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STRENGTHENING THE EFFICACY OF ACQUISITIVE PRESCRIPTION IN INTERNATIONAL LAW:

IMPLICATIONS FOR THE SENKAKU-DIAOYU ISLANDS DISPUTE

Richard Stubbs¹

Nestled between Taiwan, Mainland China, and Japan in the East China Sea lie five uninhabited islands and three barren rocks known as the Senkaku Islands.² The Senkakus were mostly ignored in the records of international discourse until 1969 when potentially vast oil and gas reserves were discovered in their vicinity.³ Since then, the ownership of the islands has been hotly contested between China and Japan.⁴ To date, it has become one of the primary topics of contention between the two Asian powers.

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⁴ Hiromichi Moteki, *The Senkaku Islands Constitute an Intrinsic Part of Japan* 7 (Society for the Dissemination of Historical Fact, 2010).
The situation has recently threatened to erupt into violence.\(^5\) Prior to August 2012 the islands were privately owned by a Japanese family. Then, the Japanese government purchased the islands provoking violent protests across China.\(^6\) The following month, seventy-five Taiwanese fishing boats escorted by ten Taiwanese Coast Guard vessels entered the immediate vicinity of the islands and were intercepted by Japanese Coast Guard ships. The two parties announced their respective claims on the islands using LED lights and loud speakers and blasted each other with water cannons.\(^7\) In the months following, a Chinese government aircraft entered the islands’ airspace, prompting Japan to scramble fighter jets in response.\(^8\) Japan also claims that in January 2013, a Chinese frigate locked its weapons targeting systems on a Japanese destroyer.\(^9\) Over the last several years, there has been a consistent increase of military displays in the vicinity of the islands, causing observers to label it a “powder keg.”\(^10\)

Considering how close to catastrophe this dispute has come, it is in the best interests of the international community to help find a resolution to this territorial dispute. The Senkaku Islands controversy is the result of centuries of shifting legal norms, regional political

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tension, and outright warfare between China and Japan. Addressing all of these issues is beyond the scope of this paper, and beyond the scope of the law itself, but there is one malfunctioning common law principle called “acquisitive prescription” that encourages this brinkmanship. I aim to help defuse the situation by proposing new standards for acquisitive prescription. Establishing clear standards will reduce the incentive to assert a territorial claim with military force.

To lay the foundation of these standards, Section I will review the historical context of the dispute, while Section II will review the legal precedent for acquisitive prescription. Section III will outline the new standards based on the preceding sections, and Section IV will apply them to the Senkaku Islands dispute.

I. DISPUTE BACKGROUND

Before 1895, the islands were little more than a geographic footnote. By 1403 AD, the Chinese had discovered and named the islands. During the Ming and Qing dynasties, the islands were navigational markers on the way to the kingdom of Ryukyu, and a popular spot for Chinese fishermen. Furthermore, both the Ming and Qing dynasties included it in coastal defense maps. Nevertheless, Japan claims that over several decades in the late 1800s its government surveyed the area and found no evidence of habitation or exercise of authority by the Ming or Qing dynasties. They then declared the islands terra nullius - uninhabited land - and made the decision to annex the islands into Okinawa Prefecture in January 1895 during the First Sino-Japanese War. Several months later, the war ended with the signing of the Treaty of Shimonoseki, where Taiwan and its islands were ceded to Japan.

On the other hand, the Chinese believe the Japanese seized the island as the spoils of victory, as part of “[t]he island of Formosa,

11 Lohmeyer, supra note 2, at 27.
12 Diaoyudao shi Zhongguo de Guyou Lingtu (钓鱼岛是中国的固有领土) [Diaoyu Islands are the Inherent Territory of China] (Sept. 25, 2009) http://news.qq.com/a/20120925/001641.htm.
together with all islands appertaining or belonging to the said island of Formosa.”  

