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## UNRESOLVED TERRITORIAL ISSUES IN THE EAST CHINA SEA

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*Abstract:* In the last decade, China, Taiwan and Japan have intensified their territorial claims in the East China Sea over the islands that the Chinese call Diaoyu, Taiwanese Diaoyutai, and the Japanese Senkaku (hereinafter: the Senkaku/Diaoyu Islands). Due to the increasingly visible escalation in mutual relations arising from different points of view regarding the sovereignty of the mentioned islands and different approaches of the coastal states regarding the delimitation of the borders of exclusive economic zones and continental shelves where no party wants to make concessions to the other party, the application of international law seems inevitable mechanism for overcoming territorial disputes. This is very important because if the disputes are not settled peacefully and with the application of international law, it is quite certain that in the future, the relations between the coastal states will deteriorate. Along with this, there may also be stronger interference by the United States in disputes, which, as a great power, can use the existing situation to strengthen its own geo-strategic position and military presence, and then to ensure its own geo-economic interests in a global game for the energy resources in which this maritime region is quite rich. Hence, it is necessary for all parties in the territorial dispute to make additional efforts to reach solutions in accordance with the rules and principles of international law, which, in all likelihood, constitute an optimal guarantee of achieving lasting peace and security in this part of the world.

*Key words:* East China Sea, territorial disputes, Senkaku/Diaoyu Islands, maritime delimitation, Japan, China, Taiwan, international law.

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## **GEOGRAPHICAL POSITIONING OF THE SENKAKU/DIAOYU ISLANDS**

In the world-renowned naval charts, the Senkaku/Diaoyu Islands are positioned in the East China Sea (in Chinese, *Dong Hai*), which is part of the Pacific Ocean (Google maps, 2017). They are located in the waters between 123°20'-124°40'E (east longitude) and 25°40'-26°00'N (northern latitude), roughly due east of Mainland China, northeast of Taiwan, west of Okinawa Island, and north of the southwestern end of the Ryukyu Islands (Wikipedia, 2017). The Senkaku/Diaoyu Islands represent a group of five smaller volcanic islands and three cliffs: Uotsurishima/ Diàoyú Dǎo, Taishō-tō/ Chìwěi Yǔ, Kuba-shima/ Huángwěi Yǔ, Kitakojima/Běi Xiǎodǎo, Oki-no-Kita-iwa/Dà Běi Xiǎodǎo, Oki-no-Minami-iwa/Dà Nán Xiǎodǎo and Tobise/Fēi Jiāo Yán. In some naval charts that were mainly plotted by foreign seafarers and geographers, this island group was designated as the Pinnacle Islands (Lai, 2013, p. 208, Alkhalili, 2013). In the group of the Senkaku/Diaoyu Islands, whose surface is approximately 6.27 square kilometers, only two islands are inhabited and are located on the very edge of the continental plateau of the East China Sea. The islands are facing Okinawa to the south, and are approximately located 76 nautical miles east of the Chinese island of Pengjia, 100 nautical miles northeast of Keelung in Taiwan, 220 nautical miles west of Okinawa, and 92 nautical miles northwest of the Ishigaki Islands in Japan (Ishigaki-jima).

## **RETROSPECTIVE OF STATE CLAIMS FOR SOVEREIGNTY OVER THE SENKAKU/DIAOYU ISLANDS**

The dispute over the Senkaku/Diaoyu Islands originates from the distant Chinese-Japanese past (Upton, 1972, Ivy Lee, 2013, pp. 35, etc.). Until the 1970s, China, Taiwan and Japan had claimed sovereignty over the islands located half way from Taiwan and the southwestern end of Okinawa. According to Chinese historical artefacts, China was the first to discover and use the islands of Senkaku/Diaoyu. At the time of the Chinese dynasty Ming (from 1368-1644), this area was considered an integral part of the Chinese territory. The Islands of Senkaku/Diaoyu are officially mentioned in the 15th century, in a document found in the Bodleian Library in Oxford and in the book *Shun Feng Xiang Song*, published in 1403. A comprehensive evidence of the Chinese affiliation of the island of Senkaku/Diaoyu is found in numerous reports compiled by Chinese emigrants at that time, but also in naval and military charts and defensive documents in which the islands are drawn on a road leading from China to Okinawa. During the Qing dynasty (from 1644-1911), the Senkaku/Diaoyu Islands were under the jurisdiction of Taiwan, which was part of China. As the border between the Senkaku/Diaoyu Islands and Okinawa in the 17th century, the area of Heishuigou was taken, which

