

7th Berlin Conference on Asian Security (BCAS)

***Territorial Issues in Asia
Drivers, Instruments, Ways Forward***

Berlin, July 1-2, 2013

*A conference jointly organised by Stiftung Wissenschaft und Politik (SWP), Berlin
and Konrad-Adenauer-Stiftung (KAS), Berlin*

Discussion Paper
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Session III: Mixed Drivers

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Territorial Questions in East Asia in the Context of Changing Power Relations

I. Introduction

One often hears the expression the “Asian age.” It is not necessarily easy to clearly delineate Asia which is, furthermore, not a monolithic entity. If one narrows one’s focus on East Asia (by which I mean mainly China, Japan and Korea) which has appeared as an economic powerhouse of the world, there is a long list of diplomatic problems in the region, for instance, maritime delimitation, de-nuclearization, the question of “un passé qui ne passe pas”, environmental protection, etc.

Recently, the territorial questions in the region have attracted substantial attention. The question of Senkaku/Diaoyudao, which flared up in September 2012, has witnessed unprecedented rhetorical and military escalations between China and Japan. The question of Dokdo/Takeshima, which was greatly aggravated by the visit of a Korean president in August 2012 reached fever pitch when Japan announced that it would unilaterally refer the question to the International Court of Justice (“ICJ”).¹ Although Japan did not act on the announcement, this long-simmering question remains a big bone of contention between Korea and Japan.

Observers from outside the region would be tempted to raise the following question; Why do they not settle the question through a judicial mechanism such as the ICJ or international arbitration. Indeed, East Asia is the only region that has not referred any territorial disputes to the ICJ. This is in stark contrast with Southeast Asia that recently saw its two territorial disputes settled by The Hague Court.²

In this short presentation, I will not go into a detailed description of the territorial questions. Instead, I will focus on some commonalities running through them. One of my arguments is that China’s rise makes the normative picture in the region complicated. With particular reference to the territorial questions in East Asia, the long shadow of history looms large, affecting, among others, the characterization of the question and the choice of normative rules to be applied to the question. I will discuss in some detail the palimpsestic nature of international law in East Asia and look at its implications for the questions at hand. In particular, I will talk about the strategies that will be used by China in order to strengthen its position concerning the

¹ Choe Sang-Hun, “South Korea Returns Letter on Islets from Japanese Leader”, *New York Times* (August 23, 2012).

² The Court handed judgments on a case between Malaysia and Indonesia (*Pulau Ligitan and Pulau Sipadan* case) in 2002 and the other between Malaysia and Singapore (*Pedra Branca* case) in 2008.

Senkaku/Diaoyudao question. This will be followed by a brief suggestion for the future course of action for the states in the region.

II. Okinawa or a Symbol of the Persistent Past in East Asia

One may wonder why this paper dealing with the territorial questions in East Asia begins with a brief discussion on Okinawa. However, it is telling that the unsettled and even turbulent state of affairs in the region has brought back to life a long forgotten (at least to the observers from outside the region) issue, i.e., China's territorial claims over Okinawa. This is amply demonstrated by an article carried by Renmin Ribao on May 8, 2013. The article was titled "Not only must the Diaoyudao Islands be returned, but also can the Ryukyu (Okinawa) Question be Reopened". This article co-authored by two Chinese historians elicited ferocious responses from some Japanese media.³ What lies behind this highly inflammatory (unofficial as yet) claim that carries a huge risk of boomeranging back to China which has lots to lose by territorial irredentism?

Let us briefly look at the highly convoluted history of Okinawa, in particular, its history during the 1870s when the traditional East Asian regional order was at its initial stage of gradually being replaced by the "modern" European international law, often called the public law of Europe.⁴ Okinawa, which used to be the Ryukyu kingdom, was governed as part of Satsuma *han* of Japan after 1609 but also sent tributary missions to the Qing court (this was called the "relationship of dual allegiance").⁵ A heated controversy over the "international" status of Ryukyu broke out in 1871 when fifty-odd Ryukyu fishermen who had been shipwrecked and drifted to Taiwan were massacred by Taiwan's "uncivilized savages." This tragedy was one of the great watersheds of East Asian diplomatic history. In the process of resolving

³ For instance, the Yomiuri Shimbun carried an editorial titled "Okinawa Claim a Step Too Far" on May 10, 2013. See also Jane Perlez, "Calls Grow in China to Press Claim for Okinawa", New York Times (June 13, 2013).

