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Citation: Rule of Law Series, Japan Digital Library (March 2015),  
[http://www2.jiiia.or.jp/en/digital\\_library/rule\\_of\\_law.php](http://www2.jiiia.or.jp/en/digital_library/rule_of_law.php)

## Issues on the Title of the Senkaku Islands: Analysis of the Viewpoints of Japan and China\*

Kyoko Hamakawa

*Issue Brief, National Diet Library No. 565 (Feb. 28, 2007)*

Since 1971, the Chinese government has claimed the territorial title to the Senkaku Islands, asserting that they have been Chinese territory since the time of the Ming Dynasty. On the other hand, the Japanese government takes the position that there exists no issue of the territorial title to be resolved concerning the islands. This paper compares and examines the viewpoints of Japan and China over the territorial title to the Senkaku Islands. The main arguments can be broadly divided as follows; (1) before 1895, when Japan incorporated the islands, whether they were *terra nullius* or Chinese territory; (2) if Japan's territorial incorporation of the islands by its Cabinet Decision was conducted in a valid manner; and (3) if Japan has exercised sovereignty over the islands continuously and peacefully since the territorial incorporation. The last argument whether sovereignty has been exercised continuously and peacefully is regarded as particularly crucial in the past international adjudications on territorial disputes.

### Introduction

The Senkaku Islands are currently an uninhabited group of islands comprised of Uotsuri Island, Kuba Island (also known as Kobi-sho Island), Taisho Island (also known as Kumeakashima Island or Sekibi-sho Island), Kitakojima Island, and Minamikojima Island, Tobise Island, Okinokitaiwa Island, and Okinominamiwa Island. It was thought that the islands had little economic value. However, the scientific survey by the United Nations Economic Commission for Asia and the Far East (ECAFE) in 1968 concluded that the continental shelf in the East China Sea might contain prolific oil reserves and after that, the islands quickly became the focus of attention. In the early 1970s, China began to claim territorial title of the islands.<sup>1</sup>

After reviewing how the attribution of territories is determined in international law, this paper will summarize and examine the arguments on the territorial title of the Senkaku Islands.

\* *This article was originally published as 濱川今日子「尖閣諸島の領有をめぐる論点—日中両国の見解を中心に」『調査と情報 -Issue Brief』No. 565, 国立国会図書館調査及び立法考査局、2007年2月、1-10頁。*

1 *Statement by the Ministry of Foreign Affairs, the Government of the People's Republic of China (December 30, 1971), reproduced in Kazankai, Nitchu Kankei Kihon Shiryoshu 1949 nen-1997 nen [Collection of Basic Documents on Japan-China Relations from 1949 to 1997] (1998), pp. 401-402. Taiwan also independently claims title to the Senkaku Islands, but it is beyond the scope of this paper.*

Figure 1: The composition of the Senkaku Islands

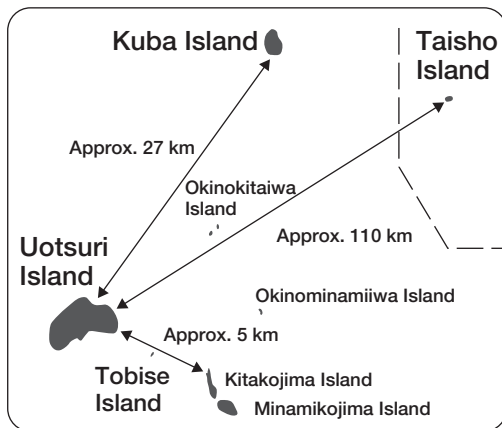
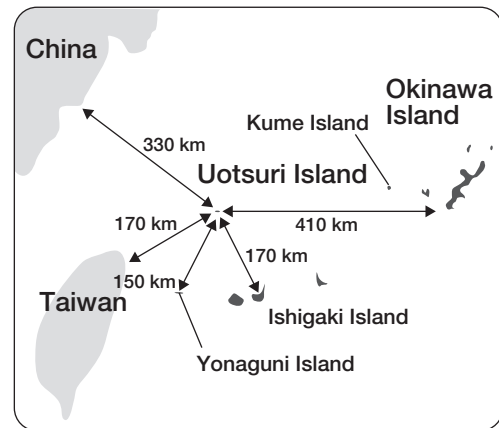


Figure 2: The Location of Uotsuri Island



Source: Each map is from the website of the Ministry of Foreign Affairs

## I. International Law concerning the Attribution of Territory

A territory belongs to the state that possesses the title to that territory. Territorial title provides the foundation or grounds that enable a state to validly exercise sovereignty over a specific territory.<sup>2</sup> As the modes for states to acquire territorial title, occupation, accretion, cession, annexation, conquest, and prescription have traditionally been recognized.<sup>3</sup> Among these modes of acquisition, Japan bases its title to the Senkaku Islands on occupation.

### 1. Theory of Occupation

Occupation means that a state occupies effectively *terra nullius*, an area that does not belong to any state, with an intention to possess that territory.

A state generally expresses its intention to possess a territory through a declaration or a notification to other states that it will incorporate the relevant area into its own territories. However, according to the mainstream opinions, neither a declaration nor a notification is an absolute requirement in order for a state to show its intention to acquire a territory because its intention can be assumed from specific state activities and other relevant facts.<sup>4</sup>

Effective occupation, in other words, signifies the substantive state activities that prove the intention of possession. Today, it is said that physical occupation in the form of the actual use or settlement is not necessarily required and that social possession in the sense of establishing sovereignty is considered to be sufficient.<sup>5</sup>

### 2. The Importance of the Continuous and Peaceful Display of Territorial Sovereignty in the International Judicial Precedents

In a traditional legal theory, once a state has acquired territorial title, this immediately generates opposability

<sup>2</sup> Takane Sugihara et al., *Gendai Kokusaiho Kogi dai 3 pan* [Lectures on Modern International Law] (3rd ed., 2003), p. 105.