is described in historical sources as the “Black Water Zone” that cultivates the Chinese continental plateau. Historical sources state that in 1720, the deputy of Chinese Ambassador Xu Baoguang sent a royal sign to the King of Okinawa. Working with local representatives, he succeeded in compiling a travelogue *Zhongshan Chuanxin lu*, in which the westernmost border of the kingdom of Okinawa in Kume-yima south of Heysheigh was identified based on the record of the mission of Chusan. Something similar was done by the deputy ambassador, Zhou Huang, in 1756, confirming that Heishueigou represents the border between Qui Yi and Kume-jima, while envoy Li Dingyuan noticed that there was a traditional practice of sacrificing domestic animals when crossing the Okinawa basin (Joyman Lee, 2011, Cohen&Chiu, 1974, p. 351).

In talks with Japan over the sovereignty of the Ryukyu Islands, Li Hongzhang, the Qing dynasty diplomat called to the fact that the Japanese writer Hayashi Shihei noticed in his illustrated geography that the Senkaku/Diaoyu Islands are not entering the composition of the Ryukyu Islands (Hamakawa, 2015, p. 5). In the same period, sea charts and geographical maps of large maritime powers such as the United Kingdom, Spain, the United States of America and France portrayed the Senkaku/Diaoyu Islands with a component part of China (e.g. a geographical map called “China’s latest map” in Great Britain in 1811, then a ticket was printed in the United States in 1859, etc.). A naval map of the eastern Chinese coast from Hong Kong to the Liaodong Bay built by the British Navy in 1877 portrayed the Senkaku/Diaoyu Islands as part of Taiwan. In addition, the Senkaku/Diaoyu Islands were clearly separated from the Japanese Nansei (Nansei shotō) or the Ryukyu Islands on the maritime chart. After Japan annexed the Ryukyu Islands in 1879 (renaming them to Okinawa Island), Japan began to operate more or less concealed with the aim of occupying the Islands, and finally it was able to do that after the end of the Chinese-Japanese War (1894–1895). On this occasion, the renowned Chinese state reformer Wang Tao, voiced opposition to Japanese expansionism, pointing out that Japan had no right to join Okinawa since this area was more formally in vassal relation to the Japanese state of Satsum. However, China was too weak to resist the Japanese military force that quickly occupied the whole of Korea (which was previously vassal of China), as well as strategically important Chinese territories in southern Manchuria, the peninsula Liáodōng, Taiwan and the Pescadores/Penghy archipelago in the Taiwan Strait. The occupation of the Senkaku/Diaoyu Islands in 1895 was not regarded by China as a legal act under international law.

Japan has ignored Chinese historical and legal arguments, believing that a request for sovereignty over the Senkaku/Diaoyu Islands stems from the fact that the Islands were discovered in 1884 by a Japanese sailor Koga Tatsushiro who after the discovery asked the Japanese government to lease the islands. However, from the available historical sources relating to this case, it appears that neither the Japanese authorities

at that time were entirely sure of whether the Senkaku/Diaoyu Islands discovery could be a valid legal basis for the Islands to belong to Japan given that there was no clear evidence to support the merits of this requirement. Therefore, the Japanese government has dispatched secret missions to establish relevant facts for the purpose of legitimizing the demand that the Senkaku/Diaoyu Islands belong to Japan. Given that the contested islands were not inhabited or occupied by any country as “no one’s land” (*terra nullius*), Japan, on the basis of a Cabinet decision of the Imperial Council of Ministers on January 14, 1895, put the Senkaku/Diaoyu Islands under the administrative power of Okinawa Prefecture. Shortly after the victory in the Sino-Japanese War, on April 17, 1895, Japan and China signed the Peace Treaty in Shimonoseki, on the basis of which Taiwan (Formosa), along with all accompanying islands was transferred to Japan (Gaimusho, 2017, Shigeyoshi, 2012). It is interesting that the Peace Treaty of Shimonoseki did not mention in the text anywhere that the Senkaku/Diaoyu Islands were simultaneously transferred to Japan.

