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International Law Regulation of Territorial Dispute in the East China Sea Between Japan and China

ABSTRACT

The present article deals principally with certain aspects concerning the possible International law regulation of the Senkaku/Diaoyu Islands dispute between Japan and China. The Senkaku/Diaoyu Islands dispute has seen sporadic flare-up over the last few decades that have led to bilateral tensions. Since rich natural and energy resources were founded in the continental shelf of the East China Sea and the contiguous area of the Senkaku/Diaoyu Islands in the late 1960s, the East China Sea started to be place of territorial disputes between Japan and China. Although both States have signed the United Nations Convention on the Law of the Sea, they go up against in their interpretations of how the Convention applies to the disputed area. The two countries have conflicting views on where the demarcation line between their respective exclusive economic zones and continental shelf's should be placed. In spite of previous efforts to institutionalize the territorial dispute, the East China Sea has remained key waters for both countries wishing to gain or preserve geopolitical influence in the region. However, since the beginning of the 21st century, the political and security environment has changed, Japan and China evaluate its territorial approaches and foster their relationship in the East China Sea, because the management of territorial dispute has great influence on regional as well as international stability.

Key words: East China Sea, Senkaku/Diaoyu Islands, Japan, China, maritime delimitation.

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Legal aspects of boundary issue

Japan ratified the 1982 United Nations Convention on the Law of the Sea in June 1996. After that, Japan adopted the Law on the territorial sea and the contiguous zone, as well as the Law on the exclusive economic zone and continental shelf, which were supplemented by procedure for implementation. It also established an exclusive economic zone around the disputed Senkaku/Diaoyu Islands. China ratified the 1982 United Nations Convention on the Law of the Sea in June 1996. In the ratification declaration, China confirmed its sovereignty over the territories which have been mentioned in the 1992 Law on its Territorial Waters and their Contiguous Areas that included disputed Senkaku/Diaoyu Islands. At the same time, China declared the precise location of straight baselines, which is important to delineate the Territorial Sea and the Contiguous Zone. The straight baselines connecting base-points on the mainland coast and the outermost coastal islands.² In the Law it is set that the territorial sea extending 12 nautical miles from these baselines and from offshore islands. China's declaration of sovereignty over the Diaoyu Islands does not mean evidence of sovereignty over a continental shelf or exclusive economic zone extending from the features. That's why, the baselines for the Territorial Sea including the baseline for the disputed Islands will be announced at a future date. Japan does not agree with China's base lines.³ Both States claim their exclusive economic zones extending 200 nautical miles from its coasts. China claims its exclusive economic zone on the basis of its continental shelf, which extends beyond Japan's declared area. From topographically, geomorphologically and geologically point of view, the continental shelf of the East China Sea is the continuity and underwater natural prolongation of the Chinese continent. The continental shelf of the Chinese continent ends at the Okinawa Trough. China holds that the Okinawa Trough, which does not follow the Japanese coast closely, proves that the continental shelves of China and Japan

² Mihael W. Reisman, Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation*, St. Martin's Press, New York, 1992; Park Choon-Ho, "The Yellow Sea-East China Sea Oil Disputes Revisited: New Opportunity for Joint Development," in Kim Dalchoon et al. eds., *Exploring Maritime Co-operation in Northeast Asia: Possibilities and Prospects*, Institute of East and West Studies, Yonsei University, Seoul, 1993, pp. 3-14; Liyu Wang and Peter H. Pearce, "The New Legal Regime for China's Territorial Sea", *Ocean Development and International Law*, vol. 25, No. 4, 1994, p. 442.

³ In principle, straight baselines must be drawn to satisfy several requirements: they must not depart from the general direction of the coast, the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters, they not be drawn to and from low-tide elevation, and shall not cut off the territorial sea of another State from the high seas of an exclusive economic zone. *Handbook on the Delimitation of Maritime Boundaries*, Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, United Nations, New York, 2000, p. 6.

are not connected, and that the Okinawa Trough serves as the natural boundary between them. Based on that approach, which allows claims up to 350 nm from the coast, China claims an area which extends from its coast up to the Okinawa Trough which is within the 350 nm limit. China's continental shelf on this way represent an area which is extending throughout the natural prolongation of its land territory to the outer edge of the continental margin, i.e., presumably to the Okinawa Trough.⁴ China argues that the Okinawa Trough delineates the edge of the continental margin and that the axis of the Okinawa Trough thus serves as the boundary between the continental shelves of the two States.

