusteeship system to the former Japanese Mandated Islands. The Treaty would contain no reference to Pratas Reef and Island, over which China formally reasserted sovereignty in 1947, or to the Paracel Islands or Spratly Island, title to which has been disputed between France and China. While Japan also claimed Spratly Island before the war, its claim to this uninhabited spot is not believed important enough to warrant mention in the treaty.”¹⁸

The view on the status of the Spratly and Paracel Islands taken by Britain was to make it ambiguous, maintaining the same as its past claim. In October 1947, the Foreign Office of Britain had prepared a dossier of decisions for attending the conference in San Francisco. The internal, not public, file itemized that Japan should renounce the right and claim of the Spratly Islands and Amboyna Cay, but it was unnecessary to list the name of the particular island and to indicate which nation would succeed to the renounced island. Britain was disinclined to compete for the authority of the Spratly Islands with France. However, as long as Britain did not officially renounce the Spratly Islands, France would not be permitted to control the islands. Therefore, the best way to deal with the problem was not to ascertain its authority. In 1949, R. S. Milward who was responsible for formulating policies had clearly expressed the British view on the Spratly Islands. He said:

¹⁸United States Department of State, *Foreign Relations of the United States, 1950. Volume VI: East Asia and the Pacific* (Washington: U.S. Government Printing Office, 1950), 1328, <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=turn&entity=FRUS.FRUS1950v06.p1342&id=FRUS.FRUS1950v06&isize=M>.

“It has already been agreed at the official level that the Peace Treaty terms offered to Japan should be so worded so as to imply a renunciation of her claim to these islands; but this treaty will leave the sovereignty open to dispute between Britain, France and any other nations who choose in the future to interest themselves in the islands, until the vacuum is filled, and some claimant becomes able to exercise a more real and permanent sovereignty than has been possible hitherto.”¹⁹

In 1950, the Australian government informally asked whether the UK might be prepared to seek trusteeship for the Spratly and neighboring islands. On October 24, the Foreign Office replied: “In our view the dominant consideration in the disposal of these Islands is their strategic importance. From that point of view, we should not object to the ownership of the Islands by France, but we should not wish their ownership to go to Japan, the Philippines, Nationalist China or, particularly, the Central People’s Government of China.”²⁰

On September 8, 1951, fifty-one countries attended the Peace conference in San Francisco. The United States supported the Republic of China’s presence at the meeting, but Britain wished that the People’s Republic of China would attend. Finally, the United States and Britain reached a compromise, and so the two countries were not invited to the conference, yet France and Vietnam who were also involved in the disputes over the Paracel and Spratly Islands assigned their representatives to be present at the meeting.

At the San Francisco conference, the deputy minister of Foreign Affairs of the Soviet Union, Andrei Gromyko, proposed thirteen amendments on September 5. The first amendment was to suggest that Japan should admit the authority of the Paracel Islands and more southern islands to be owned by the People’s Republic of China. However, the move was overruled by the vote of 48 to 3 (the three votes were cast by the Soviet Union, the Czech Republic, and Poland). On September 7, the

¹⁹Tønnesson, “The South China Sea in the Age of European Decline,” 42.

²⁰Geoffrey Marston, “Abandonment of Territorial Claims: The Cases of Bouvet and Spratly Islands,” *The British Yearbook of International Law* 57, no. 1 (1986): 337-56, http://groups.yahoo.com/group/diendan_binhluan/messages/4187?threaded=1&m=e&var=1&tidx=1.

Prime Minister of the State of Vietnam, Tran Van Huu who also held the position of Minister of Foreign Affairs, announced in the meeting that the Paracel and Spratly Islands belonged to its territory. There was no one who supported the proposal or made a comment about the speech by Vietnamese representative. Hence, they did not reach an agreement on the issue of the ownership of the Spratlys and Paracel Islands at the conference.²¹

Finally, Japan signed a treaty with forty-eight countries, with the exception of the Soviet Union, the Czech Republic, and Poland. However, Paragraph 2 of Article 2 which specified: “Japan renounces all right, title and claim to Taiwan and the Pescardos,” and Paragraph 6: “Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands” had come in for sharp criticism. The order of the two items in the agreement with Japan was only to emphasize the utility of renouncement and not to specify the recipients. Besides, the Republic of China was not a signatory country to the peace treaty. Due to the reasons mentioned above, the renounced Paracel and Spratly Islands were easily mistaken to have the status of *terra nullius*.

