

The China-Japan Clash Over the Diaoyu/Senkaku Islands

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Which country should the islands called Diaoyu by the Chinese and Senkaku by the Japanese belong to, China or Japan? Currently, these islands are under Japanese control, but China also claims sovereignty over them. When signing the 1978 Sino-Japanese Treaty of Peace and Friendship, then Vice-Premier Deng Xiaoping said: "Our generation is not wise enough to find common language on this [Diaoyu/Senkaku] question. The next generation will certainly be wiser. They will surely find a solution acceptable to all."

We, the people of the 21st century, are the "next generation." Although it is doubtful that we are any wiser than our predecessors, we can at least try to improve our understanding of these issues.

A first step in that direction is a well researched book on the Diaoyu/Senkaku question, Suganuma Unryu's *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands* (Honolulu: University of Hawai'i Press, 2000).

Origins of the dispute

The Diaoyu Islands are China's irredenta, an area that historically belonged to China but is currently under Japanese control (to adapt the dictionary definition of the word). There is a powerful current of irredentism concerning

these islands among Chinese people not only in China proper, but all over the world. Many Chinese feel that China was unjustly deprived of the Diaoyu Islands and that they should be a rightful part of Chinese territory.

Major support for Chinese irredentism comes from the history of relations between Imperial China (Ming and Qing) and the Ryukyu Kingdom. The acknowledged boundary between China and Ryukyu until the demise of the Ryukyu Kingdom was somewhere in the sea east and south of the Diaoyu Islands (west and north of the Ryukyu Islands). This Sino-Ryukyuan boundary became a Sino-Japanese boundary when Japan took over Ryukyu and proclaimed it Okinawa Prefecture in 1879. After the incorporation of Ryukyu in the empire of Japan, the Japanese government turned its attention to other small islands in the surrounding seas. In 1885, Tokyo declared sovereignty over the North and South Ufuagarijima (today's Daito) Islands and placed them under the jurisdiction of Okinawa Prefecture. About this time, the Japanese-appointed governor of Okinawa petitioned Tokyo for the take-over of the Diaoyu Islands. (Another uninhabited island to the south of the Daito Islands was added to the Daito group as Okino Daitojima in 1900.) The Japanese government hesitated, but decided to incorporate the Diaoyu Islands in Japanese territory in January 1895 in the midst of the Sino-Japanese War, which ended with the Treaty of Shimonoseki in November of the same year. The Treaty stipulates, among other things, that China cedes to Japan "the island of Formosa together with all islands appertaining or belonging to said island of Formosa" [Article II{b}]. Whether the Diaoyu Islands, which were

not called Senkaku by Japan until 1900, are implied in "islands appertaining or belonging to said island of Formosa" is an unsettled question. China's answer is affirmative, while Japan insists that these islands were *terra nullius* when Japan took over. Japan justifies its position by the international law of how *terra nullius* becomes a specific state's territory. The legality of the Japanese occupation of the Diaoyu Islands on January 14, 1895 as well as the question of how these islands figured in the negotiation for the Treaty of Shimonseki deserves renewed attention.

After the Treaty of Shimonoseki, the Japanese government placed the Diaoyu Islands under the jurisdiction of Yaeyama County (comprising the southernmost island group of Okinawa Prefecture) and leased some of them to a Japanese entrepreneur, Koga Tatsushiro, who used the islands as a bonito fishing and processing base. The Diaoyu Islands were uninhabited before Koga came. In 1942, the Koga enterprise folded and all the human agents left the islands, returning the Diaoyu, now Senkaku, Islands to the earlier uninhabited state.

World War II and territorial re-alignment

Losing the Pacific War, Japan accepted the terms of the Potsdam Proclamation of July 25, 1945 and unconditionally surrendered to the Allies on August 15. The Potsdam Proclamation was jointly issued by the Three Great Allies: the United States, the Republic of China, and Great Britain. With respect to the postwar territory of Japan, the Proclamation stipulates, among others:

"(Article 8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."

The Cairo Declaration of December 1, 1943 by

the same Three Great Allies states:

"... Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914 and all the territories that Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China."

Months before Potsdam, in the early days of the Battle for Okinawa, U.S. military government was established over occupied islands and adjacent waters of the Ryukyu Islands, "suspending" "all powers of the Government of the Japanese Empire" (Article II, United States Navy Military Government Proclamation No. 1). This proclamation had serious implications for the subsequent evolution of the status of Okinawa. There was no mention of the Senkakus, but these islands had by then been under the administrative jurisdiction of Okinawa Prefecture for nearly fifty years. The U.S. simply assumed that they were part of the Ryukyu Islands, which the U.S. detached from Japan at this time.

