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Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations

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Specialist in Asian Affairs

January 22, 2013

Congressional Research Service

7-....

www.crs.gov

R42761

Summary

Since the mid-1990s, tensions have spiked periodically among Japan, China, and Taiwan over the disputed Senkaku (Diaoyu/Diaoyutai) islets in the East China Sea. These flare-ups run the risk of involving the United States in an armed conflict in the region. Japan administers the eight small, uninhabited islets, which some geologists believe sit near significant oil and natural gas deposits. China and Taiwan both contest Japanese claims of sovereignty over the islets.

U.S. administrations going back at least to the Nixon Administration have stated that the United States takes no position on the territorial disputes. However, it also has been U.S. policy since 1972 that the 1960 U.S.-Japan Security Treaty covers the islets, because Article 5 of the treaty stipulates that the United States is bound to protect “the territories under the Administration of Japan” and Japan administers the Senkakus (Diaoyu Islands). Under the treaty, the United States guarantees Japan’s security in return for the right to station U.S. troops—which currently number around 50,000—in dozens of bases throughout the Japanese archipelago. Although it is commonly understood that Japan will assume the primary responsibility for the defense of the treaty area, in the event of a significant armed conflict with either China or Taiwan, most Japanese would likely expect that the United States would honor its treaty obligations.

Each time tensions over the islets have flared, questions have arisen concerning the U.S. legal relationship to the islets. This report will focus on that issue, which has four elements:

1. U.S. administration of the Senkakus (Diaoyu Islands) from 1953 to 1971;
2. the application to the Senkakus (Diaoyu Islands) 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, approved by the Senate in 1971 and entered into force the following year (the Daito Islands lie to the east of Okinawa);
3. the U.S. view on the claims of the disputants; and
4. the relationship of the U.S.-Japan Security Treaty to the islets.

Members of Congress periodically have been involved or expressed interest in the Senkaku (Diaoyu) dispute over the decades, most prominently when the issue of the U.S.-Japan Security Treaty’s application arose during the Senate’s deliberations over the Okinawa Reversion Treaty. In 2012, congressional committees explored the topic in hearings and inserted in the FY2013 National Defense Authorization Act (H.R. 4310/P.L. 112-239) a resolution stating, among other items, that “the unilateral action of a third party will not affect the United States’ acknowledgment of the administration of Japan over the Senkaku Islands.” Similarly, in January 2013, Secretary of State Hillary Rodham Clinton stated that “we oppose any unilateral actions that would seek to undermine Japanese administration” of the islets. This language was a reaction to China’s increase in patrols around the Senkakus since the fall of 2012, moves that appear to many to be an attempt to exploit the U.S. distinction between sovereignty and administrative control by demonstrating that Beijing has a degree of administrative control over the islets.

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Introduction

Periodically, tensions arise among Japan, China, and Taiwan over a small group of islets located about 120 miles northeast of Taipei, Taiwan. Japan, China (also known as the People's Republic of China, or PRC), and Taiwan (also known as the Republic of China, or ROC) all claim sovereignty over the islets, known as the Senkakus in Japan, the Diaoyu in China, and the Diaoyutai in Taiwan. China considers the islets to be part of Taiwan, over which it claims sovereignty. The land features in question are eight in number, sometimes described as five islets and three rocks, 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. Tensions flared following Tokyo governor Shintaro Ishihara's April 2012 announcement in Washington, DC, that he intended to lead a movement to purchase three of the eight islets from their private owner. Ishihara, who is known for expressing nationalist Japanese views, called for demonstrating Japan's control over the islets by building installations such as a telecommunications base, a port, and a meteorological station. He conducted an online campaign to support his efforts, raising nearly \$20 million in private donations for the purchase.¹ In a move it said was designed to prevent Ishihara or other nationalists from acquiring the islets, Japan's central government on September 12, 2012, purchased the three islets for ¥2.05 billion (about \$26 million at an exchange rate of ¥78:\$1). China and Taiwan protested the move, and across China large-scale anti-Japanese protests erupted, some of which resulted in violence. Since Ishihara's April 2012 speech, the islets also have been the scene of increased activity—and sometimes direct encounters—between activists, fishermen, and maritime vessels of all three governments.

Many observers worry that an accident could result in armed conflict between Japan and China. Starting in the fall of 2012, China began regularly deploying China Maritime Surveillance (CMS) and Fisheries Law Enforcement Command (FLEC) ships to patrol near the islands and stepped up what it called routine and normal patrols to assert jurisdiction in "China's territorial waters." On some days, the ships entered areas that Japan claims as part of its 12 nautical mile territorial waters. Chinese military surveillance planes reportedly have entered airspace that Japan considers its own, in what Japan's Defense Ministry has called the first such incursion in 50 years.²

Each time tensions erupt over the islets, questions have arisen concerning the U.S. relationship to the islets. This report will focus on that issue. It was originally written by Larry Nicksch, who retired from CRS in 2010. It has been updated and modified slightly from the original.

