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What the Chinese White Paper Says on Diao Yu Dao? An Opportunity to Revisit the Issue

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Summary

The Chinese government has recently issued a White Paper on the Diao Yu Dao/Senkaku dispute. Although the White Paper puts across the already known Chinese positions, it does provide an opportunity to revisit the issue. A careful reading of the White Paper reveals some gaps which necessitate further exploration. This Issue Brief presents the historical and legal debate surrounding the dispute and in the process underscores the inconsistencies and weaknesses in the Chinese claims.

In the wake of the recent controversy over the contested island territory called Senkaku by Japan and Diao Yu Dao by China, the Chinese government released a White Paper on September 25, 2012 explaining its side on the dispute. The White Paper tries to make a case to prove that the Diao Yu islands have been "an inherent territory of China" since time immemorial; that Japan snatched it from China under duress in 1895 under the Treaty of Shimonoseki; and that US and Japanese subterfuges have kept Diao Yu Dao separate from China, although China has been challenging Japan on this issue all along. The White Paper puts forward evidence based on history, historical jurisdiction, long tradition and geography to buttress the Chinese claims and conclude that the Diao Yu islands have been Chinese territory since time immemorial.

Summary of the White Paper

According to the White Paper, the book *Voyage with a Tail Wind* (*Shun Feng Xiang Song*), published in 1403 during the reign of Emperor Yongle of the Ming Dynasty, carries the earliest reference to Diao Yu Dao, a reference which indicates that the island had become a part of China by "the 14th and 15th centuries".[1] Further, since 1372, when the King of Ryukyu became a tributary to the Ming Dynasty, the Chinese court had "sent imperial envoys to Ryukyu 24 times to confer titles on the Ryukyu King" until as late as 1866, and these envoys had passed by within a stone's throw of the Diao Yu Dao islands. What the Chinese government thereby implies is that the island is contiguous to China and on the direct sea-lane from China to Ryuku, and that it is further away from Japanese territory. According to the White Paper, even the Ryuku court records endorse the Chinese claim that "Diaoyu Dao and its affiliate Chiwei Yu belong to China whereas Kume Island belongs to Ryukyu, and that the separating line lies in Hei Shui Gou (today's Okinawa Trough) between Chiwei Yu and Kume Island." Further, the White Paper states that the Ming Dynasty established its jurisdiction over Diao Yu Dao by assigning its defence to the imperial coast guards against Japanese pirates. Later, the Qing dynasty brought the islands under the local administration of Gamalan, today's Yilan County in north-east Taiwan. The White Paper also highlights the fact that the Diao Yu Dao Islands had appeared on the Ming "Map of Coastal Mountains and Sands" in 1561. Moreover, several maps published in the 18th and 19th centuries – a Japanese map published in some Japanese literature in 1785; the "Map of East China Sea Littoral States" by Pierre Lapie (a French cartographer) and others in 1809; "A New Map of China from the Latest Authorities" published in Britain in 1811; Colton's China published in the United States in 1859; and "A Map of China's East Coast:

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1 *Diaoyu Dao, an Inherent Territory of China*, The State Council Information Office of the People's Republic of China, September 25, 2012, http://english.gov.cn/official/2012-09/25/content_2232763.htm (accessed on 28 September 2012). All information- without quotation marks or within quotation marks-in the following passages is based on the White Paper.

Hong Kong to Gulf of Liao-Tung" compiled by the British Navy in 1877—all depicted Diao Yu Dao as part of China. Furthermore, the White Paper asserts that the Diao Yu Dao maritime area has been a fishing ground for Chinese fisherman for generations, and the islands themselves have served as a navigation marker for the Chinese living in nearby areas.