From the current Chinese perspective, there are very few arguments to support the Japanese request that these islands are not occupied. According to Chinese legal opinion, there is a clear distinction between the view that the islands were “uninhabited” and the view that the islands “were not occupied”. Historical sources prove the exact opposite because before the Japanese discovery and occupation of the Senkaku/Diaoyu, the Islands were visited by Taiwanese fishermen whose graves have been preserved to this day. China’s territorial claim is also justified by the fact that prior to the Japanese discovery of the Senkaku/Diaoyu, it carried out some state acts such as providing navigation assistance to ships, collecting medicinal herbs and fishing. After the conclusion of the Peace Treaty of Shimonoseki in 1895, the Senkaku/Diaoyu Islands were given to Taiwan. By the end of the Second World War, the Islands were returned to China. Namely, China persistently insists that, according to the Cairo Declaration and the Potsdam Proclamation rendered during the Second World War by the Allied Powers (which Japan accepted as part of a Peace Treaty concluded in San Francisco in 1951), it was clearly stipulated that Japan was obliged to return China the administration of these Islands, as well as to all other territories that Japan took over by force, such as Manchuria, Formosa and Pescadores. Moreover, in Article 8 of the Potsdam Proclamation of Allied Powers, it is underlined that the Japanese sovereignty relates exclusively to the islands of Honshu, Hokkaido, Kyushu, Shikoku, “and such minor islands as we determine” (Cairo Communique, 1943, Potsdam Proclamation, 1945). In October 1945, Japan renounced rights over Taiwan. However, the issue of territorial sovereignty over the Senkaku/Diaoyu Islands was not explicitly solved. In response to the possible omission of the Senkaku/Diaoyu Islands from the final text of the Peace Treaty, on August 15, 1951, prior to the San Francisco Conference, the Chinese government publicly announced that: “If the People’s Republic of China is excluded from the preparation, formulation and signing the Peace Treaty with Japan, regardless of its

content and outcome, it would be considered unlawful and invalid by the central national authority”. In September 1951, the Chinese government sent another note stating that the San Francisco Peace Treaty was illegal and invalid and that the Diaoyu Islands are “China’s Inherent Territory”. According to the Chinese standpoint, after the Japanese surrender at the end of the Second World War, Taiwan was returned to China along with the Senkaku/Diaoyu Islands (The People’s Republic of China, State Council Information Office, 2012).

Japan contests China’s alleged argument by stating that its sovereignty on the Senkaku/Diaoyu Islands stems from Japanese continuing administration that begins with the incorporation of Islands which dates back to the Sino-Japanese War and the conclusion of the Peace Treaty of Shimonoseki, and then on the basis of the absence of Chinese territorial claims between 1895-1970. Finally, Japan believes that it takes sovereign rights on the Senkaku/Diaoyu Islands based on the fact that they were affiliated to the group of islands Nansei Shoto which have nothing to do with Taiwan (whose government of Kuomintang recognized for opportunistic reasons as a legitimate Chinese government until 1972), and hence, even with the San Francisco Peace Treaty concluded after the end of the Second World War in which China and Taiwan did not take part (Seokwoo Lee, 2002, pp. 124-126).

In order to understand the difference in the views of China and Japan, it must be taken into account that based on the San Francisco Peace Treaty the Nansei Islands south of the 29th parallel of the northern latitude were placed under the care of the United Nations and the civil administration of the United States of America. The US Administration of the Ryukyu Islands (USCAR), adopted on February 29, 1952, Regulation no. 68, and then on December 25, 1953, and Proclamation no. 27, which unilaterally extend the boundaries of this area on the Senkaku/Diaoyu Islands (Treaty of Peace with Japan, 1951). Based on the US-Japan Treaty of 1960, the US took over the administration of Okinawa, including the Senkaku/Diaoyu Islands (Treaty of Mutual Cooperation and Security, 1960).

Considering that there is a possibility of a different interpretation that could lead to an open territorial dispute, in August 1970, the Okinawa Assembly adopted a decision on the basis of which the Senkaku/Diaoyu Islands were declared as an integral part of the territory of Japan. This decision was supported by the National Parliament of Japan. That same year, Taiwan made an official protest, and China made similar complaints through public media demanding that it should return to the Senkaku/Diaoyu Islands. Japan and the United States then signed the Reversion Agreement on 17 June 1971, which envisioned the return of Okinawa. The Okinawa Reversion Agreement also included the restoration of administrative authority over the Senkaku/Diaoyu Islands from May 15, 1972 (Agreement concerning the Ryukyu Islands and the Daito Islands). On the same day that the said Agreement was signed, the US Government issued a statement that the return of Okinawa would have no effect on the sovereignty over the Senkaku/Diaoyu

