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An enquiry into the palimpsestic nature of territorial sovereignty in East Asia – with particular reference to the Senkaku/Diaoyudao question*

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I Introduction

China is rising (or it has already risen). According to press reports, in 2010 China replaced Japan as the second biggest economy of the world.[1] The inexorable rise of China has led some international relations scholars to predict the inevitable conflict between China and the incumbent hegemon – that is, the United States.[2] China, which would like to avoid confrontation with the other superpower while it pursues the policy of economic modernisation, calls into question the conventional wisdom of the realist bent, in particular its thesis of the inevitability of conflict in the case of big change in power relations. China in 2012 promoted its own revisionist theory entitled 'a new type of great power relationship' (*Xinxing Daguo Guanxi*).[3]

Against this background, an important question for international law scholars is whether and how the rise of China will translate into (hopefully

* Part of this chapter is based on the presentation the author made at the 2011 ILA Asia-Pacific Regional Conference (Taipei, 29 May–1 June 2011) under the title 'Territorial Questions in the East China Sea from a Trans-temporal Perspective'.

[1] Mure Dickie, 'China Economy Overtakes Japan', *Financial Times*, 14 February 2011.

[2] e.g. John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W. W. Norton, 2001); *ibid.*,'China's Unpeaceful Rise', *Current History* (April 2006), 160–2. For detailed discussions of the question, see Steve Chan, *China, the U.S. and the Power-Transition Theory: A Critique* (London and New York: Routledge, 2008); Barry Buzan, 'China in International Society: Is "Peaceful Rise" Possible?', *The Chinese Journal of International Politics*, 3 (2010), 5–36.

[3] Cui Tiankai and Pang Hanzhao, 'China–US Relations in China's Overall Diplomacy in the New Era: On China and US Working Together to Build a New-Type Relationship Between Major Countries' (20 July 2012), available at www.fmprc.gov.cn/ce/cggb/eng/gyzg/xwdt/t953682.htm.

peaceful) change in the normative configurations of international society. To adduce an example, the rise of China brings with it a renewed and even (to some ears) 'retro-sounding' emphasis on the principle of (State) sovereignty. Recently, there have been premature rumours of the death of sovereignty, and the concept of sovereignty is often criticised for being a stumbling block in the increasingly globalising world. In contrast, the newly rising (or, to use Kissinger's perceptive expression, 'returning'[4]) China unabashedly claims itself to be 'a most enthusiastic champion' for the principle.[5]

The impact of China's rise on current international law is strongly felt, among others, in the field of territorial sovereignty that delineates the space within which State sovereignty (*imperium*, *jurisdictio*) is exercised.[6] The recent flare-up between China and Japan over the Senkaku/Diaoyudao Islands is a case in point. In 2013, China began to call into doubt even the territorial status quo of Okinawa.[7] It is well known that China has fervently emphasised the principle of territorial integrity[8] and is faced with some thorny territorial issues (actual or potential) of its own. An immediate question is why and on what ground China raises such claims vis-à-vis Japan that carry the risk of boomeranging back to itself.

If one looks at the question from a broader historical perspective, one can ask whether the historical fact that the traditional East Asian

[4] Henry Kissinger, *On China* (New York: Penguin, 2012), 546.

[5] Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', *Recueil des Cours*, 221 (1990), 288; Li Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order', *Singapore Journal of International and Comparative Law*, 5 (2001), 318. For a detailed discussion of the principle of sovereignty from Chinese perspective, see Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (Martinus Nijhoff Publishers, 2012), 68–96; Yang Zewei, *Zhuquanlun: Guojifa shangde Zhuquan Wenti ji qi Fazhan Qushi Yanjiu* [On Sovereignty: Sovereignty and Its Development Tendency in International Law] (Peking University Press, 2005).

[6] For a detailed discussion of the relationship between *souveraineté territoriale* (*territoriale Souveränität*) and *suprématie territoriale* (*Gebietshoheit*), see Julio A. Barberis, 'Les Liens juridiques entre l'état et son territoire: perpspectives théoriques et évolution du droit international', *Annuaire Français de Droit International*, 45 (1999), 132–46; Alfred Verdross, Bruno Simma and Rudolf Geiger, *Territoriale Souveränität und Gebietshoheit: Zur völkerrechtlichen Lage der Oder-Neiße-Gebiete* (Bonn: Kulturstiftung der Deutschen Vertriebenen, 1980).

[7] Reiji Yoshida, 'Japan Protests China's Okinawa Commentary', *Japan Times*, 10 May 2013.

[8] The principle of mutual respect for sovereignty and territorial integrity is the first among the Five Principles of Peaceful Co-existence that were promulgated by China and India in 1954. Xue, *Chinese Contemporary Perspectives on International Law*, 36.

world order (which enjoyed an exceptional longevity spanning a couple of millennia[9]) was abruptly and violently replaced by a new normative order called the 'public law of Europe' bears on the issue of territorial sovereignty over the islands.