The White-Paper also deals with Japan's "grabbing" of the Diao Yu islands, the "backroom dealing" between the United States and Japan over the islands, Japan's "unfounded" claims on the islands, and China's continuous assertion of sovereignty over the islands. It alleges that between 1884 and 1895 Japan made clandestine moves to seize the islands because of the realisation that its moves were not in compliance with international law. These clandestine moves began with a Japanese citizen's "discovery" of the uninhabited island of Diao Yu in 1884, which was followed by a series of Japanese secret fact-finding missions. The ultimate aim of these manoeuvres was to "invade" and "occupy" the island. The White Paper further states that these moves did not go unnoticed in China and were duly reported with concern in the Chinese media at that time. Further, citing from the Japanese diplomatic papers of that time, the White Paper claims that from the beginning the Japanese knew that the "discovered' islands were the Chinese territories of Diaoyu Tai, Huangwei Yu and Chiwe Yu. Thus, in 1885, the Governor of Okinawa Prefecture sought directions from the Minister of Internal Affairs, Yamagata Aritomo, on whether to put Japanese sovereignty marks on the islands. Yamagata in turn solicited the opinion of Japan's Foreign Minister, Inoue Kaoru, who advised caution since "any open moves such as placing sovereignty markers are bound to alert the Qing imperial court", suggested "not to go beyond field surveys and detailed reports", to "wait for a better time to engage in such activities as putting up sovereignty markers" and forbade publicising "the missions on official gazette or newspapers."[2] According to the White Paper, these secret moves culminated in the Japanese occupation of the islands as islands appertaining to Taiwan as part of the "unequal" Treaty of Shimonoseki in 1895.

The Chinese White Paper rejects and dismisses the Japanese Foreign Ministry's "The Basic View on the Sovereignty over the Senkaku Islands" issued on March 8, 1972. It does not accept that Diaoyu Dao was "terra nullius" (uninhabited territory). It rejects the Japanese claim that the Diao Yu Dao was separately incorporated by Japan and was not ceded to Japan as appertaining island to Taiwan in the Treaty of Shimonoseki. Further, the White Paper rejects the Japanese position that Article 2 of the San Francisco Treaty, pertaining to Japan's renunciation of conquered territories, did not cover Diao Yu Dao. It strongly differs from the Japanese argument that Diao Yu Dao was "placed under the administration of the United States as part of the Nansei Islands in accordance with Article 3 of the said

[2] As quoted in The White Paper.

treaty, and was included in the area for which the administrative rights were reverted to Japan in accordance with the Okinawa Reversion Agreement."[3] And finally, it rejects the Japanese claim that China never contested the status of Diao Yu Dao when the island was under the US trusteeship administration. It is interesting to note here that China has chosen to engage Japan on the question of interpretation of the said article of the San Francisco Treaty, although it has rejected that Treaty as a whole.

The White Paper reiterates that the Diao Yu Dao should have been reverted to China under the terms of the Cairo Declaration (which asserted that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa (Taiwan) and the Pescadores, shall be restored to the Republic of China… [and that] Japan will also be expelled from all other territories which she has taken by violence and greed"; the Potsdam Declaration (in which the Allied Powers committed themselves to carrying out the Cairo Declaration); and the Japanese Instrument of Surrender. The White Paper stresses that "on January 29, 1946, the Supreme Commander for the Allied Powers Instruction (SCAPIN) No. 677 clearly defined Japan's power of administration to 'include the four main islands of Japan (Hokkaido, Honshu, Kyushu and Shikoku) and the approximately 1,000 smaller adjacent islands, including the Tsushima Islands and the Ryukyu Islands north of the 30th parallel of North Latitude'."[4] This meant that Diao Yu Dao was not Japanese territory.

Further, the San Francisco Treaty of Peace with Japan signed in 1951 placed only the Nansei Islands under the trusteeship administration of the United States, and not the Diao Yu Dao. American jurisdiction was arbitrarily extended to the Dio Yu Islands only later through the Civil Administration Ordinance No. 68 (Provisions of the Government of the Ryukyu Islands) issued by the United States Civil Administration of the Ryukyu Islands (USCAR) on February 29, 1952 and the Civil Administration Proclamation No. 27 (defining the "geographical boundary lines of the Ryukyu Islands") on December 25, 1953.