¹ Phred Dvorak and Toko Sekiguchi, "Tokyo Governor Keeps Up Isle Rhetoric," *Wall Street Journal Asia*, August 28, 2012. For a video of Ishihara's April 16, 2012, speech, see <http://www.heritage.org/events/2012/04/shintaro-ishihara>.

² "Japan Scrambles Jets in Island Dispute with China," *New York Times*, December 13, 2012.

Figure 1. Map of Senkaku (Diaoyu/Diaoyutai) Islands and Surrounding Region



Source: Created by CRS using Esri Basemaps. The Senkaku Islands have been slightly enlarged for highlighting purposes.

The Competing Claims

The claims of China and Taiwan have a similar basis. China asserts that its Ming Dynasty (1368-1644) considered the islets part of its maritime territory and included them on maps and documents of areas covered by Ming Dynasty coastal defenses. China claims that the Qing Dynasty (1644-1911) went further and placed the islets under the jurisdiction of Taiwan, which was a part of the Qing Dynasty.³ However, although there are claims that Chinese fishermen used the islets as places of temporary shelter and repair, China never established a permanent settlement of civilians or military personnel on the islets, and apparently did not maintain permanent naval forces in adjacent waters.⁴

³ State Council Information Office, The People's Republic of China, *White Paper on Diaoyu Dao, an Inherent Territory of China*, September 2012, <http://english.people.com.cn/90785/7960320.html>. Chinese names are rendered using the Pinyin transliteration system.

⁴ 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. pp. 244-246, 260.

Japan, which argues that there is no territorial dispute, laid claim to the islets on January 14, 1895, when the Japanese Cabinet issued a decision to formally incorporate them into Japanese territory.⁵ Before then, Japan argues, the islets were uninhabited, without owner (*terra nullius*), and “showed no trace of having been under the control of China.”⁶ The Chinese and Taiwanese governments reject Japan’s *terra nullius* claim.⁷ In May 1895, Japan and the Qing Dynasty government of China signed the Treaty of Shimonoseki ending the Sino-Japanese war that had begun the previous year. Under the pact, which China today considers one of a number of “unequal treaties” forced on it by foreign powers, China ceded Taiwan (Formosa) to Japan “together with all the islets appertaining or belonging to the said island of Formosa.” The Treaty did not specifically mention the Senkakus (Diaoyu/Diaoyutai) and the islets were not discussed during the negotiating sessions.⁸ Japan has claimed from this that its incorporation of the Senkakus (Diaoyu/Diaoyutai) was an act apart from the Sino-Japanese War. In contrast, China and Taiwan argue that Japan used its victory in the war to annex the islets. They also argue that the Allied declarations at Cairo and Potsdam during World War II, which vowed to restore to China territories taken from it by Japan through military aggression, apply to the islets, which therefore should have been returned to China.⁹ In October 1945, when Japan relinquished authority over Taiwan, it did not specifically mention the disposition of the Senkakus (Diaoyu/Diaoyutai).

U.S. Administration of the Islets, 1953-1971

U.S. administration of the islets began in 1953 as a result of the 1951 Treaty of Peace with Japan.¹⁰ The Treaty did not mention the Senkakus (Diaoyu/Diaoyutai), but it referred to other islets that had reverted to Chinese control or which China claimed. These included Taiwan and the Pescadores (off the western coast of Taiwan), as well as the Spratlys and the Paracels (both in the South China Sea). 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 [the southwestern islands] south of 29 degrees north latitude” to include the Senkakus.¹¹ At the time of the signing

⁵ Ministry of Foreign Affairs of Japan, “Recent Developments in Japan-China Relations. Basic Facts on the Senkaku Islands and the Recent Incident,” October 2010, <http://www.mofa.go.jp/region/asia-paci/china/pdfs/facts1010.pdf>.

⁶ Ministry of Foreign Affairs of Japan, “Recent Developments in Japan-China Relations. Basic Facts on the Senkaku Islands and the Recent Incident,” October 2010, <http://www.mofa.go.jp/region/asia-paci/china/pdfs/facts1010.pdf>; Japan’s use of the term *terra nullius* appears, among other places, in “Fact Sheet on the Senkaku Islands,” Ministry of the Foreign Affairs of Japan, November 2012, http://www.mofa.go.jp/region/asia-paci/senkaku/fact_sheet.html.

⁷ “Statement of the Ministry of Foreign Affairs of the People’s Republic of China,” September 10, 2012, <http://www.fmprc.gov.cn/eng/topics/diaodao/t968188.htm>. “The Diaoyutai Islands: An Inherent Part of the Territory of the Republic of China (Taiwan),” April 9, 2012, <http://maritimeinfo.moi.gov.tw/marineweb/LayFromE0.aspx?icase=T02&pid=0000000516>.