In 1945, in accordance with the 1943 Declaration of Cairo, the Japanese relinquished to their original owners control of any territories taken through war to their original owners. Therefore, China claims that the Japanese should have handed over the Senkakus along with Taiwan and its other islands in 1945. The Japanese, on the other hand, argue that the annexation of the Senkakus and the cession of Taiwan and its other islands were two separate acts. While the latter was an act of war, the former was not. Therefore, the Senkaku Islands were not among the territories that the Cairo Declaration forced Japan to return. The controversy surrounding the territory thus traces right back to painful memories of war-time atrocities and national humiliation for both sides.

However, none of this surfaced for decades after the fact. After the end of World War II, the Senkakus were administered by the United States of America, along with the rest of Okinawa Prefecture. Then, in 1969, the United Nations Economic Commission for Asia and the Far East discovered potentially vast oil and gas reserves near the islands. By this time the U.S. had already returned authority of the rest of Okinawa back to Japan, but the administration of the Senkakus was not transferred until 1972. The U.S. was clear that this was a transfer of administrative duties, not of sovereignty. It was at this time that China increasingly began to criticize the situation.

II. ACQUISITIVE PRESCRIPTION

The status of the islands prior to 1895 may be a moot point. The Japanese argue that even if the initial annexation wasn’t legal, ownership of the Senkakus was passed to them through acquisitive
prescription. This is a common law principle where an unclear or faulty initial claim to property is made legitimate after lengthy, unopposed possession. In the words of D.H.N. Johnson, “Display of authority by the one party, acquiescence in that display by the other party—those are the *sine qua non* of acquisitive prescription.”

Carlos Ramos-Mrosovsky argues that it is the fear of appearing to acquiesce—and thus losing the claim—that motivates the military tit for tat currently playing out. The problem is exacerbated by the fact that the requirements of acquisitive prescription are open to interpretation. If the international community clarifies these requirements, it can assure both nations that their claims need not be enforced militarily, which is the first step towards a peaceful resolution. Roman law, international arbitrations, and decisions of the International Court of Justice provide insight into what a more efficacious standard might look like.

(i) Roman Law

The roots of prescription as a common law principle go back to Roman law. In Roman law, *usucapio* was a principle wherein the possessor of a property whose original title to that property was defective could nevertheless acquire the title so long as he had 1) acquired the property in good faith, 2) possessed it physically (*corpus occupandi*) and with the intent of ownership (*animus occupandi*), and 3) possessed it without interruption for a period of time defined by law.

The analogous principle in international law is acquisitive prescription. Acquisitive prescription, though, does not require the

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18 *Id.* at 17.
21 Lohmeyer, *supra* note 2, at 106 (“Basing a claim merely on prescription might not be advisable as this legal device is quite elastic and unpredictable.”).
original acquisition to be in good faith. Instead, it requires the acquiescence of the defendant state. Additionally, acquisitive prescription does not define a minimum length of possession. These two differences—the lack of a good faith clause and the lack of any strict temporal requirement—make acquisitive prescription a far more contentious rule than its Roman ancestor.23

(ii) Modern Precedent

Before I begin addressing these issues I will review both the motivations for and modes of implementation of acquisitive prescription. Acquisitive prescription differs from occupation (the acquisition of virgin territory, or terra nullius) only in that the latter deals with previously unclaimed territory, while the former deals with territory that has at some point been claimed already.24 Consequently, I will look at several cases where, though prescription is not at issue, the status of an occupation is. Besides the difference in territorial status, there is also the issue of acquiescence, the one legal element unique to this mode of territorial acquisition. Acquisitive prescription has been claimed or cited in a number of international arbitrations or decisions by international courts, providing a variety of views on what exactly constitutes acquisitive prescription. The following cases examine acquisitive prescription in a variety of situations and form the bedrock of acquisitive prescription precedent in international law.

