Overlapping Maritime Claims in the East China Sea between China and Japan: More than meets the eye?

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Abstract

Towards the end of the 20th century observers noticed that Japan began seeking a prominent role on the global stage for political and security issues; and particularly in East Asia, fuelled in part by a new crop of Japanese leadership feeling more assured of the need for Japan to have a more strategic voice in international affairs. Indeed, some analysts considered the setbacks Japan suffered during the early 1990s as somewhat temporary. And it should be remembered that eminent scholars considered the economic meltdown experienced by Japan and East Asia at the time threatened the global economy. Against this backdrop are views that China remains on a quest to dominate Asia the way the United States dominates the Western Hemisphere, and that this has intensified since the early days of the 21st Century. Yet, some writers have sought to downplay such perception of China by arguing that rise of China, in so far as Japan is concerned, is more of an intellectual challenge rather than a strategic threat.

In the contemporary world order, it is said that global hegemony, even by the United States is impossible, and that at best a State may eventually only dominate its own backyard. Whether China and Japan are seeking to outdo one another may be open to question. Nevertheless, observers consider that China currently seeks a stable security environment to enable focus on economic advancement, to better integrate with the regional and global economy.

At the heart of maritime issues between China and Japan are their overlapping maritime claims in the East China Sea, with fledgling results from efforts between both States to resolve the matter. These competing claims, permeate discussion in this article. The merits of either claim do not, however, form the focus of discussion. Instead, what follows is a brief review on how these two States have responded to the problem, and some broader questions for public international law and international relations flowing from their actions.

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Analysis

How overlapping maritime claims between China and Japan in the East China Sea complicate peace and stability there

Overlapping maritime claims between China and Japan in the East China Sea has been a longstanding issue between the two States. Merits of the respective claims,\textsuperscript{11} bearing in mind the contrasting principles adopted by China and Japan,\textsuperscript{12} are complicated by the presence of the Okinawa Trough in the East China Sea.\textsuperscript{13} Underlying the complications – further delaying prospects for delimitation – are competing claims in the area for territorial sovereignty.\textsuperscript{14} While China and Japan have reached some form of understanding on their overlapping maritime claims in the East China Sea,\textsuperscript{15} both States have yet to delimit their maritime boundaries there.

The above problems between the two States reached a new high recently. When Japan released its annual defence White Paper,\textsuperscript{16} Japan made plain its views on the construction and development by China of offshore platforms and other facilities in the East China Sea: “Japan has repeatedly lodged protests against China’s unilateral development [of offshore platforms and other facilities] and demanded the termination of such works ...”.\textsuperscript{17} Japan acknowledges the works in issue have occurred on the Chinese side of a Japan-China median line,\textsuperscript{18} although China does not recognise the median line drawn by Japan.\textsuperscript{19} The White Paper came hot on the heels of widely reported recent activities by China in the area.\textsuperscript{20} In maintaining that the actions complained off are justified and legitimate,\textsuperscript{21} China further considered its actions were carried out in undisputed waters and within its sovereign rights and jurisdiction.\textsuperscript{22}

Why a solution for the overlapping maritime claims is imperative for stability of maritime boundaries in the East China Sea: Unilateral vs Joint action

China and Japan arguably acknowledge that oil and gas deposits may well lie across or straddle an eventual line dividing their continental shelf,\textsuperscript{23} despite remaining at loggerheads on where precisely that line should be drawn. Is this a scenario to apply the prior appropriation rule – where the first to undertake extraction has the right to exploit the whole deposit – a rule that has been considered a counterpart in international law to the rule of capture?\textsuperscript{24} Or would conservation principles better address the mutual interests of both States?\textsuperscript{25} One immediate problem with capture of the natural resource of oil and gas is this: the concept of capture, say in this instance by China, cannot be separated from offset drilling by, in this instance, Japan; as offset drilling is triggered by a competitive spirit to acquire natural resource through capture too.\textsuperscript{26} Indeed, where the natural resource of fisheries is concerned, international law has progressed much farther including having a legal framework in place specifically addressing issues on migratory fish stocks.\textsuperscript{27}

The understanding reached between China and Japan in 2008 suggests that both States seek peace and stability in the area. However, less clear is whether both States are prepared to share power in the East China Sea. Indeed, considering their conduct – both before and since the understanding in 2008 – some observers suggest that both States are jostling for supremacy in the area and that their relations with external powers are likely to shape their future conduct in the East China Sea.\textsuperscript{28} Still, whether their common economic and security interests will prevail over power balancing overtures remains open to question; with observers further suggesting that historical animosity between the two States are likely to preclude moderation in their bilateral relations.\textsuperscript{29}
forecast however has not stopped other writers from continuing to argue that China remains on a peaceful rise and that its ambitions, not only do not coincide but instead vary greatly, with traditional notions of patterns in power behaviour.  

