

Analysis No. 183, June 2013

## THE HISTORICAL BACKGROUND TO THE TERRITORIAL DISPUTE OVER THE SENKAKU/DIAOYU ISLANDS

Donatello Osti

Despite the recent hike in attention devoted to a Sino-Japanese territorial dispute in the East China Sea, skirmishes between China and Japan over the control of the Senkaku/Diaoyu islets are nothing new. Periodically, tensions arise among Japan, China, and Taiwan over this small group of islets. This paper examines the legal grounds on which Japan's claim to the islands rest. It emphasizes the historical ties that have led Japan to exercise administrative control over the islands. Tokyo does not acknowledge the existence of a territorial dispute with China over the Senkaku/Diaoyu islands - something China is ardently trying to challenge. Beijing on the contrary has tactfully used the September 2012 purchase of the islands by the Japanese government to revamp its claim to administrative control of the islands by increasing its presence in the surrounding waters.

*Donatello Osti, Research Associate, International Peace & Security Institute, Washington DC.*

## Introduction

Tensions over the administrative control of the Senkaku/Diaoyu islands between Japan and China have become a permanent risk in the East China Sea. Since September 2012 when Japan purchased three of the disputed islands from their private owner, both countries have displayed increasingly stubborn postures over territorial claims in the East China Sea.

Despite the hike in attention devoted to this territorial dispute, skirmishes between China and Japan over the control of these tiny islets are nothing new. Periodically, tensions arise among Japan, China, and Taiwan over this small group of islets located about 120 miles northeast of Taiwan. Japan, China and Taiwan all claim sovereignty over the islets, known as Senkaku Islands in Japan and Diaoyu Islands in China and Taiwan. China considers the islets to be part of Taiwan, over which it claims sovereignty.

Some of the recent confrontations between China and Japan include a Chinese flotilla of seven warships sailing in close vicinity to Japan's southern islands in October 2012. Tensions between the two countries temporarily eased at the end of 2012 just to be revamped with the election of Japanese prime minister Shinzo Abe in December 2012. His plans to build-up the Japanese military triggered China's apprehension once more and were interpreted Japan boosting up its military forces to defend disputed territories in the East China Sea.

The most serious of Japanese-Chinese confrontations occurred at the beginning of 2013. In January, two Japanese F-15s were scrambled to intercept a Chinese reconnaissance plane that was headed for the disputed islands. This prompted China to scramble two Japanese J-10 fighters in response. In early February, Japan publicly accused a Chinese navy frigate of locking its fire control radar onto a Japanese naval ship. China denied the accusations, claiming it was a Chinese commander acting on his own accord as part of scheduled military drills near the disputed islands.

Since September 2012, China has implemented a series of measures to gradually establish what Beijing refers to as 'dual control' of the disputed islands and the waters surrounding them. Both sides' law enforcement agencies and militaries now operate in dangerously close proximity in disputed naval and aerial space.

The Sino-Japanese territorial dispute in the East China re-emerged in the late 1960s when petroleum resources were discovered on the seabed

*Tensions over the administrative control of the Senkaku/Diaoyu islands between Japan and China have become a permanent risk in the East China Sea. Since September 2012 when Japan purchased three of the disputed islands from their private owner, both countries have displayed increasingly stubborn postures over territorial claims in the East China Sea*

surrounding the islands. While the territorial dispute back then started as an energy-related controversy, China's legal claims of the islands previous to 1895 make sure that the bilateral dispute today is also one involving history and ambiguous legal status.

The disagreement over the sovereignty and jurisdiction of the islands goes back to the Japanese victory over China in the Sino-Japanese War of 1894-85. Today, the Japanese government insists that the Senkaku islands are an inherent part of Japanese territory of Japan, citing historical facts and international law.

This paper examines the legal grounds on which Japan's claim to the islands rest. It emphasizes the historical ties that have led Japan to exercise administrative control over the islands. Tokyo does not acknowledge the existence of a territorial dispute with China over the Senkaku/Diaoyu islands - something China is ardently trying to challenge. Beijing on the contrary has exploited the purchase of the islands by the Japanese government in September 2012 to revamp its claim to administrative control of the islands by increasing its presence in the surrounding waters.

