



## **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 20<sup>th</sup> 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.<sup>1</sup> Indeed, some analysts considered the setbacks Japan suffered during the early 1990s as somewhat temporary.<sup>2</sup> 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.<sup>3</sup> 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 21<sup>st</sup> Century.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Whether China and Japan are seeking to outdo one another may be open to question.<sup>7</sup> 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.<sup>8</sup>

At the heart of maritime issues between China and Japan are their overlapping maritime claims in the East China Sea,<sup>9</sup> with fledgling results from efforts between both States to resolve the matter.<sup>10</sup> 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,<sup>11</sup> bearing in mind the contrasting principles adopted by China and Japan,<sup>12</sup> are complicated by the presence of the Okinawa Trough in the East China Sea.<sup>13</sup> Underlying the complications – further delaying prospects for delimitation – are competing claims in the area for territorial sovereignty.<sup>14</sup> While China and Japan have reached some form of understanding on their overlapping maritime claims in the East China Sea,<sup>15</sup> 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,<sup>16</sup> 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 ...*”.<sup>17</sup> Japan acknowledges the works in issue have occurred on the Chinese side of a Japan-China median line,<sup>18</sup> although China does not recognise the median line drawn by Japan.<sup>19</sup> The White Paper came hot on the heels of widely reported recent activities by China in the area.<sup>20</sup> In maintaining that the actions complained off are justified and legitimate,<sup>21</sup> China further considered its actions were carried out in undisputed waters and within its sovereign rights and jurisdiction.<sup>22</sup>

### 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,<sup>23</sup> 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?<sup>24</sup> Or would conservation principles better address the mutual interests of both States?<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> Such



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.<sup>30</sup>

### **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,<sup>31</sup> 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.<sup>32</sup> 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;<sup>33</sup> albeit some consider this situation to be driven primarily by a domestic scenario that is at odds on what would be best for Japan.<sup>34</sup> It should also be mentioned that views exist suggesting that China is seeking a maritime renaissance,<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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*,<sup>38</sup> and more recently by ITLOS in the *Bay of Bengal case*.<sup>39</sup> 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,<sup>40</sup> a point echoed more recently in 2012 concerning similar circumstances faced by Bangladesh and Myanmar in the Bay of Bengal.<sup>41</sup>
- 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

