

## THE SENKAKU/DIAOYU ISLANDS DISPUTE DRAWN OUT: QUO VADIS?\*

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### Abstract

The United Nations Convention on the Law of the Sea (UNCLOS) 1982 regulate matters and disputes on maritime boundaries and its sovereignty. Although it is integrated with a compulsory dispute settlement mechanism, UNCLOS 1982 faces difficulties in resolving the disputes between Japan, China and Taiwan over Senkaku/Diaoyu Islands in the East China Sea. Not only is it subject to legal matters, the disputes is also ripewith economical issues and strong nationalist sentiments, drawing out the problem since 1372 until the present day. This article will discuss the dispute with regards to its history and the possibility of the peaceful dispute settlement which could provide a win-win solution for the disputing parties in particular, and for the international society in general.

### Intisari

Konvensi Hukum Laut PBB 1982 (UNCLOS 1982) mengatur tentang hal-hal dan sengketa terkait batas maritim beserta kedaulatannya. Meskipun telah mencakup mekanisme penyelesaian sengketa yang bersifat compulsory, konvensi ini tidak bisa dengan mudah menyelesaikan sengketa antara Jepang, China dan Taiwan atas Kepulauan Senkaku/Diaoyu di Laut China Timur. Tidak hanya berkaitan dengan permasalahan hukum, sengketa tersebut juga diliputi isu-isu ekonomi dan kuatnya rasa nasionalisme masing-masing pihak. Hal ini membuat sengketa menjadi berlarut-larut sejak tahun 1372 hingga sekarang. Artikel ini akan membahas lebih jauh tentang sengketa Kepulauan Senkaku/Diaoyu, dihubungkan dengan sejarahnya dan kemungkinan penyelesaian sengketa dengan jalan damai yang dapat memberikan win-win solution bagi para pihak yang bersengketa pada khususnya, serta bagi masyarakat internasional pada umumnya.

**Keywords:** overlapping claims, East China Sea dispute, joint-agreement.

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## A. INTRODUCTION

In the East China Sea, there are 5 (five) islets between Taiwan and Okinawa. Both the Japanese and Chinese Government claim to possess those islets. They even have their own name for the rocky islands. The Japanese call it 'Senkaku Gunto' while for the Chinese it is well-known as 'Diaoyu Tai'.

At first glance, there is nothing special about the islands. The islands of Senkaku/Diaoyu merely consist of two coral reefs and five inhabited islets. There are only herds of goats, seafowls and several kinds of moles there. However, three economic giants in Asia, namely Japan, China and Taiwan, are fiercely fighting over it. The Senkaku/Diaoyu Islands are supposedly rich with oil and gas. This is very important for the three greatest economic players in Asia since they are all countries with great energy consumption. Each government argues that they have authority upon the islands, to secure their claims to future energy resources. Furthermore, the islands also lie in a strategic navigation route while the waters around it are rich in fishery resources.

The territorial dispute in Senkaku/Diaoyu Islands has been relatively calm to date. Taiwanese traditional fishermen normally fish unimpeded, albeit with occasional inconvenience. This changed on 11 September 2012 when the Japanese announced that they have bought 3 (three) out of 5 (five) islets in the area. Such action raised resentment both from the Chinese and Taiwanese authorities.

## B. DISCUSSION

### 1. History of the Dispute and Claims of Parties

The dispute over the Islands of Senkaku/Diaoyu has been going on for

ages. Historical records stated that the dispute first arose in 1372 when China and Japan were ruled under the command of the Ming Dynasty and the Tokugawa *shogunate* respectively. In its claim, China argues that they have the legitimate authority of *Diaoyu-tai*.<sup>6</sup> This argument is supported by historical records and several treaties. China believes that their nation had first discovered the existence of the islands, and that China had made use and owned the islands long before Japan. When China was ruled under the Ming Dynasty, Diaoyu Islands were documented in the map of the dynasty and included in the Ming Dynasty's maritime defense document. Furthermore, during the Qing Dynasty era, Diaoyu Islands were under the jurisdiction of Taiwan which was part of the dynasty (State Council Information Office, 2012).