It is in this connection that the metaphors of *tabula rasa* and *palimpsest* come in handy. Is international law in East Asia a *tabula rasa* onto which only the European set of norms are indelibly etched? Or is it a *palimpsest* – that is, a parchment which, though overwritten, still retains traces from the past practices of East Asia? As will be shown below, China seems to subscribe to the latter conceptualisation in dealing with its territorial differences with Japan. Then the question arises of whether and how these traces, if any, will impact on the articulation and functioning of international law in East Asia and, in particular, on the equitable resolution of territorial issues in the region.

I will begin by presenting a brief historical overview of the question (II). I will go on to describe the respective claims of Japan and China over the Senkaku/Diaoyu Islands (III) and then offer some critical remarks on the respective positions (IV). This will be followed by an attempt to elucidate what I called the palimpsestic nature of territorial sovereignty in East Asia (V). I will also provide brief concluding remarks (VI).

II Historical overview of the question of the Senkaku/Diaoyu Islands

It is beyond argument that many Chinese books and maps (dating from the Ming (1386–1644) and Qing periods (1644–1911)) recorded the group of uninhabited islands and rocks called Senkaku by the Japanese and Diayudao by the Chinese.[10] They were used as navigational markers by various investiture missions sent to Ryukyu (present-day Okinawa) by

[9] For a classical discussion of this subject, see John King Fairbank (ed.), *The Chinese World Order: Traditional China's Foreign Relations* (Harvard University Press, 1968).

[10] Due to space constraints, I will not provide a detailed description of the Senkaku/Diayudao question, which one can find elsewhere. For instance, 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 (1974), 221–65; Yoshiro Matsui, 'International Law of Territorial Acquisition and the Dispute over the Senkaku (Diaoyu) Islands', *Japanese Annual of International Law*, 40 (1997), 3–31; Han-yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan* (Occasional Papers/Reprints Series in Contemporary Asian Studies No. 3–1999 (152)); Unryu Suganuma, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands* (Hawaii University Press, 2000); Seokwoo Lee, 'Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands', *Boundary and Territory Briefings*, 3 (2002), 1–37; Junwu Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden: Martinus Nijhoff

China. More importantly, the islands were incorporated into the coastal defence system of the Ming Dynasty in 1561.[11]

A change to this state of affairs took place with the annexation of the Ryukyu Kingdom into Japan in 1879. According to Japan, five years later a Japanese explorer 'discovered' these islands. In January 1895, when Japan's victory over China in the Sino-Japanese War was virtually sealed, Japan formally annexed these islands as *terra nullius*.

During World War II, the Allies adopted the Cairo Declaration on 1 December 1943 and declared their 'purpose . . . that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China'.[12] The implementation of this Declaration was confirmed by Paragraph 8 of the Potsdam Proclamation of 26 July 1945, which Japan undertook to carry out in the Instrument of Surrender of 2 September 1945.[13] China claims that in accordance with these documents 'Diaoyu Dao, as affiliated islands of Taiwan, should be returned, together with Taiwan, to China.'[14]

After the end of World War II, these islands were put under the trusteeship of the United States in accordance with the 1951 San Francisco Peace Treaty with Japan. The United States exercised effective administration over these islands, using them as firing ranges. However, there was no protest from the Chinese side from 1945 until late 1971.

It was only in the late 1960s that the Chinese interest in the islands resurfaced upon the publication of a report by the UN Economic Commission for Asia and the Far East indicating potential oil and gas reserves in the vicinity of the islands.[15] On 30 December 1971 the government of the People's Republic of China (PRC) raised its territorial claim over the islands (the Republic of China government did so on 12 June 1971).[16]

Publishers, 2009); Masahiko Asada, 'Diaoyu/Senkaku Islands', *Max Planck Encyclopedia of Public International Law*, 10 vols. (Oxford University Press, 2011), III, 90–3.

[11] Information Office of the State Council, The Peoples' Republic of China, 'Diaoyu Dao, an Inherent Territory of China' (Foreign Language Press, 2012), available at www.fmprc.gov.cn/eng/topics/diaodao/t973774.htm.

[12] *Supplement to the American Journal of International Law*, 38 (1944), 8.

[13] James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), 198.

[14] Information Office of the State Council, PRC, 'Diaoyu Dao, an Inherent Territory of China', 12.

[15] Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, United Nations Economic Commission for Asia and the Far East, 'Geological Structure and Some Water Characteristics of the East China Sea and Yellow Sea', *Technical Bulletin* 2 (1969), 39–40.