Venezuela vs. Great Britain, 1895

In 1895, Venezuela disputed with Great Britain over rights to the Guayana Esequiba region. Venezuela believed they inherited the territory from the Spanish Empire. Great Britain argued that before Venezuela’s independence, Spain did not have effective possession of the disputed territory and that the native population had an alli-

23 Id. at 337.
24 Lohmeyer, supra note 2, at 105.
ance with the Dutch in 1814, which influence passed to the British. The Tribunal of Arbitration awarded Great Britain 90% of the territory. The arbitrators proposed a requirement of 50 years for prescription to take effect.

**United States vs. Mexico, 1911 (1963)**

The border between the United States and Mexico had originally been defined as the midpoint of the Rio Grande River. However, over the following decades the river shifted to the south, technically converting some Mexican territory into U.S. Territory. Mexico claimed the border should have remained north of the river’s then current position. The U.S. maintained that Mexico had acquiesced to its control of the territory. The tribunal ruled that prescription requires peaceful unchallenged exercise of authority and the U.S administration failed to effectively establish that standard: the Mexican government consistently protested and one American official threatened a Mexican official who tried to exert authority over the region.

**Netherlands vs. USA, 1928**

The USA and the Netherlands disputed the territorial rights over the Island of Palmas. Through the Treaty of Paris in 1898, Spain ceded the Philippines to the United States, but the Netherlands also claimed sovereignty over one island, the Island of Palmas. The two countries took the case to the Permanent Court of Arbitration. The arbitrator found that title by discovery is only an inchoate title - it requires further exercise of State authority to be confirmed. Second, he concluded that if another sovereign begins to exercise continuous and actual sovereignty, and the discoverer does not contest this

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26 *Id.* at 88.


claim, the claim by the sovereign that exercises authority is greater than a title based on mere discovery.\textsuperscript{29}

\textit{Norway vs. Denmark, 1933}

In 1933, Norway tried to claim land in Eastern Greenland already claimed by Denmark. Denmark had allowed Norway to establish hunting settlements, but Norway argued that the territory was \textit{terra nullius}. Denmark had previously claimed the whole of Greenland even though they had never settled the eastern portion. The Permanent Court of International Justice rejected Norway’s claim because Norway’s settlement was part of an agreement between the two countries and therefore was not an occupation.\textsuperscript{30}

\textit{France vs. England, 1953}

The Minquiers and Ecrehos islands in the English Channel were officially given to France in 1360, but the UK had been exercising various administrative rights over the islands. Based on this, the ICJ awarded England the title despite France’s stronger historical claim.\textsuperscript{31}

\textit{Cambodia vs. Thailand, 1961}

In 1907, the French colonial authorities drew the map of the border between French-owned Cambodia and Thailand (then Siam). In their map, the Temple of Preah Vihear was within Cambodian territory. This map was presented to the Siamese government, who accepted it. The case, brought to the Court over 50 years later, was decided in Cambodia’s favor specifically because Thailand failed to protest the map in a reasonable amount of time. The court determined that Thailand had already acquiesced to the border in the 1907 map by the time the case was brought up.\textsuperscript{32}

\textsuperscript{29} Id. at 867–68.


\textsuperscript{32} Temple of Preah Vihear (Cambodia v. Thai.), 1962 I.C.J. 6 (June 15).
Botswana v. Namibia, 1999

In 1999 the ICJ heard arguments from Namibia and Botswana regarding the island known respectively as Kasikili or Sedudu. Namibia claimed that the otherwise uninhabited island was frequented by the Masubia tribe of natives, and that their presence generated a claim in Namibia’s behalf. The Court, however, ruled that since the Masubia tribe was only ever present intermittently, it did not represent a continuous presence, which they said was necessary to generate a claim through prescription.33

Indonesia v. Malaysia, 2002

The most recent case is the Pulau Ligitan and Pulau Sipadan dispute between Indonesia and Malaysia, heard by the ICJ in 2002. Indonesia claimed that the frequent use of the island’s waters by its fishermen generated a claim of sovereignty. The Court, however, ruled that only government action can generate a sovereign claim, so the fishermen themselves were insufficient.34

III. Proposed Standard

From these examples, the following rules may be derived. Both the Roman law of usucapio and the international legal standard for occupation require “a real element of ‘corpus occupandi’ (taking possession) as well as an element of ‘animus occupandi’ (the will to occupy).”35 These are the first two conditions for acquisitive prescription.