<sup>3</sup> The respective definitions are briefly summarized in Akira Kotera, *Paradaimu Kokusaiho: Kokusaihou no Kihon Kosei* [Paradigms in International Law: the Basic Structure of International Law] (2004), pp. 121-122.

<sup>4</sup> Sugihara, *supra* note 2, p. 106.

<sup>5</sup> Shuichi Furutani, "Kokusaihou ni okeru Ryodo/Kokkyo" [Territories and Borders in International Law], *Yurashia Kenkyu* [Eurasian Studies], Vol. 34 (2006), p. 34.

to all other states. Hence, there should be no concurrent claims of the title among states to a specific area.

In reality, however, a dispute may occur under the circumstances where it is not clear if a state has acquired the territorial title. In these instances, each state concerned brings different evidence to claim its title and it is difficult to reach an all-or-nothing judgment based on a traditional theory, in which a single state absolutely possesses the title and others do not.

In the *Island of Palmas* case (1928),<sup>6</sup> without relying on the traditional modes of territorial acquisition, such as occupation and prescription, the Permanent Court of Arbitration applied the element whether the title acquired had been maintained, by stating that “the continuous and peaceful display of territorial sovereignty ... is as good as a title.”<sup>7</sup> It can be said that in this case, the court made the judgement based on a comparative factor that which of the parties had controlled the disputed territory more effectively.

Since the *Island of Palmas* case, this legal principle of effective control has been followed as a judicial precedent for territorial disputes. Additionally, it is considered to be highly important the recognition or the acquiescence of other states, especially the other party in the dispute, to a continuous display of “actual control,” since it proves the peacefulness.<sup>8</sup>

### 3. The Critical Date

The date that the dispute arose or that the territorial title was established is called the “critical date.” International law recognizes only the facts and the state activities occurred prior to a critical date as evidence. There is no single method for determining a critical date and ultimately it is entrusted to the judgment of court. There are some cases where the parties to a dispute claimed different critical dates but courts did not specifically admit these dates.<sup>9</sup>

## II. The Bases of Claims before the Territorial Incorporation of the Senkaku Islands into Japan

China claims concerning the Senkaku Islands that “as early as the Ming Dynasty, these islands were already included in China’s coastal defence zone, and they were [...] part of the islands appertaining to Taiwan, China. The boundary between the territories of China and the Ryukyus was marked between Sekibi-sho Island and Kume Island.”<sup>10</sup> In the following sections, the author will review the documents that are considered to be evidence to support China’s claim that historically the Senkaku Islands have been its territory, and then will examine the validity of this claim.

### 1. “The Coastal Defense Zone”

In the 1560s Japanese pirates, *wako* (in Chinese *wokou*), raged around the central and southern coasts of China in the 1560s and they were a serious threat to the Ming Dynasty.<sup>11</sup> It is said that China established a coastal defense zone against *wako*, within which China claims that the Senkaku Islands were included.

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6 This is a case concerning the territorial title of the *Island of Palmas* off the coast of Mindanao in the Philippines between the United States and the Netherlands. *Island of Palmas (Netherlands v. U.S.)*, *Reports of International Arbitral Awards*, Vol. 2 (1948), pp. 829-871.

7 *Ibid.*, p. 839.

8 Akira Kotera, “Paradaimu Kokusaiho (dai 10 kai): Rikuchi to Tairikudana no Kizoku” [Paradigms in International Law (Lecture No. 10): Attribution of Land and Continental Shelf], *Hogaku Kyoshitsu* [Legal Classroom], No.256 (2002), p. 132.

9 See the judgement by the International Court of Justice on the *Minquiers and Ecrehos (United Kingdom v. France)*, *Advisory Opinions and Orders*, *I.C.J. Reports*1953, pp. 47-109.

10 Kazankai, *supra* note 1, p. 402.

11 Kyodai Toyoshi Jiten Hensan Iinkai [Kyoto University Oriental History Dictionary Compilation Committee], *Shinpen Toyoshi Jiten* [New Edition of Dictionary of Oriental History] (13th ed., 1999), p. 921.

Frequently cited as evidence of this claim is *Chou Hai Tu Bian* (An Illustrated Compendium on Coastal Defence, estimated to be published in 1562).<sup>12</sup> In *Yan Hai Shan Sha Tu* (the Coastal Island and Seashore Maps) of Volume I of *Chou Hai Tu Bian*, Map 7 and Map 8 depict the islands off the coast of Luoyuan County and Ningde County in Fujian Province, and it is claimed that the Senkaku Islands are marked in these maps together with the islands comprising a chain with them, such as to Jilong Shan, Pengjia Shan, Diaoyu Yu, Huaping Shan, Huangmao Shan, Ganlan Shan, and Chi Yu.<sup>13</sup>

However, in Volume IV of *Chou Hai Tu Bian*, *Fujian Yanhai Zong Tu* (the Map of the Coast of Fujian Province) does not even illustrate Taiwan, Keelung Islet, or Pengjia Islet, let alone the Senkaku Islands. At the time when *Chou Hai Tu Bian* was compiled, China was struggling even to defend its coast of the mainland and its defence capabilities did not extend to the Penghu Islands. Therefore, it has been noted that its intention behind drawing the Senkaku Islands in *Yanhai Shansha Tu* was only to show that it was an area that needed to be paid attention to in order to defend the mainland, as these islands were on the route the *wako* used for their raids.<sup>14</sup>

## 2. “Islands Appertaining to Taiwan, China”

### (1) The Ming Period

The next question is whether the Senkaku Islands were “the islands appertaining to Taiwan, China.”

The argument that the Senkaku Islands were islands appertaining to Taiwan bases its reasoning in the description of Uotsuri Island in *Riben Yijian* (A Mirror of Japan, 1556) “*xiaodong xiaoyu ye*” (small island [of] Xiaodong, Taiwan).

