

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

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# Japanese-Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

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Further Note- an update relating to the 18 June 2008 agreement can be found at

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## Japanese-Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation

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### **Introduction**

The management of the Japanese-Chinese relationship has huge implications for the process of accommodating China's rise as a political, economic and military power, and this process will exert great influence on regional as well as international stability (Drifte 2003). In this context, the modalities of addressing the Japanese-Chinese territorial conflicts in the East China Sea (referred to in Chinese as 'East Sea' or 'Donghai') will have repercussions for the solution of other territorial conflicts which China has (notably in the South China Sea), and provide important clues about China's military power and how it may use this power. Moreover given the strategic location of the East China Sea (ECS), the outcome of the disputes will also have an impact on how China may address the Taiwan issue. Additionally, in view of the energy aspects of the Japanese-Chinese territorial disputes, we can gain insights into the potential as well as the limits, of economic interest-based approaches to guide China towards becoming a peaceful regional and global stakeholder.

After initially managing to keep under wraps the dispute over the sovereignty of the Senkaku Islands (called 'Diaoyudao' in the People's Republic of China, and 'Diaoyutai' in Taiwan) and also the later dispute over the delimitation of the maritime border in the ECS– with the exception of occasional incidents – changed circumstances within the last few years have forced Japan and China to face the disputes squarely, and to come to some kind of agreement to avoid a confrontation which could possibly even degenerate into military clashes. From the beginning, the Japanese claimed that there was no territorial issue concerning the ownership of the Senkaku Islands, while the Chinese proposed to set aside the sovereignty dispute (albeit leaving no doubt about its own legal claim to the islands) and to engage in 'joint development' of the area's hydrocarbon resources. Concerning the maritime border in the ECS, neither side has so far backed down from its own fundamental approach of how to delineate this border. While the Japanese government had attempted to placate the Chinese by abstaining from even surveying the hydrocarbon resources in the disputed area, this holding tactic became unsustainable in the face of China's relentless exploration of the area, to the point of now extracting gas and oil in the immediate vicinity of Japan's proposed maritime border.

However, since the beginning of the 21st century, the political and security environment has changed considerably which makes a solution of the disputes simultaneously more difficult and more urgent. In Japan, the more accommodating attitude of the Ministry of Foreign Affairs (MOFA) has given way to much more public scrutiny of Japanese-Chinese relations and suspicions about Chinese political, military and economic intentions. On the Chinese side, the importance of the ECS has risen because of China's need for energy, its progress in exploring and now extracting oil and gas in the ECS, and its desire to secure free access to the Pacific Ocean in the face of an ongoing strengthening of Japanese-American military cooperation. China is now much more able, as well as willing, to deploy its growing navy to protect its existing oil and gas platforms, and to secure a safe passage to the Pacific Ocean. The latter consideration has most likely also prompted China, since April 2004, to dispute Japan's claim to an Exclusive Economic Zone (EEZ) around the Okinotori Islands in the Pacific Ocean. Moreover, bilateral tensions have been increasing since the middle of the 1990s, notably as a result of the history issue and the rise of nationalism in both countries. Against this complex background there is an increasing possibility of a military incident.

This paper analyses the various legal, political, military and economic circumstances of the two territorial disputes in the ECS, and it evaluates the approaches by both sides to turn the ECS from a `sea of confrontation` to a `sea of peace and cooperation`. At long last Japan and China have agreed in principle to an economic interest-based approach and to jointly develop the hydrocarbon resources by setting aside the sovereignty and border delimitation issues. As part of this approach, Japan is offering China desperately-needed advanced technology for a more effective use of energy. However, this paper argues that China's exploration efforts as close as 5 km from the Japan-proposed maritime border have created political and economic *faits accomplis* which are difficult to circumvent while the unequal distribution of the economic stakes (i.e. China's advance in exploiting the hydrocarbons of the ECS) puts a greater onus on Japan to achieve a compromise. As a result, an overall better political climate which would also have to be more sustainable, is a necessary precondition to concluding an economic interest-based agreement, and so prevent an escalation of the territorial disputes.

## **1. Legal aspects**

The two disputes in the ECS revolve around the sovereignty over the Senkaku Islands and the way the maritime border between Japan and China in the ECS should be drawn. Both disputes are considered by most observers to be interlinked, which complicates a compromise. For the sake of space, the position of Taiwan - which is partly congruent with that of the People's Republic of China (PRC) - is left out in the following overview.

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

a. Disputed sovereignty over the Senkaku Islands (Diaoyudao)

The Senkaku Islands (*circa* 7 square kilometers) consist of five uninhabited islets and three barren rocks, located approximately 120 nautical miles southwest of Okinawa. They are situated at the edge of the ECS's continental shelf fronting the Okinawa Trough to the south. The depth of the surrounding waters is about 100-150 meters, with the exception of a deep trough in the continental shelf just south and east of the islands, that separates them from the Ryukyu Islands (Valencia 2007, p. 151).