The Chinese White Paper avers that America's return of the Diao Yu Dao to Japan on June 17, 1971 under the Agreement Concerning the Ryukyu Islands and the Daito Islands (Okinawa Reversion Agreement) met with strong condemnation from the Chinese world. On *December 30, 1971*, the Chinese Ministry of Foreign Affairs had issued a statement declaring the reversion illegal. Even "the Taiwan authorities" firmly opposed this move. It is this pressure, the White Paper notes, that led the US to clarify in October 1971 that this reversion was without prejudice to any legal claims. In November 1971, on the occasion of ratification of the Okinawa Reversion Agreement by the US Senate, the State Department further clarified that the US is neutral on competing Japanese and Chinese claims to the islands, despite the reversion of the territory to Japan.

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3 The White Paper first presents the Japanese argument and then gives a rebuttal.

4 As cited in the White Paper.

The White Paper argues that China has all along challenged the "unfounded" claims of Japan on Diao Yu Dao. On August 15, 1951, the Chinese government declared that it would deem the San Francisco Treaty illegal regardless of its content as China was excluded from it. And on September 18, 1951, China declared it an illegal treaty. In 1958, China "released a statement on the territorial sea, announcing that Taiwan and its adjacent islands belong to China." In 1971, it criticised the ratifications of the Okinawa Reversion Agreement by the US Congress and Japanese Diet saying that "the Diaoyu Dao Islands have been an indivisible part of the Chinese territory since ancient times." Keeping Japan's infringement of China's sovereignty over Diao Yu Dao since the 1970s in view, China passed a law on the territorial Sea and the contiguous zone in 1992, which states that "Taiwan and the various affiliated islands including Diaoyu Dao" belong to China. And in the wake of the provisions of the Law of the People's Republic of China on the Protection of Offshore Islands 2009, China announced "the standard names of Diaoyu Dao and some of its affiliated islands in March 2012." Further, "[o]n September 10, 2012, the Chinese government announced the baselines of the territorial sea of Diaoyu Dao and its affiliated islands. On September 13, the Chinese government deposited the coordinates table and chart of the base points and baselines of the territorial sea of Diaoyu Dao and its affiliated islands with the Secretary-General of the United Nations." The White Paper also notes that China has consistently maintained its presence in the region through various ways and means such as marine surveillance and fishery administration vessels carrying out law enforcement patrol missions as well as by releasing weather forecasts for the region.

Revisiting the Historical and Legal Bases of China's and Japan's Claims

A careful reading of the Chinese White Paper reveals certain gaps. It mentions that in 1885 the Japanese activities were reported in the Chinese media. But contrary to its penchant of citing from the court-records, the White Paper does not indicate the official Chinese response in 1885 to the Japanese naval explorations in Diao Yu Dao. The Chinese claim of not recognising the San Francisco Treaty cannot be extended to their not recognising Japanese sovereignty of Diao Yu Dao, because their rejection of the treaty was not because of Diao Yu Dao but because China was excluded from the treaty conference. Besides, the context of the 1958 statement is also not clear. Was this statement made in the China-Japan context or the Communist-Nationalist KMT on Taiwan context? If the latter, then "Taiwan and its adjacent islands" does not necessarily imply Diao Yu Dao. It may only imply islands like Penghu, Kinmen and Matsu held by the Nationalist regime. Furthermore, going by the content of the White Paper, Diao Yu Dao was reverted to Japan on June 17, 1971 under the Agreement Concerning the Ryukyu Islands and the Daito Islands (Okinawa Reversion Agreement), but the first official Chinese statement of protest cited by the White-Paper was issued on December 30, 1971.