Islands. On this occasion, the Ministry of Foreign Affairs of China made a protest on December 30, 1971, stating that the alleged conduct of the United States leading to an open violation of the territorial sovereignty of China is not acceptable to China and that it would therefore be necessary that the United States return China its sovereign rights over the islands. The request came after the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas under the auspices of the UN Economic Commission for Asia and the Far East (ECAFE) began geophysical measurements in 1968 and since the report in 1969 stated that the area of the epicontinental plateau between Taiwan and Japan is rich in oil and other natural resources (Emery, et al, 1969, pp. 3, etc.). However, the transfer of administration over the Senkaku/Diaoyu Islands from the United States to Japan did not confirm the transfer of sovereignty. As the matter of fact, during the administration of the Senkaku/Diaoyu Islands, the United States did not dispute the Chinese sovereignty or emphasized that Japan possessed this sovereignty. Officially, the United States insisted that the issues of sovereignty over the Senkaku/Diaoyu Islands should be resolved between interested parties (Valencia, 2007, pp. 155, etc.).

In connection with the above-mentioned actions, the Ministry of Foreign Affairs of Japan on March 8, 1972, issued a statement entitled: “The Basic View of Sovereignty over the Islands of Senkaku” (Ministry of Foreign Affairs of Japan, 2017). That document repeats the claims of Japanese original sovereignty over the Senkaku/Diaoyu Islands. Namely, Japan claimed that the islands were *terra nullius*, and that they did not belong to Taiwan or the islands of the Pescadores before they were assigned to it by the Qing Dynasty on the basis of the Peace Treaty of Shimonoseki. According to the Japanese viewpoint, China did not consider these islands as an integral part of Taiwan, and the islands could not have been included in the territories that Japan had renounced under the provision of article 2 of the San Francisco Peace Treaty. The Senkaku/Diaoyu Islands were placed under the administration of the United States of America as part of the Nansei Island in accordance with the provision of Article 3 of the said Peace Treaty. According to the Japanese view, the Senkaku/Diaoyu Islands were definitely returned to Japan in accordance with the Okinawa Reversion Agreement (Hamakawa, 2015; Jade Harry, 2013, p. 660, Asada, 2007).

This view was completely unacceptable to China, so China expressed its view that the Japanese incorporation of the Senkaku/Diaoyu Islands as *terra nullius* constitutes an unlawful act of occupying Chinese territory that has no effect in international law. Neither the contract of Shimonoseki, by which Japan forced the Chinese dynasty Qing to give him Taiwan, along with all of the associated islands, including the Senkaku/Diaoyu Islands, is of no legal significance, as confirmed by the acts of the Allied Forces of the Second World War – the Cairo Declaration and the Potsdam Proclamation by which the Allied Powers obliged Japan to

unconditionally return all the territories it had seized from China. The said acts clearly define the Japanese territory which does not include the Senkaku/Diaoyu Islands. These islands have not been placed under the custody of the United Nations and the administration of the United States of America on the basis of the Peace Treaty from San Francisco. The United States arbitrarily extended custody to the Senkaku/Diaoyu Islands which *per se*, represented the Chinese territory. The subsequent “return of administrative powers” over the Senkaku/Diaoyu Islands to Japan, represents for China an unlawful attempt by Japan to occupy the Chinese territory, which in essence represents a sort of challenge to the post-war international order. However, despite open opposition, China was keen to freeze the existing conflict with Japan for some time, so in that sense, Chinese President Deng Xiaoping proclaimed a new foreign policy, “leaving aside territorial disputes” with Japan, “for the purpose of joint development”. Such an approach led to the normalization of diplomatic relations in 1972 and the signing of the Treaty of Peace and Friendship in 1978. On the basis of the Treaty, the two sides agreed not to raise any further questions regarding the sovereignty over the Senkaku/Diaoyu Islands, but to leave the issue “for resolution to future generations” (PRC Ministry of Foreign Affairs, 2000). However, although the resolution of the problem was left behind, the territorial dispute between China and Japan has not been unfortunately resolved to this day. The dispute came to the surface again, as rich oilfields were discovered in areas of their unilaterally declared exclusive economic zones. From that moment, two sides ask each other for the delimitation of its exclusive economic zones, and then the continental shelves (Harrison, 2005).<sup>2</sup>