### **Historical Background: 1894/1895**

To tackle the question of who exercised control over the Senkaku/Diaoyu islands in the past one must ask when such control started. Japan argues that the islands were *terra nullius*' before 1895 (i.e. islands that no nation claimed sovereignty over) and "showed no trace of having been under the control of China"<sup>1</sup>. Furthermore, to support its claim, Tokyo points out that a fisherman from Okinawa Prefecture made an application for the lease of the islands in 1884. For Japan, the island's sovereignty starts in 1895 when its government adopted a Cabinet Decision on January 14<sup>th</sup> to formally incorporate the islands into the territory of Japan. This decision was taken a few weeks before the end of the first Sino-Japanese War and the signing of the Treaty of Shimonoseki. However a look through historical evidence from a Chinese perspective would find that before 1885 there were no Japanese records of the Diaoyu islands as being under Japanese control. On this ground, China reject Japan's *terra nullius* claim<sup>2</sup>.

*Today, the Japanese government insists that the Senkaku islands are an inherent part of Japanese territory of Japan, citing historical facts and international law*

*For Japan, the island's sovereignty starts in 1895 when its government adopted a Cabinet Decision on January 14th to formally incorporate the islands into the territory of Japan. This decision was taken a few weeks before the end of the first Sino-Japanese War*

---

<sup>1</sup> Ministry of Foreign Affairs of Japan, Japan's use of the term *terra nullius* appears, in "Fact Sheet on the Senkaku Islands," Ministry of Foreign Affairs of Japan, November 2012, [http://www.mofa.go.jp/region/asia-paci/senkaku/fact\\_sheet.html](http://www.mofa.go.jp/region/asia-paci/senkaku/fact_sheet.html).

<sup>2</sup> "Statement of the Ministry of Foreign Affairs of the People's Republic of China", 10

In fact, according to Chinese documents dating back to the Meiji Period it is more likely that Japan occupied the islands as spoils of war rather than legitimately thorough surveys or by granting rights to local fishermen<sup>3</sup>. As the scholar Han-Yi Shaw states: “This is the inconvenient truth that the Japanese government has conveniently evaded.” Furthermore, Koga Tatsushiro, the first Japanese citizen to lease the islands from the Meiji government, attributed Japan’s possession of the islands to “the gallant military victory of our Imperial forces.”<sup>4</sup> Thus, if Japan acquired control of the islands as booty for its victory in the Sino-Japanese War, the key question relevant under international law remains whether or whether not China had claimed sovereignty over the islands before the adoption of the Treaty of Shimonoseki in 1895.

Beijing claims to have maps and documents dating to the 16<sup>th</sup> and 17<sup>th</sup> century that show the islands as part of China’s defense coast lines and being landing ground for Chinese missionaries. China claims that the islands to be historically part of Chinese Taiwan and therefore originally Beijing had sovereignty over the islands. Furthermore, China argues that it was obliged to renounced sovereignty over the islands only after the defeat in the Sino-Japanese war of 1894/1895. <sup>5</sup>

While The Treaty of Shimonoseki signed after China’s defeat in 1895 did not specifically mention the Senkaku/Diaoyu and the islets, the treaty’s China claims that the treaty’s Article 2 obliged China to cede the islands to Japan (as they-at least from a Chinese perspective-belonged to Taiwan). For China, the treaty meant that Japan gained control over Taiwan’s territory and used its victory in the war to claim annexation of the islets. Therefore – Beijing argues - the Diaoyu islands reverted to China when China resumed its sovereignty over Taiwan after World War II.

Japan on the contrary affirms that the islands did not belong to the territories ceded to Japan under the Shimonoseki Treaty in 1895, but were incorporated into Japan as “*terra nullius*” a few months before China formally ceded Taiwan to Japan under the Treaty<sup>6</sup>. In short, Japan refutes that China has any historical rights to the islands as the Senkaku are an

*if Japan acquired control of the islands as booty for its victory in the Sino-Japanese War, the key question relevant under international law remains whether or whether not China had claimed sovereignty over the islands before the adoption of the Treaty of Shimonoseki in 1895*

---

September 2012, <http://www.fmprc.gov.cn/eng/topics/diaodao/t968188.htm>.

