



## **The East China Sea Dispute: Prognosis and Ways Forward** by Mark J. Valencia

The East China Sea is one of the last unexplored high-potential resource areas located near large markets. But the development of oil and gas in much of the area has been prevented for decades by conflicting claims to boundaries and islets in the area by China, Taiwan and Japan.

Such disputes over small islands and ocean space are usually ancillary to more fundamental geopolitical dialectics. However in certain situations of big power rivalry and competition for scarce petroleum resources, such issues may become the tail that wags the dog of international relations. The intensifying competition between China and Japan for gas resources in the East China Sea could become just such a situation. However, conflict is not inevitable. China's June 2004 proposal to jointly develop the hydrocarbon resources of the East China Sea is an opportunity to cap rising tension and, at long last, harvest the resources in the disputed area.

### **The Current Situation**

Over the last several years, China has been drilling ever closer to the equidistant line between undisputed territory of both countries that has been unilaterally declared as the boundary by Japan. And it is now producing gas from the Chungxiao field situated just on its side of that line. Tokyo has officially protested the drilling because it fears China will siphon off gas from its side of the "boundary" and is now considering allowing Teikoku oil company to drill on Japan's side of it. Just the possibility of such drilling by Teikoku has been fiercely protested by Beijing which claims most of the continental shelf in the East China Sea.

In September 2005, the dispute turned dangerous when five Chinese naval vessels including a guided missile destroyer were observed near the Chunxiao gas field. One of the warships pointed its gun at a Japanese P3-C surveillance aircraft. A day before bilateral talks on the boundary were to resume, China confirmed that it had established a 'reserve vessel squadron' in the East China Sea. It was announced that the squadron was capable of "fighting during wars" and was equipped to "eliminate obstacles at sea". For Japan, this assertive act combined with the November 2004 detection of a Chinese nuclear submarine in Japanese territorial waters, increased electronic surveillance by Chinese aircraft, and the incursion of some 25 Chinese exploration ships into Japanese waters in the previous six months, meant China was a potential threat. Indeed, in its "Security and Guarding Plan," the Japanese Self-Defense Forces for the first time identified China as a threat and suggested several threat scenarios including a brigade size invasion of the Senkakus (called Diaoyu Islands by China).

## **Conflicting Claims**

The claims to the area are complicated and involve sovereignty claims to territory, and claims to both continental shelves and 200 nautical mile (nm) Exclusive Economic Zones (EEZ).

Both China and Japan claim sovereignty over the Diaoyu (Senkakus in Japanese) – eight uninhabited islets and rocks about 120 nm southwest of Okinawa. Japan controls the features but both China and Taiwan have formally incorporated them into their territory.

China holds that the Diaoyu Islands are small, uninhabited, and cannot sustain economic life of their own, and thus according to the 1982 UN Convention on the Law of the Sea (1982 UNCLOS) are not entitled to generate a continental shelf or a 200nm EEZ. Taiwan also holds that "The Diaoyudao Islands themselves are not entitled to have a continental shelf or EEZ, and thus have no significant legal effects on the boundary delimitation in the East China Sea." However Japan argues that the features are legal islands and are therefore entitled to have continental shelves and EEZs. Moreover it uses them as base points for its continental shelf and EEZ claims in the East China Sea.

Even if the conflicting sovereignty claims to the features did not exist, China, Japan, and South Korea have overlapping claims to continental shelves in the East China Sea. The parties cite different principles of international law to support their claims. China uses the principle of natural prolongation of the land territory. "The East China Sea continental shelf is the natural extension of the Chinese continental territory. The People's Republic of China has inviolable sovereignty over the East China Sea continental shelf." Taiwan also uses the natural prolongation principle as does South Korea in the East China Sea. China and Taiwan argue further that the Okinawa Trough delineates the edge of the continental margin and that the axis of the Trough thus serves as the boundary between the continental shelves of China and Japan. Japan on the other hand argues that the Trough is just an incidental depression in a continuous continental margin between the two countries and thus the continental shelf boundary should be the line equidistant between the undisputed territory of the two countries.