In January 1946, SCAP/GHQ in Tokyo took a first tentative step toward definition of the "minor islands" referred to in the Potsdam Proclamation. The Memorandum Concerning Governmental and Administrative Separation of Certain Outlying Areas from Japan, dated 29 January 1946, "excludes" from Japan a large number of islands and areas that had been incorporated in the Japanese empire. Among them are the Ryukyu Islands south of 30 degrees North Latitude. Among other areas excluded are "Formosa and the Pescadores."

In hindsight, the stock phrase "Formosa and the Pescadores" is highly imprecise, because it fails to specify whether "Formosa" is understood to include those "islands appertaining or belonging to Formosa" referred to in the Treaty of Shimonoseki of 1895. The basic confusion hinges on whether geography

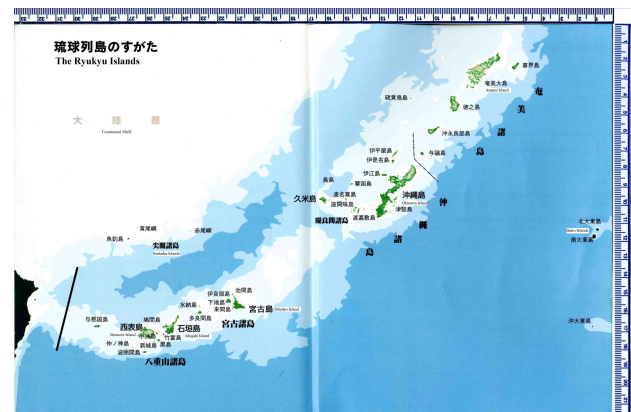
or administration is the primary criterion determining jurisdiction over the islands. If in place of "Formosa and the Pescadores" an expression were used referring to all the areas under the jurisdiction of imperial Japan's governor general of Taiwan, there would be no ambiguity over what islands should be included in "Formosa and the Pescadores." The criterion of administrative jurisdiction would also clearly leave the Senkaku Islands out of "Formosa and the Pescadores," keeping them within the purview of the former Okinawa Prefecture, renamed the Ryukyu Islands during the period of American occupation.

A treaty of peace between Japan and the Allied Powers should have resolved these and other questions regarding the definition of Japanese territory. The San Francisco Peace Treaty of 1951, however, failed to settle the territorial issues. Between 1945 and 1951, a sea change occurred in world politics: the outbreak of the Cold War. In 1949, the government of the Republic of China, one of the Three Great Allies of Cairo and Potsdam, retreated to Taiwan and its realm, although not its claims, shrank to a few coastal islands of the continent and "Formosa and the Pescadores." Even to secure this shrunken territory, the ROC needed the protection of the U.S. Seventh Fleet and extensive U.S. military aid. While the ROC continued to represent "China" in the international arena, from 1949 continental "China" was governed by the People's Republic of China. In June 1950, the Korean War broke out and the PRC soon entered the conflict. Under the circumstances, the peace treaty with Japan to settle the score for the Pacific War and formally conclude the U.S. occupation morphed into a treaty to bind Japan within the orbit of American power. The San Francisco Peace Treaty was drafted by the United States with the assistance of Great Britain. Significantly, neither the ROC nor the PRC were invited to participate in the peace conference. The Soviet Union was, but in the end refused to sign the treaty.

The hasty conclusion of a "partial" peace with Japan under the exigencies of the Cold War left several territorial and other issues unresolved, as documented by John Price in his JPRI Working Paper No. 78, "A Just Peace? The 1951 San Francisco Peace Treaty in Historical Perspective" (June 2001).

Article 3 of the San Francisco Peace Treaty, in parts relevant to Diaoyu/Senkaku, reads as follows:

"Japan will concur in any proposal of the United States to the United Nations to place under the trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 degrees north latitude (including the Ryukyu Islands and the Daito Islands)... Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."



"Nansei Shoto (including the Ryukyu Islands and the Daito Islands)" is a peculiar phraseology. "Nansei Shoto" (Southwestern Islands) is a geographic, not an administrative, term supported by some presumed consensus on what it includes. Generally, it refers to an arc of islands lying between the southern end of Kyushu and Taiwan. More rigorously, it

includes, from north to south, the Tokara Islands, the Amami Islands, the Okinawa Islands, and the Yaeyama Islands. Each of these island groups forms some distinctive cultural and linguistic unit, but all of them together are broadly classified as the Ryukyuan culture area distinguishable from the Japanese culture area to the north. But administratively, the Tokaras and the Amamis belong to Kagoshima Prefecture, while the Okinawas, Miyakos and the Yaeyamas belong to Okinawa Prefecture. Administratively, Okinawa Prefecture in the main covers the same territory as the erstwhile Ryukyu Kingdom. The Daito Islands were added to Okinawa Prefecture after the end of the Ryukyu Kingdom era, as mentioned earlier. So the Daitos are part of neither Nansei Shoto nor of the Ryukyu Islands. Nor, longitudinally, are the Daitos "Nansei" of Kagoshima.