[16] According to the PRC, 'On December 30, 1971, the Chinese Ministry of Foreign Affairs issued a solemn statement, pointing out that "it is completely illegal for the government

China argues that both sides recognised the existence of a territorial dispute over the Senkaku/Diaoyudao Islands in 1972 and 1978 and agreed to defer its settlement to a later date. Japan denies the existence of such an agreement.[17]

China and Japan remained in a 'stagnant confrontation'[18] until recently. The problem of delimiting the Exclusive Economic Zone (EEZ)/continental shelf in the East China Sea was compounded by the territorial question over the islands.[19] The stagnant confrontation flared up into an open diplomatic and even military confrontation after September 2010 when a Chinese fishing boat collided with the patrol boats of the Japan Coast Guard. Upon the 'nationalisation' of three islands (including the biggest one, Uotsurishima/Diaoyudao) by the Japanese government in September 2012, the Chinese government upped the ante by establishing straight baselines around the islands.[20] China has also tried to erode the *status quo ante* by sending naval ships to patrol the waters near the Senkaku/Diaoyudao Islands.[21]

Based on this summary, let me now proceed to a brief description and analysis of the respective claims of China and Japan.

III The respective positions of China and Japan on the Senkaku/Diaoyu Islands

I will present brief descriptions of the respective positions of China and Japan concerning title to the Senkaku/Diaoyu Islands, limiting myself to

of the United States and Japan to include China's Diaoyu Dao Islands into the territories to be returned to Japan in the Okinawa Reversion Agreement and that it can by no means change the People's Republic of China's territorial sovereignty over the Diaoyu Dao Islands". The Taiwan authorities also expressed firm opposition to the backroom deal between the United States and Japan.' Above n. 11, at 13.

[17] For the Japanese position on whether the question was shelved in 1972 and 1978, see Ministry of Foreign Affairs of Japan, 'Q&A on the Senkaku Islands' (in particular, Question No. 14), available at www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html#qa14.

[18] Steven Wei Su, 'The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update', *Ocean Development and International Law*, 36 (2005), 45.

[19] For a detailed discussion of this question, see Gao Jianjun, 'Joint Development in the East China Sea: Not an Easier Challenge than Delimitation', *The International Journal of Marine and Coastal Law*, 23 (2008), 39–75.

[20] 'Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands' (September 10, 2012), available at www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf.

[21] Martin Fackler, 'Japan Says China Aimed Radar at Ship', *New York Times*, 5 February 2013.

the facts that are closely related to the main argument of this chapter, the palimpsestic structure or nature of territorial sovereignty in East Asia.

1 Overview of the Chinese position

Until recently, it was not necessarily easy to ascertain the official position of China in sufficient detail. Because of the lack of official statements, interested parties had to rely mainly on scholarly writings. This situation has changed in the past couple of years with the publication of *Zhongguo Guojifa Shijianyu Anli* (International Law in China: Cases and Practice)[22] in March 2011 and the official pamphlet titled *Diaoyu Dao She Zhonggude Lingtu* (Diaoyu Dao, an Inherent Territory of China)[23] compiled by the Information Office of the State Council, a Peoples' Republic of China in September 2012. The former was compiled by the Department of Treaty and Law, the PRC Ministry of Foreign Affairs.[24] China's position on the Diaoyu Islands appears in pages 134–8. The latter publication was published in the pivotal month of September 2012 when Japan 'nationalised' the three islands of the Senkaku/Diaoyu group. The pamphlet is very helpful in that it contains the most detailed official view of the Chinese government, in particular, the legal grounds China invokes to found its territorial sovereignty for the islands. Another pamphlet that is largely similar in its main points was published by the PRC National Marine Data and Information Service under (rather confusingly) the same English title.

The central pillar of the Chinese claim is that the group of islands is part of 'China's inherent territory'. The expression 'inherent territory', which is widely used in East Asia (for instance, Takeshima – known as Dokdo in Korea – is claimed to be 'an inherent part of the territory of Japan',[25] and 'the Senkaku Islands are clearly an inherent part of the territory of Japan'[26]), appears to signify historic title.[27] Indeed, China's

[22] Duan Jielong (ed.), *Zhongguo Guojifa Shijianyu Anli* (International Law in China: Cases and Practice) (Beijing: Law Press China, 2011).

[23] Above n. 11.

[24] The publication is available from the following website: www.soa.gov.cn/soa/news/specialtopic/diaoyudao/gylt/webinfo/2012/09/1347338540445425.htm.

[25] Ministry of Foreign Affairs of Japan, 'Japan's Inalterable Position on the Sovereignty of Takeshima', available at www.mofa.go.jp/region/asia-paci/takeshima/index.html.

[26] *Ibid.*, and 'The Basic View on the Sovereignty over the Senkaku Islands' (May 2013), available at www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html.