However, China at that time did not rule Taiwan, nor did it have the intention of doing so. For example, in *Ming Shi* (the History of the Ming), which is the official history book of the Ming Empire, Taiwan is described within the chapter of “The Stories of Foreign Countries” as an eastern barbarian land, and Jilong Shan in the northern part of Taiwan is also included in the same chapter.<sup>15</sup> Even supposing that the Senkaku Islands were islands appertaining to Taiwan, if Taiwan was not Chinese territory, then it does not constitute evidence that the islands belonged to China. In addition, during the period in which *Riben Yijian* was written, in light of the fact that Taiwan did not have a unified government, the description “*xiaodong xiaoyu ye*” (small island [of] Taiwan) seems to mean that geographically, not politically, the Senkaku Islands were located in the vicinity of Taiwan.<sup>16</sup>

### (2) The Qing Period

Taiwan was incorporated into the Qing Empire in 1684.<sup>17</sup> Thus, it needs to be examined whether the Senkaku Islands were also incorporated into the Qing Empire as the islands appertaining to Taiwan at this time.

By looking at the *Fujian Tongzhi* (General Annals of Fujian, 1684) and *Chongzuan Fujian Tongzhi*

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12 Shigeyoshi Ozaki, “Senkaku Shoto no Kokusaiho jyo no Chii” [The Legal Status of the Senkaku Islands], *Tsukuba Hosei* [Tsukuba Review of Law and Political Science], No.18 (1995), p. 220.

13 However, it is not clear what “Mt. Ganlan” indicates and it is strange that Mt. Huaping is located to the east of Uotsuri Island. Shigeyoshi Ozaki, “Senkaku Shoto no Kizoku nit suite” [The Territorial Sovereignty over the Senkaku Islands II ], *Refarensu* [The Reference], No. 261 (1972), p. 32

14 Kentaro Serita, *Nihon no Ryodo* [Territory of Japan] (2002), p. 120.

15 Ozaki, *supra* note 12, p. 224.

16 The author used the expression “*xiaodong xiaoyu ye*” as used in the 1939 reproduction of *Riben Yijian*.

17 The Zheng government that ruled Taiwan surrendered to the Qing Empire in 1683. In 1684, the Qing Empire annexed Taiwan in Fujian Province and established Taiwan Prefectural Office.

(Recompiled General Annals of Fujian, 1838) compiled by the Qing government, it seems clear that at that time, the Senkaku Islands were not included within the administrative scope of Fujian Province. Neither descriptions of the Senkaku Islands nor their depictions on the maps have been discovered in any of the *Tongzhi* documents.<sup>18</sup>

Moreover, even after its incorporation into China, the northern end of Taiwan Province was set as Jilong Islet and neither Huaping Islet, Mianhua Islet, nor even Pengjia Islet were included in the administrative scope of Taiwan. Therefore, it is natural to assume that the Senkaku Islands, which are located at an even greater distance from Taiwan than these three islands, were not included in the scope of Taiwan Province under the rule of the Qing Empire.<sup>19</sup>

### (3) Hayashi Shihei's *Sangoku Tsuran Zusetsu* (Illustrated Outline of Three Countries)

The “Map of the Three Provinces and 36 Islands of Ryukyu” is a colored map attached to *Sangoku Tsuran Zusetsu* (Illustrated Outline of Three Countries) published in 1786 by Hayashi Shihei, an Edo Period statesman. In this map, territory such as Kyushu is marked in green and the territories of the Kingdom of the Ryukyus in pale brown, whereas the Senkaku Islands are identified in pink, the same color as China. This has been cited as evidence that even the Japanese recognized the Senkaku Islands as Chinese territory.<sup>20</sup>

However, despite the fact that this map was made after Taiwan was formally incorporated into China, it shows China and Taiwan in different colors and also contains many inaccuracies, such as depicting Taiwan as one third the size of Okinawa Island. Moreover, *Sangoku Tsuran Zusetsu* was written by Hayashi Shihei as a private citizen and thus it cannot be said to reflect the intention of the Japanese government. For such reasons, it has been noted that this book cannot be used as legal evidence for the Senkaku Islands to be Chinese territory.<sup>21</sup>

## 3. The Border between the Ryukyus and China

### (1) Records of the *Sakuhoshi* (investiture missions)

From 1372 to 1879, the Ryukyus and China were in the *choko* (bestowing tribute) - *sakuho* (investiture or title-conferring) relations and *choko* and *sakuho* ships travelled between the Ryukyus and Fuzhou. After returning home, it was customary for the *sakuho-shi* (investiture missions) to record the conditions of the voyage as well as all the rituals and situations of the Ryukyus based on their observations and experiences and to provide these records as reference for future investiture missions.<sup>22</sup>

The descriptions in the records of the investiture missions are frequently cited as evidence in claiming that the boundary between China and the Ryukyus was between Sekibi-sho Island and Kume Island.

For example, with regards to Kume Island, it is written in *Shi Liu Qiu Lu* (the Records of the Imperial Title-Conferring Envoys to Ryukyu, a mission to the Ryukyus in 1534) that “therefore, [Kume Island] belongs to the Ryukyus,” and in the *Zhong Shan Chuan Xin Lu* (the Records of Messages from Chongshan, a mission to the Ryukyus in 1719) that “[Gumi Mountain] is the mountain guarding the southwest

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18 Professor Ozaki has investigated this point in detail. Ozaki, *supra* note 12, pp. 226-228.

19 Ibid.

20 Kiyoshi Inoue, “Senkaku” *Retto: Tsuruiuo Shoto no Shiteki Kaimei* [“The Senkaku” Islands: A Historical Clarification of Uotsuri Island] (1972), pp. 42-49.

