



NUMUN

Northwestern University Model United Nations

International Court of Justice

Topic A: Sino-Japanese Island Dispute

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Sino-Japanese Island Dispute

Introduction



Figure 1 The Islands (*The Guardian*)

To most Westerners, Sino-Japanese island disputes appear petty and wasteful of resources. However, this perspective is obtuse in that it fails to recognize symbolic value of the Senkaku/Diaoyu islands. Economic value notwithstanding, the islands are the manifestation of hundreds of years of war, ethnic-strife, and jingoism. To study these islands is to gain a understanding for one of the most contentious and violent interstate relations in the history of the world. For both China and Japan, these islands are symbols of national pride and power, and recent development of the issue has revealed that ostensibly smoothed-over relations are actually just as tense as ever.



The earliest recorded map showing the Senkaku/Diaoyu islands recovered is from the 14th century, when Ming Dynasty cartographers recorded the islands as a part of the dynasty. This was a time when the islands were used solely for fishing, having small populations and economic promise. After the first Sino-Japanese War of 1894, Japan took control of the islands, and they were quickly recognized as a useful military base location in the East China Sea. At the conclusion of World War I, Japan was ordered to return all except the four main islands gained through belligerent acts that constitute Japan (Honshu, Kyushu, Hokkaido, and Shikoku) to China by the Potsdam Declaration. During World War II, however, the United States used the islands as a base, and, as a part of the Okinawa Reversion Treaty, returned the islands to Japan. The islands were seen as a part of Okinawa island group and US returned Senkaku/Diaoyu island to Japan as part of Okinawa. The islands were then sold by Japan to the wealthy Kurihara family to finance post infrastructural projects of post-war Japan, and, in 2012, renationalized at a very high cost. The islands were, by coincidence or otherwise, purchased from the Kurihara family on the anniversary of the Japanese invasion of Manchuria in the 1930s. This invasion, for many Chinese, revives memories of such atrocities as the Rape of Nanking, during which Japanese soldiers allegedly brutalized Chinese civilians in what was later deemed a serious war crime.

Already, the complicated nature of the web of claims, treaties, and international law is apparent. Coupled with this history is the fact that in the late 1960s, the United Nations Commission for Asia and the Far East (ECAFE) discovered possible oil reserves in the area, spiking economic interest in the islands.

After the Kurihara purchase, tension neared a boiling point. Throughout 2013, both China and Japan have escalated territorial rhetoric and military actions, including jet scrambling and ship explorations. Further, anti-Japanese protests have become angrier and more violent in



China, showing the fierce nationalism of the Chinese public in regard to this issue. Public Japanese flag burnings, boycotting of Japanese goods, and attacking of Japanese tourists are just some of the many actions taken by the Chinese in response to the conflict.

To navigate this complicated web of international law and provide a solution to this impossibly tense and manifold issue, we call upon you, the judges of the ICJ, to thoroughly interrogate this issue from all angles, and provide a cogent, confident, and clear solution to the issue. Although a decision will not automatically solve this issue, a multilateral voice for peace and a solution will serve to elevate dialogue between these nations. It is key that this decision be methodical and logical—only through strict and tight reasoning will a decision be taken seriously by either side of this debate.

This issue has no clear solution. As such, handle it with care.



Background and Current Situation

Antiquity-1885

The Origins of this issue are, like most of its elements, hazy. Investigation of this issue pre-1885 (era of Sino-Japanese Wars) yields a trove of unclear, handwritten documents of unclear origin and reliability. The Japanese government asserts that circa 1885, after Meiji Japan initially laid claim to the islands, surveys of the islands precluded the possibility of Chinese control, and only then did Japan annex the islands as *terra nullis* (land without an owner)¹. These facts indicate that the islands, defacto, had no history of ownership prior to Japanese annexation ca. 1895.

However there exist several pieces of evidence that contradict this claim. Taiwanese academic Han Yi-Shaw asserts that these surveys were in fact never completed following a lengthy study of Japanese primary documents.

