

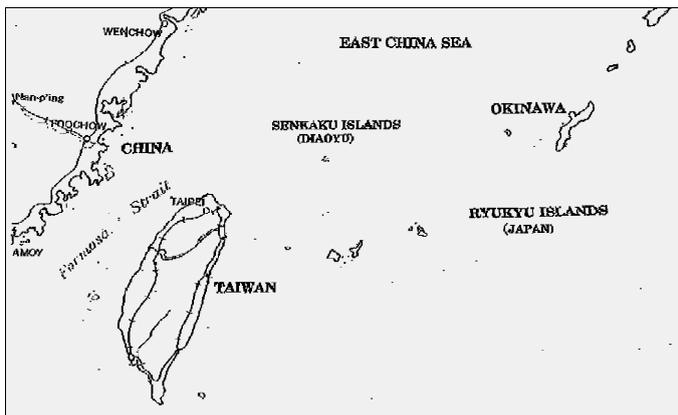
Senkaku (Diaoyu) Islands Dispute: The U.S. Legal Relationship and Obligations¹

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Summary

New tensions among China, Japan, and Taiwan over disputed islands in the East China Sea are based on long-standing territorial claims they have maintained. The United States has important relationships with all three disputants, and has had a legal relationship to the islands since the conclusion of the Peace Treaty with Japan in 1951. The chief components of this legal relationship are: (1) U.S. administration of the islands from 1953 to 1971; (2) inclusion of the islands in the terms of the U.S.-Japan Okinawa Reversion Treaty of 1971; (3) a U.S. position on the claims themselves; and (4) the application of the U.S.-Japan Security Treaty to the islands under the provisions of the Okinawa Reversion Treaty.



1 <http://wikileaks.org/wiki/CRS-96-798>. Wikileaks release: February 2, 2009. The author is a Specialist in Asian Affairs, Foreign Affairs and National Defense Division, United States Congressional Research Service.

Introduction

In recent months, tensions have arisen among Japan, China, and Taiwan over a small group of islands located about 120 miles northeast of Taipei, Taiwan. Japan, China, and Taiwan claim sovereignty over the islands, known as the Senkakus in Japan and the Diaoyus in China and Taiwan. The islands are eight in number and are uninhabited. The largest is about two miles in length and less than one mile in width. However, geologists believe that the waters surrounding them may be rich in oil and natural gas deposits.

The disputed claims are long standing. Current tensions began in late 1995 and into 1996 when China began sending ocean surveillance ships and oil drilling rigs into the waters close to the islands. In July 1996, a Japanese student group erected a lighthouse on one of the islands flying the Japanese flag. China responded with a series of denunciations of Japan. In China and especially in Japan, questions have arisen concerning the U.S. legal relationship to the islands. This report will focus on that issue, which has four elements: (1) U.S. administration of the Senkakus (Diaoyus) from 1953 to 1971; (2) the application to the Senkakus (Diaoyus) of the 1971 "Treaty Between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Islands" – commonly known as the Okinawa Reversion Treaty, ratified by the U.S. Senate in 1971; (3) the U.S. position on the claims of the disputants; and (4) the relationship of the U.S.- Japan Security Treaty to the islands.

The Competing Claims

The claims of China and Taiwan have a similar basis. China asserts that fishermen from Taiwan used the islands for fishing activities since the time of the Ming Dynasty (1368–1644). Journeys by Chinese envoys to Okinawa during this period are cited, for these envoys sometimes recorded that the western boundary of the Ryukyu islands (Okinawa is the largest island of the Ryukyus) lay at a point east of the Senkakus (Diaoyus). In 1893, the Dowager Empress of China, Tze Shih, made a grant of the islands to one Sheng Hsuan Wai, who collected medical herbs on them.² However, China

2 Upton, Peter N. International Law and the Sino-Japanese Controversy over the Territorial Sovereignty of the Senkaku Islands. *Boston University Law Review*, Fall 1972: 767; U.S. Congress. Senate Committee on Foreign Relations. Okinawa Reversion Treaty. 92nd Cong., 1st Sess.