China stands by its position that the line of demarcation must pull along the edge of the epicontinental plateau that is approaching the Okinawa archipelago. On the other hand, Japan believes that the line of delimitation should go along the central line that separates a part of the coastal area of the two countries. Japan has repeatedly accused China of exploitation near the area belonging to the Japanese exclusive economic zone. China made a proposal for joint investment in the disputed area due to these allegations. Following several unsuccessful bargaining attempts and sending military troops to disputed areas, the Chinese state overseas oil company *China National Offshore Oil Corporation*, began the exploitation of gas in the Shirakaba/Chunxiao which China considers to be 4 nautical miles inside the Chinese exclusive economic zone. Since Japan did not agree with China’s stated

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<sup>2</sup> Chinese estimates of potential gas reserves on the entire shelf range from 175 - 210 trillion cubic feet. Foreign estimates of potential oil reserves on the shelf are as high as 100 billion barrels. Chinese estimates of proven and probable gas reserves of some 17.5 trillion cubic feet on the Chinese side, much of it in the Xihu Trough. Japan and China assume rich petroleum deposits in the seabed around the disputed Islands, where the Japanese government speaks of over 94.5 billion barrels of quality oil.

approach, and considering that the site is located on the other side of the borderline, Japan tried to respond to Chinese unilateral action by guaranteeing the right to exploit its *Empire Oil Company* in the Teikoku Sekiyu area. However, for security reasons, this company has never started business. The Ministry of Foreign Affairs of China has filed a protest note to Japan since such a Japanese act is qualified as open provocation and violation of Chinese sovereign rights. In the further course of events, the above outburst between Japan has led to a worsening of relations between the two countries. The situation gradually deteriorated and in 1992, following the promulgation of the Chinese Law on the Territorial Sea and the Contiguous Zone, it culminated. The Japanese Ministry of Foreign Affairs has strongly protested against the new Chinese Law. Considering that in this case there can be no question of a territorial dispute, Japan has strengthened the request for the Senkaku/Diaoyu Islands by giving some of them to private persons. In January 2003, the Japanese government announced that it rented the island of Kuba-shima/Huangwei Yu, back in 1972, for 20 years. Kuba-shima/Huangwei Yu, along with Okinawa, were hired by the United States for military purposes. For allegedly preventive reasons, the remaining three islands – Uotsuri-shima/Diaoyu Dao, Minami-kojima/Nan Xiaodao and Kita-kojima/Bei Xiaodao, the government of Japan rented in 2002. China reacted harshly to these unilateral acts issuing a protest note. After the meeting of the President of China, Hu Jintao and Japanese Prime Minister Yasuo Fukuda in 2008, there was a melting of mutual relations. By the Agreement on joint exploitation of oil and gas in Shirakaba/Chunxiao and Asunaro/Longjin areas concluded on June 18, 2008, the two sides principally obliged the East China Sea to be no more a crack of the conflict but the “Sea of peace, cooperation and friendship” (China and Japan Joint Press Statement, 2008). The Agreement literally confirmed that it does not prejudice the merits of the set territorial claims, but is mutually agreed upon by each other “understanding” for cooperation. In this regard, China and Japan have undertaken to no longer undertake unilateral acts related to the exploitation of oil and gas in disputed areas until a final solution is reached. Given that China has already begun to exploit the gas in the Shirakaba/Chunxiao area, China has sent a call to Japan to provide technological support and invest in exploitation for the purpose of jointly generating profits. In relation to gas sites of Asunaro-Longjin, two countries have concluded the Agreement on a common development zone of 2,700 square kilometres. The Agreement represented a milestone in improving bilateral relations between China and Japan (Stamm, 2008). However, due to the fact that China continued to use independently two controversial gas sources Tianwaitian and Sankei, Japan protested that China was in violation of the provisions of the Agreement (Hunt, 2017). For Japan was not acceptable China’s view that China had sovereign rights even to the area of the continental plateau almost to the Japanese island connected to the south by Okinawa, which overlaps with its exclusive economic zone of 200 nautical miles