Japan claims that it incorporated the islands as *terra nullius* (vacant territory) in January 1895, having discovered it ten years before. The authorities of imperial China, republican China and, until 1970, the PRC did not dispute Japan's ownership. In January 1895, the Sino-Japanese War had turned in Japan's favour, but the acquisition of the Senkaku Islands cannot be linked in a legal sense to Japan acquiring Taiwan in the Peace Treaty of Shimonoseki, which was concluded in April of 1895. However, the acquisition of the Senkaku Islands occurred after ten years of hesitation by the Japanese government in view of possible negative Chinese reactions, and the decision was not conveyed to other countries at the time, but made public only in 1952 (Urano 2005, 123 ff; Su 2005, p. 54; Okuhara 1971, p. 98; Zhou Jian 1991, p. 233). The difference between China's official interest in the Senkaku Islands and that shown in the Paracel and Spratly Islands in the South China Sea, is remarkable. In the latter case, the Chinese government asserted its rights as early as the 19<sup>th</sup> century, when other countries took an interest in them or even laid claim to them (Buszinsky & Sazlan 2007, pp. 144-45).

From 1945 to 1972 the islands were administered by the US as part of their occupation of Okinawa and they were returned to Japan along with Okinawa. However, although the US confirms that the islands are part of the territory covered by the Japan-US security treaty, no US administration has ever made a statement concerning the legal title of the islands, only referring to Japan as effectively administering them (Valencia 2007, p. 155). As early as 1971, reports said that US oil companies had stopped exploring activities in the area under pressure from the US administration (Nieh 1971, p. 446). China claimed the islands only in May 1970, after Japan and Taiwan had started talks on jointly exploring the energy resources around the Senkaku Islands, and the US had agreed to return the islands, together with Okinawa to Japan (*People's Daily* 18 May 1970, 4 and 29 December 1970). Only on 30 December 1971 did the Chinese Foreign Ministry publish an official statement claiming the islands (Urano et al. 2001, p. 35-6). This was therefore after the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP), under the auspices of the UN Economic Commission for Asia and the Far East (ECAFE), had conducted a geophysical survey in 1968. The Committee said in a report in May 1969 that the continental shelf between Taiwan and Japan may be extremely rich in oil reserves (Gao & Wu 2005, p. 32). Since then the PRC has asserted territorial rights to

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

the islands, basing these on historical and legal arguments, i.e. prior discovery and use (as navigational aids and later source of medicinal herbs), the cession of the islands as part of Taiwan in the 1895 Shimonoseki Peace Treaty, as well as the cession of any Japanese claims to Chinese territory at the end of World War II (Dai Tan 2006, pp. 142-3). Japan refutes these arguments by referring to its uninterrupted administration of the islands since their incorporation into Japan in 1895, the incorporation of the islands before the Shimonoseki Peace Treaty, the absence of any Chinese claims between 1895 and 1970, and the incorporation of the islands into the Nansei Shoto group of islands, which had nothing to do with Taiwan and thus with the 1951 San Francisco Peace Treaty. Both sides refer to Japanese and Chinese maps published at various points in the past to argue that the claim of the other side had been accepted (Anami 2007, p. 190; Zhou Jian 1991, p. 230; Suganuma 2000, pp. 124-9; Lee 2002, p. 11). Without going into further detail suffice it to say that the majority of international law scholars seem to give more validity to the Japanese than to the Chinese arguments, although there are also Japanese scholars like Inoue Kiyoshi and Murata Tadayoshi who support the Chinese claim (Hsiung 2005, p. 10).

Initially both countries tried to play down the island dispute while still making clear their legal claims. The topic was raised by Japanese leaders in 1972 and 1978, and in both cases the Chinese leaders, Zhou Enlai and Deng Xiaoping respectively, proposed not to deal with it. When Komeito Chairman Takeiri met Zhou Enlai on 28 July 1972, in preparation of the normalisation of diplomatic relations, the latter is quoted as saying, `There is no need to touch on the Senkaku Islands issue. Mr Takeiri, you also had no interest. I also had no interest. But the historians raise it as a problem due to the oil issue, and Mr Inoue Kiyoshi is very keen on it. However, there is no need to place importance on it (omoku miru)` (Ishii 2006, p. 142). On 27 September 1972, Zhou Enlai, asked by Prime Minister Tanaka about his opinion about the islands, responded, `I do not want to discuss this issue now. It is not good to talk about it now. Only because of oil it has become a problem. Without it, neither Taiwan nor the US will care` (Ishii 2006, p. 143). Deng Xiaoping proposed in October 1974 shelving the Senkaku Islands issue in order to advance the conclusion of the Peace and Friendship Treaty (Urano et al. 2001, p. 43). When the negotiations entered the final stage and Deng met Japan`s Foreign Minister Sonoda Sunao on 10 August 1978, Deng said, according to the testimony of Zhang Xiangshan who participated in the negotiations, `There is the problem of what you call the Senkaku Islands and what we call the Diaoyu Islands, and there is also the problem of the continental shelf. In Japan there are some people who use these issues to obstruct the signing of the Treaty. In our country there are also people who want to obstruct [the Treaty]...But it is better not to dwell on it (tsukitsumenai ho ga yoi). In the spirit of the Peace and Friendship Treaty, it does not matter to put the issue to the side for some years...` (Ishii et al., 2003, p. 320-1). In response to this, Sonoda reminded Deng of Japan`s position on the islands and demanded only that incidents such as the sudden appearance of about 200 ships around the islands, which occurred at that time, should not happen again, which Deng promised.