China also argues that the delimitation should be effected by agreement, and that agreement through consultation on the basis of equity takes precedence over the equidistant line principle. South Korea also insists that "the presence of the [Okinawa] Trough constitutes special circumstances under which the median line principle cannot be applied."

All claimants are also entitled to a 200 nm EEZ. In its EEZ, a country exercises sovereign rights over the living and non-living resources of the waters superjacent to the sea-bed

and of the sea-bed and its subsoil, and jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment. The delineation of EEZ boundaries was not an issue until February 1996 when Japan and South Korea almost simultaneously declared 200 nm EEZs. Japan, South Korea and Taiwan all express their claim to a 200 nm EEZ in conformity with the 1982 UNCLOS, i.e., the outer limit of the EEZ extends up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. South Korea says that in the areas where its EEZ overlaps with those of neighboring states, the boundary will be delimited by agreement in conformity with the relevant rules of international law. Since all (except Taiwan) are party to the 1982 UNCLOS and the extent of the EEZ is determined by distance there should not be a problem.

But there is. The different positions stem from the different baselines and from the dispute over the ownership of features from which the EEZ is measured. Japan's position is that because it owns the group of islands called Danjo Gunto, it is able to make claims to an EEZ extending from the islands to the equidistant line between South Korea and Danjo Gunto. South Korea does not dispute Japan's ownership of Danjo Gunto, but its position is that these are Japanese islands situated on South Korea's continental shelf and thus should be discounted in drawing an EEZ boundary. Japan uses the Diaoyu/Senkaku features as a base for its EEZ claim although it has declined to specify its extent *vis-à-vis* China.

An additional complication is that the boundary for the EEZ and continental shelf will not necessarily be the same. The EEZ claim can be only up to 200 nm from baselines while a continental shelf claim can extend as far as 350 nm from baselines, depending on the morphology and geology of the continental margin.

## Ways Forward

Fortunately, there are factors at work that could ameliorate these disputes. The realization that a positive China-Japan relationship is simply too important to be destroyed by these disputes may be the catalyst necessary for wise leaders to forge at least a temporary solution. And despite chilly diplomatic relations, Japanese-Chinese trade and investment increase every year. Finally, there is growing pressure in both China and Japan to proceed with development of oil and gas in the area – and therefore increased motivation to reach a compromise.

Although both seem to agree in principle on joint development, part of the problem is that the two sides have different interpretations of what joint development means or implies, and what area should be 'jointly developed'. Japan believes it means that China must cease its current exploration and development in Japanese claimed areas and that China should share the gas on China's side of the Japanese-claimed equidistant line. But China thinks it means that Japan will not interfere with Chinese exploitation of fields on its side of the line and the area for joint development is that between the median line claim and China's claimed continental shelf boundary including the area around the disputed islets.

Focusing on the specifics of the dispute, three basic agreements in principle are necessary before details of any solution can be negotiated.

- The first is agreement that the disputed territory (Senkakus/Diaoyutai) cannot be used as a basis for EEZ or continental shelf claims. Since Japan claims an EEZ and continental shelf from the Senkakus, this would be a concession by Japan that could be compensated by the division of the shares in a joint development scheme. If the two parties cannot agree on this point, then the sovereignty issue will impede the boundary negotiations indefinitely. If they can agree, then the sovereignty issue can be separated from the boundary issue.
- The second agreement necessary to negotiate a solution is that there be a unified boundary for both the EEZ and continental shelf. This would be a major concession on China's part which could be compensated by the location of the boundary or the division of the shares in the joint development scheme. Having two boundaries would be politically messy and impractical as well as a constant source of irritation and provocation as bilateral relations wax and wane.
- The third agreement necessary is that regardless of where the boundary is located, joint development of fish, minerals and hydrocarbon resources will be undertaken. This has essentially already been agreed in principle and in practice for fisheries. It would assure both parties that they would retain a share of the resources – both known and unknown. It would also help to solidify the relationship because of the common goal of developing the resources.