[27] For a concise discussion of historic title, see Andrea Gioia, 'Historic Titles', *Max Planck Encyclopedia of Public International Law*, 10 vols. (Oxford University Press, 2011), IV, 814–23.

position as indicated in the 2012 pamphlet, in the 2011 book compiled by the PRC Foreign Ministry, and in scholarly and media materials, gives central focus to this title. In so doing, China adamantly refutes Japan's contention that the Senkaku/Diaoyu Islands were *terra nullius* in January 1895.[28]

To corroborate its argument founded on historic title, China adduces a substantial amount of historical records dating back to as early as 1403. These records document a long series of Chinese practices or actions relating to the islands such as their usage as navigational aids for various investiture missions, at the latest, since 1534. China also invokes many cases of the islands' entry in the local gazetteers and, more importantly, the practices of incorporating the islands within the Chinese coastal defence system.[29] Cartographic evidence is also proffered, such as the inclusion of the islands as Chinese territory in an official Chinese map entitled Imperial Map of Native and Foreign Lands (*Huangchao Zhongwai Yitong Yutu*, 1863).[30]

In discussing whether the islands were *terra nullius* in January 1895, Chinese commentators hint at the existence of not a single normative system, but of a double-layered normative order in East Asia at the end of the nineteenth century. In other words, as far as China is concerned, the question of the Senkaku/Diaoyu Islands being *terra nullius* or not in January 1895 should not be assessed solely according to 'modern international law' (that had been recently 'introduced' into the region). The traditional concept of territorial sovereignty as practiced in East Asia should be taken into account (at least, along with modern international law) in the evaluation of the question.

In this vein, a Chinese commentator mentions the need to '[consider] as special the Chinese ancient values on territorial sovereignty, instead of disqualifying the legal effect of [China's "obviously ineffective display of sovereignty" in the pre-1895 period]'.[31] He admits that '[traditionally]

[28] For a detailed discussion of various modes of territorial acquisition, see James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), ch. 9.

[29] Information Office of the State Council, PRC, 'Diaoyu Dao, an Inherent Territory of China', 5; Shaw, *The Diaoyutai/Senkaku Islands Dispute*, 55–7; Cheng, 'The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition', 256–7.

[30] Information Office of the State Council, PRC, 'Diaoyu Dao, an Inherent Territory of China', 6; Shaw, *The Diaoyutai/Senkaku Islands Dispute*, 55.

[31] Su, 'The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update', 52.

China's approaches to displaying its sovereignty are all alien to Western international law doctrines'.[32] These arguments are offered, in part, to counter Japan's attempt to discredit the relevance of the pre-1895 Chinese records and practices.[33] From the standpoint of China, it would be highly inappropriate to apply the yardstick of modern international law in appreciating the facts that took place under a substantially different normative order.

2 Overview of the Japanese position

While China presented its official position in an elaborate manner only recently, the Japanese government had already published a document titled 'The Basic View on the Sovereignty over the Senkaku Islands' (hereinafter, 'Basic View') in March 1972. The following discussion is based on this document, together with the supplementary information such as 'Q&A on the Senkaku Islands', which is available on the homepage of the Japanese Ministry of Foreign Affairs.[34] The 'Basic View' has evolved since its first appearance in 1972 and it is worthwhile to compare the 1972 version and the currently available one.[35]

The first paragraph of the currently available 'Basic View' summarises the Japanese position. According to the provisional translation offered at the homepage of the Japanese Ministry of Foreign Affairs, the central part of the paragraph reads: '[t]here is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law'.[36]

The current version of the 'Basic View' contains four more paragraphs that serve to elaborate the main argument as put forth in the first paragraph. The main grounds Japan invokes to support its claim of territorial sovereignty over the islands can be summarised as follows:

(a) historic title as reconfirmed by the act of annexation as *terra nullius* in 1895

[32] *Ibid.*

[33] e.g. Toshio Okuhara, 'Senkaku Retto no Ryoyuken Kizoku Mondai' (The Problem of To Whom the Territorial Sovereignty over the Senkaku Islands Belongs), *Asahi Asia Review*, 3 (1972).

[34] Above n. 7.

[35] The most recent version is effective as of May 2013. The following discussion is based on this version.

[36] The 'Basic View on the Sovereignty over the Senkaku Islands'.

(b) confirmation of Japan's sovereignty in the 1951 San Francisco Peace Treaty
(c) China's acquiescence in (or even recognition of) Japan's territorial sovereignty until 1971.