<sup>3</sup> HAN-YI SHAW, *The Inconvenient Truth Behind the Senkaku/Diaoyu Islands*, 2012 from <http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaovusenkaku-islands/> .

<sup>4</sup> *Ibidem*.

<sup>5</sup> S. WEI, *The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update*, in «Ocean Development & International Law», vol. 36, no. 1, 2005.

<sup>6</sup> *Ibidem*.

integral part of Japanese territory.

The central question is thus twofold. Firstly whether China exercised sovereignty over the islands before 1894 and secondly, whether once the Shimonoseki Treaty was signed – the islands were ceded to Japan by China were to be returned after World War II.

### **Historical background: end of World War II and the ‘Nansei Shoto’**

World War II in Asia broke out with the Second Sino-Japanese War of 1937. The U.S. joining the war in 1941 effectively halted the Japanese campaign. In 1943 the U.S., the U.K. and the future president of Taiwan, Chiang Kai-shek, adopted the *Cairo Declaration*. The declaration stated that Japan shall return all territories it had taken from China such as Manchuria, Formosa and the Pescadores. In contrast to many other occupied islands, the Senkaku/Diaoyu islands were not explicitly mentioned in the Cairo Declaration.

With Japan’s World War II defeat and unconditional surrender in 1945, the Cairo Declaration became part of the country’s capitulation by incorporation. The legal basis was codified in the San Francisco Treaty of 1951. The Treaty, signed between Japan and 48 allied signatories, excluded China and Taiwan. Japan had to make the following concessions regarding the territories previously under Chinese control. Art. 2 (b) states: “Japan renounces all rights, title and claim to Formosa and the Pescadores”. Whilst Art. 3 continues: “Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system with the United States as the sole administering authority, Nansei Shoto south of 29 degree north latitude (including the Ryukyu and the Daito Islands)”. The Treaty does not specifically mention the Senkaku/Diaoyu but it appears the islands were placed under trusteeship by being enclosed in an area known as Nansei Shoto (south of 29°N). The treaty meant that the U.S. had the right to exercise all powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters. In 1953, the U.S. Civil Administration of the Ryukyus issued U.S. Civil Administration of the Ryukyus Proclamation 27 (USCAR 27), which defined the boundaries of “Nansei Shoto [the southwestern islands] south

*The central question is thus twofold. Firstly whether China exercised sovereignty over the islands before 1894 and secondly, whether once the Shimonoseki Treaty was signed – the islands were ceded to Japan by China were to be returned after World War II*

*In 1943 the U.S., the U.K. and the future president of Taiwan, Chiang Kai-shek, adopted the Cairo Declaration. The declaration stated that Japan shall return all territories it had taken from China such as Manchuria, Formosa and the Pescadores. In contrast to many other occupied islands, the Senkaku/Diaoyu islands were not explicitly mentioned in the Cairo Declaration*

of 29 degrees north latitude” to include the Senkaku.<sup>7</sup>

Other measures of the San Francisco Treaty that were forced upon Japan meant the country had to rescind all the pre-1941 treaties between China and Japan including the Treaty of Shimonoseki. What remains unclear is China’s position during the Treaty negotiations and in its immediate aftermath. At the time, neither China nor Taiwan protested against including the islands as territories assigned to U.S. administration. One reason for the absence of Chinese opposition to allowing Washington to exercise control over the islands can be attributed to the uneasy relationship between Washington and Beijing at the beginning of the Cold War. After the Chinese revolution of 1949, there were few contacts, limited trade and no diplomatic ties between the U.S. and China.

On April 28th, 1952 the so-called Treaty of Taipei between Taiwan and Japan was signed and through that treaty other islands (Spratly – and Paracel islands) were added to the list of territories Japan had to renounce, but again no explicit mention of the Senkaku/Diaoyu islands was made. Thus, originally, the territorial dispute was between Taiwan and Japan triggered by their overlapping concession zones surrounding the islands; China was not a part to the conflict.