Both the Republic of China and the People’s Republic of China reacted to the flaw in the articles of the San Francisco Peace Treaty. On August 15, 1951, Chou Enlai, Foreign Minister of the People’s Republic of China, was dissatisfied with the draft of the San Francisco Peace Treaty and raised an objection to the treaty; he said: “. . . the draft specified that Japan renounced the right to the Spratly and the Paracel Islands without mentioning the problem of returning of sovereignty. Actually, as the whole of the Spratly Islands, Macclesfield Bank, and Pratas Islands, the Paracel Islands and Spratly should be the territory of China. Even though Japan launched a war to successfully occupy the islands, the Chinese government has already taken over the islands after Japan surrendered. Here the statement of the People’s Republic of China is that the People’s Republic of China had the right to the Spratly and the Paracel Islands which cannot

²¹Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, 41.

be encroached upon. Moreover, regardless of the stipulations coming into existence or how Britain and the United States so stipulate, this right will not be affected.”²²

On April 28, 1952, the Republic of China signed a peace treaty with Japan. Article 2 stipulated: “It is recognized that under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.”²³

The problem caused by the stipulation of the San Francisco Peace Treaty is analyzed as follows:

First of all, before 1936, the parties to the dispute over the Paracel Islands were only China and France, and then Japan which occupied some islands of the Paracel Islands in 1936 was later added. In 1909, the Qing Dynasty put the Paracel Islands under the administration of Yat county of Guangdong Province. The French Governor-General of Indochina brought the administration of the Paracel Islands into Thua Thien Province of Vietnam (in Hué) on June 15, 1938. Japan dispatched troops in 1939 to occupy the Pratas Islands, the Paracel Islands, and the Spratly Islands, and incorporated these three Islands into the administration of Taiwan, which was the first time in history the three Islands were integrated into an administrative system.

On June 10, 1919, the Japanese Laza Island Phosphorous Mine Corporation registered the mining right at the Tokyo District Court. This should be the first time that the Spratly Islands were incorporated into an administrative jurisdiction. The permission regarding the mining right

²²“Statement on the Draft of Peace Treaty of the USA and UK towards Japan and San Francisco Conference by Foreign Minister Chou Enlai, August 15, 1951,” in *Zhonghua renmin gongheguo duiwai guanxi wenjian ji (er): 1951-1953* (Documents of Foreign Relations of the People’s Republic of China, Vol. 2 (1951-1953), ed. World Knowledge Publishing House (Beijing: World Knowledge Publishing House, 1958), 32.

²³Ministry of Foreign Affairs, Republic of China, ed., *Zhongwai tiaoyue jibian (minguo 16 nian zhi 46 nian)* (A Compilation of Treaties of China and Foreign Countries [1927-1957]) (Taipei: Ministry of Foreign Affairs, Republic of China, 1958), 2.

was allowed by Japan. On March 23, 1925, the French Governor-General of Cochinchina decided (not publicly) to put the Spratly under the administration of Bac Ria Province of Cochinchina.

Before 1939, although China and France disputed the authority of the Paracel Islands and the Spratlys, which was also disputed with Japan, there was no one who owned or permanently occupied either the Paracel Islands or the Spratly Islands because they left after they established their stele or plain buildings. Consequently, not one of the parties equipped the islands with any building or garrison for long-term occupation on the Paracel and Spratly Islands.

Second, when Japan occupied the Paracel and Spratly Islands after 1939, Japan started out to build perpetual housing and sent officers to govern both islands.