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

It is quite clear that in 1972, the Chinese were very keen on achieving the normalisation of diplomatic relations, and in 1978, the conclusion of the Peace and Friendship Treaty; and since both agreements faced serious difficulties, the Chinese leaders did not want the Senkaku Islands as yet another problem to stand in their way. The two diplomatic agreements were achieved, but at the cost of sweeping explosive issues under the carpet, by agreeing to disagree for the time being. Zhou Enlai's response is particularly interesting, since he let know that he was aware of Professor Inoue Kiyoshi's support for China's claim. Even more prophetic was his comment that the sovereignty issue would become a problem if oil should be extracted from the area. It is also interesting that already in 1978, the continental shelf issue was recognised as an item of disagreement.

Being equally keen on the 1972 and 1978 agreements, the Japanese seemed inclined to go along with the Chinese approach, having made their stance on the sovereignty issue clear. However, as long as the archives on both sides are not opened, it is difficult to judge to what extent or in what form Japan ever accepted the shelving of the issue and took a stance different from that today, which even denies that there is a territorial issue regarding the Senkaku Islands. Looking at official Japanese statements, it is fair to say that there has been an evolution from agreeing, at least implicitly, to the 'shelving arrangement' in 1972 and in 1978, to later explicitly denying such an agreement. Okabe Tatsumi argues that for political convenience, Japan agreed in 1978 to shelve the issue, but that this was different from accepting it in a legal sense (Okabe 2006, p. 91). The following official Japanese statements could be interpreted in this light. In October 1990, the Cabinet Secretary Sakamoto Misoji declared that the island issue between Japan, China and Taiwan (sic) should be solved by a later generation (*China Aktuell*, October 1990, p. 781, quoting Kyodo, 23 October 1990). But by the time China promulgated its law on territorial waters in February 1992 (see below), the Japanese government would unequivocally deny any 'shelving' of the issue. When at that time Prime Minister Miyazawa Kiichi protested against the Chinese law, referring to a prior understanding with Deng Xiaoping over the Senkaku Islands, the MOFA issued a correction denying such an understanding (Hagström 2003, p. 150, p. 155). In September 1996, Administrative Vice-Minister Hayashi Sadayuki said that Japan had not agreed with Deng's 'put on the shelf' proposal (Ishii 2006, p. 158), i.e. arguing that there is no territorial issue.

In recent years, the Japanese government has reinforced its claims to the islands by leasing some of them from their private owners. In January 2003, it was reported that in May 1972, the government had signed a 20-year lease for Kubashima, separate from three other islands (Uotsurishima, Minami-kojima and Kita-kojima islands). These were leased from 2002, on a one-year renewable contract. Kubashima had been leased by the government since its reversion in 1972 with Okinawa, under an obligation to the US side, which wanted to continue to use the island (along with Taishojima, which is a national property) for bombing drills (*Yomiuri Shimbun*, 8 January 2003). It is said that another reason for leasing the other islands is to prevent trespassing

by and sales to third parties. Beijing as well as Taipei protested the Japanese move (*Japan Times*, 6 January 2003).

#### b. Disputed maritime border in the ECS

In the case of the delimitation of the ECS maritime border between Japan and China, the dispute revolves around Japan demanding the application of the equidistance approach, whereas China insists with equal fervour on the application of the principle of the natural prolongation of the continental shelf. Based on the latter approach, which allows claims up to 350 nm from the coast, China claims an area which extends from its coast up to the Okinawa Trough (*circa* 2000 m depth) which is within the 350 nm limit. Japan disputes the Chinese topographical interpretation and considers that the Trough is merely a dent in the continental shelf which cannot be construed to be a physical border, and considers Okinawa to be sitting on the continental shelf (Sakamoto 2007, p. 21). Japan argues that the EEZ of both sides overlap because the width of the ECS is less than 400 nm and therefore the median (or equidistant) line drawn through the overlapping area should be the maritime border. However, as long as a border is not agreed upon by both sides, Japan claims potentially authority (*senzaiteki kengen*) over an area stretching up to 200 nm from its coast (Email from the China Division of the MOFA, 23 June 2007). Whereas for China the disputed area is therefore between the Japanese-proposed median line and the Okinawa Trough, for Japan it is the overlapping area of the 200 nm EEZ. The Japanese discount the natural shelf prolongation approach as being superceded by more recent international litigation cases. The Chinese selection of continental shelf principle favours Chinese interests. The median line approach is advantageous to the Japanese, notably in view of its demand to draw the line westward of the Senkaku islands. According to Anami Yusuke, if the International Court of Justice has to decide, it is likely that the maritime border would be somewhere between the median line and the 200 nm EEZ line of China, because in recent decisions of the Court, the length of the coastal line has always been an important criterion (Anami 2007, p. 194).