⁴ For a detailed discussion of the pre-20th century East Asian regional order and its replacement by European international law, see Onuma Yasuaki, "When was the Law of International Society Born? – An Inquiry of the History of International Law from an Inter-Civilizational Perspective", *2 Journal of the History of International Law* (2000), pp. 1-66.

⁵ For a general history of Okinawa, see George H. Kerr, *Okinawa: The History of an Island People*, Revised ed. (Tuttle Publishing, 2000). For a critical analysis of the question from a perspective of indigenous people's studies, see Hideaki Uemura, "The Colonial Annexation of Okinawa and the Logic of International Law: The Formation of 'Indigenous People' in East Asia", *Japanese Studies* vol. 23 no. 2 (September 2003), pp. 107-124.

this controversy, Ryukyu which had stood under “dual allegiance” was incorporated into Japan (1879) in accordance with modern international law.⁶

In May 1874, i.e., more than two years after the massacre took place, Japan sent a punitive expeditionary force to Taiwan. This turn of events took aback China that firmly believed that it had “suzerainty” over Ryukyu. Chinese officials were at a loss for appropriate diplomatic responses. Resort to war was not an option because at that time the Chinese army was engaged in a campaign in the Northwest to subdue an Islamic rebellion. While China did not take effective measures against Japan’s attempt to fully annex Ryukyu into its own territory, the Ryukyu king and political leaders turned to, in addition to China, France and the Netherlands with which Ryukyu had treaty relations. However, these desperate efforts were to no avail and Ryukyu was finally incorporated into Japan through something known in Japanese history as the “Ryukyu Disposition” in March 1879.

This brief description of Okinawan history was intended to stress the fact that the formation of the territorial order in East Asia in accordance with modern international law is rather recent and that it is characterized by a rather abrupt break between the traditional East Asian world order (as represented by the relationship of “dual allegiance”) and modern international law originating from Europe. It goes without saying that Japan made a highly instrumental use of a new international normative order to unseat the “Central Kingdom” or the eternal empire from the final arbiter of power in East Asia. Given the exceptional longevity of the so-called Sino-centric order (and the comparatively short period of China’s “century of humiliation”), it would not be far-fetched to surmise that the long and persistent past would still exert its influence in the region, in particular, through the interstices springing up with the inexorable rise of China on the international scene.

⁶ For a detailed discussion of this important historical event, see Iriye Akira, “Japan’s Drive to Great-Power Status”, in Marius B. Jansen (ed.), *The Emergence of Meiji Japan* (Cambridge: Cambridge University Press, 1995), pp. 288-291.

III. Some Common Features Running Through the Territorial Questions in East Asia⁷

1. Introduction

In general, territorial disputes are regarded as being of a most inflammatory nature. This has a lot to do with, *inter alia*, the glorification of a nation's territory as a place where God's ideals are realized ("Those who wage war against the holy realm of France, wage war against King Jesus")⁸ or as the physical extension of the *Volksgeist*. In East Asia, the already convoluted and inflammatory questions of territorial disputes have been further compounded by the history of reception of "modern" international law into East Asia.

In the following, I will compare the official positions of China and Japan concerning the Senkaku/Diaoyudao question. This task has been made easier thanks to the recent publication of China's official view titled "Diaoyu Dao, an Inherent Territory of China" by the State Council Information Office of the PRC in September 2012. Japan's official position was made public already in 1972, although it went through some subtle yet significant evolution.

Even though the focus of this presentation on the Senkaku/Diaoyudao question, one needs to note that there are features common to the measures taken by Japan concerning this question and the Dokdo/Takeshima question. First, in both cases the Japanese government invokes, *inter alia*, the title of occupation, arguing that that both groups of islands were *terra nullius* at the respective time of annexation. Secondly, the Japanese Government allegedly occupied these islands when the military and diplomatic situation was definitely in its favor, i.e. during the Sino-Japanese War and the Russo-Japanese War respectively in which Japan emerged victorious.