Third, the Taiwan Executive Office of the Governor assigned personnel to head to Itu Aba Island to do research in November 1945. In December 1945, the Republic of China sent Taiwanese weathermen to take over the Paracel Islands. From November to December 1946, the Republic of China dispatched troops to take over the Paracel and Spratly Islands. In January 1947, they formed a resolution that the area of the Paracel and Spratly Islands “is temporarily governed by the Navy and to wait till Hainan Special Administrative Zone was formed, the authority of two Islands will be under the Hainan Special Administrative Zone.” Subsequently, Navy Headquarters established an administrative office on the Paracel and Spratly Islands, respectively, and then stationed troops there. When the resolution was being made by the government of the Republic of China, France occupied Pattle Island, in the west part of the Paracel Islands; the Republic of China occupied Woody Island, in the east part of the Paracel Islands; and the troops of the Republic of China occupied the Spratly Islands.

Fourth, in September 1951, fifty-one countries in San Francisco discussed the peace treaty with Japan, but this meeting was not a function of the United Nations. At that time, the Republic of China was a member of the UN, but she was not invited for political considerations; neither was the People’s Republic of China invited. However, the parties disputing

over the Paracel and Spratly Islands, including France, Vietnam (ruled by King Bao-Da), and Japan were all present at the conference. There was no doubt that those three countries should be limited by the peace treaty. However, the Republic of China needed also to follow the stipulations which were related to the terms of the Paracel and Spratly Islands in the San Francisco Peace Treaty because in terms of the treaty between the Republic of China and Japan, there were articles relevant to the renouncement of the Paracel and Spratly Islands by Japan.

Fifth, in the San Francisco Peace Treaty, the territory renounced by Japan was specified in Article 2 and there were six paragraphs listing the renounced territory which, except for the Paracel and Spratly Islands, included Taiwan, the Penghu Islands, the Kuril Islands, and part of Sakhalin.

Since the dispute over those islands mentioned above was raised by the participating countries before the conference and in the process of negotiation, and since the purpose of holding the meeting was to rebuild international peace by way of a discussion of the realm of Japanese territory, accordingly, in the meeting, the problematic territory was not dealt with by any resolution. Thereupon, the great powers with decision-making rights decided to retain and solve the problem in the future. John Foster Dulles, Secretary of State of the United States, indicated after the conference: "Some Allied Powers suggested that Article 2 should not merely de-limit Japanese sovereignty according to Potsdam, but specify precisely the ultimate disposition of each of the ex-Japanese territories. This, admittedly, would have been neater, but it would have raised questions as to which there are now no agreed answers."²⁴ Therefore, the article only specified the renouncement by Japan.

Sixth, why were the Paracel and Spratly Islands recorded in the Sino-Japanese Peace Treaty?

During the negotiation between Japan and the Republic of China, the

²⁴Daniel Patrick O'Connell, "The Status of Formosa and the Chinese Recognition Problem," *American Journal of International Law* 50, no. 2 (April 1956): 406.

clause referred to the renouncement of Taiwan, Penghu, and the Paracel and Spratly Islands, but did not mention the Kuril Islands and part of Sakhalin. Did that indicate that Japan only renounced the territory associated with the Republic of China? Daniel J. Dzurek said: “Moreover, according to the negotiating record Japan insisted that the renunciation article deal only with Chinese territory. This shows that the ROC and Japan viewed the islands of Taiwan, the Pescadores, the Spratlys, and the Paracels as having similar status - that is, belonging to China.”²⁵