21 Sakae Midorima, *Senkaku Retto* [Senkaku Islands] (1984), pp. 59-62.

22 Kazutaka Kishaba, “Senkaku Shoto to Sakuho Shiroku” [The Senkaku Islands and the records of the *sakuho-shi* envoys, *Kikan Okinawa* [Okinawa Quarterly], No. 63 (1972), p. 58.

border of Ryukyu.”<sup>23 24</sup> Also, in *Chong Bian Shi Liuqiu Lu* (the Recompilation of Records of the Imperial Mission to Ryukyu, a mission to the Ryukyus in 1561), it states that “Chi Yu is the mountain that marks the boundary of Ryukyu” and in *Shi Liu Qiu Za Lu* (Miscellaneous Records on Mission to Ryukyu, a mission to the Ryukyus in 1683) the meaning of “*jiao* (outskirts)” that is situated between Chiwei (Sekibi-sho) Island and Kume Island is explained as being “the boundary between the inner and outer.”<sup>25</sup>

However, these descriptions only show clearly that Kume Island was part of the Ryukyus, and there are no descriptions in the above documents about the ownership of Chiwei (Sekibi-sho) Island. The Senkaku Islands are located almost at the mid-point between Fuzhou and Naha, and they were useful as navigation aids on the sea route. Therefore, it should be understood that the description that “Kumejima Island (Gumi Mountain) belongs to the Ryukyus” was made not because the investiture missions considered the Senkaku Islands located west of Gumi Mountain as Chinese territory but because the Senkaku Islands were useful navigation aids.<sup>26</sup>

Moreover, with regard to the term “*jiao* (outskirts)” and the description “boundary between the inner and outer” in the *Shi Liu Qiu Za Lu*, it is pointed out to be more appropriate to interpret these descriptions as signifying an oceanic zone or the inside and outside of the current, rather than signifying the border of the states, if we consider the existence of *kuroshio* (Black Current or Japan Current) which flowed across the sea route of the investiture ships as well as the beliefs about the sea at that time.<sup>27</sup>

## (2) The 36 Islands of the Ryukyus

China claims that in the Japan-Qing negotiations on the attribution of the Ryukyus in 1879, both parties recognized that the Ryukyus consisted of 36 Islands, and the Senkaku Islands were not included in these Islands.<sup>28</sup>

However, to be an island of the 36 Islands of the Ryukyus, an island had to be an inhabited island and had a duty to pay tribute to the capital of the Ryukyu Kingdom in Shuri. Only islands that satisfied these conditions were marked as territory belonging to the Ryukyu Kingdom.<sup>29</sup> Certainly, the Senkaku Islands, which did not satisfy these conditions, were not marked on the map of the 36 Islands of the Ryukyus. Nevertheless, as was described above, the Senkaku Islands were not included in the administrative scope of Fujian Province or Taiwan Province in the Ming Period and the Qing Period. Thus, the fact that the Senkaku Islands do not appear on the 36 Islands of the Ryukyus does not immediately signify that the Senkaku Islands belonged to China.

## III. Territorial Incorporation into Japan

Japan asserts that “From 1885, the Government of Japan thoroughly conducted surveys of the Senkaku Islands through the agencies of Okinawa Prefecture and by way of other methods. Through these surveys, it was confirmed that the Senkaku Islands had been not only uninhabited but showed no trace of having been under the control of the Qing Dynasty of China. Based on this confirmation, the Government of

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23 It seems that the term ‘Chinzan’ means an island where the tutelary deity is enshrined. See Ozaki, *supra* note 13, p. 36.

24 Inoue, *supra* note 20, pp. 26-27 & pp. 40-41.

25 *Ibid.*, p. 28 & pp. 35-36.

26 Midorima, *supra* note 21, p. 53; Serita, *supra* note 14., pp. 125-126.

27 Kishiba, *supra* note 22, pp. 72-73.

28 “*Pekin Hoso: 1971 nen 12 gatsu 30 nichi*” [Radio Peking (December 30, 1971)], *Kikan Okinawa* [Okinawa Quarterly], No.63 (1972), pp. 233-234.

29 Serita, *supra* note 14, p. 125.

Japan made a Cabinet Decision on January 14, 1895, to erect markers on the islands to formally incorporate the Senkaku Islands into the territory of Japan.”<sup>30</sup>

China, on the other hand, claims that Japan stole the Senkaku Islands during the Jiawu War (First Sino-Japanese War) and that Japan pressured on the Qing government to sign the Treaty of Shimonoseki in April 1895, through which the Qing government was forced to cede Taiwan, all the islands appertaining to it, and the Penghu Islands to Japan.<sup>31</sup>

In the following sections, the validity of Japan’s territorial incorporation of the Senkaku Islands will be analysed based on the Cabinet Decision and the relationship between the territorial incorporation and the Sino-Japanese War and the Treaty of Shimonoseki.

## 1. Cabinet Decision on Territorial Incorporation

### (1) Intention to Acquire Sovereignty of the Senkaku Islands

Japan seemed to start showing its intention to acquire sovereignty over the Senkaku Islands around 1879, at the time leading to the establishment of Okinawa Prefecture. In *Dai Nihon Zenzu* (the Map of Great Japan, published in 1879), and also the English version of *Dai Nihon Zenzu* published in the same year, the Senkaku Islands were illustrated within the Ryukyu Islands. Both maps were made by private citizens but published with a copyright license from the Ministry of Interior.