According to Japan, 'the Senkaku Islands have continuously been an integral part of the Nansei Shoto Islands [present-day Okinawa Islands], which are the territory of Japan'.[37] Normally, such a statement would be followed by the enumeration of records and practices proving the claimant State's historic title over the islands in question. However, in the case of the Senkaku Islands, very curiously, Japan states that after confirming that 'the Senkaku Islands had been not only uninhabited but also showed no trace of having been under the control of the Qing Dynasty of China',[38] it annexed the islands as *terra nullius* on 14 January 1895. An acute logical problem implicit in this argument will be discussed in more detail later.

Japan also invokes the resounding and prolonged silence of China regarding the islands from 1895 until 1971. It goes further by adducing some evidence which, Japan argues, proves China's recognition of Japan's territorial sovereignty over the islands. One prominent example is an article of the *People's Daily*, the official newspaper of the Communist Party of China, which appeared on 8 January 1953. The article, titled 'Battle of People in the Ryukyu Islands against the U.S. Occupation', stated that 'the Ryukyu Islands . . . consist of 7 groups of islands; the Senkaku Islands, the Sakishima Islands'.[39] Based on these practices, Japan argues that China acquiesced in and even recognised Japanese territorial sovereignty over the islands. This would constitute an 'Achilles' heel' for China in a judicial setting.

IV Some critical remarks on the respective positions of China and Japan

This section will offer some critical remarks on the respective positions of China and Japan over the question of the Senkaku/Diaoyu Islands. It will focus on the questions that have an immediate relevance to the main question under consideration – that is, whether modern international

[37] *Ibid.* [38] *Ibid.*
[39] Ministry of Foreign Affairs of Japan, 'Q&A on the Senkaku Islands' (in particular, Question No. 4).

law alone should be taken into account when tackling the problem of determining territorial sovereignty over the Senkaku/Diaoyu Islands.

1 Critique of the Chinese position

The Chinese position is mainly anchored on historic title – a claim about which the Japanese side raises serious doubt, calling into question the relevance of the historical documents and maps that China relies upon. According to Japan, these documents and maps fall short of the legal standards set by modern international law and, as such, do not deserve to be taken into account in resolving the question.

For this reason some Chinese commentators put forth the need to evaluate these documents not from the standpoint of modern European international law, but from the viewpoint of a different normative order contemporaneous with the alleged annexation of the islands by Japan – that is, the traditional East Asian world order.[40] China holds a deep sense of mistrust and victimisation in regard to modern international law given that it perceives itself to have been on the receiving end of the instrumental (ab)use of such law by the Western and Japanese powers throughout the 'century of humiliation'.[41]

To this extent, China's reliance on the double-layered nature of international law in the region is understandable. However, China's approach is riddled with serious problems. First, it is a highly daunting task to come up with an articulate description of the traditional normative order in East Asia as a sophisticated and coherent system. Secondly, supposing one could reconstruct this order in an elaborate and coherent way, it should be recalibrated to ensure its compatibility with the fundamental principles of modern international law. For instance, the basic tenet of the traditional order is the (axiomatic) positional superiority of China and the resultant verticality of its relationship with the other members of the order. It is obvious that this verticality is diametrically opposed to the founding principle of modern international law – that is, the principle of sovereign equality of states. Thirdly, the no less difficult task of securing an interface between this order and modern international law remains.

[40] e.g. Shaw discusses the relevance of the 'East Asian World Order' throughout his book *The Diaoyutai/Senkaku Islands Dispute*.

[41] Xue observes that 'China's persistent stand on the primacy of State sovereignty has its deep roots embedded in the miserable experience in its modern history', *Chinese Contemporary Perspectives on International Law*, 71.

At the present stage, it appears that Chinese commentators are resorting to and invoking the traditional regional order without articulating the architecture and concrete contents of the order. From this, it follows that they do not know how to articulate the relationship between this order and modern international law.

2 Critique of the Japanese position

In contrast to the Chinese position, Japan appears to operate under a single normative system – that is, modern international law originating from Europe. The seemingly straightforward position of the Japanese government gives the impression that both points in time – namely, the year 1895 (when the islands were annexed as *terra nullius*) and the present – are placed within a single and seamlessly continuing normative space, obviating the need to discuss the double-layered nature of international law in East Asia.

The main Japanese position is built on historic title as reconfirmed by the act of annexation as *terra nullius* in 1895. When one compares the 1972 'Basic View' with its current version, there is a subtle yet important difference concerning the title of occupation of *terra nullius*. In the older version, this title is accorded the central role in establishing Japan's territorial sovereignty over the islands. The original claim was that '[s]ince [January 1895] the Senkaku Islands have been consistently a part of Japan's territory of Nansei Shoto'.[42] In stark contrast, the current 'Basic View' states that '[h]istorically, the Senkaku Islands have continuously been an integral part of the Nansei Shoto Islands, which are the territory of Japan'. Thus, there has been a substantial shift in the Japanese position with respect to when the islands have been regarded as the 'inherent territory' of Japan. In sum, according to the 1972 'Basic View', the islands have been a part of Japan's territory of Nansei Shoto since January 1895, while the current 'Basic View' regards them as having been an integral part of the Nansei Shoto Islands *historically*, seemingly indicating that they have been so 'from time immemorial'.