never established a permanent settlement of civilians or military personnel on the islands, and apparently did not maintain permanent naval forces in adjacent waters.³

Japan did not claim the islands until the Sino-Japanese War of 1894-1895. On January 14, 1895, the Emperor approved an Imperial Ordinance annexing the Senkakus to Japan.⁴ In May 1895, Japan and China signed the Treaty of Shimonoseki ending the war. Under the Treaty, China ceded Taiwan (Formosa) to Japan “together with all the islands appertaining or belonging to the said island of Formosa.” The Treaty did not mention the Senkakus, and the islands were not discussed during the negotiating sessions.⁵ Japan has claimed from this that its incorporation of the Senkakus (Diaoyus) was an act apart from the Sino-Japanese War. China argues that Japan used its victory in the war to annex the islands. China also argues that the intent of the allied declarations at Cairo and Potsdam during World War II was to restore to China territories taken from it by Japan through military aggression.⁶

U.S. Administration of the Islands, 1953–1971

U.S. administration of the islands began in 1953 as a result of the 1951 Treaty of Peace with Japan. The Treaty did not mention the Senkakus (Diaoyus), but it referred to other islands that had reverted to Chinese control or which China claimed. These included Taiwan, the Pescadores, the Spratlys, and the Paracels. Article 3 gave the United States sole powers of administration of “Nansei Shoto south of 29 north latitude (including the Ryukyu and the Daito Islands). [...]” 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 south of 29 degrees north latitude” to include the Senkakus.⁷ At the time of the signing of the Okinawa Reversion Treaty, several State Department officials asserted that

October 27, 28, and 29, 1971. Washington, U.S. Govt. Print. Office, 1971. 89-90. Hereafter, the hearings will be cited as Okinawa Reversion Treaty Hearings.

3 Cheng Tao. The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition. *Virginia Journal of International Law*, Winter 1974:244-246, 260.

4 Upton, op. cit., 768.

5 Ibid. 776.

6 Okinawa Reversion Treaty Hearings, 149, 152.

7 Okinawa Reversion Treaty Hearings, 149, 152.

following the signing of the Japan Peace Treaty, “Nansei Shoto south of 29 degrees north latitude” was “understood by the United States and Japan to include the Senkaku Islands.”⁸ Moreover, during the period of U.S. administration, the U.S. Navy established firing ranges on the islands and paid an annual rent of \$11,000 to Jinji Koga, the son of the first Japanese settler of the islands.⁹

Inclusion of the Senkakus (Diaoyus) in the Okinawa Reversion Treaty

The Okinawa Reversion Treaty, signed on June 17, 1971, and ratified by the U.S. Senate on November 10, 1971, provided for the return to Japan of “all and any powers of administration, legislation and jurisdiction” over the Ryukyu and Daito islands, which the United States had held under the Japan Peace Treaty. Article I of the Okinawa Reversion Treaty defines the term “the Ryukyu Islands and the Daito Islands” as “all territories with their territorial waters with respect to which the right to exercise all and any powers of administration, legislation and jurisdiction was accorded to the United States of America under Article 3 of the Treaty of Peace with Japan. [...]” An agreed minute to the Okinawa Reversion Treaty defines the boundaries of the Ryukyu Islands and the Daito islands “as designated under” USCAR 27. Moreover, the latitude and longitude boundaries set forth in the Agreed Minute appear to include the Senkakus (Diaoyus); this was acknowledged by the Chinese government and by supporters of China's claims, who testified in the Okinawa Reversion Treaty hearings before the Senate Foreign Relations Committee.¹⁰ A letter of October 20, 1971, by Robert Starr, Acting Assistant Legal Adviser for East Asian and Pacific Affairs – acting on the instructions of Secretary of State William Rogers – states that the Okinawa Reversion Treaty contained “the terms and conditions for the reversion of the Ryukyu Islands, including the Senkakus.”¹¹

8 The State Department officials included Robert Starr, Acting Assistant Legal Adviser for East Asian and Pacific Affairs; Harrison Symmes, Acting Assistant Secretary of State for Congressional Relations; and Howard McElroy, Country Officer for Japan. For their statements, see Okinawa Reversion Hearings, 90-91, 93, 147.