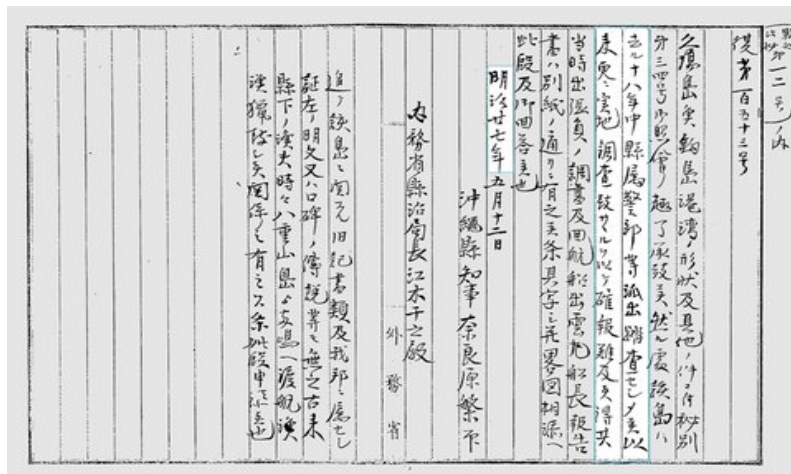


Figure 1 (Japanese Diplomatic Records Office, NYTimes)

¹ "The Basic View on the Sovereignty over the Senkaku Islands." *Senkaku Islands : Position of the Japanese Government*. Japanese Government, n.d. Web. 2 Dec. 2013.

"Through these surveys, it was confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of Japan made a Cabinet Decision on 14 January 1895 to erect a marker on the Islands to formally incorporate the Senkaku Islands into the territory of Japan."



Figure 1 shows a letter written by the governor of Okinawa Prefecture dated to May 12, 1885, stating that, although surveys of the islands were ordered, they were not completed due to inclement weather conditions and miscommunication². Japanese sources dispute this claim, insisting that surveys were in fact completed.

Using maps drawn during the Qing dynasty as evidence, the Chinese government claims that the islands were clearly under Chinese control at the time of Japanese annexation. Furthermore, Chinese advocates point to a letter written by the governor of Okinawa Prefecture to Minister of Internal Affairs Yamagata Aritomo affirms Chinese control of the islands³. This information would characterize Japanese annexation as not a claim of unoccupied land, but rather a post-war “land grab”. Japanese officials dispute this letter, however, pointing to the fact that the conclusion of the letter is that, in the face of possible Qing control, the islands should be surveyed to see whether the Qing government truly controlled the land⁴. The Japanese government asserts that this letter is actually evidence that the Meiji government was meticulous and sensitive in its annexation; it considered the possibility of Chinese ownership, thoroughly investigated this possibility, and only then annexed the land as *terra nullis*⁵ after the end of the First Sino-Japanese War.

² Han-Yi, Shaw. "The Inconvenient Truth Behind the Diaoyu/Senkaku Islands." *On the Ground*. The New York Times, n.d. Web. 02 Dec. 2013.

³ "Diaoyu Dao, an Inherent Territory of China." *Full Text: Diaoyu Dao, an Inherent Territory of China*. Chinese Government, n.d. Web. 2 Dec. 2013. "...the governor of Okinawa Prefecture sent a report in secrecy to the Minister of Internal Affairs Yamagata Aritomo on September 22, 1885, saying that these uninhabited islands were, in fact, the same Diaoyu Tai"

⁴ *Basic View*, "Therefore, we should have the islands surveyed and details — such as the configuration of harbors and the prospect of land development and local production — reported and stop there."

⁵ NB: Several details about this letter remain foggy. Japanese officials date this letter to October 21, 1885 as from Foreign Minister Inoue Kaoru to Interior Minister Yamagata Aritomo, whereas Chinese officials date the letter to September 22nd of the same year as from the governor of Okinawa Prefecture to Yamagata.



This, however, begs the question: what is the difference between a land claim invoking *terra nullis* and a land claim as a spoil of war? Land has always been reapportioned after wars. In order to understand the incredible difference that the completion of the survey makes in terms of ownership and international law, later events must be understood.