While China accepts the provisions of the San Francisco Peace Treaty, it today argues that once the U.S. returned administrative control of Okinawa to Japan in 1972, China re-gained sovereignty over the Diaoyu islands. In short, China’s position today is that the Diaoyu islands reverted to China when China resumed its sovereignty over Taiwan and its adjacent islands pursuant to either the 1951 San Francisco Peace Treaty and/or the 1952 Sino-Japanese Peace Treaty. Japan instead claims that under Art. 3 of the 1951 San Francisco Peace Treaty, the islands were included into the Ryukyu Islands and placed under the U.S. administrative control system. They were returned to Japan once the U.S. renounced Okinawa and its island chains to Tokyo in 1972. The turning point for the history of the territorial dispute over the Senkaku/Diaoyu between China and Japan was the discovery of oil in waters around the disputed islands in 1969.

*On April 28th, 1952 the so-called Treaty of Taipei between Taiwan and Japan was signed and through that treaty other islands (Spratly – and Paracel islands) were added to the list of territories Japan had to renounce, but again no explicit mention of the Senkaku/Diaoyu islands was made*

---

<sup>7</sup> Okinawa Reversion Treaty Hearings p.149-152 in M.E. MANYIN, “CRS Report for Congress Prepared for Members and Committees of Congress Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations” CRS, January 2013.

## The Discovery of Oil in 1969 and Okinawa's Return to Japan in 1972

In 1969, geologists from the United Nations Economic Commission for Asia and the Far East (ECAFE) made published research which claimed that the “continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world” which immediately sparked a Japanese and Taiwanese reaction. Okinawa Prefecture erected a national marker on the main island of Senkaku underpinning its claim to the island chain whilst Taiwan asserted that the Japanese had no exploration rights and formally declared the island to be Chinese territory<sup>8</sup>.

However, the real issue of sovereignty emerged when the U.S. trusteeship ended in 1972 and the United States declared its intention to return Okinawa Prefecture to Japan. In addition, the dispute shifted to being in between China (PRC) and Japan, as Japan derecognized Taiwan (ROC), while at the same adopting formal diplomatic relations with China. The result was that China and Japan today do not formally recognize Taiwan (ROC) as a state, meaning that Taiwan cannot claim sovereignty over the Senkaku/Diaoyu islands according to the Japanese perception of international law.

Furthermore, the inclusion of the Senkaku/Diaoyu in the Okinawa Reversion Treaty under the definition of “the Ryukyu Islands and the Daito Islands” made Article II of the Treaty applicable to the islets. This means that the U.S., while maintaining neutrality on the competing territorial claims, is obliged to defend Japan in case of an attack on the Senkaku Islands in accordance with Article V of the US-Japan Security Treaty<sup>9</sup>.

In between 1895 and the 1970s, China took virtually no action to assert its sovereignty over the Islands. Japan has viewed this “time gap” either as a lack of interest by China or of China’s acceptance of Japan’s claim.

The situation from an international jurisprudence point of view is as complicated today just as it was thirty years ago. To date, Japan argues that there is no territorial dispute, whilst China is moving away from the stance that Japan should merely acknowledge that there is a territorial dispute to trying to exercise joint control over the territory. Legal solutions

*Okinawa Prefecture erected a national marker on the main island of Senkaku underpinning its claim to the island chain whilst Taiwan asserted that the Japanese had no exploration rights and formally declared the island to be Chinese territory*

*China and Japan today do not formally recognize Taiwan (ROC) as a state, meaning that Taiwan cannot claim sovereignty over the Senkaku/Diaoyu islands according to the Japanese perception of international law*

---

<sup>8</sup> L. HAGSTRÖM, *Japan's China Policy* (1st ed., 2005), 120 in M LOHMEYER, *The Diaoyu / Senkaku Islands Dispute Questions of Sovereignty and Suggestions for Resolving the Dispute*, 85, 2008.

<sup>9</sup> Secretary of State Hillary Rodham Clinton Remarks in Hanoi, Vietnam, 30 October 2010

remain highly unlikely today and in the foreseeable future, but in theory they could include several options for the peaceful settlement of maritime disputes. These would include negotiation and conciliation such as seeking international legal arbitration which could take place on an ad-hoc basis or in a tribunal; and judicial settlement by the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS).