(Guoxing, 1995, pp. 9, etc.).<sup>3</sup> In order to secure its territorial interests, on 12 November 2008, Japan submitted to the Commission on the Limits of the Continental Shelf information on the limits of its continental shelf beyond 200 nautical miles from the baselines from which the extent of the terrestrial sea is measured, and in accordance with Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea (Submission by Japan, 2008). China subsequently responded by submitting a preliminary note to the Secretary-General of the United Nations on the establishment of the external border of its continental shelf beyond the 200 nautical miles (PRC Preliminary Information, 2009). This notification was realized through an official request of December 14, 2012, which also, on a unilateral basis, formally extended its sovereign rights to the Okinawa Basin (Submission by the PRC, 2012). This act was preceded by Japanese unilateral nationalization of the three islands of the composition Senkaku/Diaoyu Islands (Fujihira, 2013, p. 42). From that period, relations between the two countries have been considerably worsened. China has begun to directly contest Japan's long-standing physical control of the disputed areas by deploying Chinese CMS vessels to regularly patrol the territorial waters of the disputed areas. It also established an Air Defence Identification Zone (ADIZ) in the East China Sea overlapping with Japan's ADIZ which is formed on August 29, 1968, and patrolled the relevant airspace with military and maritime surveillance aircrafts (BBC, 2013). Japan and other interested coastal states refused to admit the Chinese ADIZ considering that China's proclamation of the ADIZ was a unilateral measure that directly challenged regional security, but also the application of customary international law (Hsu, 2014). At the regular annual Cabinet meeting in 2017, the Japanese Ministry of Foreign Affairs proposed the Blue Paper in which it expressed deep concern over the unilateral acts of China in the disputed area of the East China Sea. On the other hand, a spokesman for the Chinese Ministry of Foreign Affairs rejected Japanese objections, reiterating that China has undisputed sovereignty over the Senkaku/Diaoyu Islands and that it has the right to take all "public service activities" that are "reasonable and legitimate" (PRC Ministry of Foreign Affairs, 2017). In this way, an obvious political imbalance was created that caused further tensions between the two countries in the disputed area of the East China Sea (Zhang, 2017, pp. 1, etc.; Bendini, 2014, pp. 20, etc.; Morris, 2017).<sup>4</sup>

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<sup>3</sup> Following the conclusion of the Agreement of 18 June 2008, along with the above-mentioned disagreement between China and Japan, the problem of South Korea's economic rights in relation to gas sources in the northern region of Asunara was also at the forefront. In addition to the above, South Korea is fighting China along the Socotra Rock offshore on which a Korean science base was built. China believes that the building of the base has violated sovereign rights in its exclusive economic zone.

<sup>4</sup> "The dispute's importance lies in its potential to redefine the balance of power in Asia. China is testing both Japan and the US, and is increasingly irritated by the 'security belt' that Washington

## UNSUCCESSFUL ATTEMPTS OF JAPAN AND CHINA TO REGULATE TERRITORIAL DISPUTES IN THE EAST CHINA SEA

Japan ratified the 1982 United Nations Convention on the Law of the Sea in June 1996. After that, Japan adopted the amended 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 (Law of the Sea Bulletin, 1996). 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 1996. In the ratification declaration, China confirmed its sovereignty over the territories which have been mentioned in the 1992 Law on the Territorial Sea and the Contiguous Zone that included the disputed Senkaku/Diaoyu Islands (Contemporary Laws of the People's Republic of China, 1992, pp. 124-126). At the same time, China declared the precise location of straight baselines, which is important to delineate the Territorial Sea and the Contiguous Zone. According to the Chinese view, the straight baselines connect base-points on the mainland coast and the outermost coastal islands (Reisman & Westerman, 1992; Choon-Ho, 1993, pp. 3-14; Wang & Pearse, 1994, p. 442). In the Law it is set that the territorial sea extends 12 nautical miles from these baselines and from offshore islands. China's declaration of sovereignty over the Senkaku/Diaoyu Islands does not mean an evidence of sovereignty over a continental shelf or exclusive economic zone extending from the features. Given to this, the baselines for the Territorial Sea including the baseline for the disputed Islands will be announced at a future date. Otherwise, in the international law of the sea, 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 the 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, 2000, p. 6). Given these conditions, it is clear that Japan did not want to agree with the Chinese determination of baselines. 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 topographical, geomorphologic

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and its allies have set up around the Chinese coastline. Japan's confrontation with China is also radically changing Tokyo's stance. As the country most wary of China's growing economic and military power, Japan has gradually adopted 'hedging' policies – preparing for the eventuality that China's rising economic, political and military power becomes a security threat. Japan's 'pacifist' constitution has recently been reinterpreted to allow Japan to lift the ban on 'collective self-defence', permitting Tokyo to assist allied countries under attack“.

and geological 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 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 (Zhu Fenlang, 2006).<sup>5</sup> 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 (Gao, 1991, p. 199; Prescott, 1987; Prescott, 1992, pp. 25, etc.). China argues that the Okinawa Trough as a *back-arc basin* 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 (Jianjun, 2010, pp. 145, etc.).