In approaching these territorial disputes, Japan appears to take recourse to one of the basic principles of international law, that is, inter-temporal law, the *locus classicus* of which is the 1928 *Island of Palmas* arbitration. In the case, the sole arbitrator Max Huber stated that "a juridical fact must be appreciated in the light of the law contemporaneous with it, and not of the law in force at the time when a dispute in

⁷ This section, except for Sub-section 3 ("Japan's Heavy Reliance on the US View") is based on the unpublished part of my presentation made at the International Symposium organized by the Japanese Society of International Law (Nagoya University, October 11 & 12, 2003) titled "Towards an Equitable Resolution of Maritime Delimitation Disputes in East Asia".

⁸ Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), p. 255.

regard to it arises or falls to be settled”.⁹ When invoking this principle, the Japanese government seems to believe that this rule operates in an ideologically and historically neutral vacuum. It is submitted that such a mechanical and unreflective application of inter-temporal law to the territorial disputes or questions in East Asia runs the great risk of arousing and aggravating political sentiments in this region.

2. *Annexation as Terra Nullius During War*

Let me first conduct a brief historical overview of the circumstances under which the islands in question were annexed as *terra nullius*. China has known the existence of the Senkaku/Diaoyudao Islands since, at the latest, the early 15th century. These islands appear frequently in Chinese books, in particular, those recording diplomatic missions sent by China. In the 16th and 17th centuries, the islands were incorporated into the coastal defense system of the Ming dynasty. Thus, China appears to have a much stronger historic claim vis-à-vis Japan that came to know about the islands only after the annexation of Ryukyu into Japan.

The title of territorial acquisition invoked by Japan is occupation of the islands as *terra nullius* (no man’s land) in 1895. However, the process leading to the annexation of the islands is somewhat tortuous. Concerning the Diaoyu/Senkaku Islands, the Japanese government had refused the three applications (in 1885, 1890 and 1893) by the Okinawa prefecture, which had been created only in 1879, for approval to annex them, fearing that such a measure would arouse China’s suspicion and protest. From the correspondence between the Okinawa Prefectural magistrate, the Home Minister and the Foreign Minister, it is clear that the Japanese authorities were aware that the islands had been recorded in Chinese books and that they had been named by the Chinese. The significance of these facts, i.e. naming and recording of islands, in terms of the traditional East Asian order (Did they amount to something like “continuous and peaceful display of territorial sovereignty”,¹⁰ a phrase used in the 1928 Islands of Palmas arbitration, under “modern” European international law?) is not easy to ascertain. However, the fact remains that the Japanese authorities were concerned about the facts and that they decided to “await a more appropriate time” for annexing the islands.

The “more appropriate time” arrived not long after. It was in January 1895, i.e., when Japan’s victory in the Sino-Japanese War was firmly established, that the

⁹ 2 *Reports of International Arbitral Awards*, p. 845.

¹⁰ *Ibid.*, p. 839.

Japanese government granted approval to the prefecture of Okinawa to annex two of the Senkaku/Diaoyu Islands.¹¹

In this territorial question, the “Achilles’ heel” for China is the fact that it did not raise any claim over the islands until 1971. According to Japan, China even recognized Japan’s territorial sovereignty over them by various acts such as viewing them as falling under the jurisdiction of the Okinawa Prefecture in a 1953 editorial published by *Renmin Ribao*, the official newspaper of the Communist Party of China. That is why China’s case may not be necessarily stronger in a judicial setting such as the ICJ or an international arbitration. On the political and historical plane, however, it would be not difficult to see why the Chinese regard the islands as “stolen”¹² in a period when the traditional East Asian order was abruptly replaced by “modern” international law that justified colonialist practices.¹³

The occupation or annexation of the Dokdo/Takeshima Island took place under largely similar circumstances. This question has a very long history. According to the Korean claim, the island came under Korean jurisdiction as early as 512 CE. In 1696, Korea and Japan reached an agreement on the question of territorial sovereignty over the islands in the East Sea/Sea of Japan. However, a controversy still rages over the exact coverage of the agreement. While the Korean side argues that the agreement also included the Dokdo/Takeshima island, the Japanese side claims that the agreement related only to the Ulleung island (which now belongs to Korea), but not to the Dokdo/Takeshima.