**Conclusion: What lessons may be learnt**

Observers of the ‘China threat’ theory contend that, on balance, the theory is as misleading as it is counterproductive, while cautioning that even if China were a benign power, if pushed, China may well militarise its intentions thereby enhancing tensions, and ultimately making the ‘China threat’ theory a self-fulfilling prophecy. For Japan, on its part it appears to seek a balance between its growing ambitions to assert maritime jurisdiction in the East China Sea with a desire to avoid conflict with China; albeit some consider this situation to be driven primarily by a domestic scenario that is at odds on what would be best for Japan. It should also be mentioned that views exist suggesting that China is seeking a maritime renaissance, in which case as one author aptly put it, it remains to be seen whether East Asia, and it is submitted in particular the East China Sea, can accommodate two great maritime powers. Complicating an already difficult situation in the overlapping maritime claims between China and Japan in the East China Sea are claims by China to certain military exclusion zones and special fishery zones.

Complexities in reaching agreement for a line delimiting maritime boundaries should not be underestimated. Even if a delimitation line is drawn there may still remain an area of overlap, as observed by the ICJ in the *North Sea Continental Shelf cases*, and more recently by ITLOS in the *Bay of Bengal case*. In such circumstances, which under contemporary international law may well arise whether in the East China Sea or South China Sea, the issue of overlapping maritime claims between China and Japan in the East China Sea bear several lessons for States with overlapping maritime claims, including for example for the relevant States bordering the South China Sea:

- States should reflect on the wisdom from the jurisprudence: that where delimitation were to still leave an area of overlap, it would be for the States *themselves* to determine the best way of dealing with any remaining area of overlap, especially to optimise exploration and exploitation of resources that may be found therein, a point echoed more recently in 2012 concerning similar circumstances faced by Bangladesh and Myanmar in the Bay of Bengal.

- For the immediate term, it may be useful for the States in the South China Sea to assess whether China and Japan have moved forward in the quest for a solution to their overlapping maritime claims – through their understanding reached in 2008 – mindful that both States adhere to opposing principles of maritime delimitation;

- For the longer term, the same States in the South China Sea should monitor whether the exploration activities by China in the East China Sea will proceed to exploitation of the oil and gas resources. If such exploitation does occur it would be interesting to understand both the basis on which such exploitation occurs and the applicable legal framework.

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**Remarks:** Opinions expressed in this contribution are those of the author.
About the Author of this Issue

Dr Rizal Abdul Kadir is currently working with a government agency of Malaysia as the Deputy Director General of the Maritime Institute of Malaysia (‘MIMA’). He previously worked with a multinational oil and gas company, legal private practice, and for a brief period as a Research Fellow at MIMA, at various intervals since graduating in 1992.

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(hereinafter 'China Statement').


See generally eg Vilisaar, above n9.


See eg China Statement, above n19, paragraph 1. By virtue of the Principled Consensus 2008, see eg Jianjun-2009, above n16; and consider also China Statement, above n3, paragraph 3.


See eg Hardwicke, R. E. (1934-35). The Rule of Capture and its Implications as Applied to Oil and Gas. Texas Law Review, No.XIII (No.4), 391-422 at p393 et seq.


29 Odgaard, above n28, 115, 127 et seq.
32 See Al-Rodhan, above n31, 64.
34 See eg Manicom, above n33, pp317-8.
36 See eg Manicom, above n33, p325.
38 See North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark;Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3 (‘North Sea cases’, para.,[99].
39 Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) ITLOS Case No.16, 2012 (‘Bay of Bengal’), [463],[464],[471],[472].
40 See generally North Sea cases, above n38, para.,[99] and para.,[101](C)(2).
41 See Bay of Bengal, above n39, [471],[472].