Interestingly, as mentioned earlier, the White Paper claims that it was under pressure from

Chinese worldwide that the US made its position clear first in October 1971 and then in November 1971 by stating that the reversion had no legal implications for the dispute. Thus, again strictly going by the White Paper, this "under pressure" clarification from the United States had come much earlier than the official Chinese statement. The cue for this anomaly is available in the language used in the White Paper. First, it says that "**the Chinese people, including overseas Chinese** (emphasis added), all condemned such a backroom deal." It again says that "in response to the strong opposition of the Chinese government **and people** (emphasis added), the United States had to publicly clarify…". At another place, the White Paper states that "in 1971 (**date and month not given**), responding to the ratifications…, the Chinese Foreign Ministry issued a stern statement." Here, the White Paper appears to be holding something back and downplaying the possible query about the late release of the official statement on the issue through the obfuscation of mentioning the people's reaction and the government's statement in the same breath. It seems that the Chinese government was slow to appreciate the development which, in turn, gives credence to the claim that until the late 1960s or early 1970s Diao Yu Dao was not a big issue for the Chinese government. For its part, realising the future complications of its move, the United States may have made its position clear pro-actively. Here, the otherwise very comprehensive White Paper carries some intentional or unintentional confusion. It should have been clearer.

These gaps indicate that the White Paper cannot be taken at face value. The reading of scholarly literature is enough to indicate that China started showing interest in the region mainly from the late 1960s onwards. There is hardly any evidence for China's interest in these islands before that time. The entire argumentation presented in the White Paper is already well known. Scholars have treated this subject from the historical and legal points of view. A review of this literature alongside a reading of the White Paper provides a clearer picture of the nuances involved in the issue.[5]

China's claims can broadly be summarized under two broad approaches. First, it stakes its sovereignty over Diao Yu Dao by taking recourse to traditional legal theories of prior discovery and use. In this approach, it asserts that the Chinese were the first to discover the islands and have used them in a variety of means. The second approach aims at undercutting Japanese arguments based in modern international law. On this front, China

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5 Dai Tan, "The Diaoyu/Senkaku Dispute: Bridging the Cold Divide," *Santa Clara Journal of International Law*, Vol. 5, Issue 1, 2006; Steven Wei Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update," *Ocean Development & International law*, Vol. 36, No. 45, 2005; and ZhongQi Pan, "Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective," *Journal of Chinese Political Science*, Vol. 12, No. 1, 2007. As is clear from the biographical notes of Steven Wei Su and ZhongQi Pan, they are Chinese scholars. Dai Tan should also be a Chinese scholar as his name suggests. The importance of these articles lies in the fact that we get a fair view of the Japanese claims in the works done by Chinese scholars and in addition some of their views are at variance with the views expressed in the White Paper.

argues that historically Japan had acknowledged China's sovereignty over the islands since official and unofficial maps published in Japan in the 19th century depict the territory in China. Moreover, the Diao Yu Dao was ceded to Japan as territory appertaining to Taiwan in the "unequal" treaty of 1895, which again proves China's sovereignty over the islands before 1895. Besides, it argues that the post-World War II treaty arrangements compelled Japan to give up occupied Chinese territories which definitely included Diao Yu Dao.[6]

For its part, Japan does not have ancient claims. But its approach is also two-fold. Firstly, it argues that it found the islands uninhabited and carried out surveys between 1884 and 1895 to ascertain the facts. During this period, the Chinese government did not object to these Japanese activities. Secondly, Japan argues that it did not receive the islands attached with Taiwan in the 1895 treaty, but separately incorporated them after ascertaining that the territory was really *terra nullius*. Therefore, the post-World War II treaty arrangements do not cover the Diao Yu islands. Furthermore, Japan argues that it has occupied these islands for more than 100 years and for a large part of these years its authority has been unchallenged and undisturbed. China started raising its claim only in the late 1960s and 1970s when the presence of oil and gas reserves in the region came to be known after the publication of a report of the United Nations Economic Commission for Asia and the Far East in 1968. Therefore, Japan's claim is justified by law of prescription (long possession).[7]