For a long time, China had utilized Diaoyu Islands for navigational purposes to Ryukyu Islands and Okinawa, in Japan. In addition, Diaoyu Islands were also explored for its rare herbal medicine called *shi cong yong* since 1893 when the Chinese Queen, Ci Xi, gave permission to Sheng Xuanhei, the head executive of the dynasty, to pick the herbal medicines in the islands (Upton, Peter N., 1971).

China also claims that Japan has both implicitly and explicitly acknowledged China's sovereignty over Diaoyu Islands. The implicit acknowledgement can be seen through the maps published by Japan at that time.<sup>7</sup> Explicitly, Japan is believed to

<sup>6</sup> In Chinese, the islands are called *Diaoyu-tai* (Diaoyu Islands). This name is used when the discussion deals only with China's claims to the islands.

<sup>7</sup> In 1785, Japan published a map which used the same color for Diaoyu Islands and China, while a different color for Okinawa Empire. China used this fact to support their arguments that Japan has implicitly acknowledged that Diaoyu Islands were part of China's sovereignty. Further, in 1874 and 1877, Japan published

agree to China's sovereignty as proven by treaties entered after the Sino-Japanese War. When China was defeated in the Sino-Japanese War, China was forced to relinquish Diaoyu Islands to Japan as per the Shimonoseki Act of April 1895,<sup>8</sup> they further argue that Japan was obliged to return and waive their rights over the islands pursuant to the Cairo Conference of 1943 and the Potsdam Conference of 1945. This argument is supported with the provision in the 1951 San Francisco Peace Treaty which stipulates that "[a]ll treaties, special accords, agreements concluded prior to this treaty as consequences of the conclusions of the war, are hereby null and void", thus the possession of Diaoyu Islands should be returned to China.

On the other hand, Japan claim that they are the ones who have the authority of Senkaku Islands<sup>9</sup> for they legitimately own the islands. In 1885, a Japanese agency from the Okinawa Prefecture conducted surveys and ensured that Senkaku Islands were uninhabited. The result of the surveys also showed that there were no traces of Chinese occupation.<sup>10</sup> Japan hence decided to erect a marker in Senkaku Islands in 1895.

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official maps of the Ryukyu Island and the Note on History of Okinawa without including Diaoyu Islands as part of Japan's territory (Heflin, 2009).

<sup>8</sup> Article 2 (a) of Shimonoseki Act stipulated, "China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals and public property thereon: (b) the island of Formosa, together with all islands appertaining or belonging to the said island of Formosa." China argued that Diaoyu Islands were part of Formosa Islands (Taiwan) which were Chinese's sovereignty.

<sup>9</sup> The name of *Senkaku Gunto* (Senkaku Islands) is used when the discussion deals only with Japan's claims to the islands.

<sup>10</sup> Japan argued that Senkaku Islands were *terra nullius*, namely a free or unclaimed territory.

Moreover, Japan argues that Senkaku Islands were neither part of Formosa Islands, nor Pescadores Islands. Consequently, they did not have any obligation to return it back to China under the San Francisco Peace Treaty of 1951. Since then, the Senkaku Islands were integrated to Nansei Island which was part of Japan's sovereignty in accordance to Japan and United States' treaty signed in 1971 concerning Ryukyu Islands (Okinawa) and Daito Islands (MOFA, 2012).

In order to convey their authority over Senkaku Islands, in a peaceful and continuous manner, Japan exercised its sovereignty by monitoring the area around Senkaku Islands through Japanese patrol.<sup>11</sup> Japan has also erected a lighthouse in 1978 and a helicopter port in 1979 in the Senkaku Islands (Lohmeyer, 2008). Another argument for Japan's claim is that China has acquiesced by not making any attempt to control and to take over Senkaku Islands post World War II.

Today, the sovereignty of Senkaku/Diaoyu Islands remain undecided and in dispute. Each government of the disputing parties still holds on their own claims. Japan has registered Senkaku Islands as part of Ishigaki, Okinawa Prefecture and as part of Nansei Island; while China strongly believes that Diaoyu Islands are part of Daxi, Taiwan Province (Dzurek, 1996). The dispute is indeed difficult to solve for it is not only subject to aspects of territorial sovereignty, but also extends to economic, nationalist and security concerns.