If these three basic agreements can be reached, then myriad possibilities open up. Variables that can be negotiated include the location of the boundary, the area of joint development, and the split of the resources and responsibilities – and the latter may vary with location. If the division of the shares in the joint development agreement and the boundary location are considered as a package, there will be more to balance and tradeoff.

In all options, the first step would be to agree to a 12 nm territorial sea enclave around the Senkaku/Diaoyu islets and to leave that area either as a "no-go" zone or for joint use and future settlement. The options also assume that China's claim to the Japan/South Korea JDZ will be quietly dropped as part of this settlement and that the tiny overlap between China and South Korea due to China's use of the Dandong feature as a basepoint will also be separated and quietly resolved.

## A Modus Operandi

The major issue is between China (including Taiwan) and Japan. As a first step towards a solution, Japan and China could tacitly agree on an equidistance line ignoring the Diaoyu/Senkaku islands as a non-precedential "working" boundary. Taiwan and any remaining foreign concession holders could perhaps be persuaded by inducements from Washington, Tokyo, and Beijing to abandon any remaining offshore concessions on Japan's side of the equidistance line. Under this "working" agreement, Taipei would not advance its claims to the seabed beyond the equidistance line based on its

claim to jurisdiction over the mainland. Beijing and Taipei might then cooperate in the development of the resources on the Chinese side of the equidistance line.

The United States and Japan could help make this scenario a reality by making clear that its recognition of the PRC as the sole legitimate government of China carries with it recognition of the PRC as the sole representative of Chinese continental shelf and EEZ claims. This would encourage Japan to do likewise, and could incidentally help improve Sino-Japanese relations.

The U.S. government and companies should then tacitly encourage China and Japan to explore an agreement. China and Japan could then enter into negotiations for continental shelf and EEZ boundary-making in good faith, and during that time conduct joint exploration to determine the size of any hydrocarbon resources in an agreed area – perhaps the area of original overlapping claims. This would be similar to the *modus operandi* in the South China Sea involving China, the Philippines, and Vietnam. When the time is right, a full-scale joint development program could be launched in part or all of the area.

### **In the Meantime**

Given that swift resolution of these disputes is unlikely, the most pressing immediate task is to find effective mechanisms to manage them and prevent any escalation of incidents that cannot be prevented. The key problem lies not so much with governments, but nationalist political constituencies within the polity of each state and the pressures that they can bring to bear. In the short and medium term, it is therefore critically important that the governments involved in these disputes take seriously the fact that governments of other claimant states are also constrained by domestic political considerations. There has been a marked failure to do so in the past.

Second, while governments may feel unable or be unwilling to prevent citizens embarking on provocative actions like the 1996 erection of a lighthouse on the Senkakus by Japanese nationalists, or the August 2006 attempted visit by Taiwan activists to the disputed islands, they should refrain from conferring official status on such actions. Moreover, if they disapprove of them, they should have the courage to say so publicly. If this is perceived to be too politically difficult, they should at least ensure that their disapproval is communicated to the government of the rival claimant state.

Third, greater emphasis needs to be placed on the role of preventive diplomacy. This has been taken up by the ASEAN Regional Forum (ARF) and the Council for Security Cooperation in the Asia Pacific (CSCAP), but so far with little practical impact on policy. None of the claimant states has indicated any interest in taking the disputes to formal legal adjudication, but it might still be possible via the offices of the Chairperson of the ARF for an “eminent persons’ group” to be created. Such a group should preferably undertake its preventive diplomacy task during a spell of relative calm. The task would not be to seek resolution, but rather to consider ways of managing the dispute non-violently and preventing (or at least controlling) escalation should there be more flare-ups.

Urgently needed is bilateral agreement on guidelines for the regime of military vessels in foreign EEZs as a form of conflict avoidance. This might in turn lead to a ‘Declaration on the Conduct of Parties in the East China Sea’ similar to, but more robust than, that reached by the multiple claimants to the South China Sea of which China is the most prominent.