The further interpretation of the Japanese position is as follows. First, since China did not show any resistance or disapproval of Japanese action in the region from 1885 to the late 1960s, it has no legal basis to challenge Japan's possession today even if China had sovereignty over Diao Yu Dao before 1885, which anyway was not the case in the Japanese understanding. Secondly, in the Japanese understanding, the San Francisco Treaty is not applicable to Diao Yu Dao because the island was not ceded with Taiwan in the Treaty of Shimonoseki. Neither the Treaty of Shimonoseki nor the San Francisco Treaty carries any specific reference about Diao Yu Dao. Thirdly, Japan did relinquish Chinese territory under the San Francisco Treaty but the treaty did not mention who will own them. Moreover, China was not a signatory to the treaty. Therefore, even if it is assumed that the San Francisco Treaty covered Diao Yu Dao, the island will not go to China but to the US as Article 4 (b) of the treaty recognizes the "validity of the dispositions of property of Japan and Japanese nationals pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3." In fact, the Diao Yu Dao along with Okinawa islands was transferred to the United States after the treaty. The US transferred it back to Japan in 1971. If this is not recognized as transfer, then there will be no other transfer and the law of prescription will apply.[8]

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6 Dai Tan, pp. 142-43.

7 *Ibid,* pp. 145-46.

8 *Ibid*, pp. 156-157.

In International Law, there is a long list of case laws on the question of territorial acquisition. The Island of Palmas case (United States v. the Netherlands) established that what matters more than mere discovery is peaceful and continuous display of sovereignty. Contiguity and geographical proximity are not more important than peaceful and continuous display of sovereignty. The Clipperton Island Case (Mexico v. France) propounded the principle that "a country claiming title to an island must actively challenge other hostile claims" and "active displays of sovereignty are given greater weight than mere declarations of prior possession of title." In the Minquiers and Ecrehos Case (England vs. France), the International Court of Justice held that "claims of ancient title were of little determinative value" and what was determinative was "more recent displays of sovereignty". In the El Salvador/ Honduras case (Nicaragua Intervening), the International Court of Justice upheld the logic of long possession and awarded some of the disputed islands to El Salvador and some to Honduras, thus implementing the logic of long and uncontested possession. In the Indonesia vs. Malaysia case on sovereignty over Pulau Ligitan and Pulau Sipdan, the International Court of Justice ruled that the acts of a private person are not a basis for title over a territory unless those acts are governed by some sort of government legal, administrative or judicial endorsement.[9]

In the light of these arguments provided by Dai Tan, one cannot help but reach the conclusion that China's ancient and medieval claims are untenable in the modern context. China's historical arguments are too old, loose, notional and do not link up to the present. There is hardly any sustainable evidence that China exercised effective sovereignty over the disputed island. Dai Tan argues that if China could prove that Dio Yu Dao was ceded under the Treaty of 1895 and that the island should have been returned to it under the San Francisco Treaty of 1951 and the 1952 Treaty of Peace between the Republic of China and Japan, that will be its strongest point (Incidentally, Japan signed a separate peace treaty with the Republic of China (RoC or Taiwan) in 1952 as it then did not recognize People's Republic of China (PRC or China), in which it reiterated the commitments it had made in the San Francisco Treaty regarding relinquishing Chinese territory. However, in this treaty too, Diao Yu Dao did not figure as Chinese territory that Japan was supposed to give up. Ironically, the PRC cites this treaty as well in its favour despite the fact that it has never recognized the RoC as a state.)

