

Resolving the China-Japan Dispute Over the Senkaku Islands

Thomas J. Schoenbaum

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The Senkaku Islands (or Diaoyu Islands under their Chinese name) is a group of five small volcanic islands and three "rocks" (considered too small for human habitation) located in the East China Sea, 410 kilometers southwest of mainland Okinawa, 170 kilometers northeast of Keelung, Taiwan, and 145 kilometers north-west of the Japanese Ishigaki Islands. The largest of the Senkaku Islands is Uotsuri-jima, which has an area of 4.3 square kilometers. Although the islands are not now inhabited, they are at the center of a potentially ugly dispute between China and Japan. This is because rich deposits of natural gas apparently lie beneath the surrounding waters. Energy-hungry China is carrying out exploration activities and is preparing to develop the gas fields. Naturally, Japan is anxious to preserve its interests in the islands and its resources.

The core of the political dispute over the islands

is a multifaceted legal dispute over each nation's territorial rights to this area. Both sides claim the law is on their side. The legal dispute may be divided into three parts.

The first dispute is over sovereignty. Do the islands belong to China (Taiwan?) or Japan? China claims the islands through discovery in 1372 and various contacts ranging from fishing vessels to gathering medicinal herbs on the islands. Japan contests this claim on the basis that China never exercised effective administration over the islands. Japan's claim to the islands rests on their administration by Japan, which was uncontested from 1895 to 1971. China counters that this administration was illegal, and the islands were returned to China under the terms of the 1951 Peace Treaty between Japan and the United States.

This sovereignty dispute is difficult to resolve. The criterion for a valid claim to the island is not discovery alone but effective legal and administrative control. China's claim therefore does not appear to be valid, and Japan's actual administration makes her claim stronger, but the question is whether Japan's administration is

tainted by war (claiming by conquest is invalid). A key question in this regard is whether the Senkaku Islands were included in the lands ceded to Japan under the 1895 Treaty of Shimonoseki, which ended the Sino-Japanese War. If so, then China can claim the islands, since this cession was renounced by Japan in conjunction with the US Peace Treaty of 1951. But neither the 1895 treaty nor the 1951 Peace Treaty specifically mentions the Senkaku Islands. This fact favors Japan's claim because Japan can plausibly argue that the Senkaku Islands are outside the scope of both agreements. Another point favorable to Japan is the fact that after World War II, the islands were administered by the United States and were included in the area returned to Japan in 1971.

A second aspect of the dispute concerns the Asian continental shelf and the maritime boundary between China and Japan. The Asian continental shelf (the underwater prolongation of the continent) stretches hundreds of kilometers under the East China Sea to the Okinawa Trough, a deep-sea trench west of the Ryukyu Island chain stretching from Taiwan north toward Kyushu, Japan. The Senkaku Islands are located on this Asian continental shelf, substantially west of the Okinawa Trough. This enhances the claim of China at least to the valuable submarine gas deposits because under the UN Convention on the Law of the Sea, China has rights to this continental shelf area. However, Japan also has

rights under the Law of the Sea to an exclusive economic zone (EEZ) extending 200 nautical miles to the west of the Ryukyu Islands chain (Okinawa Prefecture). Japan's EEZ overlaps the Asian continental shelf, so Japan limits its claim to a line that is equidistant between the Ryukyu Islands and the Asian mainland. Even in this modified form, however, Japan's EEZ overlaps China's claim to the continental shelf and the Senkaku Island gas deposits. .

A third aspect to the dispute is that the sovereign owner of the Senkaku islands can claim maritime zones surrounding them: these islands themselves have both an EEZ and a continental shelf. The UN Convention on the Law of the Sea grants both rights to islands, but uninhabitable "rocks" are granted only a territorial sea of 12 nautical miles. Under this criterion, the Senkaku Islands, but not the rocks, have a continental shelf and an EEZ of their own. So if Japan's territorial claim to the islands is correct, Japan can claim extensive maritime rights independent of China's maritime claims as a coastal state.

These maritime law questions are thorny and impossible to answer with certainty. China can argue its continental shelf rights exclude Japan's EEZ claim. But Japan can argue that the Law of the Sea treaty grants Japan an EEZ that includes the right to approximately half of the gas deposits. The question of overlapping EEZ and continental shelf claims is not answered in the

UN Convention on the Law of the Sea. Overlapping claims are supposed to be resolved, "in order to achieve an equitable solution." The difficulty of giving a definitive answer to the sovereignty claims over the Senkaku Islands also precludes any definite answer with respect to who owns the surrounding maritime zones.

What can be done? One option is for China and Japan to submit their dispute to the International Court of Justice (ICJ) at The Hague. This may provide an answer, but there are serious risks. The court's schedule likely means years of uncertainty before a decision is rendered, and given the inherent legal difficulties, there is a good chance the ICJ would render a divided or inconclusive judgment. As happened in the North Sea Continental Shelf Cases in 1967, the court may well say that the parties should negotiate their differences. If the ICJ decides in favor of one side, the result would be a humiliating diplomatic defeat for one of the parties. An all-or-nothing gamble is a bad idea.

Given these legal uncertainties, there is only one good answer: Japan and China should enter into a bilateral joint development agreement relating to all matters concerning the Senkaku Islands. This accords with principles of customary international law requiring cooperation with respect to common hydrocarbon deposits. In the North Sea there are several examples of such bilateral cooperative agreements. Joint

development also is eminently practical; this will allow unitization of the hydrocarbon deposits, the most efficient way to ensure efficient exploitation and environmental protection as well as fair allocation of the costs and benefits. Under the unitization principle, the deposit is exploited cooperatively by all interested parties who share in some proportion all costs and revenues. Unitization is the usual way oil and gas deposits are developed in the case where a deposit underlies different privately owned lands. Joint development would carry political benefits as well: Sino-Japanese cooperation on an important matter is in the interest of both countries and of peace in the world.

Would a joint development agreement settle the dispute? The best way to settle the dispute within the framework of a joint development agreement is for Japan and China to conclude a Joint Sovereignty Agreement recognizing the legal validity of both countries' claims. The extent of each overlapping claim can be the basis upon which the parties would share development costs and benefits. The parties could create by agreement a Bilateral Development Authority to administer the islands and surrounding waters. The first step in creating such an authority is for China and Japan to agree to share information concerning the possible mineral deposits surrounding the islands. Regrettably, China has rejected this. It should reconsider this decision.

Such an Authority would be an important precedent. This would create a new international organization for East Asia and an ongoing process of cooperation. It would turn a potentially ugly dispute into a hopeful model for the future. Despite past differences, China and Japan have a shared future destiny.

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 (http://www.amazon.com/exec/obidos/tg/detail/-/031414904X/qid=1108565182/sr=8-2/ref=sr_8_xs_ap_i2_xgl14/102-1460009-4967346?v=glance&s=books&n=507846) He can be reached at tschoen@icu.ac.jp
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See also Koji Taira, The China-Japan Clash over the Diaoyu/Senkaku Islands.
 Thomas J. Schoenbaum contributed this article to *Japan Focus*. A leading specialist on maritime law, (<http://japanfocus.org/157.html>)