Japan disputes the Chinese interpretation and considers that the Okinawa Trough basically cannot be construed to be a natural border. It argues that the Okinawa Trough is just an incidental depression in a continuous continental margin between the two States. In essence, Okinawa is sitting on the continental shelf. For this connotation Japan cited the International Court of Justice's precedent in the Case Concerning the continental shelf (*Libya vs. Malta*) where the Court concluded that, if be a fundamental discontinuity between the continental shelf areas between adjacent States, the boundary should lie along the general line of the fundamental discontinuity. Japan claims that the continental shelf boundary should be the line equidistant between the undisputed territories of the two countries. It argues that the continental shelf should extend only to 200 nm. It estimated that the exclusive economic zone of both sides overlap because the width of the East China Sea is less than 400 nm and therefore the median line drawn through the overlapping area westward of the disputed Senkaku/Diaoyu Islands should be the maritime border. Japan promulgated 200 nm of the exclusive economic zone from the straight baselines. It applies the median line method of delimitation, i.e., the line every point of which is equidistant from the nearest point on the baseline of Japan and the nearest point on the baseline from which the breadth of the territorial sea pertaining to the foreign coast which is opposite the coast of Japan. Japan's proclamation to the west and north of the Senkaku/Diaoyu Islands left unclear. The extent of overlap is unknown because China and Japan have not published maps or specified exclusive economic zone with coordinates the limits of their claims in the East China Sea.

In 1998, China promulgated the exclusive economic zone and continental shelf Act which did not mention any specific geographical areas. However, this

⁴ Zhiguo Gao, "China and the LOS Convention," *Marine Policy* (1991), p. 199. etc. J. R. V. Prescott, "Maritime Jurisdiction in East Asian Seas," East-West Environment and Policy Institute, *Occasional Paper* No. 4, 1987; J.R.V. Prescott, "Maritime Jurisdiction," in Joseph Morgan and Mark J. Valencia, eds., *Atlas for Marine Policy in East Asian Seas*, Berkeley, California, University of California Press, 1992, p. 25. etc.

Act opens the door for settlement with Japan on the basis of international law and in accordance with the principle of equity. In the other side, Japanese Law on the exclusive economic zone and continental shelf gives possibility for both sides to stipulate boundary which may be agreed as a substitute for median line. However, as long as a border is not agreed upon by both sides, for China the disputed area is therefore between the Japanese-proposed median line and the Okinawa Trough, and for Japan it is the overlapping area of the 200 nm exclusive economic zone.

Applicable rules to boundary delimitation

The delimitation of sea areas has always an international aspect.⁵ It cannot be dependent only upon the will of the Japan and China as expressed in its municipal laws which established their exclusive economic zones and continental shelf. Territorial overlapping claims of China and Japan require maritime boundary delimitation. In principle, the validity of the delimitation with regard to other States depends upon international law. The determination of maritime boundaries is governed by international law that has evolved through and progressive development as reflected in the 1982 United Nation Convention of the Law of the Sea.⁶

According to the 1982 United Nations Convention on the Law of the Sea one of the two applicable rules for delimiting maritime boundaries in the East China Sea is possible. First one begin from interpretation of article 76 which defines a coastal state's continental shelf as comprising the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The paragraph 6 of the same article 76 provides that, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nm from the baselines from which the breadth of the territorial sea is measured. China adheres to this rule of the natural prolongation of land territory, holding that East China Sea continental shelf is the natural extension of the Chinese continental territory. The Chinese continental-shelf claim extends all the way to the axis of the Okinawa Trough (about 350 nm from the

⁵ "Fisheries Case", Judgment of December 18th 1951, International Court of Justice Reports 1951, p. 132.

⁶ "Convention on the Law of the Sea with Annexes and Index, Final act of the Third UN Conference on the Law of the Sea", UN Treaty Series vol. 1833, p. 3. Etc. The 1982 United Nation Convention of the Law of the Sea, under its article 311, prevails, over the 1958 Geneva Conventions.

China coast), enclosing in essence all of the oil potential and resources in the East China Sea.

