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Why China Should Take Japan to the ICJ

If the Court Awards the Senkakus to China,
Japan Will Comply

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In President-elect Biden's first telephone conversation with Japanese Prime Minister Suga on November 12, 2020, [Biden reportedly reaffirmed that the US commitment to come to Japan's defense includes the Senkaku Islands](#). This incurred China's sharp criticism. Serendipitously, on the same day, [the UN General Assembly and the Security Council held the triennial election of judges to the International Court of Justice \(ICJ\)](#) and reelected both Hanqin Xue of China and Yuji Iwasawa of Japan. These two developments have a connection: in this essay, I argue that the Senkaku issue should be settled by the ICJ.

It is important first to distinguish between "conflicts" and "disputes" in international law. A "conflict" is a *de facto* situation of differences between states, while a "dispute" is a *de jure* notion based on the relevant substantive and procedural rules of international law. What should be avoided is exacerbating a "conflict" by coercive

measures. It is necessary to make every effort to transform a conflict into a dispute so that it can be resolved peacefully, preferably through judicial settlement by the ICJ. This is particularly the responsibility of the country seeking to change the *status quo*.

Another important concept in territorial disputes is the "critical date," which the ICJ normally determines in settling territorial disputes. The ICJ will admit only relevant facts established prior to the critical date as evidence, and no evidence is admissible with regard to facts occurring after that date. It is therefore meaningless to try to build up facts through actions after the critical date. This is one of the ways in which submitting a claim to the ICJ can actually reduce tension between the parties.

Japan's position on the Senkaku Islands is clear. Japan incorporated the islands in January 1895 after having carefully surveyed and determined that the islands had been *terra nullius* (no man's land). Ever since, the Senkaku Islands have been under Japanese administration except for 27 years between 1945 and 1972 when the islands were under US administration (in accordance with [Article 3 of the San Francisco Peace Treaty of 1951](#), to which China did not object). The Senkaku returned to Japan along with Okinawa in 1972. Thus, the islands have been under the effective and peaceful administration of Japan for more than a century. It is clear that the Senkaku Islands are an inherent part of Japan, as evidenced by both historical facts and international law, and therefore there is

no “dispute” about the sovereign title of the islands.

For China as a responsible superpower, seeking a legal solution is preferable to exacerbating tension by sending government vessels to the area and repeatedly intruding into Japan’s territorial waters.

It was only in 1971, 86 years after Japan’s incorporation of the islands in 1895, that China (and Taiwan) first expressed opposition to Japanese administration. China’s assertion of sovereignty over the islands is based on the theory that China was the first to “discover” the islands, that the area had been long covered by the China-centric “Great East Asian Order,” and specifically that since the 16th century the area of the islands had been covered by the maritime patrol zone of the Chinese government. It is questionable whether these and other historical facts could be sustained as predominant evidence for China’s alleged “effective control” over the islands. It goes without saying that [discovery alone does not create a legal title and that it has to be supported by effectivité](#), or state actions that continuously and peacefully display the claimant’s sovereignty.

If China considers that its claim is really good enough to beat Japan, what China should do is to bring the matter to the ICJ. Since Japan does not consider the Senkaku issue a legal “dispute,” there is no reason for Japan to negotiate with China over the sovereignty of the islands. It is the Chinese side that should

take the initiative to transform the issue into a legal dispute, because it is China that is seeking to change the status quo long established under international law.

How could China make it a legal dispute? It is actually quite simple. All it has to do is refer the case to the ICJ. If China decides to take this course, Japan will not run away from settling the issue at the ICJ. If China genuinely wishes the ICJ to solve the issue, it should accept the ICJ’s compulsory jurisdiction [under Article 36\(2\) of the ICJ Statute](#), which Japan did as early as 1958. (Japan would not agree to refer the case to the ICJ under Article 36(1) because this would require the two states to negotiate the terms of referral; since Japan does not agree that a legal dispute exists over the islands, such negotiation would be unacceptable.)

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If the case is brought to the ICJ, precedents indicate the court likely will find that the critical date for this dispute is January 1895, when Japan incorporated the islands as *terra nullius* into its territory. The court will ask which side can establish more convincing evidence as to whether the islands were no man’s land at that time. Another possible critical date in this case may be December 1971, when China first expressed objection to Japanese administration of the islands.

Japan could submit a number of pieces of favorable post-1895 evidence to prove her uncontested ownership, such as the 1920 letter of the then-consul of the Republic of China in Nagasaki confirming Japan's ownership of the Senkaku, and official maps published in China in 1933 and 1958 (reprinted in 1960), as well as maps in official school textbooks used in China up to 1970.

In the unlikely event that Japan loses the case, Japan will certainly comply with the decision. Much as it disagreed, it complied when the [ICJ ruled against it in 2014 in a dispute with Australia over Japan's whaling program in the Antarctic](#). Twenty years after joining the WTO, China routinely goes to WTO dispute settlement, where it wins some cases and loses others. China should do the same at the ICJ.

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