Given the remoteness and low economic value of the island, it did not become a diplomatic issue between Korea and Japan for a long time after 1696. It was not until the 1870s, i.e. when Japan tried to modernize itself, including delimiting its territorial body in a scientific and exact manner that the island reappeared as a diplomatic question. Quite significantly, Japan regarded the island as belonging to Korea until its volte-face on the question in 1905.

Thus, as early as 1870, a Japanese investigation team sent by the Foreign Ministry drew up an official document titled “Report on the Confidential Enquiry into the Particulars of Korean Foreign Relations”. In it there is the part dealing with the

¹¹ The second domestic measure to incorporate the remaining islets was taken on 5 March 1896 in the form of the Imperial Ordinance No. 13, based on the Cabinet decision of 1895.

¹² This is the expression used by the Chinese Foreign Minister Yang Jiechi at the United Nations General Assembly on September 27, 2012. “Yang Jiechi Expounds China’s Solemn Position on the Diaoyu Islands Issue at the 67th Session of the UN General Assembly”, <http://www.fmprc.gov.cn/eng/topics/diaodao/t975814.html> . See also Shao Sha Ping (ed.), *Guojifa* [International Law] (Beijing: Gaodeng Jiaoyu Chubashe, 2008), p. 145.

¹³ Han-Yi Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan* (Occasional Papers/Reprints Series in Contemporary Asian Studies No.3 – 999 (152)), p. 111.

question of “circumstances under which Takeshima [present-day Ulleungdo] and Matsushima [present-day Dokdo] has fallen under Korean possession”.¹⁴ In 1877, the *Dajokan*, the highest executive organ of Japan, again examined the issue and instructed the Home Ministry that “Re Takeshima and another island, bear in mind that our country has nothing to do with them.”¹⁵

However, the international situation surrounding the island changed drastically with the ascendancy of Japanese power on the Korean peninsula and, especially, the successful conduct of the Russo-Japanese War. It was on 28 January 1905 that the Japanese cabinet decided, in the form of granting an application filed by a fisherman named Yozaburo Nakai of the Prefecture of Shimane, to incorporate Dokdo which the cabinet regarded as a *terra nullius*, “having no traces of ownership by any country”.¹⁶

Under the circumstances, there is a high likelihood that the title or institution of occupation appears, at least in the eyes of the Chinese and Koreans, a technical or legal camouflage that serves to justify an essentially expansionist and colonialist act on the part of the pre-1945 Japan. Again, it bears repeating that a rather mechanical invocation of inter-temporal rule cannot do justice to a much more convoluted historical context of the given period, proving counterproductive in a communicatively rational resolution of these difficult problems.

3. Japan's Heavy Reliance on the US Views

Another common thread running through the two questions is the heavy reliance Japan places on the position of the United States. As regards the Senkaku/Diaoyudao question, the Japanese Foreign Ministry quotes on its homepage the statement made by the U.S. Secretary of State John Foster Dulles at the 1951 San Francisco Peace Conference and the Joint Communiqué of Prime Minister Nobuske Kishi and U.S. President Dwight Eisenhower in 1957.¹⁷

Concerning the Dokdo/Takeshima issue, Japan highlights the so-called “Rusk Letter” and other U.S. practices to support its territorial claims. The letter was sent by the Assistant Secretary of State for Far Eastern Affairs to the Korean Ambassador to the United States in August 1951, that is, shortly before the adoption of the San

¹⁴ *Nihon gaiko monjo* vol. 3, document no. 87 (15 April 1870);

¹⁵ *Dajokan*, *Kobunroku* (20 March 1877); Korea Foreign Ministry, “Dokdo, Korea’s Beautiful Islands”, p. 8. <http://dokdo.mofa.go.kr/upload/english.pdf>.

¹⁶ *Kobunruiju* vol. 29 no. 1.

¹⁷ Q&A on the Senkaku Islands < http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html#qa15>.

Francisco Peace Treaty. In the letter, Assistant Secretary Rusk expressed a view in favor of Japan over the question of Dokdo/Takeshima.¹⁸

Japan invokes the United States positions and views despite the fact that neither China nor Korea was invited to the 1951 Peace Conference and that, as a result, neither of them became party to the 1951 Peace Conference. Indeed, the People's Republic of China called the treaty "illegal and null and void" on September 18, 1951, that is, 10 days after its adoption.