1885-1972 (Sino-Japanese War to Okinawa Reversion Treaty)

The First Sino-Japanese War was fought in 1894 and 1895 between Qing China and Meiji Japan, as a territorial dispute over control of Korea⁶. This war was ended by the Treaty of Shimonoseki, ratification of which was completed on May 8, 1895. Article III of the Treaty of Shimonoseki, as was reprinted in full in the New York Times on August 4th, 1895, stipulates that “the island of Formosa, together with all the islands appertaining or belonging to said island of Formosa” would be ceded from China to Japan in perpetuity⁷.

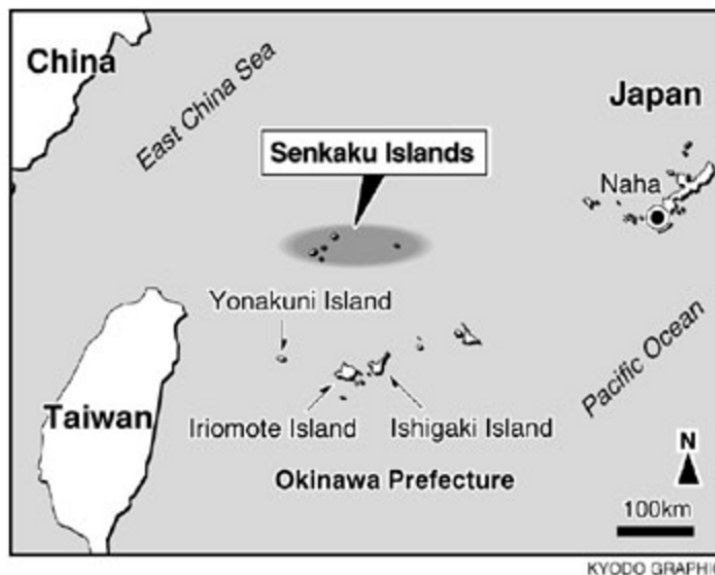


Figure 2 (japanfocus.org)

⁶ q.v. Although the actual circumstances of the war won't be discussed in length in the maintext as it doesn't directly pertain to the island dispute itself, research therein is recommended. Specifically, look into the ideas of relative levels modernization (Qing China was unprepared), and blows to national ego and pride that definitely factor into attitudes on the island dispute. Japanese treatment of China during this process is often called condescending, and the inception of the island dispute in such an environment may factor into the notion that national pride is riding on ownership of the islands.

⁷ "The Japan-China Treaty." *The New York Times* 4 Aug. 1895: n. pag. Print.



The ambiguous phrasing of “all of the islands appertaining or belonging to said island of Formosa” has led Chinese officials to believe that this taking by the Japanese of the Senkaku islands constituted a “spoils of war”. Moving forward about 50 years, the distinction between the *terra nullis* and “spoils of war” becomes apparent at the conclusion of World War II.

The Cairo Declaration of November 27, 1943, given by President of the United States Franklin Roosevelt, Nationalist Government Chairman of China Chiang Kai-Shek, and the Prime Minister of the United Kingdom Winston Churchill, states that “all territories stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be returned to the Republic of China”. It also states “Japan will also be expelled from all other territories which she has taken by violence and greed”⁸. The Japanese Instrument of Surrender, the formal surrender of the Japanese Empire at the end of World War II, references these terms. After Japanese surrender, the formal peace process begun, and with it, a new complicating factor arose.

In the formal peace treaty, the Treaty of San Francisco that came into power in April of 1952, the Ryukyu and Daito islands (of which the Japanese assert the Senkaku islands is a part) were ordered by the United States to be returned to American administration⁹. The United States, 20 years later, in a show of good faith to the possibility of emergent Japanese democracy, ceded all lands referred to as being subject to American Administration back to Japan¹⁰.

⁸ Heiferman, Ronald. *The Cairo Conference of 1943: Roosevelt, Churchill, Chiang Kai-shek, and Madame Chiang*. Jefferson, NC: McFarland, 2011. Print.