(i) Corpus Occupandi

What qualifies as corpus occupandi? From the Pulau Ligitan and Pulau Sipidan case it is evident that the actions of private per-
sons does not constitute *corpus occupandi*. Rather, the government of a state must explicitly cause its will to be obeyed in the territory. So regulation of citizens or activities, the taxing thereof, etc., count as *corpus occupandi*. In situations where the territory is uninhabited, however, the terms become much less clear.

In the Eastern Greenland case, Denmark never physically occupied the territory. The Island of Palmas arbitration, on the other hand, emphasizes that without an actual exercise of sovereign authority, any claim on territory is inchoate. Denmark’s exercise of authority in Eastern Greenland included granting monopoly rights to hunting groups. Thus the Danish Crown exercised its authority in Eastern Greenland even if they lacked a physical occupation. Therefore, I propose that a positive requirement of *corpus occupandi* be maintained. In uninhabited territory, the state need not occupy it physically, it merely needs to effectively regulate activities.

(ii) Animus Occupandi

*Animus occupandi*, the will to occupy, means that the possession of territory by a state must be exercised as a sovereign. This means that if one country occupies a territory with permission from the territory’s owner, that possession cannot generate a prescriptive claim. Furthermore, acquisitive prescription in international law requires publicity. If a state discovers a territory but fails to communicate that discovery, then any other state with a prior claim cannot have

36 Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 Brit. Y.B. Int’l L. 376, 416 (1950) (“The borderline between attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration.”).

37 Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 846 (Perm. Ct. Arb. 1928) (“An ‘inchoate’ title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.”).

38 Johnson, *supra* note 19, at 344.
acquiesced. \textsuperscript{39} Put another way, the owner of a territory cannot acquiesce to another state’s occupation unless they know about it, or could reasonably be expected to. Therefore, the requirement of \textit{animus occupandi} is not fulfilled unless the acquiring state both occupies the territory as a sovereign, and has taken reasonable measures to publicize its occupation.

(iii) “Continuous and Peaceful”

Additionally, a state’s exercise of authority must be both continuous and peaceful. The Island of Palmas arbitration repeatedly emphasized the “continuous and peaceful display of State authority” on the part of the Netherlands, which superseded the United States’ inchoate title. \textsuperscript{40} Both the continuous element and the peaceful element are required: the arbitration specifically points out the need for continuous authority, \textsuperscript{41} while the arbitration award from the Chamizal case denied the United States’ claim of prescription because there was evidence that the American authority was maintained by threat of force. \textsuperscript{42} Any authority based on force or which is only intermittent cannot support a prescriptive claim.

(iv) Acquiescence

The final and most controversial element of acquisitive prescription is acquiescence. For a title to transfer by prescription, the state that claims a prior title must either explicitly or implicitly acquiesce to the other state’s occupation. An explicit acquiescence, a formal recognition of the acquiring state’s authority, would be sufficient to demonstrate acquiescence. However, the vast majority of acquisitive prescription cases deal with implicit acquiescence. The precedent

\textsuperscript{39} \textit{Id.} at 347.

\textsuperscript{40} Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 868 (Perm. Ct. Arb. 1928).

\textsuperscript{41} \textit{Id.} at 867.

agrees that implicit acquiescence includes two elements: lack of protest and time.

Lack of Protest

Acquisitive prescription requires that the acquiring state has made its occupation public enough that the original owner of the territory could reasonably be expected to be aware of it. On the other hand, there is no positive requirement for the acquiescing state when the acquiescence is implicit. Rather, it is required to show that the acquiescing state did not take any action that contested the acquiring state’s authority. This is a generally agreed upon principle, but the question remaining is which methods of protest suffice and which do not.