The Geography Bureau in the Ministry of Interior published *Dai Nihon Fuken Kankatsu Zu* (the Map of Prefectural Jurisdiction of Great Japan, 1879), which included the Senkaku Islands in the Ryukyu Islands, and *Dai Nihon Fuken Bunkatsu Zu* (the Map of the Prefectural Divisions of Great Japan, 1881), which depicted the Senkaku Islands on the map of Okinawa Prefecture without showing their names. The fact that the maps prepared by the Ministry of Interior included the Senkaku Islands in the maps of Japan seems to indicate Japan’s intention to acquire sovereignty of the islands.<sup>32</sup>

### (2) The opinion of Foreign Minister Kaoru Inoue on Erecting National Territory Markers

In 1885, the Governor of Okinawa Prefecture submitted a proposal to Interior Minister Aritomo Yamagata asking for instructions on erecting national markers when conducting a survey of the Senkaku Islands. Interior Minister Yamagata found no trace that these islands belonged to the Qing Empire and considered that they were uninhabited islands adjacent to Miyakojima Island and Yaeyama Island, over which Okinawa Prefecture had jurisdiction. For these reasons, he concluded that there seemed to be no problem in erecting national markers and prepared a proposal, entitled “The Matter concerning the Erection of National Markers on the Uninhabited Kumeakashima Island and Two Other Islands,” to be submitted to the Dajokan (Ground Council of State) deliberation. Following this on October 9 of the same year, he consulted with Foreign Minister Kaoru Inoue and requested his opinion. On October 21, Foreign Minister Inoue answered as follows.

These islands are small islands near the national border with the Qing Dynasty, and in particular, their names are being attached by the Qing Dynasty. There are those who circulate rumors in Qing newspapers that the Japanese government is occupying islands in the vicinity of Taiwan that belong to the Qing Dynasty, which are arousing their suspicions towards the Japanese government, and who

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30 Gaimusho [Ministry of Foreign Affairs], Senkaku Shoto ni tsuite no Kihon Kenkai [Basic View of the Senkaku Islands], available at <<http://www.mofa.go.jp/mofaj/area/senkaku/kenkai.html>>.

31 Kazankai, *supra* note 1, p. 402.

32 Obviously, there exist the maps of Japan that do not include the Senkaku Islands prior to their incorporation into Japanese territory. The maps of this period have been studied in detail by Professor Ozaki. See Ozaki, *supra* note 13, pp. 41-43.

frequently alert the Qing government for caution. Therefore, “if we took measures such as publicly erecting national markers, it would result in making the Qing Dynasty suspicious. [...] We should deal with the erection of national markers, land development and other undertakings some other day.”

Based on this answer, Interior Minister Yamagata postponed the submission of the proposal concerning the erection of national markers to the Dajokan deliberation.

However, the above opinion of Foreign Minister Inoue does not indicate that Japan recognized that the Senkaku Islands belonged to the Qing Empire. He rather considered the diplomatic relations between Japan, which at that time was a small country, and the Qing Empire, which was large. Within the context of the major issues Japan was facing at that time,<sup>33</sup> namely the issue over Korea and the annexation of the Ryukyus, it is pointed out to be natural for the Ministry of Foreign Affairs to avoid any friction with the Qing Dynasty caused by this sort of small issue.<sup>34</sup>

### (3) The Cabinet Decision to Approve the Erection of National Markers

After 1885, Tatsushiro Koga travelled to the Senkaku Islands to engage in fishing activities and collecting bird feathers, while there were also other people who started travelling to the Senkaku Islands to engage in fishing and some other activities. On January 13, 1890, in order to control fishing and other marine activities in the Senkaku Islands, the Okinawa Prefectural Governor submitted a proposal that the Interior Minister place the uninhabited Uotsuri Island and two other islands under the jurisdiction of Yaeyama Island local office. The same proposal was also made to both the Interior Minister and the Foreign Minister on November 26, 1893. However, the government did not respond to any of these proposals. Furthermore, in 1894, Koga applied for a permit to conduct development on the Senkaku Islands to the Interior Minister and the Agriculture Minister, but it was not accepted.<sup>35</sup>

The Sino-Japanese War started on August 1, 1894, and victory and defeat had almost been decided at the end of the year. It was in this situation that on December 27, Interior Minister Yasushi Nomura requested the opinion of Foreign Minister Munemitsu Mutsu concerning the submission of “The Matter concerning the Erection of Jurisdictional Marker on Kuba Island and Uotsuri Island” to the Cabinet as the circumstances were considered to be different than in 1885. On January 11, 1895, the Foreign Minister answered to the effect that the Ministry of Foreign Affairs did not have any particular objections to the erection of the markers.

In this way, this matter was submitted to the Cabinet on January 14, 1895, and in accordance with the proposals of the Okinawa Prefectural Governor, a Cabinet Decision was made to include “Kuba Island and Uotsuri Island within the jurisdiction of Okinawa Prefecture and to approve the erection of national markers.”<sup>36</sup> On January 21, under the joint names of the Ministry of Interior and the Ministry of Foreign Affairs, the order was issued that the proposal of the Okinawa Prefectural Governor to erect national markers had been approved.

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33 Serita, *supra* note 14, p. 130.

34 Ozaki, *supra* note 13, p. 45.

35 “Ryukyu Gunto ni okeru Koga shi no Koseki” [Mr. Koga’s Distinguished Achievements in the Ryukyu Islands], in *Naha Shishi: Shiryō hen dai 2 kan Jyō* [History of Naha City: Historical Materials, Volume 2-1], Naha Shishi Hensyū Inkai Henshu [Naha City Historical Materials Editorial Committee ed.] (1966), p. 245.

36 In addition to Kuba Island and Uotsuri Island, it is considered that the Cabinet Decision also incorporated into Japanese territory Kitakojima Island, Minamikojima Island, Tobise Island, Okinokitaiwa Island, and Okinominamiwa Island, which form a chain with these two islands. However, with regards to the incorporation of Taisho Island, there are two theories; one is that it was incorporated at the same time as these islands by the Cabinet Decision (Serita, *supra* note 14, pp.134-135), while the other is that it was incorporated on July 25, 1921, when it was designated state-owned land and recorded in the registry of national land (Ozaki, *supra* note 13, pp. 48-49).