The delimitation issue is made more complex by the claims of South Korea, which borders the ECS in the north. Whereas South Korea has not yet agreed with China on the delimitation of its maritime border, and even has a dispute over the territorial title to a submerged feature ('Ieo' in Korean; 'Suyan' in Chinese) on the continental shelf, it has a provisional agreement with Japan. However, in 1974, when both countries drafted the Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, and the Agreement between Japan and the Republic of Korea Concerning the Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, China objected vigorously, but without referring to any particular territorial claim of its own. As a result, Japan deferred ratification of the agreements until June 1978, when it ratified the agreement without regard to China's continued opposition (Gao & Wu 2005, p. 33). Japan and South Korea

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

conducted seven explorations on three sites between 1980 and 1986, but, without finding any economically viable fields, they abandoned the search (*Korea Herald*, 2 August 2002).

The agreement on the joint development in the southern part also has a negative impact on Japan's insistence on the use of the median line in delimitating the Japanese-Chinese maritime border. While Korea insisted on the natural prolongation of the continental shelf, Japan wanted to apply the equidistance principle. In order to overcome the deadlock, Korea disclaimed in the agreement the rights that it would have under unilateral development of the area stretching down to the Okinawa Trough, while Japan disclaimed half the right to develop the area up to the median line. However, the agreement contains a provision (Article 28) which denies any prejudice of the agreement to the ultimate sovereign rights of any part of the Joint Development Zone (Takeyama 1984, p. 295, p.302; Hamamoto 2007, p. 33).

The dispute over the title to the Senkaku Islands is linked in various ways to the pending question of how to draw the maritime border between Japan and China. It will be important to clarify whether these islands allow the owner state to claim an EEZ and a continental shelf. According to the 1982 UN Convention of the Law of the Sea (UNCLOS), Article 121 (3), 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. Valencia states that both countries agree that the islands generate the right to a 12 nm territorial water zone and to a 12 nm contiguous zone, but whereas China applies Article 121 (3) and thus denies the islands the right to an EEZ and continental shelf, Japan disagrees and upholds such claims (Valencia 2007, p. 154). If Japan's interpretation of UNCLOS is accepted, then it can claim up to an equidistant line with China. If China is given the title to the islands under such conditions, it could claim a continental shelf up to the Okinawa Trough, and an EEZ to an equidistant line with the nearest undisputed Japanese island. Otherwise both countries would have an overlapping continental shelf and EEZ claims extending from their nearest undisputed territory (Valencia 2007, p. 146). However, according to Sakamoto Shigeki, China has not taken an official position on whether the Senkaku Islands are a rock or an island, which means that only in the latter case could the islands be entitled to an EEZ (Sakamoto 2007, p. 21).

Most international law scholars argue that the resolution of the ownership of the Senkaku Islands is a prerequisite for coming to an agreement over the delimitation of the maritime border between Japan and China in the ECS (Gao & Wu 2005, p. 46). However, Valencia considers this evaluation outdated in view of 'recent legal developments', without specifying them (Valencia 2007, p. 166).

c. Relevant domestic laws

In this context it is important to mention the domestic laws which both countries enacted to protect their maritime interests, because they shape the framework in which a compromise can be found. In the following, the major relevant laws and regulations are briefly introduced.