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<sup>11</sup> Pursuant to the decision of *the Islands of Palmas Case*, one of the requirements to prove the States' sovereignty over a territory was by exercising sovereignty by peaceful and continuous means.

## 2. East China Sea Crisis: Economy, Nationalism and Future Energy Security

As energy prices rise, conflicts regarding the issue of economy will be inevitable. The dispute of Senkaku/Diaoyu Islands concerns overlapping sovereignty as its background. However, other aspects such as the economical aspect, energy resources and nationalism play important roles in miring the problem for hundreds of years.

As explained earlier, the dispute in Senkaku/Diaoyu Islands has taken place over a long period of time. China has once again raised the issue after the *United Nation Economic Commission for Asia and the Far East (ECAFE)* conducted academics surveys indicating the probability of rich resources of hydrocarbon energy, i.e. oil and gas, in the East China Sea, or precisely at 200.000 km<sup>2</sup> near Senkaku/Diaoyu Islands in 1969 (Li, 1975). This result was also supported by Indonesian discovery of the great gas reserves in Natuna, southern East China Sea. According to Kurtubi, Executive Director of Center for Petroleum and Energy Economic Studies, geologically, based on theory of correlation, the existence of hydrocarbon energy correlates to the pattern of the Pacific Ring of Fire. If the pattern of this Ring of Fire is drawn farther from Natuna to the north, it will go through Senkaku/Diaoyu Islands and about and farther onto Siberia (Sanjoyo, 2012). As one of the biggest energy consumer in the world, China would not hold peace and certainly would take such actions as it deems necessary regarding this discovery to safeguard its energy security in the future.

On the other hand, Japan is in an awful condition after the 2011 earthquake. Japan was forced to shut down all their nuclear power plants, making the falling of

their economy up to 5%. Furthermore, Japan still has to import their oil and food from other countries (Amadeo, 2012). These facts impose big demands on Japan to find its own energy resources, which could be answered by claiming Senkaku/Diaoyu Islands.

The rich fishery resources around Senkaku/Diaoyu Islands also becomes the background of the disputing parties' claims. Fishery plays a major role in the economies of Japan, China and Taiwan. This is shown by statistical data released by the Food and Agriculture Organization (FAO) in Rome, Italy, in 2012. The data demonstrates that fishery production in China within the year of 2010 reached up to 14.8 million tons with the cultivation of up to 32.7 tons or 62.3% of world fishery production and cultivation. Whereas, the fishery consumption attained 42.8 million tons or 81% from the production and cultivation (Suhartono, 2012). Although fishery activity is not the main issue in this dispute, Chinese fishing activities around the islands have been invoked several times by China as grounds for claims over Senkaku/Diaoyu Islands.

Nationalist sentiment of Japan and China also has significance in this dispute. Due to the different interpretation of the history of both countries, neither China nor Japan are willing to give in and sacrifice or share the uninhabited islands. China believes that Japan has occupied Senkaku/Diaoyu Islands illegally pursuant acts from the Sino-Japanese War. The Japanese action was considered as a humiliation to China. This situation was exacerbated when Japan announced that they had bought islets in the Senkaku/Diaoyu Islands early September 2012. The wave of anti-Japanese demonstrations in China was no longer avoidable. The demonstrators have attacked stores and manufacturers owned

by Japanese citizens. Even big manufacturers such as Panasonic, Canon, Honda, Nissan and Toyota were forced to shut down their factories in China and halted their production for several days (Nance, 2012).

### 3. United Nations Convention on the Law of the Sea (UNCLOS) 1982 Regulation on Senkaku/Diaoyu Islands Dispute

In spite of nationalist and economic issues in the Senkaku/Diaoyu Islands dispute, this article will try to analyze the problem from an international law of the sea point of view about overlapping claims through the *United Nations Convention on the Law of the Sea (UNCLOS) 1982* as its instrument.

After a long process of negotiations, the final result of international law making was impressive. UNCLOS 1982 is not only a codification of the international law of the sea that has progressively developed, forming a constitution for the oceans, but it also shaped an integral normative system, complete with compulsory dispute settlement mechanism with its own judicial forum (Gavouneli, 2007).