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 there is 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 overlaps 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

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<sup>5</sup> "The continental shelf between China and Japan is 325 nm in width at maximum, 167 nm at minimum and 216 nm in average, which objectively causes partial overlap of the continental shelf and the exclusive economic zone of the two countries, and leads to conflicts between the two sides in their claims to the sea area".

maps or specified exclusive economic zone with coordinates of 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 Act opens the door for settlement with Japan on the basis of international law and in accordance with the principle of equity. On the other side, Japanese Law on the exclusive economic zone and continental shelf gives the possibility for both sides to stipulate boundary which may be agreed as a substitute for the 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 OF INTERNATIONAL LAW FOR REGULATION OF UNSETTLED TERRITORIAL DISPUTES IN THE EAST CHINA SEA**

The delimitation of sea areas has always had an international aspect (*International Court of Justice Reports*, 1951, p. 132). 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 (Oda, 1995, pp. 312, etc.). 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 and progressive development as reflected in the 1982 United Nation Convention of the Law of the Sea (Convention on the Law of the Sea, 1982, pp. 3, etc.). According to the 1982 United Nations Convention on the Law of the Sea, which prevails over the 1958 Geneva Conventions on the Law of the Sea, one of the two applicable rules for delimiting maritime boundaries in the East China Sea is possible. The 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 the 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 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 Sea, 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 an 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 these areas beyond and adjacent to their territorial sea, are 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 the 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 (Oda, 1969, pp. 373-401; Encyclopedia of Public International Law, 1995, pp. 305-312).

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 the continental shelf and of the exclusive economic zones requires the application of customary law (International Court of Justice Reports, 1993, p. 59.). 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 an equitable solution if the continental shelf and the exclusive economic zone share a common maritime boundary. From the recent case law, there is a trend towards the delimitation of a 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 the principle of distance which is not opposed to the principle of proportionality, *a contrario*, both principles are complementary and both remain essential elements in the process of delimitation (International Court of Justice Reports, 1985, p. 13.). 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 does not mean equality have to be referred on occasion of the delimitation of maritime boundaries between Japan and China (International Court of Justice Reports, 1982, p. 18). In the absence of an 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 the 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 (Fenglan, 2006). 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 (Blake, 1987, pp. 111-118; Birnie, 1987, pp. 15-37; Charney, 1994, p. 227).

The question of delimitation of the maritime border between Japan and China in the East China Sea obviously is common with a 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 the territorial sovereignty 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 (*terra nullius*), 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 Islands territories administered by Japan are also claimed by China. 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 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 the 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 as an exclusive economic zone. The reply to the 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.

### **EVENTUAL SOLUTIONS FOR REGULATION OF TERRITORIAL DISPUTES IN THE EAST CHINA SEA**

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 (Ryjouk, 2017). 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 it 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 (Stamm, 2008). 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, economic, geographic or any other kind of consideration. On the basis of the rule, the land dominates the sea; Japan and China have the 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 the basis of the rules of international law which are fundamental for the 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, geomorphologic 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. Joint development and exploitation of fish, minerals, and hydrocarbon resources depends very much on the two regional powers. If no agreement is 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 International Arbitration (Dimitrijević, 2011, pp. 68-77; Soons & Schrijver, 2012, p. 5).

### SUMMARY

Based on the previous analysis, it is clear that there are serious differences between Japan and China regarding the determination of sovereignty over the Senkaku/Diaoyu Islands which is a preliminary issue for the delimitation of the



sovereign rights of the two States in the East China Sea. In this respect, the following differences are crucial.