China

In 1958, the Standing Committee of China's National People's Congress passed a statement concerning the territorial waters, that established a 12 nm zone, but the statement did not say anything about maritime borders (Ishii 2006, p. 145). Moreover, the statement enumerated various islands as in the 1992 law (see further down), but omitted mentioning the Diaoyu Islands (Miyoshi 2006, p. 260). This statement was followed in 1992 by the 'Law of the People's Republic of China on its Territorial Waters and their Contiguous Areas', that included not only the South China Sea, but also explicitly the Senkaku Islands. According to reports, it was the People's Liberation Army (PLA) which insisted, over the objections of the Chinese Ministry of Foreign Affairs, in explicitly referring to the Senkaku Islands (Hagström, p. 168). The territorial law raised great concern with all maritime neighbours of China, including Japan, which officially protested several times and at various official levels (Suganuma 2000, pp. 142-4; Hagström 2003, pp. 148-153). But the Chinese top leadership was not interested in pushing the issue any further. When Jiang Zemin, then Secretary General of the Chinese Communist Party, visited Japan in April 1992, Prime Minister Miyazawa raised the issue of China's new territorial law, but Jiang referred to a statement made in 1978 by Deng Xiaoping about leaving the issue for the future (Mendl 1995, p. 82). The 1992 Law complicated the preparation for the first visit by the Japanese emperor (Tenno) to China, an event which both Japan and China very much desired should occur without incidents. For this reason, as well as to calm the concerns of countries disputing territory with China in the South China Sea, the Chinese Foreign Ministry stated that the law did not represent a change in Chinese foreign policy, and would not affect the joint development of contested territories (*Beijing Review*, 30 March 1992, p. 10-11).

In 1996, China ratified UNCLOS, which it had signed on the first day the Convention was opened for signature in 1982. In the ratification declaration, China reconfirmed its sovereignty over the territories mentioned in the 1992 Law. At the same time, China promulgated the precise location of straight base lines, which is important to delineate the Territorial Sea and the Contiguous Zone. In the text it is stated that the remaining baselines for the Territorial Sea would be announced at a future date. It is probably not a coincidence that the baseline for the Diaoyu Islands was among those not announced (Song 2002, p. 9, 14). Incidentally, both Japan and China have drawn the baselines around their territory in a way which is considered by some legal scholars to be not in line with UNCLOS criteria, and the Japanese government does

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

not agree with China`s base lines (Valencia 2007, p. 143; Kawasaki-Urabe 1996, p. 93). This is worthwhile mentioning here because this circumstance will require an additional compromise when Japan and China want to agree in future on the location of the EEZs and the maritime boundaries.

In 1998, the National People`s Congress promulgated the PRC Exclusive Economic Zone and Continental Shelf Act which did not mention any specific geographical areas. However, in Article 2 paragraph 3, Beijing opens the door for an agreement which diverts from the principles set out in the Act: `Conflicting claims regarding the EEZ and the Continental Shelf by the PRC and States with opposite or adjacent coasts shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimiting the area so claimed` (Sakamoto 2007, p. 22).

## Japan

In May 1977, Japan adopted a law which expanded the country`s claim to territorial waters from 3 nm to 12 nm, and which also established a 200 nm fishery zone. After having ratified UNCLOS in June 1996, it established in the following month the Law on the Territorial Sea and the Contiguous Zone, as well as the Law on the EEZ and Continental Shelf, which were supplemented by guidelines for implementation. The latter also established an EEZ around the Senkaku Islands. However, laws and the guidelines lack any stipulations in case of infringements in the maritime areas. The Law on the EEZ and Continental Shelf stipulates in Article 2 that the median line should apply `or the line which may be agreed upon by Japan and foreign country as a substitute`. This gives the Japanese government legal room to agree with China on another maritime border not based on the median line, as is the case with China`s 1998 Act.

As a result of China`s expanding activities in the East China Sea since the second half of the 1990s, the Upper House representative, Takemi Keizo, took an interest in the issue as early as December 1995, through Diet interpellations of the government, which led to two new laws in 2007. As a result of Takemi`s initial efforts, the Liberal Democratic Party`s (LDP) Foreign Affairs Committee (Gaiko Chosakai) took the issue up in November 2003 and established a Working Team headed by Takemi (interview with Takemi Keizo, 7 October 2004; *Yomiuri Shimbun*, 28 April 2005). As a result, on 15 June 2004, the LDP`s General Affairs Council (Seimu Chosakai) published the `Nine Proposals to Protect the Ocean Rights`, which called for a comprehensive maritime strategy, and robust measures and legislation to protect Japan`s maritime interests, particularly in the ECS. This Proposal led, in April 2006, to the establishment of a study group comprising the LDP and New Komeito, later joined by the Democratic Party of Japan (DPJ), to study the establishment of a basic maritime law. Two separate bills creating the Basic Law of the Ocean ([http://www.ron.gr.jp/law/law/kaiyou\\_k.htm](http://www.ron.gr.jp/law/law/kaiyou_k.htm)) and the Law on Establishing Safety Areas for Maritime Structures

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

(<http://law.e-gov.go.jp/announce/H19HO034.html>) were passed by the Diet in April 2007, and came into effect on 16 July 2007. One of the main aims of the second law is to protect the vessels used by marine resource explorers and fishermen in Japan's EEZ. The law is based on Article 60, paragraph 5 of UNCLOS and was therefore overdue. Since the Japanese government raised the stakes in the ECS conflict in 2005 by giving a Japanese company a licence to survey the area adjacent to the median line on the Japanese side, it became necessary to provide security guarantees for such activities (see further down). It is noteworthy that these two laws were the result of the endeavours by Diet members (led by Takemi Keizo) which has not been very common. They were formulated with the active contribution of the Ocean Policy Research Foundation (Kaiyo Seisaku Kenkyu Zaidan), an organisation of Sasakawa Yohei's Nippon Foundation, and it took only nine months to finalise the legislation (Akiyama 2007). These legislative efforts were primarily motivated by China's activities in the ECS, but it remains to be seen to what extent law enforcement agencies will use the laws to oppose these activities, and to what extent this will heighten the likelihood of a clash between Japanese and Chinese coast guards, or even their navies in the absence of a solution of the territorial disputes (*Financial Times*, 21 March 2007).