The second equally applicable rule safeguarded in the 1982 United Nations Convention on the Law of the Sea for delimiting maritime boundaries, such as in the East China is by reference to the coastal States respective exclusive economic zones. Article 57 of the 1982 United Nations Convention defines a coastal State's exclusive economic zone as area which not extending beyond 200 nm from the straight baselines from which the breadth of the territorial sea is measured. Japan and China are two States with opposite coasts, and the body of waters between them is less than 400 nm in all. The width varies from 180 nm at the narrowest points to 360 nm at the widest. It is 1,300 km (or 702 nm) in length from north to south. The exclusive economic zones present a weighty overlap problem, because this areas beyond and adjacent to their territorial sea, is subject to a specific legal regime established by the unilaterally promulgated act which is not the entire in conformity with the 1982 United Nation Convention.

The 1982 United Nations Convention contains identical provisions dealing with the delimitation of exclusive economic zone and delimitation of the continental shelf. Hypothetically a solution is given in accordance with article 74 and article 83 of the 1982 United Nations Convention which set the delimitation of the maritime zones (exclusive economic zone and continental shelf) between Japan and China as the States with opposite coast. In compliance to these rules the delimitation should be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice.⁷

First and foremost, States are bound to apply equitable principles as part of international law to balance up the various considerations which it regards as relevant in order to produce an equitable solution. The goal of achieving an equitable solution when establishing the delimitation of both of continental shelf and of exclusive economic zones requires application of customary law.⁸ Essentially, customary international law and the 1982 United Nations Convention on the Law of the Sea require an equitable result. There is the logically prior question of whether it will be equitable solution if the continental shelf and exclusive economic zone share a common maritime boundary. From

⁷ Shigeru Oda, "International Law of the Resources of the Sea", *Recueil des Cours Académie de Droit International*, 1969, vol. 127, pp. 373-401; "Exclusive Economic Zone", in *Encyclopedia of Public International Law*, R. Bernhardt ed., Vol. II, Amsterdam, 1995, pp. 305-312.

⁸ "Delimitation in the Maritime Area between Greenland and Jan Mayen (Denmark v. Norway)", Judgement, *International Court of Justice Reports*, 1993, p. 59.

the recent case law there is a trend towards delimitation of single maritime boundary for all the overlapping zones between opposite and adjacent States. Most States would regard this as a pragmatic and workable solution. Whether the boundary of the continental shelf areas and the boundary of the exclusive economic zone have to be identical depend quite simply on the result of delimitation. Few principles of delimitation may be applied under the condition of equitable principles. The first one is proportionality which is based upon the relationship between the lengths of the relevant coasts of States whose maritime zones have to be delimited, on the one hand, and the area of maritime space to be allocated to each of the parties by the delimitation, on the other. The second one is principle of distance which is not opposed to principle of proportionality, *a contrario*, the both principle are complementary and both remain essential elements in the process of delimitation.⁹ Application of equitable principles, including abstention from refashioning nature, non-encroachment by one party on areas appertaining to the other, respect due to all relevant circumstances and the notions that equity (*ex aequo et bono*), which doesn't mean equality have to be referred on occasion of the delimitation of maritime boundaries between Japan and China.¹⁰

In the absence of equitable solution, the Japanese unilaterally drew a median line, which is rejected by China on the ground that it is giving in favour of Japan. The median line not only turns into the Chinese side but also turns to the west to enclose the disputed Senkaku/Diaoyu Islands on the Japanese side of the line. Japan considers all waters east of this unilaterally drawn median line to be Japanese territory. China argues that the delimitation should be effected only by agreement, and that agreement through consultation takes precedence over the equidistant line principle. Its representatives pointed out, that median line or equidistance line is only a method in the delimitation of the sea, which should not be defined as the method that must be adopted, still less as the principle for the delimitation.¹¹ The delimitation of the sea should follow the fundamental principle, i.e., the equitable principle. In some cases, if equitable and reasonable results in the delimitation may be achieved by using the method of median line or equidistance line, States concerned can apply it by agreement.¹²

⁹ "Continental Shelf Case (Libya v. Malta)", *International Court of Justice Reports*, 1985, p. 13.

¹⁰ "Continental Shelf Case (Tunisia v. Libya)", *International Court of Justice Reports*, 1982, p.18; "Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)", *International Court of Justice Reports*, 1985, pp. 56-58.