## 2. Relationship with the Treaty of Shimonoseki

On April 17, 1895, the governments of Japan and the Qing Empire signed the Japan-Sino Peace Treaty (hereinafter the Treaty of Shimonoseki). Article 2 of the Treaty of Shimonoseki stipulates that “China cedes to Japan in perpetuity and full sovereignty, the following territories together with all fortifications, arsenals, and public property thereon.” One of the “following territories” includes “[t]he island of Formosa, together with all islands appertaining or belonging to the said island of Formosa.”

The question is whether the Senkaku Islands were ceded as part of all islands appertaining to the island of Formosa (Taiwan). If the Senkaku Islands were included within the islands appertaining to Taiwan, Japan would have given up sovereignty over the Senkaku Islands in the disposition of its territories after World War II.<sup>37</sup>

### (1) The Peace Conference

During the negotiations to conclude the peace treaty, the Qing Empire strongly resisted the demands from Japan for the cession of Taiwan and the Penghu Islands, but it did not raise any question with regards to the status of the Senkaku Islands.<sup>38</sup> If the Qing Empire recognized the Senkaku Islands as its own territory, it would have protested their cession in the same way as it protested that of Taiwan and the Penghu Islands. With regards to this point, some who support China’s claim express the opinion that the Qing Empire, which had lost the war, probably did not have time in that period to separately negotiate and determine the territorial rights of the small islands like master seeds.<sup>39</sup> The counter argument to this opinion is that a protest based on international law has nothing to do with victory or defeat in war, and thus if China had recognized the islands to be its own territory, naturally it should have protested their cession or taken some other measure during the war or during the negotiations for the Japan-Sino peace treaty, or even after that period.<sup>40</sup>

### (2) “Official Note on the Transfer of Taiwan”

Moreover, at the signing of the “Official Note on the Transfer of Taiwan” on June 2, 1895, in accordance with Article 5 of the Treaty of Shimonoseki, there were the following exchanges between Japan’s minister resident Mizuno and Qing Empire’s plenipotentiary Li Ching-fang on the scope of the islands appertaining to Taiwan.

Li expressed concerns that Japan would make a claim at a later time to the islands that were scattered in the vicinity of Fujian Province as the islands appertaining to Taiwan. Thus, he asked whether it was not necessary to prepare a list of the names of the islands included within the islands appertaining to Taiwan. Mizuno replied that there might be islands that are omitted from the list or islands which do not have any names, in which case this would mean that such islands do not fall under the jurisdiction of either government, and that is an inconvenient situation. He continued that the islands appertaining to Taiwan were officially recognized on nautical charts and maps, and because there were the Penghu

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37 It seems that China does not necessarily take the position that the Senkaku Islands were ceded to Japan based on the Treaty of Shimonoseki. Peking Radio, on December 30, 1971, claimed that, “China was robbed of these islands when the defeat of the Qing government was determined in the Sino-Japanese War.” It continued that “the Treaty of Shimonoseki was signed and Taiwan, as well as all the islands appertaining to it, and the Penghu Islands were ceded to Japan.” *Pekin Radio*, *supra* note 28, p. 234.

38 Midorima, *supra* note 21, pp. 72-73.

39 Inoue, *supra* note 20, p. 135.

40 Shigeyoshi Ozaki, “Senkaku Shoto no Kizoku nit suite (Ge no 2)” [The Territorial Sovereignty over the Senkaku Islands III], *Refarensu* [The Reference], No. 263 (1972), p. 169.

Islands lying between Taiwan and Fujian, it would never be the case that the Japanese government would claim the islands in the vicinity of Fujian Province to be among the islands appertaining to Taiwan. Li assented to this.<sup>41</sup>

In relation to this, the maps and nautical charts that Japan published on Taiwan until 1895, without exception, identified the northeast limit of Taiwan in Pengjia Islet, and both Japan and the Qing Empire recognized in their official maps and nautical charts that the Senkaku Islands were not included within the territory of Taiwan.<sup>42</sup>

From the above discussion, it is considered that the Senkaku Islands were not included in “[t]he island of Formosa, together with all islands appertaining or belonging to the said island of Formosa” that were transferred to Japan by Article 2 of the Treaty of Shimonoseki.

### 3. Effective Control after the Incorporation

As was explained in Chapter I, international law attaches importance to the continuous and peaceful display of territorial sovereignty in deciding the attribution of a certain area. Thus, the question is how Japan exercised control over the Senkaku Islands after its territorial incorporation in 1895 until the end of World War II.

In 1896, when the county system was enforced in Okinawa Prefecture, Uotsuri Island and Kuba Island were soon incorporated into Yaeyama County. Together with Minamikojima Island and Kitakojima Island, Uotsuri Island and Kuba Island were designated as state-owned lands, after which their address numbers were set.<sup>43</sup> In September of the same year, the government granted to lease Tatsushiro Koga the four islands of Uotsuri, Kobi-sho, Minamikojima, and Kitakojima free of charge for 30 years. After the end of the free lease period, the islands were leased for a fee, subject to yearly contract. In 1932, the government sold off the islands to Zenji Koga (Tatsushiro Koga’s son) and the four islands became private properties under his name. On the islands, Koga collected the feathers of albatross and mined guano (seabird excrement) as well as engaged in processing other marine products. He paid land tax each year after purchasing the four islands. The management of the islands by Koga continued until immediately before the Pacific War.<sup>44</sup>

In addition, various national institutions and the Okinawa prefectural government frequently visited the Senkaku Islands to conduct on-site surveys and reflected the results of these surveys in maps and nautical charts. They also conducted various other surveys, such as of natural resources, geographical features, and a preliminary survey toward the establishment of a meteorological station. Descriptions of the islands appeared in official government documents, including Okinawa Prefecture statistical documents and prefectural directory.<sup>45</sup>

From the above facts, it can be seen that Japan consistently displayed sovereignty over the Senkaku Islands during the period from the territorial incorporation until the end of the Pacific War. No state had ever protested against Japan’s sovereignty over the Senkaku Islands during this period.<sup>46</sup>

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41 Kanori Ino, *Taiwan Bunka Shi* [A Cultural History of Taiwan Part 2] (1928), pp. 936-937.