Disputes regarding overlapping claims over maritime territory are governed under UNCLOS 1982. This international convention is applicable in Senkaku/Diaoyu Islands disputes as both Japan and China have ratified the convention.<sup>12</sup>

Senkaku/Diaoyu Islands are located 120 nautical miles from Taiwan, 200 nautical miles from China and 240 nautical miles from Okinawa, Japan (Mrosovsky, 2008). With this, UNCLOS 1982 recognizes a regime called *Exclusive*

*Economic Zone (EEZ)* which bestows the sovereign right for the Coastal States upon natural resources and other economical activities, as well as jurisdiction concerning any kind of installation, marine scientific research and the protection and the preservation of the marine environment. Moreover, pursuant to Article 121 (II) UNCLOS 1982, islands might be furnished with State right of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. Even a remote islet can be used to determine the exclusive economic zone of a State.

Further, the sovereign rights regulated under the exclusive economic zone regime, is also regulated under Part VI of UNCLOS 1982 concerning the continental shelf. If the concept of the exclusive economic zone and the continental shelf are in one unity, hence problems upon determination of the exclusive economic zones relevant to the continental shelves will emerge (Anwar, 1995). This complicates cases of maritime jurisdictional delimitation where the coasts of States are opposite or adjacent to each other.

Basically, there are two methods of maritime zone delimitation. The first method is median line or equidistance method. In this method, an imaginary line is drawn congruently with the same length from the nearest points of the baselines from which the breadth of the territorial sea of each of the States is measured thus constructing an equidistance line (Kusumaatmadja, 1986). This principle applies on the delimitation of the territorial sea, the contiguous zone, the continental shelf or the border of neighboring States.

The second method is delimitation based on equity. This method looks holistically at the various needed factors to settle a dispute in a fair and satisfying manner (Anwar, 1995).

<sup>12</sup> On the chronological list of ratification of the *United Nations Convention on the Law of the Sea (UNCLOS) 1982*, Japan and China had ratified the convention in 1996.

In the case of maritime boundary claims, Article 83 (1) of UNCLOS 1982 stipulates how “[t]he delimitation of the continental shelf between States with adjacent or opposite coasts shall be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” In line with the given article, Article 74 (1) of UNCLOS 1982 rule that “[t]he delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law. As referred to in Art. 38 of the Statute of International Court of Justice, in order to achieve an equitable solution.” Meaning, in order to settle the claims over Senkaku/Diaoyu Islands, Japan, China and Taiwan must first discuss and negotiate amongst themselves, under the terms of ‘equity’ and ‘efficiency’ pursuant to UNCLOS 1982, to accomplish the aim of the construction of the law of the sea in its relation with the exploration of natural resources (Anwar, 1995).

In the absence of an agreement, as is the case between Japan, China and Taiwan, the use of equidistance method or median line is obligatory. Unfortunately, in practice, this method is not always as easy as its theory. Often, this method delivers inequity for one of the parties.

#### **4. Seeking for Peaceful and Effective Solution for the Disputes over Senkaku/Diaoyu Islands**

In line with the spirit indulged by the United Nations, disputes settlements through war and by force are not recommended.<sup>13</sup> This shall apply too in the Senkaku/Diaoyu Islands disputes.

One of the legal means that the parties in disputes might consider is third-party dispute settlement such as arbitration or adjudication through the International Court of Justice. This was done by the United States and the Netherlands in 1931 in the *Islands of Palma Case*, by France and Mexico in 1932 in the *Clipperton Island Case* and by El Salvador and Honduras in the *Minquiers and Ecrehos Case* which were similar to the Senkaku/Diaoyu Islands disputes.

If the disputing parties have agreed to settle the dispute with the help of third party, then each party must be ready to prepare all the data and arguments to support their claims. This preparation might appear complicated as Senkaku/Diaoyu Islands are uninhabited. Consequently, both parties could not provide testimony or witness to the *effectivité* principle, as was the case in *Sipadan-Ligitan (Malaysia v Indonesia)*. Such principle however, could be proven by learning the cultures developed within the inhabitants.