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- <sup>1</sup> Green, M. J. and K. Furukawa (2000). "New Ambitions, Old Obstacles: Japan And Its Search for an Arms Control Strategy." *Arms Control Today* 30(6), (July-August): 17-24, 17 *et seq.*
- <sup>2</sup> Brown, R. H. (2007). "Will Japan Become a Global Power?" *Asian Journal of Social Science* 35(3): 340-351, 340.
- <sup>3</sup> Thurow, L. C. (2000). "Globalization: The Product of a Knowledge-Based Economy." *The Annals of the American Academy of Political and Social Science* 570: 19-31, 23.
- <sup>4</sup> See Mearsheimer, J. J. (2005). "Better to Be Godzilla than Bambi." *Foreign Policy* 146(Jan-Feb): 47-48 ('Mearsheimer'), 48 *et seq.*
- <sup>5</sup> See eg Shih, C.-y. (2011). "A Rising Unknown: Rediscovering China in Japan's East Asia." *China Review* 11(1): 1-26.
- <sup>6</sup> See Mearsheimer, above n4, 48.
- <sup>7</sup> See eg Hagström, L. and B. Jerdén (2010, December). "Understanding Fluctuations in Sino-Japanese Relations: To Politicize or to De-politicize the China Issue in the Japanese Diet." *Pacific Affairs* 83(4): 719-739.
- <sup>8</sup> See views in eg Deng, Y. (1998). "The Tree Prefers Calm, But the Wind Does Not Stop": China's Search for National Security." *China Review*: 61-82, 62; although for a critical evaluation of such generally agreed position see eg Chen, M. (2005). "Going Global: The Chinese Elite's Views of Security Strategy in the 1990s." *Asian Perspective* 29(2): 133-177, esp 141 *et seq.*
- <sup>9</sup> See eg Vilisaar, M. (2010). "Sino-Japanese Maritime Jurisdictional Disputes in the East China Sea." *Acta Societatis Martensis* 4: 229 ('Vilisaar').
- <sup>10</sup> See eg Zhang, X. (2011). "Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation." *Ocean Development & International Law* 42(1): 53-65.
- <sup>11</sup> See generally eg Vilisaar, above n9.
- <sup>12</sup> See eg Jianjun, G. (2008). Joint Development in the East China Sea: Not an Easier Challenge than Delimitation. *The International Journal of Marine and Coastal Law*, 23, 39-75; Royer, K. F. (1989). Japan's East China Sea Ocean Boundaries: What Solutions Can a Confused Legal Environment Provide in a Complex Boundary Disputes? *Vanderbilt Journal of Transnational Law*, 22, 581-630.
- <sup>13</sup> See eg Jianjun, G. (2010). The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea. *Chinese Journal of International Law*, 9, 143-177; Cf. Letouzey, J., & Kimura, M. (1986). The Okinawa Trough: Genesis of a Back-Arc Basin Developing Along A Continental Margin *Tectonophysics*, 125, 209-230.
- <sup>14</sup> See further eg Ozaki, S. (2010). Territorial Issues on the East China Sea: A Japanese Position. *Journal of East Asia and International Law*, 3, 151-174 (hereinafter 'Ozaki'); Wu, H., & Zhang, D. (2010). Territorial Issues on the East China Sea - A Chinese Position. *Journal of East Asia and International Law*, 3, 137-149.
- <sup>15</sup> For further background on this, see eg Jianjun, G. (2009). A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea. *Ocean Development & International Law*, 40(3), 291-303 (hereinafter 'Jianjun-2009').
- <sup>16</sup> See Ministry of Defence, Japan, Defence of Japan 2015. [http://www.mod.go.jp/e/publ/w\\_paper/2015.html](http://www.mod.go.jp/e/publ/w_paper/2015.html) (accessed 3 Dec 2015).
- <sup>17</sup> Ibid, Digest Part I, Security Environment of Japan at p.5.
- <sup>18</sup> See eg Ibid.
- <sup>19</sup> See eg Ministry of Foreign Affairs, People's Republic of China, (2015). 'China's Oil and Gas Development in the East China Sea is Justified and Legitimate', via [http://www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1284278.shtml](http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1284278.shtml) (accessed 3 Dec 2015) (hereinafter 'China Statement').
- <sup>20</sup> See eg FlorCruz, M. (2015). 'East China Sea Territorial Dispute: Japan Resurfaces Protests Over China Gas Facility', *International Business Times*, via <http://www.ibtimes.com/east-china-sea-territorial-dispute-japan-resurfaces-protests-over-china-gas-facility-1996862> (accessed 3 Dec 2015); Editor, A. T. (2015). 'China says it has every right to drill in East China Sea', *Asia Times*, via <http://atimes.com/2015/07/us-not-neutral-in-south-china-sea-disputes-top-us-diplomat/> (accessed 3 Dec 2015).
- <sup>21</sup> See eg China Statement, above n19, opening paragraph.
- <sup>22</sup> See eg China Statement, above n19, paragraph 1.
- <sup>23</sup> By virtue of the Principled Consensus 2008, see eg Jianjun-2009, above n16; and consider also China Statement, above n19, paragraph 3.
- <sup>24</sup> See eg Crommelin, M. (1986). The US Rule of Capture: Its Place in Australia. *AMPLA Yearbook*, 264-281 at p276; Lagoni, R. (1979). Oil and Gas Deposits Across National Frontiers. *AJIL*, 73, 215-243, at p219.
- <sup>25</sup> See eg Nliam, S. O. (2014). International Oil And Gas Environmental Legal Framework And The Precautionary Principle: The Implications For The Niger Delta. *Afr. J. Int'l & Comp. L.* 22, 22: 22-39.
- <sup>26</sup> 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.*
- <sup>27</sup> See eg *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature Dec. 4, 1995, 2167 UNTS 3 (entered into force 11 December 2001).
- <sup>28</sup> See generally eg Odgaard, L. (2002). "Perception, Pragmatism, And Political Will: Maritime Disputes And Balances Of Power In The Asia-Pacific" *Asian Perspective* 26(4) Special Issue on China-ASEAN Relations: 113-143 ('Odgaard').



<sup>29</sup> Odgaard, above n28, 115, 127 *et seq.*

<sup>30</sup> See generally eg Yang, S.-y. (Fall 2013). "Power Transition, Balance of Power, and the Rise of China: A Theoretical Reflection about Rising Great Powers." *China Review* **13**(2): 35-66.

<sup>31</sup> For a review of opposing viewpoints see eg Al-Rodhan, K. R. (2007). "A Critique of The China Threat Theory: A Systematic Analysis." *Asian Perspective* **31**(3): 41-66 ('*Al-Rodhan*'), 63.

<sup>32</sup> See Al-Rodhan, above n31, 64.

<sup>33</sup> See remark in Manicom, J. (2010). "Japan's Ocean Policy: Still the Reactive State?" *Pacific Affairs* **83**(2): 307-326 ('*Manicom*'), 325 *et seq.*

<sup>34</sup> See eg Manicom, above n33, pp317-8.

<sup>35</sup> See eg Dooley, H. J. (2012 Spring/Summer). "The Great Leap Outward: China's Maritime Renaissance." *The Journal of East Asian Affairs* **26**(1): 53-76.

<sup>36</sup> See eg Manicom, above n33, p325.

<sup>37</sup> See esp Charney, J. I. (1995). "Central East Asian Maritime Boundaries and the Law of the Sea." *AJIL* **89**: 724-49, 743 *et seq.*

<sup>38</sup> 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]).

<sup>39</sup> *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].

<sup>40</sup> See generally *North Sea cases*, above n38, para.[99] and para.[101](C)(2).

<sup>41</sup> See *Bay of Bengal*, above n39, [471],[472].