42 Serita, *supra* note 14, p. 141.

43 Taisho Island was designated state-owned land and listed in the registry of national land on July 25, 1921. (Ozaki, *supra* note 13, pp. 48-49)

44 *Ibid.*, pp. 50-51.

45 *Ibid.*, pp. 51-52.

46 Midorima, *supra* note 21, p. 109.

## IV. Position after World War II

### 1. Disposition of Territory in the Post-War Period

In 1943 during World War II, three of the main allied powers of Great Britain, the United States, and China announced the Cairo Declaration, in which they included the statement “[t]he objective of the participating countries... is to restore to the Republic of China all the territories Japan has stolen from the Qing Dynasty of China such as Manchuria, Formosa (Taiwan) and the Pescadores (the Penghu Islands).” Japan accepted the Potsdam Declaration on August 15, 1945, and by signing the instrument of surrender on September 2, it agreed to the policy described in the Cairo Declaration.

Based on the above policy in the declarations, the Peace Treaty with Japan of 1951 specifically stipulated which territories Japan would renounce and which it would retain among those territories that it possessed before the war. Related to this paper, Article 2 stipulates that Japan renounces Taiwan and Penghu Islands. Meanwhile, Article 3 provides that Japan retains sovereignty of the Nansei Shoto Islands south of 29° north latitude, and that the United States can exercise the three powers (powers of administration, legislation, and jurisdiction) over these territories and their inhabitants until it proposes their trusteeship to the United Nations.

### 2. Attitudes of the States Concerned

It will be discussed here if the Senkaku Islands were part of the territory that Japan had to renounce or if they were part of the territory over which Japan retained sovereignty in the Peace Treaty with Japan. This section will consider this question by examining the responses of the states concerned after the end of World War II.

#### (1) Legislations by the United States Military Government

When occupying Okinawa after the war, the United States succeeded the jurisdictional scope that Okinawa Prefecture had before. For example, on January 29, 1946, in response to the General Headquarter of the Allied Forces’ (GHQ) “Memorandum of Understanding on Governmental and Administrative Separation of Certain Outlying Areas from Japan,” the Ministry of Foreign Affairs unofficially submitted to GHQ a document entitled “Outlook on the Nansei Shoto Islands” with a list of the names of the Nansei Shoto Islands. This list included the Senkaku Islands within Okinawa Prefecture, mentioning the following islands’ names: Sekibi-sho Island, Kobi-sho Island, Kitajima Island, Minamijima Island, and Uotsuri Island.<sup>47</sup> Moreover, in the following legislations, the United States indicated the latitude and longitude of the area over which the United States Civil Administration of the Ryukyu Islands (USCAR) and the Government of the Ryukyu Islands had jurisdiction, and the Senkaku Islands were included within this area: the “Law Concerning the Organization of the Gunto Governments” (United States Military Government Ordinance No. 22), the “Provisions of the Government of the Ryukyu Islands” (United States Civil Administration Ordinance No.68) that provided the legal basis for the establishment of the Government of the Ryukyu Islands, and the “Geographic Boundary of the Ryukyu Islands” (United States Civil Administration Proclamation No.27) that re-designated the geographical boundaries of the Ryukyu Islands under the administration of the United States alongside the restoration of the Amami Islands.<sup>48</sup> In this way, the

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47 “(i) Genko Kankei Horei: Gaimusyo no Nansei Shoto Kan” [(i) Current Legal Developments: Ministry of Foreign Affairs’ View on the Nansei Shoto Islands], *Kikan Okinawa* [Okinawa Quarterly], No.56 (1971), pp. 107-108.

48 “(i) Genko Kankei Horei: Ryukyu Retto no Chiriteki Kyokai” [(i) Current Legal Developments: Geographical Boundaries of the Ryukyu Islands], *Kikan Okinawa* [Okinawa Quarterly], No. 56 (1971), pp. 109-111.

United States consistently treated the Senkaku Islands as one part of Okinawa during the period of its administration of Okinawa.

The islands were also treated as part of Okinawa in the “Agreement between Japan and the United States concerning the Ryukyu Islands and the Daito Islands” in 1972 hereinafter the Okinawa Reversion Agreement). In the Agreed Minutes for the Agreement, the Senkaku Islands were included in the territories to be reverted to Japan, as stated that “[t]he territories [restored to Japan through this Agreement] are the territories under the administration of the United States of America under Article 3 of the Treaty of Peace with Japan, and are, as designated under Civil Administration Proclamation Number 27.”

## (2) Effective Control by Japan under the United States Administration

Japan continued to display effective control over the Senkaku Islands through the activities of the United States Civil Administration of the Ryukyu Islands and the Government of the Ryukyu Islands, even at the time under the United States administrations.