This difference is not merely temporal. It compels one to reconstruct the logical relationship between the titles. According to the 1972 'Basic

[42] The English version of the 1972 'Basic View' of Japan is available from the following source: Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study*, 2 vols. (Princeton University Press, 1974), I, 351–2.

View', this relationship is straightforward. The islands were annexed as *terra nullius* in 1895 and have since then remained a part of Japan's territory. Under the current 'Basic View', Japan annexed the islands not as *terra nullius*, but in order to reconfirm its historic title over them. It is clear that an acute logical problem ('annexing as *terra nullius* the islands that have been a historically inherent part of your territory') lurks in the new formulation.

An important question is why Japan is taking the risk of committing such a logical fallacy. If nothing had happened to the once unassailable superiority of modern international law, such retreat into a logical quagmire by Japan would not have been necessary. The compulsion, as it were, to take such a substantial risk suggests that a significant change has taken place to, generally, the international legal order of East Asia, and, more specifically, to the normative parameters of territorial questions in the region. The unquestionable superiority of modern international law (in particular, the positivity and legitimacy of annexation of *terra nullius* as a title of territorial acquisition), obviating the need to look at any other normative system, gave way to the necessity to reformulate Japan's argument concerning its territorial title, even at the risk of logical inconsistency.

3 Preliminary conclusion

The critical survey conducted above suggests that the rise or return of China as a world power has dented the unquestionable authority of modern international law as the ultimate normative benchmark for the region. This probably has led China to invoke the 'pre-modern' documents and practices with more ease and conviction. Japan seems to be compelled to take into account this change, even at the risk of logical self-contradiction.

Does this imply that the contemporary legal order in East Asia is of a palimpsestic nature? Supposing that that order is (at least partially) palimpsestic, how can one secure an 'interface' between modern international law and the traditional regional order in an articulate and coherent manner? Is this mode of viewing contemporary international law applicable to the other non-European regions? Does this approach not carry the risk of further aggravating the 'fragmentation of international law' about which much concern has been expressed from various angles? One can come up with a very long list of questions concerning the palimpsestic

nature or structure of international law, some of which are discussed in the next section.

V The palimpsestic nature of territorial sovereignty in East Asia

This chapter does not aim to evaluate the merits of the respective claims of China and Japan over the Senkaku/Diaoyu Islands, but to examine the fundamental question underlying China's argument: the existence and relevance of the traditional concept of territorial sovereignty and its implications for the resolution of the Senkaku/Diaoyu dispute. I will first describe the dilemma faced by the Chinese side and then suggest a strategy for a palimpsestic reconstruction of its claims over the Senkaku/Diaoyu Islands.

1 Dilemma faced by the Chinese scholars

A fundamental difference between the approaches of China and Japan concerning the Senkaku/Diaoyu Islands lies in the choice of normative system(s) to be applied to the question at hand. In this connection, the Chinese side places a substantial reliance on the traditional concept of territorial sovereignty.

Concerning the Chinese argument based on the double-layered structure of international law in East Asia, let me first point out that a substantial degree of uncertainty surrounds such resort to the traditional order. Chinese commentators do not elaborate what the substantive contours or contents of this order are in reference to territorial acquisition. They stop at suggesting the existence and relevance of this order. While unable to articulate the architecture and contents of this order, they still believe that this normative dimension exists and could (or should) impact, in one way or another, the resolution of the question. There exists a perception that there is 'something important', but it remains on the furthest edges of their epistemological horizon, defying a comprehensible and detailed exposition.

Without a clear idea of what this traditional order is, it is very difficult to expect scholars to proceed to the 'Herculean' task of securing and clarifying the relationship or interaction between the traditional order and modern international law. Until and unless this relationship or interface is constructed in an intelligible and coherent manner, the traditional order is in danger of remaining just that, a hodge-podge of 'premodern' practices not susceptible of scientific or systemic treatment or

categorisation by modern international law. That this is not an idle worry is amply demonstrated by a series of decisions of the International Court of Justice and international arbitral tribunals.[43]