⁹ "Treaty of San Francisco." *treaties.un.org*. United Nations, n.d. Web. 2 Dec. 2013. "...place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 north latitude (including the Ryukyu Islands and the Daito Islands)..."

¹⁰ "Okinawa Reversion Agreement, 1972." *Council on Foreign Relations*. Council on Foreign Relations, n.d. Web. 2 Dec. 2013. "With respect to the Ryukyu Islands and the Daito Islands, as defined in paragraph 2 below, the United States of America relinquishes in favor of Japan all rights and interests under Article 3 of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, effective as of the date of entry into force of this Agreement. Japan, as of such date, assumes full responsibility and authority for the exercise of all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of the said islands."



Thus, two narratives appear:

- i. *Japanese Narrative*: Meiji government expresses interest in Senkaku Islands, surveys and inspects to ensure that islands are *terra nullis*, then annexes them as such. The islands are thus *not* winnings from any aggression, and the Japanese Instrument of Surrender (Cairo communiqué and Potsdam declaration) does not apply. The islands were ceded to American administration by the Treaty of San Francisco, and returned to Japan via the Okinawa Reversion Treaty.
- ii. *Chinese Narrative*: Islands are taken from China as a term of the Treaty of Shimonoseki, and are thus a winner's spoil of the First Sino-Japanese War. As per the Japanese Instrument of Surrender, affirmed are the Cairo Communique and the Potsdam Declaration which reaffirmed the Cairo Communique¹¹. All territories won by Japan from China are returned to China. Thus, the islands revert to Chinese control.

Private and Public Control: The Kurihara Family (1900-2012)

Parallel to the above narrative of treaties and agreements runs a narrative of private control of the islands that further complicates the issue. After the islands were annexed in 1895, a Japanese businessman, Koga Tatsushiro, leased the island from the Japanese government, in order to open a fish-processing plant, for which he brought in approximately 200 Okinawans to the island. This business, however, failed some 50 years later in 1940, leaving the islands deserted but still owned by the Koga family. Upon passage of the Okinawa Reversion Treaty,

¹¹ NB: Article 8 of the Potsdam Declaration reaffirms all land-reapportioning clauses of the Cairo Communique



the lease of the Koga family was reinstated. With no desire to retain the land, Koga Tatsushiro's descendants sold this land to the wealthy Kurihara family in the 1970s.¹²

As the situation grew more tense, the Japanese government purchased the islands from the Kurihara family for a sum of 2.05 billion yen, renationalizing the islands.

Current Situation (1968-Present)

In 1966, the Committee for Coordination of Joint Prospects for Mineral Resources in Asian Offshore Areas (CCOP) was convened by the United Nations Economic Commission for Asia and the Far East (ECAFE) to investigate potential oil resources in East Asia, primarily in the East China Sea. A survey of those areas in 1968 revealed that “a high probability exists that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world”¹³. This area of course includes the disputed Senkaku/Diaoyu islands.

The discovery of this vast oil resource ignites tension within the region surrounding land rights. Only after this discovery did the Chinese government begin to dispute Japanese claims to the island¹⁴¹⁵¹⁶.

In the wake of these new economic consequences of ownership, Sino-Japanese relations degraded. Deployment of Japanese and Chinese ships to the areas around the island as a show of

¹² "Japan Confirms Disputed Islands Purchase Plan." *BBC News*. BBC, 09 Oct. 2012. Web. 02 Dec. 2013.

¹³ Gao, Zhiguo and Wu Jilu: “Key Issues in the East China Sea: A Status Report and recommended Approaches”, in: Harrison, Selig (ed.) (2005): *Seabed Petroleum in Northeast Asia: Conflict or Cooperation*, Washington D.C., Woodrow Wilson International Center for Scholars.

¹⁴ q.v. the Taiwan story: the Republic of China (a.k.a. Taiwan, formerly Formosa) also staked a claim to these islands with this oil revelation. As your directive is to study this issue in the context of Sino-Japanese relations, this claim won't be investigated in the maintext, but we urge you research it on your own.