### [The use of the islands and tax collections]

In 1951, the U.S. Navy established a maritime zone for bombing exercises around Kuba Island and Taisho Island, and also designated Kuba Island as a zone for special exercises. Taisho Island was also designated as a zone for exercises in 1956. Since Kuba Island was private property owned by Zenji Koga, in July 1958, the United States Civil Administration, designating the Government of the Ryukyu Islands as its agent, concluded a basic lease agreement with Koga and paid him rent. Prior to that, the Government of the Ryukyu Islands had levied property tax from Koga for Uotsuri Island and the other four islands that he owned. After the conclusion of the lease agreement, it also newly collected withholding tax from the income he received from leasing Kuba Island.<sup>49</sup>

### [Scientific surveys]

A total of 10 scientific surveys on the geological features, resources, and biota of the islands were conducted on the Senkaku Islands between 1950 and 1971.<sup>50</sup>

### [Law enforcement against illegal entry into the area]

In 1968, officials from the Immigration Agency of the Legal Affairs Department, the Government of the Ryukyu Islands, discovered that a few dozen Taiwanese had landed on Minamikojima Island and were engaged in the work of dismantling ships that had been stranded. As these workers did not have a permit to enter the area, the officials ordered them to leave the island and instructed them to acquire the permit to enter the area, should they wish to do so. The workers left Minamikojima Island and later returned to the island with a permit from the Ryukyu Islands High Commissioner.<sup>51</sup>

### [Erection of territorial markers]

In 1970, the Government of the Ryukyu Islands erected territorial markers on five islands—Uotsuri Island, Kitakojima Island, Minamikojima Island, Kuba Island, and Taisho Island—stating that entry to

49 Midorima, *supra* note 21, pp. 115-116.

50 *Ibid.*, pp. 117-118.

51 “(Ro) Kankei Kobunsho to: Senkaku Retto ni okeru Fuho Nyuiki Taiwanjin no Chosa Hokoku” [(Ro) Recent Developments (Official Documents): Report on the Investigation of the Illegal Entry of Taiwanese into the Senkaku Islands, *Kikan Okinawa* [Okinawa Quarterly], No. 56 (1971), pp. 165-168.

these islands is prohibited to anyone other than the inhabitants of the Ryukyu Islands without permission of the High Commissioner. In addition, in 1969, Ishigaki City erected markers on the above five islands to indicate the land register.<sup>52</sup>

### (3) China's Response

Toward achieving the retrocession of Taiwan and the Penghu Islands as stated by the Potsdam Declaration, on August 29, 1945, China appointed the Chief Executive of Taiwan Provincial Government and Garrison Commander, and on September 20, promulgated the Taiwan Provincial Administrative Executive Office Organizational Ordinance. On October 25, by conducting the formal surrender ceremony for the retrocession of the territories from Japan to China, China officially recovered Taiwan and the Penghu Islands as its own territory.<sup>53</sup>

In contrast, from 1945 until 1970, China did not make any territorial claims to the Senkaku Islands, nor did it lodge any kind of effective protest.<sup>54</sup> This suggests that even China itself recognized that the Senkaku Islands were not part of Taiwan or the Penghu Islands.

Therefore, it can be said that, according to Article 3 of the Peace Treaty with Japan, the Senkaku Islands were included as part of the area over which Japan remain to hold its sovereignty, and based on the Okinawa Reversion Agreement, the United States restored Japan's sovereignty over them.

## Conclusion

This paper examined the major arguments concerning the dispute over the title of the Senkaku Islands. There exist other arguments in the dispute, such as the argument that the names of the Senkaku Islands were given by Chinese and that this fact serves as evidence that historically they were Chinese territory. It was beyond the scope of this paper to analyse these points because they are not regarded as decisive elements in determining the attribution of territory under international law.<sup>55</sup> In addition, the paper did not examine some materials of dubious credibility, such as the imperial edict of Empress Dowager Cixi that awarded Uotsuri Island to Sheng Xuanhuai for the collection of medical herbs, due to space constraints.

The recent developments regarding the Senkaku Islands are as follows. First, in 1992, China enacted the "Law on the Territorial Sea and the Contiguous Zone."<sup>56</sup> In Article 2 of this law, the Senkaku Islands are clearly described as being Chinese territory. In March 2004, an incident occurred, in which Chinese activists had illegally landed on the Senkaku Islands and were arrested by the Japanese police and deported to China. Also, in February 2005, in response to the nationalization of the Uotsuri Island lighthouse by the Japanese government due to the abandonment by the owner, the Chinese government commented on this act as "illegal and without effect." Furthermore, recently, there is an issue between Japan and China concerning the China's exploitation of gas fields in the area around the Senkaku Islands, where maritime boundaries between the two states have not been delimited.

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52 "(Ro) Kankei Kobunsho to: Senkaku Retto ni okeru Keikokuban Setti nit suite" [(Ro) Recent Developments (Official Documents): Regarding the Erection of Warning Signs on the Senkaku Islands], *Kikan Okinawa* [Okinawa Quarterly], No. 56 (1971), pp. 135-136; "(Ro) Kankei Kobunsho to: Senkaku Gunto Hyochu Konryu Hokokusho" [Report on the Establishment of Territorial Markers in the Senkaku Islands], *Kikan Okinawa* [Okinawa Quarterly], No. 56 (1971), pp. 174-178.

53 Keishiro Irie, *Nihon Kowa Jyoyaku no Kenkyu* [Research on the Peace Treaty with Japan] (1951), pp. 61-64.

54 Serita, *supra* note 14, p. 115.

55 Ozaki, *supra* note 12, pp. 208-220.

56 Law on the Territorial Sea and the Contiguous Zone (Law of the People's Republic of China No.55), *translated in* Chugoku Sogo Kenkyujo hen [China Research Institute Editorial Committee ed.], *Genko Chuka Jinmin Kyowakoku Roppo 1* [Contemporary Laws of the People's Republic of China 1], pp. 124-126.

As state activities after a critical date have no legal effect on the judgment on the attribution of territory<sup>57</sup>, Japan, which has exercised actual sovereignty over the Senkaku Islands, will continue to claim the legitimate rights over the islands against China while maintaining effective control.

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<sup>57</sup> The Japanese government does not recognize the existence of an issue to be solved over the territorial rights to the Senkaku Islands. However, if it were necessary to determine a critical date, it seems appropriate to set the date in 1971, when China began the assertion of its territorial claims. The enactment of the Law on the Territorial Sea and the Contiguous Zone by the Chinese government and cruises by public vessels in the waters around the Senkaku Islands are actions taking place after this critical date, and therefore have no effect on the attribution of the title of the islands.