Why were the Paracel and Spratly Islands referred to in the Sino-Japanese Peace Treaty in particular, which is not on the list of the renounced territories of Japan in the San Francisco Peace Treaty? There are two reasons: first, in 1895, Japan obtained Taiwan and the Penghu Islands as ceded territory by treaty. In the case of the three islands in the South China Sea occupied by Japan, those islands were incorporated by armed force, so there was not any relationship bound with the treaty. According to the articles of the San Francisco Peace Treaty, Japan’s renouncement of Taiwan was to satisfy the demands of the allies in the Cairo Declaration in 1943 and the Potsdam Proclamation in 1945. The renouncing of the Paracel and Spratly Islands in the South China Sea was argued by Britain. Japan incorporated the Pratas Islands, the Paracel and Spratly Islands into the administration of Taiwan in 1939, so it was a part of Taiwan. Consequently, when Japan renounced Taiwan and the Penghu Islands, the three islands were necessarily involved in the renouncement. Second, since Japan negotiated the issue of renouncing Taiwan, the Penghu Islands, and the three islands of the South China Sea with the Republic of China, that should indicate that these territories were related to the Republic of China, otherwise the Paracel and Spratly Islands should not have been referred to in the treaty.²⁶

²⁵Daniel J. Dzurek, *The Spratly Islands Dispute: Who’s on First?* (Durham: International Boundaries Research Unit, University of Durham, 1996), 16.

²⁶During the negotiation between the ROC and Japan, the representative of the ROC, Hu Ching-yu, suggested that the Paracel and Spratly Islands had been the territory of China, and both islands were under the administrative jurisdiction of Taiwan, so he insisted on writing the two islands into the treaty. Japan agreed to that suggestion. See “Records of

The problem should focus on whether the renounced territory of Japan equals *terra nullius* or not. In international law, *terra nullius* is defined as territory which does not belong to any country and is not under the administrative jurisdiction of any sovereign state or instituted entity.

When France negotiated with Japan and asked whether signing the Sino-Japanese Peace Treaty meant that Japan had transferred the Paracel and Spratly Islands to Taiwan, on May 23, 1952, the Ministry of Foreign Affairs of Japan sent a letter to the counterpart of France saying: "I concur with your understanding that Article 2 of the Peace Treaty between Japan and the Republic of China signed on April 28, 1952 should not be construed as having any special significance or meaning other than that implied by Article 2, paragraph (f), of the Treaty of San Francisco." Swedish scholar Stein Tønnesson argued based on this letter from Japan: "Thus, France could convince itself that in a subtle way it had nullified China's gain."²⁷

Actually, Japan could not respond to questions beyond the Peace Treaty. British premier, Sir Anthony Eden, replied to a member of the House of Commons during interpellation on February 4 1955: "Under the Peace Treaty of April 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are, therefore, in the view of Her Majesty's Government, territory the *de jure* sovereignty over which is uncertain or undetermined."²⁸ Probably the UK would not accept the case of Japan renouncing the Paracel and Spratly Islands as certain or determined.

Negotiation between the ROC and Japan on March 5, 1952," in *Zhong-Ri waijiao shiliao congbian (jiu): Zhonghua minguo dui Ri heyue* (Historic Documents of Diplomacy between China and Japan, Vol. 9: The ROC and Japan Peace Treaty), ed. The Research Society of ROC's Diplomatic Problem (Taipei: The Research Society of ROC's Diplomatic Problems, 1966), 52-53; "Third Draft of Peace Treaty by Japan on March 28, 1952," in *ibid.*, 190.

²⁷Tønnesson, "The South China Sea in the Age of European Decline," 43.

²⁸O'Connell, "The Status of Formosa," 409.

Nevertheless, both *de facto* and *de jure*, the Republic of China had already obtained the sovereignty of the Paracel and Spratly Islands from Japan since December 1945. In January 1947, Macclesfield Bank, the Paracel, Spratlys, and Pratas Islands were all incorporated into the territory of the Republic of China, which was under the administration of the Hainan Special Administrative Zone. Although due to the scarcity of armed forces, the troops of the Republic of China retreated from the Paracel and Spratly Islands to Taiwan in May 1950, the ROC Government did not officially announce a renunciation of the two islands. The sovereignty over the Paracel and Spratlys by the Republic of China had been in force until April 28, 1952 and after, when the San Francisco Peace Treaty and Sino-Japan Peace Treaty came into force. Therefore, the ROC's claim of sovereignty over the two islands was consistent. In 1951, Japan proclaimed that it was renouncing the Paracel and Spratly Islands for the agreement of the San Francisco Peace Treaty. However, there is a question: Can the renouncement compete with the actual jurisdiction right of the Republic of China over both islands? The most significant point is that, although both islands theoretically became *terra nullius* when Japan renounced them, both *de facto* and *de jure*, the two islands groups could not be *terra nullius*.