### Situation Today

Since the 1970s, tensions have spiked periodically between China, Japan and Taiwan. However recent flare-ups have the potential to be more serious, longer lasting and are able to alter the territorial status quo of disputed islands in the East China Sea. Tokyo's former governor Shintaro Ishihara's announcement in April 2012 that he would purchase part of the Senkaku islands on behalf of Tokyo's municipal government created a spiral of events that have greatly exacerbated the conflict between China and Japan over the administrative control of the islands. The Japanese government led by then prime minister Yoshihiko Noda had no choice but to step-in to avoid Ishihara from acquiring the islands. In fact the central government formally purchased the islands on 10 September 2012. On the same day, Beijing announced territorial sea baselines around the islands. According to Chinese law, the move placed the disputed islands under Chinese administration and was therefore a direct challenge to Japan's control of the islands.

China's behavior has been interpreted as a bid to test Japan's resolve and establish the perception in the international community that China and Japan exercise joint control over the territory in a bid to change the current status-quo<sup>10</sup>.

This view is also supported by a recent report by the International Crisis Group (ICG) which argues that China's actions reflect a "reactive assertive" tactic used previously in the South China Sea. For the ICG, this tactic exploits perceived provocation in disputed areas by other countries to take strong countermeasures to change the status quo in China's favor. Interpreting the Japanese government's decision to purchase the islands as a unilateral change to the status quo, China implemented a series of pre-planned actions with the goal of changing the facts on the ground. The most important was when Beijing declared territorial baselines around

*Tokyo's former governor Shintaro Ishihara's announcement in April 2012 that he would purchase part of the Senkaku islands on behalf of Tokyo's municipal government created a spiral of events that have greatly exacerbated the conflict between China and Japan over the administrative control of the islands*

---

<sup>10</sup> T. HITOSHI, *The Senkaku Islands and Japan-China relations*, East-Asia Forum, March 2013

the islands in September, thereby increasing the number and length of its law enforcement patrols to directly challenge Japan's de facto control of the area<sup>11</sup>. For Chinese experts, the immediate aim of this behavior is to establish "overlapping" or "dual control" in the disputed waters in order to get Japan to at least admit that a dispute exists with China.

Chinese analysts confirmed that territorial baselines had been drawn long before but had been withheld from public release as Beijing had been concerned about appearing expansionist. The Japanese purchase of three of the disputed islands then provided an opportunity to implement the plan. A scholar jokingly referred to Ishihara and Noda as "comrades" for giving China the chance to change the situation around the Senkaku/Diaoyu islands in its favor<sup>12</sup>. China's efforts to deconstruct the status quo and push Japan to recognize the reality of a territorial dispute has put Japan in an uncomfortable position. Tokyo has no choice but to justify its control over the Senkaku/Diaoyu, even if it does not admit any ambiguity regarding its sovereignty over the islets.

The regional dimension should not go unmentioned. China and Japan are both confronted with other territorial disputes with neighboring countries. China with the Philippines and Vietnam whilst Japan with South Korea and Russia. Therefore both feel compelled to demonstrate resolve to defend their claims over the Senkaku/Diaoyu for fear that other rival claimants would take advantage of any perceived weakness.

## Conclusions

Despite the rhetorical calls for an increase in its voiced nationalism, both China and Japan understand that the value of economic interdependence is too high to jeopardize relations further. Nonetheless, although a maritime confrontation remains unlikely, strategic mistrust continues to exist between Tokyo and Beijing. The two countries lack instruments and mechanisms to manage incidents, let alone to discuss intentions or operating protocols. A Japanese-Chinese maritime collision could happen because of rough weather, low visibility, mechanical failures or miscalculations. In this evolving scenario one option would be to just ignore the sovereignty issue and return to the status quo of the past where China and Japan agree to disagree on whom the disputed islands belong to.

---

<sup>11</sup> *Dangerous Waters: China-Japan Relations on the Rocks*, «Asia Report», International Crisis Group 245, 8 April 2013,

<sup>12</sup> *Ibidem*.