2 Strategy for a palimpsestic reconstruction

Let me now address the question of how to ascertain the substantive contours or contents of the traditional East Asian order, often known as the Sino-centric order. The late Professor Wang Tieya observed in his 1990 Hague Lectures that 'for thousands of years in the context of Chinese traditional order, no international law of any kind could possibly exist'.[44] The veracity of this sweeping statement can be questioned in many ways. However, the question of the correctness of the 'Wang thesis' should not detain us here. What is important for our purposes is that the supposed or professed cultural or moral character of the order (or, seen from a different angle, the alleged absence of an 'inter-State' relationship) resulted in a dearth of reflections or scientific treatments of the subject now called international law. For example, books were written dealing with diplomatic rituals. However, little literature on the 'legal' nature of the tributary relations (often assimilated to 'suzerainty', a highly misleading term having a European origin) was produced.[45] To use the Hegelian terms, the Sino-centric order existed and functioned as a 'being-in-itself' (*an-sich-sein*), lacking in self-awareness and remaining 'self-identical'. In other words, the order did not reach the stage of 'being-for-itself' (*für-sich-sein*), 'the fully deployed, exteriorized, which therefore lies, as it were "before itself"'.[46]

As a result, it is not surprising that Chinese scholars could not present a systematic exposition of the substantive contents of the order in spite of their repeated invocations of it. There lies the difficult task for the scholars

[43] Cases involving territorial sovereignty in which arguments based on 'pre-modern' legal concepts or practices were rejected by international judicial organs include, among others, *Western Sahara (Advisory Opinion)* (1975), *Case concerning the Territorial Dispute (Libya/Chad)* (1994) and *Eritrea-Yemen Arbitration, Phase I Award* (1998).

[44] Wang, 'International Law in China', 219. See also Fairbank, *The Chinese World Order*, 5 ('the traditional Chinese world order can hardly be called international').

[45] For discussions on the history of international law in East Asia, see Keishiro Iriye, 'The Principles of International Law in the Light of Confucian Doctrine', *Recueil des Cours*, 120 (1967), 1–57; Onuma Yasuaki, 'When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', *Journal of the History of International Law*, 2 (2000), 27–32, 51–4.

[46] Charles Taylor, *Hegel* (Cambridge University Press, 1975), 112.

who are interested in the palimpsestic nature of international law in East Asia and other non-European regions. They have first to articulate the traditional orders in their regions in a systematic and coherent manner. Given the absence or dearth of academic or reflective heritage in this regard and the resultant need to work from scratch, the enormity of the task can be readily understood.

It is beyond my ability to provide an articulate description of the order in this chapter. All I can do is merely to suggest a research strategy for the future. The first task is to collate cases or practices relating to territorial questions from historical materials. In analysing these cases, one needs to find recurrent patterns and determine whether they have normative implications. In doing so, the risk of uncritically subsuming these practices under the ready-made categories and concepts of modern international law should be avoided. One should not overlook or ignore a certain overlap or commonality between the two normative orders. At the same time, every effort should be made to remain aware of and alert to the characteristics peculiar to the traditional East Asian order.

Let me adduce an example. China accords substantial weight to the fact that the Chinese first discovered and named the Diaoyu Islands. In this connection, let me discuss an official Chinese map entitled Imperial Map of Native and Foreign Lands (*Huangchao Zhongwai Yitong Yutu*, 1863). In the explanatory part to the compilation of maps, a co-compiler of the maps, Yan Shusen, stated the principle of 'the name follows its owner' (*mingcongzhuren*). He strengthened the authority of the principle by tracing it to one of the canonical texts of Confucianism, 'The Commentary of Gongyang to the Springs and Autumns Annals'. If a certain locality on the map belonged to non-Sinic frontier lands (*siyi*), both the Chinese and vernacular names were used. He subsequently provided a select list of vernacular expressions for, among others, river, mountain, castle, lake and their Chinese counterparts.[47]

In connection with the Senkaku/Daioyu question, this principle could assume a certain importance. On the 1863 map, the three islands belonging to the Senkaku/Diaoyu Islands are indicated in Chinese names only, while those islands belonging to the present-day Okinawa are indicated in both Chinese and the vernacular – that is, Ryukyuan – names. According

[47] e.g. Toshio Okuhara, 'Senkaku Retto no Ryoyuken Kizoku Mondai' (The Problem of to Whom the Territorial Sovereignty over the Senkaku Islands Belongs), *Asahi Asia Review*, 3 (1972).

to the Chinese side, this fact is interpreted to reflect Qing China's clear conception of territorial ownership of the Diaoyu Islands.[48]

There is much need for further research into the significance of the principle as expressed in the 1863 map. The Chinese interpretation would be further strengthened if one could prove that this supposed principle, rather than being a one-off in 1863, was in fact widely used in traditional East Asia. Then the Chinese side could be justified in claiming that the islands in question fell under the Chinese *dominium* under the traditional East Asian order, thereby refuting Japan's argument based on the annexation of the islands as *terra nullius*.[49]

To address this thorny question, interdisciplinary and international co-operation among scholars is required. Even if one were able to articulate the substantive contours or contents of the traditional order, the no less daunting challenge of securing an interface between this order and modern international law remains. In carrying out this difficult task, one should not conceptualise the relationship between the two orders as two separate circles that never overlap. This would be as grave an error as supposing that both an island dispute in mid-nineteenth-century East Asia and one in early twenty-first-century Europe occupy the same normative space. There should be a certain level of overlap or commonality between the orders in respect of the conception of territory (and the concomitant rules such as its inviolability in time of peace), the catalogue of valid territorial titles, the probative value of maps and so on. In so doing, one should construct the interface in such a way as to ensure compatibility between the traditional order and modern international law.