Nevertheless, the precedence from the mentioned cases shows how the claims could be supported by proofing the parties’ practices in exercising its sovereignty in peaceful means continuously. Additionally, acquiescence by the other parties could also determine the sovereignty. Based on the history, China was the first one to discover the Diaoyu Islands. However, Japan peacefully and continuously exercised its sovereignty over the Senkaku Islands. Since 1895, Japan had erected a marker in the islands and routinely patrolled the islands. Japan also erected a lighthouse and built a helicopter port. This might allow Japan to prove its

<sup>13</sup> The recommendation to settle the disputes peacefully is ruled under Article (2) (3) of the

United Nations Charter which stipulate, “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

claims, since as a matter of fact, China had never demonstrated its protests against Japan's actions in the islands and hence could be considered to have acquiesced to Japan's sovereignty over Senkaku/Diaoyu Islands.

Furthermore, although the disputes of the Senkaku/Diaoyu Islands are of legal disputes, in its settlement, other non-juridical aspects are decisive as well, as stated in the Resolution No. 1105 (XI) (Kusumaatmadja, 1986). As discussed above, the Senkaku/Diaoyu Islands dispute is burdened with economic, political and nationalist issues from each party. Such non-juridical aspects should be considered, discussed and examined factually in settling the disputes.<sup>14</sup>

The dispute settlement through the International Court of Justice or arbitration seems unpopular with the parties. The win-lose solution might cause further problem in their economical and social relations. The most concrete means to be suggested is by inviting Japan, China and Taiwan to sit in a table and formulate a *joint-agreement*.

Learning from the United Kingdom and Argentina, the formulation of a joint-agreement between Japan, China and Taiwan is not unfeasible. In 1995, the United Kingdom and Argentina consented to the *Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic*. This agreement enabled the creation of a special area for the exploration and exploitation of hydrocarbon resources by offshore industry. Both parties agreed to conduct the exploration and exploitation with the commercial principle of good faith.<sup>15</sup> This

agreement offered a more equitable and profitable solution for all parties.

In fact, in 2008, Japan and China did come to a joint agreement to explore four areas rich in gas energy resources in East China Sea. Furthermore, they have also agreed to halt any development in the disputed area. Both parties had even consented to conduct a cooperative survey with balanced investment in the northern Chunxiao/Shirakaba and southern Logjing/Asunaro, East China Sea. Unfortunately, China started to explore the oil-rich area in Tianwaitan/Kashi unilaterally. This has provoked protests on behalf of Japan during January 2009 until early 2010 (US Department of Energy, 2012).

China's action was truly regrettable. If only China had acted as per the agreement, the joint agreement on the management of natural resources in Senkaku/Diaoyu Islands might have been accomplished today. The peaceful means through joint agreement surely will give a win-win solution particularly for the disputing parties, and generally for other parties who either directly or indirectly get the impact of the disputes.

Albeit the disputes are still drawn-out until today, the authors do hope that a peaceful solution will be realized in the near future. The Japanese Ministry of Foreign Affairs (2012) once documented Deng Xiaoping's comment on the disputes in Senkaku/Diaoyu Islands on 25 October 1978,

“[c]ertainly there are differences of opinion between us on this issue, but when we normalized diplomatic relations between our two countries, both parties promised to leave the issue aside. Even if this means the issue is temporarily shelved, I don't think I mind. I don't mind if it's shelved for ten years. The

<sup>14</sup>See Mochtar Kusumaatmadja, *Hukum Laut Internasional*, Bina Cipta Publisher: Bandung, 1986, on page 115.

<sup>15</sup> See Article 2 *Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic*, 27 September 1995. Available at <http://www.falklands.info/history/95agree.html>

people of our generation don't have sufficient wisdom to settle this discussion, but the people of the next generation will probably be wiser than us. At that time, a solution that everyone can agree on will probably be found."(MOFA).

### C. CONCLUSION

The disputes between Japan, China and Taiwan in the East China Sea is a dispute of maritime boundaries and overlapping sovereignty. The *United Nations Convention on the Law of the Sea* (UNCLOS) 1982 is one of international law

of the sea's instrument which accommodates such disputes. However, because other non-judicial aspects such as economic and nationalism factors has mired the dispute, there has been no solution or settlement for the parties until today.

One of the most concrete and peaceful solution feasible for the disputing parties is to formulate a joint agreement on the management of natural resources in Senkaku/Diaoyu Islands. If such agreement were accomplished, it would be beneficial not only for the disputing parties but also other parties related to East China Sea.

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