In the modern era, registering protest with the relevant international body—the League of Nations since 1919 or the United Nations since 1945—is an easily identifiable method. But previous to the formation of said bodies, the acceptable protests would take different forms. In the Chamizal case, the arbitrators recognized diplomatic correspondence protesting the situation as sufficient protest. What is not clear is what alternative diplomatic action would also suffice. If a country published its protest domestically or in correspondence with some third nation, would that suffice? The precedent is simply unclear on this.

Therefore, I propose the following standard: Since the acquiring state must evidence the publicity of its occupation, it seems reasonable to require that the acquiescing state must demonstrate that it protested either to the acquiring state itself or to the international community at large. Such protest must be public enough that the acquiring state could reasonably be expected to be aware of it. Mentioning protest in correspondence with third party nations—unless they were public negotiations of which the acquiring state could reasonably be expected to be aware—would not constitute protest, nor would any form of domestically-published opinion. Exceptions

43 Lohmeyer, supra note 2, at 105.
might apply if the acquiescing state was somehow unable to publish such protest due to extreme economic squalor or technological or natural barriers that the state could not reasonably have been expected to overcome.

**Time**

The most controversial question is how much time following the beginning of the occupation indicates implicit acquiescence. Scholars have repeatedly pointed out that this must vary according to the nature of the territory involved; uninhabited or remote regions should require a different length of time than inhabited, accessible regions. The Island of Palmas arbitration accepted the over-200-year occupation of the Netherlands, but the Temple of Preah Vihear case ruled that Thailand had acquiesced to the boundary with Cambodia after just over 50 years. In the original treaty of agreement to the arbitration of the Guayana Esequiba case, the two nations agreed that territories possessed longer than 50 years would remain the territory of the acquiring state. Thus 50 years is a measuring stick that multiple cases have used as a standard, at least for inhabited areas.

For uninhabited territories, the general consensus holds that the more valuable the territory, the longer the temporal threshold for acquiescence. Thus, uninhabited islands of little material or strategic value would require less than more valuable, inhabited areas. If 50 years emerges as the standard of acquiescence for inhabited areas, then some shorter amount of time would suffice for uninhabited areas. I propose that 40 years is a sufficient length of time to establish the implicit acquiescence of territorial rights to uninhabited, low-value territories.

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46 *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6, 8 (June 15).


(v) Condensed Standard

Based on the above analysis, I propose the following general standard for acquisitive prescription: If the acquiring state provides evidence of (1) corpus occupandi, (2) public animus occupandi, and (3) a continuous and peaceful exercise of state authority; and (4) the acquiescing state fails to provide evidence of sufficiently public protest within 50 years for inhabited or resource-rich areas, or 40 years for uninhabited and resource-lacking areas (based on how the territory was understood for the majority of the occupation), then the acquiring state acquires the title, and the acquiescing state’s title is extinguished via prescription.

IV. Application to Senkaku-Diaoyu Dispute

Japan is quick to assert China’s acquiescence: Since January of 1895 the Senkaku Islands have been under Japanese rule. Their annexation was a separate legal act from the Treaty of Shimonoseki. At the time, China made no protest whatsoever. Furthermore, in 1945, which was the 50th anniversary of the annexation, China, which stood alongside other Allied nations as victors over Japan, made no claim to the islands. More than 20 years later, after the United Nations Economic Commission for Asia & the Far East discovered potential oil reserves in the maritime territory near the islands, China raised its first objection to the status quo, after 71 years of acquiescence. By the proposed standard, China’s 71-year silence constitutes acquiescence.