An international jurist, Hungdah Chiu, quoted the *principle of uti possidetis* (first use of your property) from volume two of *Oppenheim's International Law* edited by Hersch Lauterpacht, and claimed that the Republic of China was able to obtain the sovereignty of Taiwan and the Penghu Islands in terms of occupation first. *Oppenheim's International Law* states: "Unless the parties stipulate otherwise, the effect of a treaty of peace is that conditions remain as at the conclusion of peace. Thus, all moveable State property, such as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent, remain his property, as likewise do the fruits of immoveable property seized by him. Thus further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who may annex it. But it is nowadays usual, although not at all legally necessary, for a conqueror desirous of retaining conquered territory to secure its

cession in the treaty of peace.”²⁹

Note 3 of the above-mentioned paragraph exemplified a case: the concealed cession related to Tripoli and Cyrenaica after the war between Turkey and Italy in 1912. Turkey was loath to cede these territories with *expressis verbis*, but Italy strongly insisted on obtaining them. Therefore, both parties signed a protocol on October 15, 1912 which stipulated that Turkey should permit the people’s liberty upon the two territories within three days and renounce authority over the territories. Then, Turkey did so and signed a Peace Treaty on October 18. So Italy announced that the two territories were to be annexed by them. However, Giulio Diena believed that was not a concealed cession, but a renouncement by Turkey and a renounced land occupied by Italy first.³⁰

The principle was often called the *principle of uti possidetis*, which means that an agent continues to keep the property that it already had. According to this principle, the Republic of China was enabled to obtain the Japanese territory which was put under the jurisdiction of Taiwan without any specification in the peace treaty in terms of the *principle of uti possidetis*.³¹

Nevertheless, is the *principle of uti possidetis* operable in the case of Japan renouncing the Paracel and Spratly Islands? Similarities and dissimilarities between the case of Tripoli and Cyrenaica and another case of the Paracel and Spratly Islands are listed below.

Similarities: Both territories were renounced.

Dissimilarities:

1. Italy compelled Turkey to renounce the territories of Tripoli and Cyrenaica within three days. On the contrary, the Republic of China did not force Japan to renounce the islands as Italy did. However, the San

²⁹Hersch Lauterpacht, ed., *Oppenheim’s International Law, Vol. II*, 7th edition Longmans, (London: Longmans, Green and Co Ltd., 1952), 611.

³⁰*Ibid.*, 611, note 3.

³¹Hungdah Chiu, “Taiwan Penghu falü diwei wenti de yanjiu” (A Study of the Legal Status of Taiwan and the Pescardos,” in *Guanyu Zhongguo lingtu de guojifa wenti lunji* (Essays on Chinese Territory of International Law Issues), ed. Hungdah Chiu (Taipei: Taiwan Commercial Press, 2004), 9.

Francisco Peace Treaty was signed on September 8, 1951 and came into force on April 28, 1952. The renouncement became effective on that date.

2. Italy immediately announced its incorporation of the territory in Tripoli and Cyrenaica after signing the treaty with Turkey, but the Republic of China did not proclaim its incorporation of the Paracel and Spratly Islands after signing the peace treaty with Japan as Italy did.

3. Tripoli and Cyrenaica were not under the domain of Italy before Turkey renounced the two lands. However, before the peace treaty between Japan and the Republic of China in which Japan renounced the Paracel and Spratly Islands, the two islands had already been put into the domain of the Republic of China for six years.