Japan's heavy reliance on the U.S. positions and views can be understood as an attempt to muster up as much evidence in its favor as possible, in particular, views held by powerful states. One can readily find such approaches (i.e. invoking the positions of third states in bilateral disputes) in other international disputes or questions. In the East Asian context, however, Japan's behavior can be viewed as carrying a deeper significance. It may be interpreted as reflecting an entrenched psychological and epistemological dependence by Japan on the United States. When it comes to the normative order in the East Asian region, this idea can be taken as endorsing the displacement of the authority of the traditional regional order by a new and stronger universality coming from outside the region.

IV. East Asian International Order as a Palimpsest?

In this short presentation, I have limited myself to pointing out some salient features common to the two questions. An important connotation of the above analysis is that the parties to the questions do not and cannot agree on the normative framework on the basis of which the questions can be categorized and, ultimately, resolved. The reason why the East Asian states are "reluctant litigants" lies not only with the hard-to-define "cultural" factors, but with the still unsettled substantive configurations of international law in the region.

With particular reference to the territorial questions and disputes in East Asia, there is a huge gap between China and Korea, on the one hand, and Japan, on the other. While Japan places its reliance on the international law as it stood in 1895 or 1905, China and Korea regard this approach as deeply flawed and in bad faith (*mala fide*). As we have seen above, China believes itself to have a much stronger historic claim, which it argues should be fully taken into account in framing and resolving the question. Linked with the strategic considerations such as the oil and gas resources in the vicinity of the Senkaku/Diaoyudao islands and the PRC Navy's access to the

¹⁸ Ministry of Foreign Affairs of Japan, 10 Issues of Takeshima, pp. 10-11 <http://www.mofa.go.jp/region/asia-paci/takeshima/pamphlet_e.pdf>.

Pacific, this issue has been recently confirmed as representing one of the “core interests” of China.¹⁹ The high symbolic value of the issue in terms of Chinese nationalism also helps with the entrenchment of the Chinese position.

This highlights what I would like to term the palimpsestic nature of international law in East Asia. The question I am raising by this expression is whether the normative order in East Asia has been completely replaced with modern international law originating from Europe. Or are the traces or vestiges of the traditional East Asian order visible under the newly written texts of modern international law? One may be justified in thinking that the latter is the case given China’s repeated insistence on it being a “benign hegemon”, if it ever was a hegemon, invoking its past practice differing from other great powers. Then, the big question is what are the substantive contours or contents of the traditional East Asian order, often known as the Sino-centric order.

As can be seen in the Okinawa question and the Dokdo/Takeshima and Senkaku/Diaoyudao issues, the normative order in East Asia can be analogized to a subduction zone where an old tectonic plate having been drawn down or overridden by a new tectonic plate, while the old plate has not been completely subducted into the mantle. Under the circumstances, it is not surprising to see a rising (or already risen) China wanting to achieve a “peaceful change” of the normative order in which it feels its voice has been insufficiently reflected. This does not mean that China will be, to use Buzan’s expression, a revolutionary revisionist power.²⁰ China has been too intricately enmeshed into the existing world order to work as a “demolition man” after the Mao model. It also cannot go back to the old Sino-centric weltanschauung where inequality, rather than sovereign equality, is the foundational principle of international order.

Against such a backdrop, China will point out the still open and malleable nature of international law as a normative system. On a more specific level, concerning the territorial question between China and Japan, China will argue that there has been no normative or diplomatic closure of the issue, that is, the Senkaku/Diaoyudao question is still open. This is exactly what China has attempted to achieve since 1972 and, in particular, after the question flared up into a full-scale diplomatic confrontation in September 2012. After preventing the issue from becoming a closed one and in so doing securing a room for maneuver or change, China will try to transform the status quo in its favor by using, among others, the following strategies.

¹⁹ Kyodo, “China Officially Labels Senkakus a’ Core Interest” (April 27, 2013).

²⁰ Barry Buzan, “China in International Society: Is ‘Peaceful Rise’ Possible?”, *The Chinese Journal of International Politics* vol. 3 (2010), p. 17.

First, China will expand the parameters of the question and thereby recast the nature of the Senkaku/Diaoyudao as a question of history rather than a territorial question amenable to the application of technical rules of positive international law. In so doing, China can throw spotlight on the imperialistic character of the 19th century international law and the huge sufferings afflicted on China and the Chinese people by Japan in the pre-1945 period. Korea is pursuing a similar approach to the Dokdo/Takeshima question.