## 2. The East China Sea's hydrocarbon resources

It seems obvious that the conclusions of the 1969 CCOP Report about great hydrocarbon reserves in the ECS, notably around the Senkaku Islands, ignited the Japan-China sovereignty dispute. The Report's conclusions were later confirmed by Japanese as well as Chinese research. According to a 1994 estimate by METI (Ministry of the Economy, Trade and Industry Ministry), deposits of oil and natural gas on the Japan side of the East China Sea amount to 500 million kilolitres in crude oil volume (*Yomiuri Shimbun*, 28 August 2004). Selig Harrison mentions that Chinese estimates of potential ECS gas reserves on the entire shelf range from 175 – 210 trillion cubic feet (Saudi Arabia alone has 'proven and probable' gas reserves of 21.8 trillion cubic feet and the US 117.4 trillion cubic feet). Foreign estimates of potential oil reserves on the shelf are as high as 100 billion barrels (Saudi 261.7 billion barrels, US 22 billion barrels 'proven and probable'). Harrison refers to Chinese estimates of 'proven and probable' gas reserves of some 17.5 trillion cubic feet on the Chinese side, much of it in the Xihu Trough. Both countries assume rich petroleum deposits in the seabed around the disputed Senkaku Islands, where the Japanese government speaks of over 94.5 billion barrels of quality oil (Harrison 2005, p. 5-6).

The importance of hydrocarbon resources for both Japan and China has only increased since then, while both countries want to reduce their high dependence for energy on the Middle East. Japan has reduced its oil dependence by a third since the oil crises in the 1970s, but it remains the world's third largest consumer of oil (after China and the US), as well as the world's largest importer of liquified natural gas (LNG), accounting for 40 percent of total world imports. While its energy consumption growth is expected to level off, Japan will

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

continue to import vast quantities of oil and gas. In 2003, China became the world's second largest consumer of oil (it became a net oil importer in 1993), following the US but now ahead of Japan. According to the 2004 World Energy Outlook released by the International Energy Agency, China's oil imports in 2030 will reach about 500 million tons, an amount equivalent to U.S. imports (*Yomiuri Shimbun*, 13 April 2005). In 2006, China was the world's sixth largest oil producer

[http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/reports\\_and\\_publications/statistical\\_energy\\_review\\_2007/STAGING/local\\_assets/downloads/pdf/oil\\_section\\_2007.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2007/STAGING/local_assets/downloads/pdf/oil_section_2007.pdf).

Currently, the most important hydrocarbon resource in the ECS is gas. Although gas has a share of only about 3 % in China's total energy consumption, it is rising fast, driven by a deliberate policy of reducing the environmentally damaging high coal consumption. In 2007, despite its own growing gas production, China started to import gas in the form of LNG. It is also relevant in our context that China's leaders consider that control of foreign oil and gas fields is very important for guaranteeing a stable supply, rather than relying on market forces and diversification, as Japan does. It is well known that this Chinese approach is attracting considerable international criticism as to its impact on certain conflict zones (e.g. Darfur in Sudan).

Clearly, the considerable oil and gas resources in the ECS would be important for both countries not only in terms of satisfying their absolute needs, but also in reducing their import dependence on the Middle East. China's oil and gas consumption is increasing faster and growing higher than that of Japan. Some Chinese specialists are even using this circumstance to press their country's territorial claims, arguing that as the bigger country, it has the right to claim the whole continental shelf up to the Okinawa Trough for the delimitation of the EEZ. Implicitly, this contains the argument that as the bigger country with the greater need of energy resources, China has a greater right to these resources. This is very similar to China's official insistence that its continental shelf demand is in accordance with UNCLOS, because of the length of its coastal line and its population there, in contrast to the narrow and sparsely populated Okinawa island chain (interview with a senior MOFA official, 19 October 2004). This argument was also used by China's ambassador, Wang Jin, in Tokyo in 2005: 'In contrast to the long coast line of China, Japan consists of a chain of islands. Seen from this special geographical point of view, the median line as the border between the two countries does not agree with the principle of equity' (Hamakawa 2006, p. 3).