The stipulation of renouncing the Paracel and Spratly Islands by Japan in the San Francisco Peace Treaty was made at the claim of Britain, which argued: “this treaty will leave the sovereignty open to dispute between Britain, France and any other nations who choose in future to interest themselves in the islands, until the vacuum is filled and some claimant becomes able to exercise a more real and permanent sovereignty than has been possible hitherto.” The purpose of Britain was to put the Paracel and Spratly Islands under the effective jurisdiction of occupiers who were interested in the islands. The stipulation of renounced territories causing the destruction of international order and more conflicts between countries was not the expectation of each country that attended the conference. Therefore, the “renouncement” could be defined in terms of *uti possidetis* in order to maintain the international peace. No matter what the other did, the Republic of China adopted the *principle of uti possidetis* and continued to *de facto* and *de jure* occupy the Paracel and Spratly Islands which were renounced by Japan.

Seventh, before and after the signing of the San Francisco Peace Treaty and Sino-Japan Peace Treaty, the Republic of China indeed governed the Paracel and Spratly Islands and included them in an official published map of Chinese territory. On the other hand, France did not control or occupy any island of the Spratly Islands, nor did any official map show the Spratly Islands belonging to Vietnam which was ruled by France. Since 1946 France had occupied such islands as Pattle of the

Paracel Islands. France also put those islands into its administrative system. However, it did not draw any official map to indicate that the islands belonged to Vietnam which was ruled by France. Moreover, the Philippines did not exercise any occupation of the Spratly Islands; Vietnam was an Associated State of France, so it was not totally independent.³² Vietnam further did not actually occupy the Paracel and Spratly Islands. The authority of Pattle was transferred from France to Vietnam. It indicated that France had invaded Pattle Island with armed forces. Therefore, such a transfer of territorial sovereignty is certainly not to be in force in international law.

In terms of the critical date in international law, if the effective date, April 28, 1952, of the San Francisco Peace Treaty and Sino-Japan Peace Treaty, is set as the critical date,³³ then the conflicts which occurred before that critical date should be recognized as disputes. In other words, before the critical date, the disputant country will be a qualified party indeed, and its arguments would be taken into consideration by the court. As to those new conflicts or newly-added pieces of evidence happening after the critical date, those disputant countries should not be recognized as authentic disputant parties. The claims related to the Spratly Islands made by France, the Philippines, Vietnam, Malaysia and the People's Republic of China are not qualified anymore. That is, the Republic of China should be the country that has the most superior legal justification compared to the other countries from the viewpoint of occupation, undertaking the territories that Japan renounced, or *uti possidetis*.

³²The State of Vietnam became an Associated State of France on March 8, 1949, to be semi-independent. Monique Chemillier-Gendreau thinks the State of Vietnam had an international personality. See Chemillier-Gendreau, *Sovereignty Over the Paracel and Spratly Islands*, 90.

³³Monique Chemillier-Gendreau suggested three critical dates referring to (1) Vietnam became a protectorate state of France in 1884; (2) France suggested to China that it submit the controversy to the International Court of Justice in 1937; (3) France retreated from Vietnam and Vietnam entered onto the international stage in 1954/56. See Chemillier-Gendreau, *Sovereignty Over the Paracel and Spratly Islands*, 124. In terms of legal perspective, these three dates are not compared to the superiority and legitimacy of the effective date of the San Francisco Peace Treaty.

Daniel Patrick O'Connell compared the postwar occupation of South Sakhalin and the Kuril Islands by the Soviet Union to the case of Taiwan. In the Yalta Agreement, the Soviet Union required that Japan return South Sakhalin and nearby islands, internationalize Da-Lien city, rent Port Arthur, and return the Kuril Islands after its surrender. After the war, the Soviet Union occupied the two islands, South Sakhalin and the Kuril Islands, which were renounced by Japan, and became territories obtained by the Soviet Union. The case of the Republic of China mentioned above was much the same. The occupation of renounced territory could be applied to the case of Taiwan. He indicated that "It is doubtful, therefore, whether there is any international law doctrine opposed to the conclusion that China (and in the case of the Kuriles and South Sakhalin, the Soviets) appropriated the *terra derelicta* of Formosa by converting belligerent occupation into definitive sovereignty."³⁴ The inference was also suitable for the principle of occupation of the Paracel and Spratly Islands by the Republic of China.