⁸ Upton, Peter N., “International Law and the Sino-Japanese Controversy over the Territorial Sovereignty of the Senkaku Islands,” *Boston University Law Review*, Fall 1972, p. 776. State Council Information Office, The People’s Republic of China, *White Paper on Diaoyu Dao, an Inherent Territory of China*, September 2012, <http://english.people.com.cn/90785/7960320.html>.

⁹ Okinawa Reversion Treaty Hearings, pp. 149, 152; “The Diaoyutai Islands An Inherent Part of the Territory of the Republic of China (Taiwan),” Ministry of Foreign Affairs of the Republic of China (Taiwan), <http://www.mofa.gov.tw/EnOfficial/Topics/TopicsArticleDetail/fd8c3459-b3ec-4ca6-9231-403f2920090a>.

¹⁰ Treaty of Peace with Japan, signed Sept. 8, 1951, 3 U.S.T. 3169.

¹¹ Okinawa Reversion Treaty Hearings, pp. 149, 152.

of the Okinawa Reversion Treaty, several State Department officials asserted that 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.”¹² Moreover, during the period of U.S. administration, the U.S. Navy established firing ranges on the islets and paid an annual rent of \$11,000 to Jinji Koga, the son of the first Japanese settler of the islets.¹³ China has described the U.S.-Japan understandings related to the islets as “backroom deals” that are “illegal and invalid.”¹⁴

Inclusion of the Senkakus (Diaoyu Islands) in the Okinawa Reversion Treaty

The Okinawa Reversion Treaty,¹⁵ which was signed on June 17, 1971, and entered into force on May 15, 1972, 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 (Diaoyu/Diaoyutai). 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.”¹⁶

U.S. Position on the Competing Claims

During Senate deliberations on whether to consent to the ratification of the Okinawa Reversion Treaty, the State Department asserted that the United States took a neutral position with regard to the competing claims of Japan, China, and Taiwan, despite the return of the islets to Japanese administration. Department officials asserted that reversion of administrative rights to Japan did not prejudice any claims to the islets. 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 (Diaoyu/Diaoyutai), Secretary of State William Rogers answered

¹² 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, pp. 90-91, 93, 147.

¹³ *Ibid.*, pp. 77, 94, 119; Hornsby, Michael, “Japan Asserts Rights to Isles Claimed by China,” *London Times*, Mar. 19, Mark J. Valencia, “The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions,” *Asian Perspective*, Vol. 31, No. 1, 2007, pp. 150-156.

¹⁴ State Council Information Office, The People’s Republic of China, *White Paper on Diaoyu Dao, an Inherent Territory of China*, September 2012, <http://english.people.com.cn/90785/7960320.html>.

¹⁵ Treaty on Reversion to Japan of the Ryukyu and Daito Islands, signed Jun. 17, 1971, 23 U.S.T. 446.

¹⁶ Okinawa Reversion Treaty Hearings, p. 91.

that “this treaty does not affect the legal status of those islands at all.”¹⁷ In his letter of October 20, 1971, Acting Assistant Legal Adviser Robert Starr stated:

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.¹⁸

Successive U.S. administrations have restated this position of neutrality regarding the claims, particularly during periods when tensions over the islets have flared, as in 1996, 2010, and 2012.

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

The inclusion of the Senkakus (Diaoyu Islands) 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. Article II states that “treaties, conventions and other agreements concluded between Japan and the United States of America, including, but without limitation to 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.”¹⁹ Using “Okinawa” as shorthand for the territory covered by the Treaty, Secretary of State Rogers stated in his testimony before the Senate Foreign Relations Committee that the Security Treaty “becomes applicable to Okinawa” in the same way as it applied to the Japanese home islands.²⁰ 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.²¹

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/Diaoyutai). During a 2010 worsening of Japan-PRC relations over the islets, Secretary of State Hillary Clinton summed up the U.S. stance by stating, “... with respect to the Senkaku Islands, the United States has never taken a position on sovereignty, but we have made it very clear that the islands are part of our mutual treaty obligations, and the obligation to defend Japan.”²²

¹⁷ *Ibid.*, p. 11.

¹⁸ *Ibid.*, p. 91.

¹⁹ The Treaty of Mutual Cooperation and Security Between Japan and the United States, 11 U.S.T. 1632, was signed on January 19, 1960, and entered into force on June 23 of the same year.

²⁰ Okinawa Reversion Hearings, p. 22.

²¹ *Ibid.*, p. 42, 44.

²² “Hillary Rodham Clinton Remarks Following Signing Ceremonies,” Hanoi, Vietnam, October 30, 2010. Clinton went on to say that “We have certainly encouraged both Japan and China to seek peaceful resolution of any disagreements that they have in this area or others. It is in all of our interest for China and Japan to have stable, peaceful relations. And we have recommended to both that the United States is more than willing to host a trilateral, (continued...)”