¹¹ Zhu Fenglan, "The Delimitation of East China Sea Continental Shelf: Sino-Japanese Disputes from the Perspective of International Law", *China International Studies*, 2006.

¹² Gerald H. Blake, "Mediterranean Micro-Territorial Disputes and Maritime Boundary Delimitation", *Il regime giuridico internazionale del Mare Mediterraneo*, U. Leanza, Milano, 1987, pp. 111-118; P. Birnie, "Delimitation of Maritime Boundaries: Emergent

The question of delimitation of maritime border between Japan and China in East China Sea obviously is common with dispute over the sovereign rights to the Senkaku/Diaoyu Islands. China and Japan argue that they have inviolable sovereignty over the Islands. The disagreement over the evidence of ownership can be summarized as follows. China argues that the Senkaku/Diaoyu Islands were part of its territory until April 17, 1895, when they were ceded to Japan after losing a war. The Chinese contend that the islands should have been returned under the terms of Article 2 of the San Francisco Treaty of 1951. Therefore, according to China, whatever happened after April 1895 cannot detract from China's longstanding claim? Japan bases its case on the contention that the islands belonged to no country until January 1895, when they were incorporated into Japanese territory by a cabinet decision. It argues further that since that time, Japan has maintained continuous and effective control of the islands, and therefore what happened before January 1895 cannot diminish Japan's sovereignty. For the purpose of this analyse it will be important to clarify whether these islands allow the holder State to claim an exclusive economic zone and a continental shelf. Actually, the Senkaku/Diaoyu territories administered by Japan are also claimed by China.¹³ The Senkaku/Diaoyu Islands consist of five uninhabited islets and three inhospitable rocks, located just about 120 nm southwest of Okinawa. They are situated at the edge of the East China Sea's continental shelf fronting the Okinawa Trough to the south. The depth of the surrounding waters is about 100-150 meters, with the exception of a deep trough in the continental shelf just south and east of the islands, that separates them from the Ryukyu Islands According to article 121(3) of the 1982 United Nations

Legal Principles and Problems", in: Gerald Blake ed., *Maritime Boundaries and Ocean Resources*, Croom Helm, London, 1987, pp. 15-37; J.I. Charney, "Progress in International Maritime Boundary Delimitation Law", *American Journal of International Law*, 1994, n° 88, p. 227.

¹³ When the United States handed back Okinawa, including the Senkaku/Diaoyu Islands to Japanese sovereignty under the 1972 Okinawa Reversion Treaty, Japan had announced that United States involved in the dispute. In November 1996, Acting Deputy Assistant Secretary of Defence Kurt Campbell said that the Senkaku/Diaoyu Islands fall under the terms of the 1960 U.S.-Japan Security Treaty. Campbell also said that the treaty obligation over the disputed islands did not mean the United States recognized Japan's claims to them. "The 1972 U.S.-Japan agreement on the return of Okinawa to Japan clarifies that the Senkaku/Diaoyu islands fall under Japanese administration. This was clearly specified by the United States for security purposes," Campbell said. He made it clear that the United States was not taking sides on the islands dispute. He said he was only clarifying the extent of the 1960 U.S. - Japan Security Treaty, drawing a line between territory effectively administered by Japan and territory that was legally Japan's. This statement was interpreted to mean that the United States was conducting a balancing act between China and Japan. Mark J. Valencia, "The East China Sea Dispute: Context, Claims, Issues and Possible Solutions", *Asian perspective*, vol. 31, No. 1, 2007, p. 155.

Convention of the Law of Sea, rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. Japan and China agree that the islands generate the right to a 12 nm territorial sea and to a 12 nm contiguous zone, but whereas China applies article 121(3) and thus denies the islands the right to an exclusive economic zone and continental shelf, Japan upholds such argues. It means that Japan holds that the features are islands and are therefore entitled to have continental shelves and exclusive economic zones. It thus uses them as base points for its continental shelf and exclusive economic zone claims in the East China Sea.

If Japan's interpretation of the 1982 United Nations Convention of the Law of the Sea is accepted, then it can claim up to an equidistant line with China. If China is given the title to the islands under such conditions, it could claim a continental shelf up to the Okinawa Trough, and an exclusive economic zone to an equidistant line with the nearest undisputed Japanese island. Otherwise both countries would have an overlapping continental shelf and exclusive economic zone claims extending from their nearest undisputed territory. China has not taken yet an official position on whether the Senkaku/Diaoyu Islands are a rock or an island, which means that only in the latter case could the islands be entitled to an exclusive economic zone. The reply on question of ownership of the Senkaku/Diaoyu Islands is a prerequisite for pending to an agreement over the delimitation of the maritime border between Japan and China.