VI Concluding remarks

In this short chapter, I have conducted a preliminary investigation into China's 'rise' or 'return' and its implications for the resolution of a territorial question between China and Japan, concerning the Senkaku/Diaoyu Islands. In so doing, I have attempted to demonstrate that while Japan

[48] Shaw, *The Diaoyutai/Senkaku Islands Dispute*, 55.

[49] China could argue that under the standard of modern international law the inclusion of these uninhabited and remote islands in an official map can amount to not only 'symbolical' but 'effective' occupation. On the other hand, Japan could invoke the case law as elaborated in the *Island of Palmas* arbitration and regard the 1863 act of China, at most, as creating an 'inchoate' title. For a detailed discussion of discovery creating only an inchoate title, see *Island of Palmas or (Miangas), United States* v. *Netherlands*, Arbitration (1928), Reports of International Arbitral Awards, vol. 2, 843–6.

operates under the European version of territorial law that has enjoyed a monopolistic authority in the region since the latter half of the nineteenth century, China places a substantial reliance on, in addition to contemporary international law, the normative discourse that reigned supreme in traditional East Asia. I have used the metaphor of palimpsest to delve into the (at least partially) double-layered structure or nature of international law in today's East Asia. The metaphor can be utilised in other non-European regions of the world.

One may ask about the differences between China's rise and its challenge for contemporary public international law, on the one hand, and the other challenges coming from outside Western Europe in the past, on the other. As regards the latter, three examples come to mind. First, Japan's rise in the post-1945 period was partial in the sense that it was limited to the economic and financial field. More importantly, Japan seems to lack an *animus* to change the international legal order. Secondly, the rise of the Soviet Union led to a fierce rivalry between the capitalist and the socialist camps and posed a great challenge to the unity and continuity of international law. The theory of peaceful co-existence, firmly premised on the fundamental incompatibility between the two camps,[50] is an apt example. However, 'peaceful co-existence' meant co-survival in a state of 'cold peace' without meaningful interchange. This constitutes a significant contrast to the relationship between China and the rest of the world that can be characterised as one of profound entanglement. Thirdly, there was a serious attempt by the G-77 states to reformulate the international legal order during the period of de-colonisation, as is exemplified by the effort to establish a new international economic order or a new international information order. However, the rise of this group of states at the discursive level was not matched by a rise at the material level. In other words, their rise, if ever, had only *animus*, lacking in *corpus*. Thus looked at, the challenge China's rise poses for current international law is unprecedented and, therefore, requires a focused and, at the same time, flexible response.

To use the metaphor of giant, China can be described as a giant that does not yet know how to articulate its normative past. The rise of China will surely impact on the configurations of the international normative system in one way or another, thus ensuring that the current international law is recalibrated to reflect the normative experiences and expectations of

[50] For a detailed discussion of the subject, see Grigory I. Tunkin, 'Coexistence and International Law, *Recueil des Cours*, 95 (1958), 1–81.

China. In the region, discomfort with the current system of international law is not limited to China. The late Professor Han-key Lee, who is regarded as one of the pioneers of modern international law research in Korea, proposed the establishment of a Regional International Court of Justice of Asia for the pacific settlement of disputes, especially disputes arising from State boundary or territory problems. This court was to 'solve regional problems on the basis of regional philosophy of law and practices'.[51]

The re-conceptualisation of international law in East Asia from a palimpsestic perspective and the resultant recalibration of current international law carry the risk of furthering the centrifugal tendency of international law. This exercise cannot be a nostalgic and unreflective attempt to return to an ostensibly idyllic past, which is unfeasible given that international law has been transformed (probably irrevocably) by the 'public law of Europe'. East Asians cannot return to the days when the positional superiority of China was the founding principle of the regional order. In particular, one should beware the danger of the palimpsestic approach to territorial questions in East Asia falling prey to the siren call of irredentism, which runs diametrically counter to the fundamental principle of the stability of boundaries. It should aim at a more modest and pragmatic goal of achieving a peaceful change or polyphonic reconstruction of international law without radically undermining the stability and security of the current international order.

[51] Han-Key Lee and MyongWhai Kim, 'Background Paper on Hongkong Conference in International Law', *Korean Journal of International Law*, 12 (1967), 181–2.