Although China and Japan agree that the possession of sovereignty over islands entails the right to a territorial sea of up to 12 nautical miles and up to 12 nautical miles on the contiguous zone, they disagree about the possibility of declaring the exclusive economic zones and the continental shelves. On the one hand, Japan supports China's position towards a consistent application of Article 121 (3) of the 1982 United Nations Convention on the Law of the Sea, which stipulates that the possession of cliffs and rocks in which people cannot live and where it is not possible to develop independent economic life does not entail the right to declare the exclusive economic zones and continental shelves. On the other hand, Japan does not consider that the Senkaku/Diaoyu Islands cannot have their exclusive economic zones and the continental shelves. By this approach, Japan basically confirms that the Senkaku/Diaoyu Islands are viewed as islands, and not as cliffs or rocks whose status by law must not entail the right to proclaim those seas. If such a Japanese interpretation of the 1982 United Nations Convention on the Law of the Sea is accepted, then Japan could ask that the delineation with China in the East China Sea goes by a central line or a line of equal distance. However, in the event that it is established that China has sovereign rights over the Senkaku/Diaoyu Islands, it could require the establishment of its continental shelves all the way to the Okinawa Basin and the proclamation of its exclusive economic zone on a line of equal distance with the closest Japanese island in respect of which there is no dispute. In the case of *a contrario*, both States would retain territorial aspirations on the continental shelves and the exclusive economic zones of the other that overlap and stretch from their nearest territories that are not disputed. Since China has not yet taken an official stand on whether the Senkaku/Diaoyu represents rocks or islands for it, the issue of sovereignty over the disputed sea area will be a preliminary legal issue that needs to be answered before any agreement on territorial delineation in the East China Sea (O'Shea, 2012).

It is clear, therefore, that China and Japan (including Taiwan but also others coastal states such as South Korea which have territorial claims in the East China Sea), must resolve their territorial disputes peacefully, without coercion, intimidation, threats, or the use of force, and in a manner consistent with the rules and principles of international law codified in the 1982 United Nations Convention on the Law of the Sea, and also contained in customary international law (O'Rourke, 2017). Achieving a legally sustainable solution to sovereignty over the Senkaku/Diaoyu Islands through a peaceful settlement of the dispute foreseen in Article 287, Part XV of the 1982 UN Convention includes the overcoming of Sino-Japanese relations that are burdened by mutual misunderstanding, nationalist animosities, and geopolitical and historical rivalries. After all, it is a prerequisite for overall

regional stability and the achievement of a higher level of freedom and rights related to the international law of the sea (Drifte, 2008, 2014).<sup>6</sup>

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<sup>6</sup> In the past decades, Japan and China have refused to bring the dispute before the International Court of Justice. This negative attitude suggests that the solution must be sought through a political dialogue that will require a positive atmosphere in the negotiations and a strong leadership that will lead to constructive relations and respect for mutual national interests.

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Duško DIMITRIJEVIĆ

### **NEREŠENA TERITORIJALNA PITANJA U ISTOČNOM KINESKOM MORU**

*Apstrakt:* U poslednjoj deceniji, Kina, Tajvan i Japan intenzivirali su teritorijalne zahteve u području Istočnog kineskog mora nad ostrvima koja Kina naziva Djaoju, Tajvan Djaojutaj a Japan Senkaku (u daljem tekstu: Ostrva Senkaku/Djaoju). Zbog sve vidljivije eskalacije u međusobnim odnosima koja proizlazi iz različitih stanovišta priobalnih država u pogledu delimitacije granica isključivih ekonomskih zona i epikontinentalnih pojaseva, gde nijedna strana ne želi da napravi ustupke drugoj strani, primena međunarodnog prava čini se neizbežnim mehanizmom za prevazilaženje teritorijalnih sporova. Ovo tim pre, jer u slučaju da se sporovi ne reše mirnim putem i uz primenu međunarodnog prava, sasvim je izvesno da će u perspektivi doći do zaoštavanja odnosa između priobalnih država. Uz navedeno, može doći i do jačeg uplitanja SAD, koja, kao velika sila, može iskoristiti postojeću situaciju za ojačavanje sopstvene geostrateške pozicije i vojnog prisustva, a potom i za osiguranje sopstvenih geo-ekonomskih interesa u globalnoj utakmici za energetske resursima sa kojima je ova pomorska regija prilično bogata. Otuda je neophodno da sve strane u sporu ulože dodatne napore da postignu rešenja u skladu sa pravilima i principima međunarodnog prava, koji, po svemu sudeći, predstavljaju optimalnu garanciju za postizanje trajnijeg mira i sigurnosti u ovom delu sveta.

*Cljučne reči:* Istočno Kinesko more, teritorijalni sporovi, Senkaku/Djaoju ostrva, delimitacija, Japan, Kina, Tajvan, međunarodno pravo.