However, all this does not mean that China's case lacks all basis in law. Steven Wei Su has pointed out that the argument that Western legal philosophy is alien to resolving disputes related to old Chinese civilization could be a saving grace for China on the question about the absence of effective and conspicuous exercise of sovereignty on Diao Yu Dao in history. "The Divergent Culture" principle, accepted in the Eritrea Vs. Yemen case, is a valid principle in international law. In this case, the court said, "western ideas of sovereignty are strange

9 *Ibid,* pp. 148-54.

to peoples brought up in the Islamic tradition". Moreover, he concedes that China's silence on the issue for 70 years is problematic and baffling. Neither the PRC nor the RoC is forthcoming and convincing on the question of the long silence. Probably, the unimportant size of the territory was responsible for the PRC's silence and the Cold War context for the RoC's. Moreover, it was difficult for too small a territory like Diao Yu Dao to find specific mention in any treaty. However, the silence itself is not fatal to the Chinese case since in the field of International Law long silence has not always been an impairing factor as can be seen in the Clipperton Island Arbitration and the Island of Palmas Case.[10]

Furthermore, according to Steven Wei Su, the lack of public notability (publicity or public notification) in Japanese actions from 1884 to 1895 is also questionable. Although public notability is not an essential ingredient in the case of territorial acquisition, a reasonable amount of public notability is always desirable. The secretive manner in which the Japanese conducted themselves in the said period is questionable. The acquisition of the islands was done through a cabinet decision and no usual method like planting of a flag and other physical display of acquisition was applied. This gives credence to the Chinese accusation that the Japanese were aware of the status of Diao Yu Dao and therefore acted in a clandestine manner. In fact, the final timing of the take over of the island was occasioned by Japan's victory over the Qing Government of China.[11]

A reconciliation of the contradictions in the Chinese position may be found in ZhongQi Pan's writing as well. He underscores that from the Chinese point of view the Cairo Declaration, the Potsdam proclamation, and the 1972 Joint Communiqué between China and Japan and the 1978 Treaty of Peace and Friendship between China and Japan which confirm Japanese commitment to the Cairo Declaration and the Potsdam Declaration, have overriding effect on inconsistencies, ambiguities, unspecificity of the Treaty of Shimonoseki, and San Francisco Treaty. In the light of Pan's argument, one can conclude that for China the cession of Diao Yu Dao as Taiwan's appertaining territory to Japan is *a priori* reality or truth which has the moral backing of the Cairo Declaration and the Potsdam Declaration. This must prevail over Japan's legalism.[12]

What Steven Wei Su argues is not improbable, has been written by Japanese historians too, and very much plausible in the political context of the time. This was the time when Japan was preparing to realise its colonial ambitions. As Pan alludes, the spirit of post-World War II should also be respected. The Chinese arguments could have a grain of truth. But their arguments are essentially political. Translating them into legal arguments is a

10 Steven Wei Su, pp. 49-54.

11 *Ibid,* p. 53.

12 ZhongQi Pan, p. 83.

complicated job. Furthermore, once you accept that the "too small" and "economically valueless" islands have become important for China in the late 1960s and early 1970s after a long silence of 70 years, then the morality of the claim gets questioned and affects the legal worth of the claim, although China's belated but intense activism on the issue is also bound to gain some legal weight.

Conclusion

In the eyes of modern International Law, the Chinese claims are considerably weak and irredentist. Although modern International Law originated in the West, it continues to enjoy relatively universal support. Further, the Chinese notions of history and International Law cannot be applied to a dispute when the other party does not subscribe to them.

In the light of all this, it can be concluded that China needs to engage in serious introspection about its approach towards the territorial issues. Does it behove a rising superpower that postures to be qualitatively different from the existing and preceding ones to make small territorial issues a question of life and death? Does this irredentism serve any worthwhile purpose? Would such behaviour assuage its small neighbours' concerns? What are the alternative conceptions of International Law that China has to offer? Can China and Japan not find a win-win formula to exploit the natural resources of the area?

The idea here is not to condone Japan's militaristic past. But history keeps creating new realities, which are sometimes painful. Every unpleasant reality that history has introduced cannot be changed. Reversing and undoing those realities may inflict even greater pain.