¹⁵ Yi, Sōg-u, Shelagh Furness, and Clive H. Schofield. *Territorial Disputes among Japan, China and Taiwan concerning the Senkaku Islands*. Durham, UK: International Boundaries Research Unit, Dept. of Geography, University of Durham, 2002. “The Senkaku Islands issue was not raised until the Economic Commission for Asia and the Far East (hereinafter 'ECAFE') of the United Nations Economic and Social Council suggested the possible existence of large hydrocarbon deposit in the waters off the Senkaku Islands. ... This development prompted vehement statements and counter-statements among the claimants.”

¹⁶ q.v. a Japanese accessory argument: http://www.mofa.go.jp/region/asia-paci/senkaku/fact_sheet.html this and other Japanese administration fact-sheets on the matter assert that because the Chinese had no problem with Japanese land-claims until the ECAFE survey, their vehemence has no actual grounding in international law.



power and control have been a frequent occurrence since the ECAFE discovery¹⁷. After such naval posturing, declarations of intolerance of such acts and condemnation of the other are always soon to follow¹⁸. Such posturing was the extent of hostilities until the Japanese renationalization of the islands (see *Private and Public Control*) and a 2010 collision of Japanese and Chinese vessels in the area¹⁹.



Figure 3 Anti-Japan Protests in China (ABC News)

The islands were purchased from the Kurihara family in September of 2012, around the anniversary of the Japanese invasion of Manchuria in the 1930s, which is associated with

¹⁷ Wakatuski, Jethro, and Yoko Iwaki. "Chinese and Japanese Ships Cluster around Disputed Islands." *CNN*. Cable News Network, 24 April 2013. Web. 1 Dec. 2013.

¹⁸ "Fact Sheet on the Senkaku Islands." *Ministry on Foreign Affairs*. Japanese Government, n.d. Web. 2 Dec. 2013.

¹⁹ Ramzy, Austin. "China-Japan Tensions Grow After Shipping Collision." *TIME.com*. TIME, 13 Sept. 2010. Web. 1 Dec. 2013.



brutality against Chinese civilians and needless Japanese aggression²⁰. This purchase marked the beginning of a revival of anti-Japanese sentiment in China, causing anti-Japanese protests to break out across China in 2012, with some of them growing violent²¹. Despite attempts by the Chinese government to suppress violent sentiment, antipathy towards the Japanese continues to grow in the Chinese national mindset.

Most recently in November of 2013, the Chinese government imposed airspace restrictions over the islands, declaring their ownership of the islands in what many consider a turning point in the dispute²². The Japanese and Korean governments lashed out against this action, using nationalistic rhetoric. Additionally, the international community has reacted strongly to this development, with Western and East Asian powers rallying against the Chinese claim²³²⁴. As international voices become more involved, this issue, which began as minor dispute over fishing islands is quickly evolving into a global issue²⁵

²⁰ Harries, Meirion, and Susie Harries. *Soldiers of the Sun: The Rise and Fall of the Imperial Japanese Army*. New York: Random House, 1991.

²¹ Tang, Didi. "Anti-Japan Protests in China Turn Violent." *The Independent*. Independent Digital News and Media, 15 Sept. 2012. Web. 1 Dec. 2013.

²² "China Imposes Airspace Restrictions over Japan-controlled Senkaku Islands." *Theguardian.com*. Guardian News and Media, 23 Nov. 2013. Web. 2 Dec. 2013.

²³ Spetalnick, Matt. "U.S. Says China Air Defense Zone Unacceptable, Shouldn't Be Implemented." *Reuters*. Thomson Reuters, 05 Dec. 2013. Web. 2 Dec. 2013 "White House spokesman Jay Carney assailed [China](#) for a "dangerous and provocative" move that increased the risk of stumbling into a crisis, and said that was not consistent with the behavior of a major power."

²⁴ Hume, Tim, and Jethro Mullen. "China Sends Fighter Jets into Disputed Air Zone; Japan, South Korea Defiant." *CNN*. Cable News Network, 29 Nov. 2013. Web. 2 Dec. 2013.

²⁵ NB: The ramifications of the airspace claim are impossible to assess at this point in time (Dec. 2013). Please keep an eye out for an addendum to this document.