Historically and geographically, neither Nansei Shoto nor the Ryukyu Islands include the Senkaku Islands. But administratively, the Senkakus were attached to Okinawa Prefecture by decree of the Japanese state shortly after the Sino-Japanese War of 1894-95. The absence of mention of the Senkaku Islands in the Treaty definition of Nansei Shoto is a geographically correct usage of the term, but it was inconsistent with the Treaty intention that must have been to include the Senkakus. From the Treaty language alone, one might infer that the Senkakus are not included in "Nansei Shoto (including the Ryukyu Islands and the Daito Islands)" and that Article 3 of the Peace Treaty does not apply to the Senkakus. It is possible that the two "republics" of China, ROC and PRC, each in its own way speaking for "China," might have drawn this inference in view of their shocked outburst of disapproval concerning Japan's take-over of the Senkakus at the time of the 1972 "reversion of Okinawa."

Twenty years after the San Francisco Peace Treaty took effect, the United States relinquished all powers of government over the Ryukyu Islands and the Daito Islands in favor of

Japan. During preparations for the "Okinawa reversion," when it became clear to the PRC and the ROC that the Diaoyu Islands were to be transferred to Japan, both protested. In response, the United States explicitly said that the Senkakus were included in the "Nansei Shoto" of Article 3 of the San Francisco Peace Treaty. Suganuma quotes a State Department official as saying: "The term 'Nansei Shoto' was understood to mean all islands [south of 29 degrees north latitude] under Japanese administration at the end of the war ... The term, as used in the treaty, was intended to include the Senkaku Islands." (p. 134) One only regrets that the administrative, rather than the geographical, definition of Nansei Shoto was not used in the Peace Treaty. But this does not put the Senkaku issue to rest as we note below.

The Ryukyu Islands and Japan's "residual sovereignty"

In December 1950, in anticipation of the peace treaty with Japan, the U.S. Military Government in Okinawa was reorganized and renamed the United States Civil Administration of the Ryukyu Islands (USCAR). USCAR spawned its Ryukyuan counterpart, the Government of the Ryukyu Islands (GRI) staffed by Ryukyuans. The Provisions of the Government of the Ryukyu Islands, dated 29 February 1952, precisely defined the area of "political and geographic jurisdiction" of the GRI in terms of longitude and latitude (Article 1). The area so defined included the Senkaku Islands, thus placing them within the area controlled by USCAR.

About this time, Japan and the ROC were negotiating a separate treaty based on the San Francisco Peace Treaty. The bilateral treaty signed in Taipei on April 28, 1952 made no mention of Senkaku or Diaoyu Islands. The ROC failed to seize a major opportunity to discuss and assert (or even reserve) sovereignty over the Diaoyu Islands. Did this failure signify that "China" had abandoned the

Diaoyu Islands as a part of its territory? Suganuma speculates: "It is inevitable to say that representatives from the ROC failed to recall the existence of the Diaoyu Islands." (p. 123). The ROC's amnesia was decisive. It would not be easy to defend this loss of memory or subsequently to play a major role in the Diaoyu/Senkaku dispute. However, the legal environment surrounding the Diaoyu/Senkaku Islands is examined in a recent book by Qiu Hongda cited by Suganuma (p. 256), *Diaoyutai Lieyu Zhuquan Zhengshi Wenti Jiqi Jiejue Fangfa de Yanjiu* (Study of the Disputed Sovereignty over the Diaoyu Islands Problem and Its Resolution) (1991).

By 1970, U.S. jurisprudence on Japan's "residual sovereignty" had reached a high level of sophistry. According to Qiu, in May 1971, in response to an inquiry from the Republic of China concerning the Diaoyu/Senkaku Islands, the U.S. replied in effect (by reverse translation from the Chinese text): The United States believes that a return of administrative rights to Japan, from which these rights were initially acquired, in no way damages the Republic of China's claim of sovereignty; nor can the United States, in transferring the administrative rights over these islands, grant Japan an expansion of the legal rights that it [Japan] had prior to giving them to the United States. (Qiu, 26)

The U.S., moreover, stated that what it acquired from Japan by the Peace Treaty was not sovereignty over the Diaoyu Islands, but administrative rights. Okinawa reversion did not affect claims of sovereignty with respect to these islands by any state, be it the ROC, PRC, or Japan. The U.S. has no involvement in these sovereignty disputes. (See Suganuma, p. 135.) This "neutral" position of the United States may give slight satisfaction to the ROC and the PRC. But it is devastating to a Japan at fear the U.S. standing aside in the event of a showdown with China.