There are purely economic and logistical reasons which in practice make the oil and gas reserves in the ECS more useful for China than for Japan. In the case of gas, which seems to be most abundant in the contested area, it is important to note that Japan imports gas only in form of LNG and therefore a big land-based gasification plant would have to be built. This would require laying a pipeline, which would be uneconomical because it would have to lead to Japan's major consumer centres, over 2,000 km from the gas fields. Moreover, such a pipeline would have to cross deep waters, including the Okinawa Trough (Goto 2005, p. 38;

Dai 2006, p. 166). In the case of oil, opinions are more diverse because extracted oil could more easily be loaded on tankers, although using the existing Chinese pipeline structure to the Chinese mainland would be cheaper.

Obviously, these economic and logistical circumstances have no impact on legal circumstances and do not provide grounds for demanding that Japan should abandon its territorial claims to facilitate a solution. There are no practical obstacles to Japan taking part in the exploitation of the oil and gas fields, as well as sharing the profits as part of a bilateral agreement.

### **3. Initial attempts at joint development**

Soon after the 1969 Report, Japan started to explore with its ECS neighbours possibilities for joint development of the Sea's hydrocarbon resources. However, at that time Japan had not yet established diplomatic relations with the PRC, only with Taiwan (Republic of China). In March 1969, Japan began protracted negotiations with Taiwan and South Korea, leading to an agreement in principle in September 1970, to set up a joint development project (Yu 1994, p. 107; Nieh 1971, p. 444; Takeyama 1984, p. 286).

After switching diplomatic recognition from Taiwan to the PRC in 1972, Japan continued negotiations with South Korea only, and only on the maritime area between the two countries in the northern area of the ECS. This resulted in the above-mentioned agreement which, despite China's protests, was ratified by Japan in 1978. Most of the joint development zone is on the Japanese side of what Japan claims to be the median line (Park 2005, p. 21), a situation which Japan today in its negotiations with China wants to avoid. Moreover, some sections of the maritime area in which Japan did some survey work in 2004 (see further down) are also part of the 1978 Japan-South Korea joint development area; and some of the area being developed now by China in the North of the ECS (notably the Longqing field) is considered by South Korea as adjacent to that joint development area (Park 2006, p. 104-105). It is clear from this circumstance that an agreement between Japan and China concerning the northern part of the ECS will have to involve South Korea and ultimately will depend on an agreed maritime border between the latter and China.

There have also been proposals for Japan and China to jointly develop energy reserves in the ECS. In 1984, Deng Xiaoping proposed solving the territorial problems of the Spratly Islands in the South China Sea and the Senkaku Islands, by jointly developing the disputed areas before discussing the question of sovereignty (Yu 1994, p. 107; Urano et al. 2001, p. 49). There have been various other reports about Chinese joint development proposals for the continental shelf and /or the Senkaku Islands area, but in each case Japan first demanded a settlement of the maritime border or recognition of its title to the Senkaku Islands. The October 1980 proposal by Deputy Premier Yao Yilin for joint oil development around the Senkaku islands is

particularly intriguing, since he mentioned that it should also include the US (*Asahi Evening News*, 11 October 1980). In the same year, Japanese-Chinese negotiations on joint development of the area, including the area around the islands, foundered after a series of meetings (Drifte 2003, p. 59). Other negotiations took part between 1985 and 2001 which foundered as much on the territorial disputes as on the disarray among the various Chinese actors (Yarita 2005, p. 23-6). The Ministry of Foreign Affairs asserts that these negotiations were only between private entities, not between the two governments (Email from the China Division in the MOFA, 22 June 2007). However, Miyoshi writes that the negotiations between oil development companies of both sides after 1985 were under the supervision of the governments (Miyoshi 2006, p. 271). In 1995, the relevant Shanghai office of the Chinese State Council proposed joint research on the Japanese side of the continental shelf, to a Japanese oil company, but the latter declined in view of Japanese claims of sovereignty over the area (Hiramatsu 2002, p. 83-4). On 12 October 1996, Foreign Minister Qian Qichen suggested to a Japanese media group in Beijing that the sovereignty issue over the Senkaku Islands should be shelved and the area jointly developed (Mohri, p. 141). However, the Japanese government restated that before any talks about joint exploration of the continental shelf could start, the issue of the delimitation would have to be settled (MOFA Press Conference 15 October 1996, <http://www.mofa.go.jp/announce/press/1996/10/1015.html#2>).

#### **4. The rise of tensions**

Although Japan and China initially managed to keep the dispute over the Senkaku Islands largely under wraps, the occasional restatement of both sides' contrasting legal position left no doubt about the unresolved issue. However, various incidents occasionally interrupted this truce until the tensions became more or less permanent at the end of the 1990s, when they were reinforced by the maritime border dispute. Tensions were also fanned by a general deterioration of the bilateral relationship as a result of China's military developments, the Japanese reaction to them being to enhance its security links with the US. This was seen by China as aiming for its containment. In addition, there was the history conflict, rising nationalism and assertiveness on both sides, and growing political and economic competition between the two countries contributing to the rising tensions.