Fifth, if the creation of an eminent persons’ group is considered premature, Track II meetings involving scholars, “think tank” analysts, and officials “acting in their private capacity” could be set up to investigate a range of confidence-building measures designed to foster conflict management and to prevent conflict escalation, rather than to seek a long-term solution. The Canadian-sponsored, Indonesian-hosted Track II effort, the South China Sea Working Group, which involves China and Taiwan and which deliberately avoided engaging in discussions on sovereignty issues, provides a possible precedent. Here, the focus was on building confidence among claimant states by encouraging maritime cooperation between them in non-controversial areas such as marine scientific research, environmental protection, including biodiversity, fisheries assessment and management, and mineral resource assessment. The focus was on what is achievable at the time. Although these were formally ‘Track II’ meetings, officials from the claimant states take part under the polite fiction that they are acting in their “private capacity”. This Track II cooperation eventually provided the basis for formal official cooperation.

### **Prognosis**

Obviously, the tone and tenor of China/Japan and China/Taiwan relations will affect the possibility of a solution. If these relations deteriorate, the issue may well become a flash point. The following analysis assumes these relations remain stable.

There are both specific positive and negative factors at work. Positive factors include the claimants ratification of the 1982 UNCLOS; China and South Korea’s rapprochement and discussion of joint development in the Yellow Sea; China and Taiwan’s discussions on, and their agreement to jointly develop any hydrocarbons in their portion of the East China Sea; China’s relative restraint in not exploiting the Diaoyu issue and its control of its nationalists in that regard; and Japan’s reciprocal attempts to control its nationalists; agreement in principle to joint development; precedents and experiences with joint arrangements – China with the Philippines and Vietnam in the South China Sea and Japan with South Korea in the northern East China Sea; and a previous compromise between the two regarding fisheries in the disputed area.

But these positives have to be weighed against negative factors, such as Japan’s alleged agreement (based on misinterpretation of Feb. 2005 Joint Declaration) with the United States to help in the defense of Taiwan against China; China’s increasing incursions in Japan’s sea and air space; Japan’s declared perception of China as a threat; South Korea and Japan’s declarations of EEZs which encompass areas claimed by China; Japan’s use of the Senkakus as a basepoint for its EEZ claim; China’s specific reaffirmation of its sovereignty over the Diaoyutais in its 1992 Territorial Sea

Law; the domestic public reactions to the exploits of nationalists on both sides; and the apparent unwillingness of one or both to resolve the issue.

### **Seizing the Moment**

The Sino-Japanese maritime conflict has two fundamental dimensions: the sovereignty dispute over the Diaoyu (Senkaku) islands and the delimitation of a boundary for the vast EEZ and continental shelf of the East China Sea. Many commentators have considered the issues inseparable. They view settlement of the first as a necessary condition for the second. However, this view is outdated. Recent legal developments, international adjudications, state practice, and the ratification of the Law of the 1982 UNCLOS by the claimants point to the possibility of separating the two issues. Islands of similar location, economic utility, and legal status to those of the Diaoyutai/Senkakus have invariably been ignored in seabed boundary delimitations between opposite states. This suggests that regardless of their ultimate owner, the features will only have a maximum 12 nm territorial sea around them. They will not be permitted to generate their own continental shelf or EEZ beyond that limit.

The implication of this conclusion for the Sino-Japanese maritime conflict is that the territorial and jurisdictional issues are separable and that the latter may be dealt with before the former is finally resolved. Agreement on the irrelevance of the Diaoyutai/Senkaku territorial dispute to, and detaching it from, the Sino-Japanese jurisdictional controversy would therefore be a major milestone on the path toward a solution. Indeed if such agreement were reached it would indicate that a boundary ignoring these features can be negotiated.

Domestic nationalist politics is a prime factor in these disputes. But nationalist politics seem to run in cycles of intensity. When the cycles in the respective nations reach their next common positive peaks, wise and courageous leaders should seize the opportunity to hammer out a preventative *modus operandi* to manage these conflicts. The alternative is continued mutual suspicion, unstable relations, unmanaged and undeveloped resources, and an increasing frequency and intensity of incidents, fueling nationalist sentiments and resultant political conflict.

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