Since the United States apparently considers the ROC, the PRC and Japan as being on an equal footing in their contest for sovereignty over Diaoyu/Senkaku, it should be possible for the disputants to agree to appear and argue their cases before some adjudicatory authority (such as the International Court of Justice).

However, the position of the ROC remains weak. As one of the former three Great Allies and a member of the UN Security Council, the ROC should have been able to resolve the Diaoyu/Senkaku issue during the long U.S. occupation of the Ryukyu Islands including Diaoyu/Senkaku before it yielded its UN seat to the PRC in 1971. Yet the ROC remained silent about it throughout this period, leading international observers to suspect that it had abandoned Diaoyu/Senkaku.

However, Qiu suggests that the 1954 ROC-U.S. Mutual Defense Treaty contains wording implying that the ROC did control the Diaoyu Islands. Article 7 stipulates:

"The Government of the Republic of China grants, and the Government of the United States of America accepts, the right to dispose of such United States land, air, and sea forces in and about Taiwan and the Pescadores as may be required for their defense as determined by mutual agreement."

Qiu highlights the word "about" to indicate (though not explicitly) the surrounding seas under the ROC's control. Later, according to Qiu, the ROC and the U.S. agreed to place under the U.S. forces' patrol the area some miles north of Taiwan, meaning that the ROC had consented to U.S. forces patrolling the area around the Diaoyu Islands. (Qiu, p. 28)

This is an extremely fine point. One can well imagine the spectacle when the three disputants present and defend their claims before an arbitral or judicial authority.

In August 1951, the PRC published its views on the draft Peace Treaty. The statement pointed out that the drafting process and outcome monopolized by the United States violated a number of international agreements such as the United Nations Declaration of 1942, the Cairo Declaration, the Yalta Agreements, the Potsdam Declaration and Agreement, and the Basic Post-Surrender Policy of the Far East Commission. Among these violations, that of the United Nations Declaration had to do with the defining principle for peace settlements with the Axis Powers; i.e., a general, not separate, peace. Paragraph (2) of the Declaration states: Each government pledges itself to cooperate with the governments signatory thereto and not to make a separate armistice or peace with the enemies.

The San Francisco Peace Treaty was in essence a separate peace between the United States and Japan, as charged by the PRC, which was not invited to the Peace Conference. Korea, north and south, were not invited either. Some countries attending the conference did not sign immediately, including India and the USSR. The PRC rejected all of the provisions of the Treaty. But it also made a number of specific points. John Price notes four issues on which the PRC registered specific objections: (1) reparations, (2) territories, (3) safeguards against resurgence of Japanese militarism, and (4) U.S. predominance over Japan's economy.

Among the territorial issues, of utmost importance to the PRC (as well as to the ROC) was the Treaty's failure to assign sovereignty for "Formosa and Pescadores" (Article 2 [b]). This reflected a strategic consideration of the United States. According to Price, by freeing Taiwan from Japanese rule but not specifically returning it to China, the U.S. was able to deploy the Seventh Fleet in the Taiwan Strait. Had Taiwan been explicitly made part of China, U.S. protection of the ROC would have amounted to illegal intervention in China's internal affairs. In the logic of the San

Francisco Peace Treaty, Taiwan then was not a part of Chinese territory, and the government of the Republic of China was a government in exile preparing to recapture Chinese territory on the mainland.

The status assigned to Taiwan by the San Francisco Peace Treaty was extremely unsatisfactory, even humiliating to both the ROC and the PRC. The ROC succeeded in making Taiwan a part of China by its own peace treaty with Japan, concluded in 1952. The PRC had to wait for this until 1972.

The Treaty of Peace signed at Taipei in April 1952 states in Article 4: It is recognized that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war. Among the treaties rendered null and void is the Treaty of Shimonoseki by which China was compelled to cede Taiwan to Japan. The invalidation of this treaty restores Taiwan to its status as a part of China. In other words, by the Treaty of Taipei, Japan ceded Taiwan back to China. The Republic of China thereby acquired a portion of Chinese soil to govern.