Furthermore, Japan argues that it has continuously and peacefully exercised authority over the Senkakus since 1895. In 1896, the Japanese “discoverer” of the islands received from the Japanese government the exclusive usage rights of the islands. By 1910, 200 people lived on the island, which continued to develop its fishing industries. In 1932, the discoverer’s son purchased the islands from

49 Lohmeyer, supra note 2, at 194.
50 MOTEKI, supra note 4, at 14.
51 Lohmeyer, supra note 2, at 105.
the Japanese government and in turn sold it to the Kurihara family in the 1970s. Nevertheless, during this entire period, property taxes were consistently paid to the government of Okinawa Prefecture.\textsuperscript{52}

In 2012, the Japanese government successfully nationalized the islands. Japan’s claim of effective occupation is well supported.

The Chinese argue that Japan’s prescriptive claim lacks a publicized \textit{animus occupandi}. The Japanese decision to annex the islands was not made by the government publicly, but rather in a closed meeting of cabinet ministers.\textsuperscript{53} Furthermore, the year following the annexation, the imperial edict updating the Okinawa Prefecture registry did not contain the islands.\textsuperscript{54} In contrast, when Japan annexed the Ogasawara Islands in 1876 and again in 1891, it published their intent, stating the islands’ names and locations publicly.\textsuperscript{55} Not only did Japan not declare any intent of acquisition to the international community, it also failed to publicly announce or record the islands’ annexation domestically.

Further, the Chinese claim that they never acquiesced. In 1941, due to the difficulties of the Second World War, the Japanese government ceased supply shipments to the islands, forcing all the islands’ inhabitants to return to Okinawa Prefecture.\textsuperscript{56} The islands were again uninhabited and unmaintained until the end of the war in 1945. After Japan’s defeat, the islands fell into the United States’ custody. Therefore, the Japanese occupation of the Senkakus ended in 1941. To the Chinese, then, the Japanese occupation did not last 71 years, but rather 46. Since the islands had been inhabited and productive during the occupation, China would argue that the 50-year requirement should apply. If that is the case, then the Japanese occupation did not last long enough for the Chinese to acquiesce.

\begin{footnotes}
\footnotetext[52]{Moteki, \textsl{supra} note 4, at 7–14.}
\footnotetext[53]{Diaoyudao shi Zhongguo de Guyou Lingtu, \textsl{supra} note 12.}
\footnotetext[54]{Lohmeyer, \textsl{supra} note 2, at 159.}
\footnotetext[55]{Han-yi Shaw, \textsl{[The Diaoyutai/Senkaku Islands Dispute; its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan]} 104 (Sch. Of Law Univ. of Md. 3rd ed. 1999).}
\footnotetext[56]{Moteki, \textsl{supra} note 4, at 9.}
\end{footnotes}
Neither of the above arguments is persuasive. While the Japanese demonstrate *corpus occupandi* and unopposed occupation, they also failed to publicize their occupation. But the Chinese should not be quick to rejoice; they never landed on nor displayed authority over the inhabitants of the Senkakus, so if their original claim to the islands is held to the proposed requirements for *corpus occupandi*, then their title is also inchoate. What this means is that both countries have defective claims.

V. Conclusion

This is actually a desirable outcome; without dismissing either side entirely, the International Court of Justice can offer this analysis as an advisory opinion, pushing the issue out of the legal realm and into the diplomatic. Since both sides have registered their protest, no further demonstrations of authority would have any legal impact. With that, the legal motivation to flex military authority is removed, and diplomacy becomes the most efficient way to approach the Senkakus.

The Senkaku Islands dispute is a legal Gordian knot. Unfortunately, a dearth of applicable precedent and the internal political realities of both countries leave the Alexandrian solution nowhere to be found. Currently, the vagueness of acquisitive prescription encourages aggressive assertions of sovereignty. My proposed standard clarifies acquisitive prescription and discourages military responses. In the absence of legal leverage, the most viable remaining option would be increased diplomatic interaction; the contested rights to the islands would become a bargaining chip instead of a powder keg.