Possible options

In accordance with the United Nations 1982 Convention on the Law of the Sea, the delimitation of the sea should be conducted first through consultation and by agreement between parties concerned. It means that in the delimitation of the East China Sea the choices of the parties concerned should be respected to the greatest extent. As long as Japan and China can reach an agreement, any method of the delimitation, provided it can be accepted by the parties concerned, is reasonable. After years of dispute over gas fields in the East China Sea, Japan and China have reached an agreement, with both sides announcing on 18 June 2008. The agreement was made in a spirit of understanding and cooperation. In the current agreement, the two countries agreed to stand the border issue for the time being and promised to refrain from unilaterally exploiting the disputed areas until a resolution was found. The new agreement affects two of the disputed gas fields: Shirakaba/Chunxiao and Asunaro/Longjin. In the case of the Shirakaba/Chunxiao field, which China has already started to develop, Japan has been invited to invest in its development. As for the Asunaro/Longjin gas field, China and Japan have agreed on establishing a joint development zone. The agreement represents a milestone in

the improvement of bilateral relations between China and Japan.¹⁴ Regarding delimitation of their maritime border, Japan and China are free to adopt whatever delimitation line they wish, whether that line is based on political, economical, geographic or any other kind of consideration. On the basis of the rule, the land dominates the sea, Japan and China have liberty to point out particular potential solutions for delimitation of the “inherited” maritime zones (continental shelves and exclusive economic zones). In fact, it means that Japan and China should be obliged to determine the existing facts on basis of the rules of international law which are fundamental for delimitation of maritime border of States with opposite coasts. In order to achieve an equitable solution, Japan and China should take a wider consideration of all facts, principles and rules within the context of general international law. It anticipates the principle of equidistance or different equitable principles of delimitation (historic titles or other special circumstances such as the geographic configuration, geomorphological and geological factors of the seabed and subsoil, economic factors, political and security factors, environment, presence of third States, etc.). In the near future, Japan and China should make every effort to negotiate a solution on a common boundary line for both the exclusive economic zones and continental shelves. Such boundary lines between Japan and China are crucial for East Asian security and joint development of fish, minerals, and hydrocarbon resources which depends very much on the two regional powers.¹⁵ If no agreement be reached within a reasonable period of time, Japan and China should resort to the conciliation procedures provided for in Part XV of the 1982 United Nations Convention. Either State then may resort to compulsory procedures provided for in the Convention by submitting the dispute to the International Court of Justice, the International Tribunal for the Law of the Sea or to the Arbitration.

Summary

With regard to the delimitation of the East China Sea between Japan and China, it can be seen that there exists a grave difference in their territorial claims to the East China Sea. First, on the claim to the continental shelf, China struggles endeavours for the natural prolongation criterion, while Japan stands the distance criterion. Second, on the principle of the delimitation, Japan prefers the median line while

¹⁴ Ralph A. Stamm, “China, Japan: Getting sensible, finally”, *ISN Security Watch*, 30 June 2008.

¹⁵ Duško Dimitrijević, “Delimitation maritime border in the East China Sea”, in: Edita Stojić Karanović, Džemal Hatibović, Ivona Lađevac, *Japan and Serbia Contemporary Issues*, Institute of International Politics and Economics, Belgrade, 2009, pp. 23-31.

China stands for the equitable principle. Third, on the issue whether the two States belong to the same continental shelf, China presumes that geographically, topographically, geomorphologically and geologically the Okinawa Trough has distinct features that separate the continental shelf and slope of the East China Sea from the Japanese Ryukyu Islands, which is an important parameter that should be taken into consideration in the delimitation process of the continental shelf. Japan holds that the Okinawa Trough is sea basin contingently formed in the course of the prolongation of the continental margin of the two States. Hence, Japan claim to the continental shelf of 200 nautical miles is not affected by this, and the legal effect of the Okinawa Trough should not be taken into consideration in the delimitation of the continental shelf of the East China Sea.

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