However, the ultimate nationality of the Diaoyu/Senkaku Islands remains opaque. Chinese literature almost invariably claims that these were among the "islands appertaining or belonging to Formosa" that were ceded to Japan under the Treaty of Shimonoseki. Now that the ROC has taken back Taiwan in the name of China, the question is whether the Diaoyu Islands should also be returned to China. As far as the PRC is concerned, it is obvious that the Diaoyu Islands are a part of Chinese territory.

In February 1992, ahead of the coming into force in November 1993 of the United Nations Convention on the Law of the Sea (discussed below), the PRC adopted the Territorial Water Law, which claims sovereignty over Diaoyu,

among others. Japan promptly protested. Despite this collision of sovereignties over Diaoyu/Senkaku, 1992 was a memorable year in the improvement of Sino-Japanese relations: President Jiang Zemin visited Japan in April and Emperor Akihito returned the courtesy by visiting China in October. In Tokyo, Jiang reaffirmed China's commitment to Deng Xiaoping's legacy of "shelving" the Diaoyu/Senkaku question. (Suganuma, pp. 142-143)

History has come full circle. The origin of the sovereignty dispute over the Diaoyu Islands was the unilateral decision by Japan to incorporate them in Japanese territory in January 1895. These claims were, moreover, reinforced by the San Francisco Treaty and subsequent U.S.-Japan protocols with respect to the Ryukyus. Now the People's Republic of China has unilaterally declared its sovereignty over Diaoyu. Can such a "zero-sum dispute" be settled to the satisfaction of all the parties involved? That is the question that remains unresolved.

Enter the International Law of the Sea

The Sino-Japanese sovereignty dispute over Diaoyu/Senkaku may worsen in the years to come due to new developments in the Law of the Sea subsequent to the Sino-Japanese Treaty of Peace and Friendship of 1978. The Third United Nations Convention of 1982 on the Law of the Sea legitimizes a 12-nautical-mile territorial water from the shore base line and the coastal state's "sovereign rights" over the exploration and exploitation of the continental shelf as well as a seaboard or island state's "exclusive economic zone" within 200 nautical miles. In addition, the continental shelf can be extended subject to the approval of the UN Commission on the Limits of the Continental Shelf. China played a leadership role in promoting these new-fangled ideas in the international Law of the Sea, while Japan remained a passive participant.

A continental state would surely seek the most generous delimitation of its continental shelf, while any island, however small, would claim a maximum permissible area around it as the exclusive economic zone. The Diaoyu Islands lie at the eastern edge of China's continental shelf some 230 nautical miles to the east of Fuzhou. Sovereignty over these islands, if assigned to China, would enable China to claim sovereign rights over the continental shelf plus the exclusive economic zone to the north and east of the Diaoyu Islands. This would give China exclusive economic rights to the whole southern portion of the East China Sea. Seen from the Japanese side, the Senkaku Islands under Japanese sovereignty would entitle Japan to an exclusive economic zone, which would extend Japan's sovereign rights 200 miles to the north and west, substantially encroaching on China's continental shelf.

Clearly the Law of the Sea generates irresistible temptations to secure sovereignty over Diaoyu/Senkaku. A variety of great economic prizes are at stake, not least being potential oil wealth in the area. (For recent Sino-Japanese quarrels over where to dig for natural gas, see Kosuke Takahashi, "Gas and Oil Rivalry in the East China Sea," *Asia Times on Line*, July 27, 2004.) Since the end of World War II, between China and Japan, blood has run hot and cool in cycles over a number of issues, though without dire consequences such as use or threat of force. The first question the Japanese asked when the U.S. returned the Senkakus to Japan as a part of Okinawa Prefecture in 1972 was whether the U.S.-Japan Mutual Security Treaty effectively obligated the U.S. to defend these islands against external attacks.

Fortunately, despite occasional incidents instigated by nationalist extremists in both China and Japan, the governments of both countries have so far chosen to act as if sovereignty over Diaoyu/Senkaku were indeterminate even while reiterating their

respective territorial claims. The degree of moderation demonstrated by both sides at the official level is commendable in view of the efforts needed for controlling sovereign urges. The sustained practice of mutual self-restraint under this as-if assumption could develop into prior consultation and agreement whenever either side initiates action for utilization of the resources of the East China Sea. After a period of separate action subject to consultation and agreement, China and Japan could conclude that there are great merits in joint action and eventually develop an institution like an "East China Sea Economic Community" to jointly

manage this marine space as communal property subject to an optimal reconciliation of resource development and conservation as well as environmental protection in accordance with the Law of the Sea.

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