

Japan needs to reassess its legal position on claims in the East China Sea, write **Jerome A. Cohen** and **Jon M. Van Dyke**

# Lines of latitude

Japan's arrest in September of a Chinese fishing captain within the 12-nautical-mile territorial sea surrounding the Diaoyu-Senkaku Islands – five tiny islets and three barren rocks northeast of Taiwan – has again inflamed relations between the two great East Asian powers. These remote features, with a total land area under seven square kilometres, have proved incapable of sustaining human habitation. They have little intrinsic importance apart from their considerable ability to arouse nationalist passions. Yet, since Japan, which controls them, insists that the islets are entitled not merely to a territorial sea but also to a vast exclusive economic zone (EEZ) and part of the adjacent continental shelf, the sovereignty issue has become linked to the major challenge of drawing fair national maritime boundaries in the East China Sea.

China's claim to the islets is based on the "discovery" of unclaimed territory and derives from a range of Chinese governmental contacts and references going back to 1372. Japan's claim is also based on the "discovery" of supposedly

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unclaimed territory, despite the fact that official Japanese documents, several of which were unearthed by Taiwan scholar Han-yi Shaw, demonstrate that the Japanese government was well aware of China's historic claim when it began to take an interest in the islets in 1885. During the subsequent decade, contrary to the assertions now made by Japan, its officials not only failed to complete surveys of the islets necessary to confirm their alleged unclaimed status, but also recognised that the matter "would need to involve negotiations with Qing China". To avoid China's suspicion, Japan chose to conceal its intention to occupy the islets "until a more appropriate time". That time came in January 1895, when Japan, by then on its way to defeating China in their 1894-95 war, adopted a Cabinet decision that the islets were Japanese territory. Yet even that Cabinet decision was not made public until after the second world war.

China maintains that the islets passed

to Japan not by virtue of the unilateral, secret Cabinet decision but together with Taiwan and other unmentioned pertinent islands under the 1895 peace treaty of Shimonoseki. Therefore, Beijing argues, they should have been returned to China together with Taiwan and other pertinent islands after the second world war instead of falling under temporary American administration, as Okinawa did.

Japan points out that neither Chiang Kai-shek's Republic of China nor Mao Zedong's (毛澤東) People's Republic of China protested at the post-war placing of the islets under American administration, although the PRC did reject the entire post-war treaty settlement, from which it had been excluded.

After a 1968 UN survey reported the huge oil and gas potential of the area near the islets, both competing Chinese governments began to protest against the scheduled 1972 US return of the islets to Japanese control, even though the US took no position on their ultimate ownership. Today, now that the PRC has "risen", and the legal status of the islets remains unresolved, failure to settle this territorial dispute has begun to threaten not only the area's development of petroleum resources and fisheries but also its peace and security.

Neither China nor Japan has accepted the recent American offer to "host" a discussion of the dispute. China wants the US to keep out of all its sea boundary problems, as it has already made clear regarding the South China Sea. To China, American involvement in the East China Sea seems even more inappropriate, since the US, although professedly neutral on the territorial question, has nevertheless infuriated China by reaffirming that, being administered by Japan, the islets are protected by the 1960 US-Japan Security Treaty.

Although Japan generally values American support to balance China's growing power, it cannot welcome the US offer to enter the islet dispute, since Japan takes the ludicrous position that there is no dispute. Moreover, if the US were to become an impartial mediator, it would have to note that Japan's claim to sovereignty over the islets is based on a distorted version of late-19th-century history that does not pass the international smell test.

A mediator would also remind Japan – as China frequently has – that, under Article 121(3) of the UN Convention on the Law of the Sea, decisions of the International Court of Justice and



international practice, these tiny, uninhabited spits of land that cannot sustain economic life on their own are not entitled to the 200-nautical-mile EEZ and resources of the adjacent continental shelf enjoyed by genuine "islands".

It is time for Japan to reassess its views on the international law of the sea. Those of its views that are plainly irresponsible only discredit others that deserve serious consideration. Perhaps most insulting to the world community is its claim that the rock called Okinotorishima that constitutes Japan's southernmost "land", a reef system with land at high tide no larger than a king-sized bed, is entitled to an EEZ and continental shelf.

If Japan wants to peacefully settle its East China Sea boundaries with China, it should also abandon its unpersuasive claim that the Diaoyu-Senkaku are entitled to an EEZ and continental shelf. Their ownership would thus become much less important and could be temporarily set aside. Then the parties could continue negotiations to reconcile China's claim to control the economic resources of its vast continental shelf with Japan's endorsement of the widely accepted principle of drawing equidistant EEZ

boundaries between neighbouring coasts. Even before completing the complex details of a boundary agreement, they can also implement their long-pending plans to jointly develop petroleum resources in disputed areas.

To avoid future clashes over the Diaoyu-Senkaku, the parties should establish some co-ordinating mechanisms, including a hotline like the one China suggested to Vietnam. Although neither side is enthusiastic about international adjudication, to divert domestic nationalist passions into constructive channels, they should display enough confidence in their legal positions to refer the territorial sovereignty dispute to the International Court of Justice, the International Tribunal for the Law of the Sea or an agreed arbitration panel. Further dithering is dangerous and unproductive.

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