It also should be noted that in providing its consent to U.S. ratification of the Treaty, the Senate did not act on the advice of several committee witnesses that it include a reservation concerning the Senkakus (Diaoyu/Diaoyutai) in the resolution of advice and consent to ratification. Moreover, the Security Treaty itself declares in Article V that each party would act “in accordance with its constitutional provisions and processes”²³ 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 islets. Since 1971, the United States and Japan have not altered the application of the Security Treaty to the islets.

China’s increase in patrols around the Senkakus since the fall of 2012 appears to many to be an attempt to demonstrate that Beijing has a degree of administrative control over the islets, thereby exploiting the U.S. distinction between sovereignty and administrative control. Some observers, seeking to avoid a situation where the United States inadvertently encourages more assertive Chinese actions, have called on Obama Administration officials to stop using the word “neutral” in describing the U.S. position on the issue and to also publicly declare that unilateral actions by China (or Taiwan) will not affect the U.S. judgment that the islets are controlled by Japan. In its own attempt to address this perceived gap, Congress inserted in the FY2013 National Defense Authorization Act (H.R. 4310, P.L. 112-239) a resolution stating, among other items, that “the unilateral action of a third party will not affect the United States’ acknowledgment of the administration of Japan over the Senkaku Islands.” Perhaps responding to the criticism of the Administration’s rhetoric, in January 2013 Secretary Hillary Rodham Clinton stated that “we oppose any unilateral actions that would seek to undermine Japanese administration” of the islets during opening remarks to the press with Japanese Foreign Minister Fumio Kishida.

(...continued)

where we would bring Japan and China and their foreign ministers together to discuss a range of issues.” In 2004, Deputy Secretary of State Richard Armitage stated that the U.S.-Japan Mutual Security Treaty “... would require any attack on Japan, *or the administrative territories under Japanese control*, to be seen as an attack on the United States.” (emphasis added) U.S. State Department, “Remarks and Q & A at the Japan National Press Club, Richard L. Armitage, Deputy Secretary of State,” February 2, 2004.

²³ The U.S.-Japan Security Treaty was one of several collective defense agreements entered by the United States between 1947 and 1960. Almost all of them, including the U.S.-Japan agreement, include a provision specifying that the parties’ obligations shall be carried out in accordance with their respective constitutional processes. This language was included to satisfy congressional concerns that the agreements could be interpreted as sanctioning the President to take military action in defense of treaty parties without additional congressional authorization (i.e., a declaration of war or joint resolution authorizing military force). For further discussion, see CRS Report R40614, *Congressional Oversight and Related Issues Concerning International Security Agreements Concluded by the United States*, by (name redacted) and (name redacted).

The Japan-China Dispute over Their Maritime Boundary

Japan and China are involved in another East China Sea disagreement over maritime boundary (as opposed to the competing claims over the territorial sovereignty of the Senkaku (Diaoyu/Diaoyutai)). While China claims the whole continental shelf to the Okinawa Trough, Japan claims the same shelf to a median line between its undisputed territory and that of China. Since at least the 1970s, China has been exploring and building pipelines on and around its side of the median line in the disputed waters, under which are oil and gas deposits. In the first decade of the 2000s, Japan and China began to pursue a bilateral agreement over the exploitation of the undersea hydrocarbon resources. In their negotiations, both Beijing and Tokyo sought to make a distinction between their territorial dispute over the Senkakus (Diaoyu/Diaoyutai) and the rights to develop the undersea hydrocarbon fields.

In June 2008, the two sides announced an agreement on joint exploration for gas and oil in two of the fields close to or straddling the “median line” that Japan claims is the rightful boundary between the two countries’ 200-mile exclusive economic zones (EEZs). The United Nations Convention on the Law of the Sea (UNCLOS) defines an EEZ as the area extending from a country’s coastline outwards up to 200 nautical miles from the baseline of a country’s territorial sea, which ends 12 nautical miles from its coastline. The Japan-China joint development explicitly states that it does not prejudice either side’s legal claims in the area. Under the agreement, the two countries reached an “understanding” for cooperation in the Chunxiao gas and oil fields (called Shirakaba in Japanese), the southernmost of the fields. To date, however, no progress has been made in implementing the agreement.

It is unclear to what extent and in which situations the U.S.-Japan Mutual Security treaty, which refers to an armed attack on the territories under the administration of Japan, would apply in the event of a Sino-Japanese military conflict over the two countries’ maritime boundary dispute. Regardless of the treaty’s technicalities and its interpretation, however, it is likely that Japanese policymakers and citizens would expect that the treaty would apply to any Sino-Japanese military conflict, including those involving the competing maritime claims.

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