Secondly, related to the first strategy, China will try to secure positional superiority vis-à-vis Japan by elevating the issue from a bilateral to a multilateral question. The statement of the PRC Ministry of Foreign Affairs issued on September 10, 2012 is an apt example. In it, the Ministry claimed that “Japan's position on the issue of the Diaoyu Island is an outright denial of the outcomes of the victory of the World Anti-Fascist War and constitutes a grave challenge to the post-war international order.”²¹ In this statement, Japan is relegated back to its 1945 status as a defeated enemy state from which Japan has made a great deal of efforts to extricate itself. China’s strategy can be effective given, among others, Japan’s clumsy handling of issues relating to the “unfortunate past” such as “comfort women” and its increasing tendency to the conservative and nationalistic outlook. It is well known that Korea is highly critical of Japan concerning these issues.

Thirdly, China may try to expand the space secured by the doctrine of “a new type of major-power relations.” In an elaborate article on this concept, Cui Tiankai and Pang Hanzhao strongly deny any hegemonistic ambitions in Asia.²² However, the palpable change in China’s rhetoric (as is demonstrated by Chinese Vice Foreign Minister Fu Ying’s statement that “A small country should not at will encroach on (the territory of) or provoke a large country”),²³ coupled with China’s emphasis on the United States’ respect for China’s “core interests” as an essential condition for the development of “a new type of great power relationship”, leads one to suspect the a qualitative change has taken place in the self-perception of China as an international player after the Global Financial Crisis. The implications of the proposed new relationship are not clear yet. The relationship may imply a China that is, as a great power (as the then Vice President Xi Jinping said during his visit to the United States in 2012, “the vast Pacific Ocean has ample space for China and the United States.”),²⁴

²¹ <http://www.fmprc.gov.cn/eng/topics/diaodao/t968188.shtml> .

²² Cui Tiankai and Pang hanzhao, “China-US Relations in China’s Overall Diplomacy in the New Era – On China and US Working Together to Build a New-Type Relationship between Major Countries” (July 20, 2012). <http://www.fmprc.gov.cn/eng/wjb/zzjg/bmdyys/xwlb/t953682.htm> .

²³ Asahi Shimbun/Asia and Japan Watch, “Editorial: U.S., China Really Need to Talk” (June 7, 2012). <http://ajw.asahi.com/article/views/editorial/AJ201206070068> .

²⁴ Keith Richburg, “Xi Jinping Stirs Nationalistic Sentiments Ahead of Trip to U.S.”, Washington Post (February 13, 2012). <http://www.washingtonpost.com/blogs/blogpost/post/xi-jinpings->

more equal and sovereign than other nations in the region. This should have substantial impact on the characterization and solution of the territorial and maritime delimitation questions in East Asia.

V. Concluding Remarks

Given the highly fluid state of international law and relations in East Asia, it will be very difficult to foresee any definitive resolutions of these territorial questions in the near future. Therefore, it is imperative for the states concerned to “manage” the problems judiciously so that these questions will not escalate into military conflicts. This requires some *modus vivendi* or provisional arrangements in the form of (legally non-binding) code of conduct or diplomatic understanding.

While maintaining regional peace and stability through these avenues, the states in the region should apply, in a duly adjusted manner, the main point of the new type of great power relationship (“we should prove that the traditional belief that big powers are bound to enter into confrontation and conflicts is wrong, and seek new ways of developing relations between major countries in the era of economic globalization”)²⁵ to East Asia. Thereby, the states in the region should demonstrate that the conventional wisdom that a big change in the power relations in a region is destined for conflict is wrong. They should also seek new ways of developing relations among themselves in the era of increasing economic inter-dependence. In so doing, it is hoped that they will find peaceful and equitable solutions to the territorial questions in the region.

²⁵ [comments-stir-nationalist-sentiments-on-chinese-twitter-ahead-of-trip-to-us/2012/02/13/gIQADPunAR_blog.html](http://www.iqadpunar.org/blog/2012/02/13/gIQADPunAR_blog.html) .

Cui and Pang, *supra* note 22.