Bloc Positions:

Judicially Active Judges

First and foremost, judicial activism is a school of legal thought, and or practice, in which judges extrapolate the meaning of legal documents to a particular issue with the goal of balancing the law and context of a situation. Judicial activism is often criticized by more conservative legal thinkers, who believe that the principle of any given law is essential and eternal and thus is not meant to be interpreted differently among different cases. However, proponents of judicial activism argue there is no way that policy or law makers could ever foresee every situation in which their policy would be applied, and thus law must be able to be made applicable. In the case of the island dispute, judges who take a more activist interpretation of international law may be more inclined to consider the social and political implications of the Court's decision along with the relevant laws, treaties, and policies. Activist judges should not only consider the international laws and policies involved with this case (such as the United Nations Convention on the Law of the Sea, customary international law of territorial acquisition, the Treaty of San Francisco, the Treaty of Shimonoseki, and the Treaty of Peace and Friendship) but also the implications of a possible decision. How do the socioeconomic implications of a particular decision affect both China and Japan (and potentially other countries as well), and how can the legal boundaries within this case be extrapolated to best suit our purposes for this topic?

Judicially Restrained Judges

Conversely, judicial restraint is a school of legal thought where judges first and foremost respect *stare decisis*, the principle wherein judges have an obligation to respect and uphold past decisions (precedent). These judges will attempt to limit the amount of interpretation by the



court, instead seeking to maximize deference to precedent. This doctrine also espouses the idea that pieces of legislation should not be struck down unless they are clearly in violation of bedrock principles (in US law, for example, the Constitution, whereas this idea is fuzzier in international law). These judges will believe in that past treaties and legislation are binding, notwithstanding any other conditions (see *Judicially Active Judges*) which bear no significance on the legitimacy of the case (duress, coercion among others being obvious exceptions). In the case of the island dispute, these judges will show a heavy deference to previous treaties and agreements like the Treaty of Shimonoseki, The Treaty of San Francisco, The Potsdam Declaration, and the Okinawa Reversion Treaty. However, it has become abundantly clear that these documents are often unclear and vague. In clearing up vagueness, these judges will defer not to a consideration of socioeconomic conditions, but will rather search for an answer in other treaties/agreements.

Questions to Consider:

1. Considering the lack of details in many of the relevant treaties and agreements, how should judges seek to provide a clear answer when the documents are not themselves clear? Should judges be active or restrained while doing this?
2. How do economic interests in the island affect the decision over the dispute, if at all? Does this decision have anything to do with the value of the islands/oil reserves near the islands?
3. To what extent did Western involvement/irresponsibility cause this dispute? Should western powers like the USA be held accountable in any way?



4. In the immediate future, how should we deal with the Chinese declaration of airspace restrictions over the island? Although a broad decision is needed, a short-term resolution of this issue is urgently needed.
5. How does the complicated history of Sino-Japanese relations factor into the island's history, and modern politicians rhetoric and interactions?
6. With global voices beginning to chime in, should this issue be multilateral/mediated by a world power like the ICJ, or should the ICJ simply facilitate a bilateral agreement between China and Japan
7. To what extent should the Republic of China's (Taiwan's) claim to the island be considered?
8. To what block does your judge belong: activist or conservative?

Recommended Sources:

1. Various news sources (NYTimes, Reuters, BBC): This is a rapidly evolving issue that will likely have significant changes up until the day before the conference. You will be held accountable for being up to date.
2. Japanese and Chinese Government: This government information, which can be found online, can provide valuable insight into the arguments presented by either side of the debate.
3. Seokwoo Lee: *Territorial Disputes among Japan, China, and Taiwan concerning the Senkaku Islands*. This book is an excellent primer for study of the issue. Most of it is freely available online via Google Books.
4. Primary Sources: It is highly recommended that you study the *actual texts* of the treaties and international law we will be discussing: i.e. the Treaty of Shimonoseki, the Treaty of San



Francisco, the Cairo Communique, etc. These documents will prove invaluable in drafting your decisions.