9 *Ibid.*, 77, 94, 119; Hornsby, Michael. Japan Asserts Rights to Isles Claimed by China. *London Times*, Mar. 19, 1972.

10 Okinawa Reversion Treaty Hearings, 93, 144, 148.

11 Okinawa Reversion Treaty Hearings, 91.

U.S. Position on the Competing Claims

In presenting the Okinawa Reversion Treaty to the U.S. Senate for ratification, the State Department asserted that the United States took a neutral position with regard to the competing Japanese and Chinese claims to the islands, despite the return of the islands to Japanese administration. Department officials asserted that reversion of administrative rights to Japan did not prejudice any claims to the islands. When asked by the Chairman of the Senate Foreign Relations Committee how the Okinawa Reversion Treaty would affect the determination of sovereignty over the Senkakus (Diaoyus), Secretary of State William Rogers answered that “this treaty does not affect the legal status of those islands at all.”¹² In his letter of October 20, 1971, Acting Assistant Legal Adviser Robert Starr states:

The Governments of the Republic of China and Japan are in disagreement as to sovereignty over the Senkaku Islands. You should know as well that the People’s Republic of China has also claimed sovereignty over the islands. The United States believes that a return of administrative rights over those islands to Japan, from which the rights were received, can in no way prejudice any underlying claims. The United States cannot add to the legal rights Japan possessed before it transferred administration of the islands to us, nor can the United States, by giving back what it received, diminish the rights of other claimants. The United States has made no claim to the Senkaku Islands and considers that any conflicting claims to the islands are a matter for resolution by the parties concerned.¹³

Successive U.S. administrations have restated this position of neutrality regarding the claims. In the midst of the current tensions, the State Department and the U.S. Embassy in Japan have reiterated this position.¹⁴

The U.S.-Japan Security Treaty and the Islands

The inclusion of the Senkakus (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 islands. Article II states that “treaties, conventions and other agreements concluded between Ja-

12 Ibid., 11.

13 Ibid., 91.

14 Kristof, Nicholas D. A Mini Asian Tempest Over Mini Island Group. *New York Times*, Sept. 16, 1996. A8.

pan and the United States of America, including, but without limitation the Treaty of Mutual Cooperation and Security between Japan and the United States of America... become applicable to the Ryukyu Islands and the Daito Islands as of the date of entry into force of this Agreement.” Using “Okinawa” as shorthand for the territory covered by the Treaty, Secretary of State Rogers stated in his testimony before the Foreign Relations Committee that the Security Treaty “becomes applicable to Okinawa” the same as applied to the Japanese home islands.¹⁵ Deputy Secretary of Defense David Packard, in his testimony, stressed that Japan would assume the “primary responsibility” for the defense of the treaty area but that the Security Treaty was applicable.¹⁶

In short, while maintaining neutrality on the competing claims, the United States agreed in the Okinawa Reversion Treaty to apply the Security Treaty to the treaty area, including the Senkaku (Diaoyu) islands. It also should be noted that in ratifying the Treaty, the Senate did not act on the advice of several committee witnesses that it include in the instrument of ratification reservations concerning the Senkakus. Moreover, the Security Treaty itself declares in Article V that each party would act “in accordance with its constitutional provisions and processes” in response to “an armed attack [...] in the territories under the administration of Japan.” “Administration” rather than “sovereignty” is the key distinction that applies to the islands. Since 1971, the United States and Japan have not altered the application of the Security Treaty to the islands.

15 Okinawa Reversion Hearings, 22.

16 *Ibid.*, 42, 44.