Eighth, the San Francisco Peace Treaty intended to resolve the problem of territories occupied by Japan's prewar invasion and to ask Japan to renounce those acquisitions. This case can also be applied to the invasion by France. After the Peace Treaty came into force, France still occupied some islands of the Paracel Islands by armed force. France's action transgressed the basic tenet of the San Francisco Peace Treaty.

Even the French Ministry of Foreign Affairs announced their ownership of the Spratly Islands rather than Vietnamese ownership in September of 1953. When the French transferred Cochinchina to the State of Vietnam (Bao-Da regime) in 1949, the Spratly Islands were not involved. Therefore, the Spratly Islands ought to have been under the administration of the Ministry of Overseas France.³⁵ In March 1956, the French government declared again the above statement.³⁶

³⁴O'Connell, "The Status of Formosa," 414.

³⁵Tønnesson, "The South China Sea in the Age of European Decline," 39.

³⁶"Territorial Disputes over Ownership of Nansha and Paracel Islands," *Keesing's Contemporary Archives* 10 (September 1956): 15131.

By May 1954, French troops had left Vietnam because of losing the battle of Dien Bien Phu. The islands they had occupied before should have waited for peaceful negotiation, rather than a unilateral transfer to Vietnam. Vietnam could not inherit territories that were taken over by French invasion. Consequently, in the conference of the San Francisco Peace Treaty, no one country supported the view raised by Vietnam.

Ninth, when the San Francisco Peace Treaty was in force, France did not occupy any island in the Spratly Islands, so there was no possibility that Vietnam could obtain the Spratly Islands from France's occupation. France, in September 1953, declared that the Spratly Islands belonged to herself rather than Vietnam. Thus, obviously, Vietnam did not have a standpoint to proclaim sovereignty over the Spratly Islands being transferred from France. The Philippines invaded the Spratly Islands in the 1970s and Malaysia in the 1980s; both countries are disqualified as claimant parties, because they are not the qualified disputant parties before the critical date related to the San Francisco Peace Treaty.

Conclusion

The main purpose of the San Francisco Peace Treaty was to deal with the problem of peaceful coexistence with Japan and deprive Japan of its invaded territories before and during the war. But each related country held different views on the Paracel and Spratly Islands, so the resolution was made that Japan was obliged to renounce the islands as a method to terminate the controversy. The renouncement was treated as an action to assign the Paracel and Spratly Islands with the status of deserted islands without any sovereign administrator and with the possibility of being taken over by any powerful country at any time. Although the aim of the Peace Treaty was not to judge the status of the islands' legal sovereignty, an international conference mechanism should have specified that the dispute over the uncertain territories be arbitrated by the international court or be trusted temporarily to the United Nations. However, these two islands involved conflicts among France, Britain, and China, so the con-

troversty could not be settled by means of the above-mentioned measures.

Since December 1945, the Republic of China had completed the occupation and administrative governance of the Paracel and Spratly Islands; officers were sent there to govern the islands. On September 8, 1951, the San Francisco Peace Treaty was signed and came into force on April 28 the next year. During that period, the authority over the two islands was exercised by the Republic of China and was in force indeed. In the conference of the San Francisco Peace Treaty, both the People's Republic of China and the State of Vietnam proposed their sovereignty over the two islands, but the proposals were all rejected. Since the San Francisco Peace Treaty and the Sino-Japan Peace Treaty had come into force, the Republic of China had the priority to occupy the two renounced territories. No matter what the resolution of the San Francisco Peace Treaty was or when it was in effect, the administration and legal jurisdiction of the Republic of China over the two islands were not null and void in *de facto* and *de jure* terms.

In short, after the critical date of the signing of the Sino-Japan Peace Treaty and the time when the San Francisco Peace Treaty was in force, new disputant countries, whatever their arguments or activities of strengthening physical facilities on those islands, are disqualified as the disputant parties in terms of international law or maintaining international order.

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