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The Senkaku Islands and International Law

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Key Concepts

Territorial issues always stimulate strong sentiments of nationalism in all the parties concerned. However, what is needed most is to have a calm and reasoned debate over these issues. Clashing nationalisms will be detrimental to any attempt to solve the problems.

From such a perspective, it is important to distinguish between “conflicts” and “disputes.” A “conflict” is a *de facto* situation of differences between states while a “dispute,” particularly a legal dispute, is a *de jure* notion based on the relevant substantive and procedural rules of international law. What should be avoided is exacerbating a “conflict” by coercive measures. It is necessary to make every effort to transform a conflict into a dispute, which is particularly the responsibility for a country seeking to change a status quo. What is important is to “control” those disputes through peaceful settlement, preferably through judicial settlement by the International Court of Justice (ICJ).

Another key concept which is important in territorial disputes is a “critical date” which the Court normally determines in settling territorial disputes. The Court will admit only relevant facts established prior to the critical date as evidence and no evidence is admissible with regard to the facts occurring after that date. It is therefore meaningless to try to build up whatever facts and actions after the critical date. This is one of the important merits of the judicial settlement of disputes for reducing tension between the parties.

Japan’s Position

Japan’s position on the Senkaku Islands is clear. Japan took measures to incorporate the islands in January 1895 after having carefully surveyed and determined that the islands had been terra nullius (no man’s land). Ever since, the Senkaku Islands have been under the Japanese administration except for 27 years between 1945 and 1972 when the islands as part of Okinawa were under the US administration but returned to Japan along with Okinawa in 1972. Thus, the islands have been under the effective and peaceful administration of Japan for more than a century. It is clear that the Senkaku Islands are an inherent part of Japan, as evidenced by both historical facts and international law, and therefore there is no “dispute” about the sovereign title of the islands.

China was upset at the purchase of the Senkaku Islands by the Japanese government in September of last year. The measures taken were a commercial transfer of title under domestic law of Japan, which has nothing to do with the islands’ status under international law. The islands had been held by the Japanese government until 1932 and were then transferred to a private citizen who now wanted to sell the islands to somebody else. The then-governor of Tokyo, a rather assertive politician, demonstrated interest in purchasing the islands, which many feared might cause unnecessary friction with China. Thus, the objective of the Japanese government in purchasing the islands was, with all good intentions, to minimize any adverse impact on the Japan-China

relationship.

It was only in 1971, 86 years after Japan's incorporation of the islands in 1895, when China (and Taiwan) first expressed opposition to the Japanese administration. This was apparently stimulated by a UN report which had indicated possible oil and gas resources in the area. China's assertion of sovereignty over the islands is based on the theory that China was the first to discover the islands and that the area had been long covered by the China-centric "Great East Asian Order," and specifically that since the 16th century the area of the islands had been covered by the maritime patrol zone of the Chinese government. It is questionable that these and other historical facts could be sustained as predominant evidence for China's alleged "effective control" over the islands. It goes without saying that discovery alone does not create a legal title and that it has to be supported by *effectivité*.

China's Desired Action

If China considers that their assertion is really good enough to beat Japan, what China should do is to bring the matter to the ICJ. Since Japan does not consider the Senkaku issue a "dispute" there is no reason for Japan to sit and negotiate with China over the sovereignty of the islands. It is the Chinese side that should take the initiative to transform the issue into a legal dispute, because it is China who is seeking to change the status quo long established under international law.

How could China make it a legal dispute? It is actually quite simple. All it has to do is refer the case to ICJ, just like Japan has been trying to do with South Korea over the Takeshima Islands dispute. If China decided to take this course, Japan would not run away from settling the issue at the ICJ. Of course, the initiative should come from China and that initiative should be genuine. If China genuinely wishes to solve the issue by ICJ, China should accept the compulsory jurisdiction of the Court which Japan did as early as 1958. Seeking a legal solution is much more preferable for China as a responsible superpower to exacerbating the tension by sending government vessels to the area and repeatedly intruding into Japan's territorial waters. The issue should be treated as a legal dispute deserving resolution by the ICJ or by other international dispute resolution; and in any event, resolution should occur without gunboats locking radars and other such dangerous conduct.

Critical Date

If the case is brought to the ICJ, when will the critical date for this dispute be? Following the precedents of international courts and tribunals, it is likely that the date be designated as January 1895 when Japan incorporated the islands as *terra nullius* into the Japanese territory. The Court will ask which side can establish predominant and more convincing evidence as to whether or not the islands were no mans' land at the time of the Japanese incorporation.

Another possibility for the critical date in this case may be December 1971 when China first expressed objection to the Japanese administration of the islands. This would be a preferable date for Japan, because she can submit a number of pieces of favorable evidence to prove her uncontested ownership. For instance, in 1920 the then-consul of the Republic of China in Nagasaki wrote a letter of appreciation for the rescue of 31 Chinese fishermen who had been washed ashore on the "Senkaku Islands, Yaeyama District, Okinawa Prefecture, the Empire of Japan." Maps published in China in 1933 and 1958 (reprinted in 1960), as well as maps in official school textbooks used in China up to 1970, all indicated the Senkaku Islands as part of Japan.

Furthermore, in the San Francisco Peace Treaty of 1951, Senkaku Islands were not included in the territories to be renounced by Japan, namely Taiwan and Pescadores Islands, in accordance with Article 2 (b). On the contrary, Article 3 of the Treaty clearly provided that Senkaku Islands were to be placed under the administrative control of the United States, along with Okinawa. China raised no objections at all when the United States took administrative control of the islands and used them as a bombing range throughout the 1950s

and 60s, for which the U.S. government paid fees to the owner of the islands. These administrative rights were reverted to Japan in 1972.

China and International Adjudication

It is widely speculated that there is no chance for China to accept the jurisdiction of the international courts and tribunals. However, the present writer is optimistic that China may in the long run consider the option of judicial settlement of disputes more positively.

For instance, since China became a member of the WTO more than 10 years ago, she has been quite active and cooperative with its dispute settlement procedures. China now appears quite accustomed to going through the WTO dispute settlements where she has won in some cases and lost in others. Besides, China has demonstrated very good performance in implementing the recommendations of the WTO Dispute Settlement Body (which appears to be a much better track record than the United States!) It is hoped that China will become mature enough not to hesitate about going to other international courts and tribunals as well to solve its disputes.

There are Chinese judges at the ICJ and ITLOS (International Tribunal for the Law of the Sea). China has an excellent group of experts in international law and international adjudication. It should be added that the level of Chinese law students is very high. In February last year, the writer was invited to the Jessup ICJ Moot Court Competition held in Beijing to serve as one of the judges. About 40 law schools from all over China participated in the competition. It was a great surprise to see that the participating students demonstrated excellent standard both in their research ability and written and oral pleadings based on their profound understanding of the jurisprudence of international courts and tribunals. Thus, the present writer has high hopes for the young generation of international lawyers in China.

Since the end of World War II, Japan has contributed significantly to the development of international law and to peaceful settlement of disputes. It is hoped that China and Japan will work jointly toward building a more peaceful world based on the rule of law.

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