The most serious incidents were initially created by nationalist groups in Japan, the PRC, Hong Kong and Taiwan. For example, in 1978, members of a Japanese right wing group landed on the Uotsuri/Diaoyu island to erect a lighthouse, and the same group repeated this in July 1996, on one of the other islets, Kitakojima (Chung 2004, Chapter 3). In February 2005, the Japanese government finally ceded to the demands of the group to take over the Uotsuri lighthouse structure and its maintenance (Kaijo Hoan Report 2007, p. 16).

## Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

In 1978, a fleet of fishing vessels from the Chinese mainland entered the waters around the Senkaku Islands, just as Japan and China were trying to reach a compromise to conclude the Peace and Friendship Treaty of 1978. It is assumed that, in this case, the Chinese government wanted to pressurise Japan on the Senkaku issue. In September 1996, another incident led to the drowning of a Hong Kong activist in the territorial waters of the island group, when the Japanese authorities intercepted his boat. In March 2004, seven Chinese activists landed on Uotsuri Island. After the Japanese police arrested them, the Chinese Foreign Ministry protested and called it a serious violation of Chinese sovereignty over the island. In order to prevent any further diplomatic tensions, the Japanese then deported the activists (*Yomiuri Shimbun*, 5 October 2004).

### a. Chinese exploration and Japanese abstention

Of a more serious long-term nature are the tensions generated by China's pursuit of oil and gas explorations, as well as the increase of Chinese scientific research vessels and naval vessels in the ECS area claimed by Japan as its EEZ and around the Senkaku Islands. However, the Japanese government took until the end of the 1990s before really making an issue of the Chinese activities.

China's exploration activities in the ECS started in 1974 (Hiramatsu 2002, p. 74). In 1983, the Pinghu oil and gas field was discovered by the then Ministry of Geology and Mineral Resources, and preparation for exploration began in 1992 (ADB Report 2004). From the early 1990s, China stepped up exploration in Japan's claimed EEZ. Faced with Japanese protests, Beijing insisted that operations by Chinese ships in the zone were legitimate scientific research as permitted under UNCLOS. However, the Japanese government often discovered evidence of China conducting exploration into natural resources, in violation of the Convention. These activities included drilling into mineral deposits and firing air guns at the seabed.

In October 1999, a rig only 4.8 km from the median line found gas in what was later called the Chunxiao field (Hiramatsu 2002, p. 78). This Chunxiao gas field is now part of what is confusingly called the Chunxiao gas field group (‘tengun’ in Japanese) and encompasses altogether four gas fields. Apart from the Chunxiao gas field, these are the Tianwaitian, Duanqiao and Canxue gas fields. In November 1998, China started full operations of its first oil and natural gas field in the Pinghu field, about 70 km from the median line on the Chinese side. As proof of the Japanese government's long-lasting tolerance of China's ECS resource extraction activities, in 1997 – 98, it co-financed, through its contribution to the Asian Development Bank (ADB), as well as directly through its Export/Import Bank (renamed in 1999 Japan Bank of International Cooperation), the two oil and gas pipelines from the Pinghu field to the Chinese mainland. The oil pipeline to a Chinese off-shore island is 306 km long and the gas pipeline to Luchao is 386 km. The initial disbursement by the ADB was in February 1997, and the final one was as late as November 2001 (ADB Report May 2004). This support of Chinese oil and gas extraction activities has received heavy criticism in Japan in latter years.

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

Today, the Japanese government publicly insists that the Pinghu field is within the contested ECS area, as long as no agreement on the demarcation is reached, because it lies within 200 nm from the Japanese mainland (*Yomiuri Shimbun*, 28 April 2005, 9 November 2006). The Pinghu pipelines have now also come under suspicion because China has connected them with the pipelines of the Chunxiao field. Seen from a Chinese perspective, however, the long-term Japanese tolerance and even financial support must have been interpreted as at least implicit acquiescence to China's rights in the area, as long as it did not encompass any area on the Japanese side of the median line.

According to Japanese press reports, production started at the Tianwaijian gas field (50 – 60 km from the median line) in September 2005 (*Japan Times*, 2 October 2005; Anami 2007, p. 210). The Chinese company in charge, China National Off-shore Oil Corporation (CNOOC), however, announced the beginning of production in 2006 only on 12 April 2007, when it published its 2006 annual report (Interview with Shimizu Yoshikazu of *Tokyo Shimbun*, 14 May 2007; *Kyodo News*, 12 April 2007).

At the time of writing (April 2008), it is not clear how close China is to starting production from the Chunxiao gas field, which is the closest Chinese field to the median line. There have been several announcements about the start by CNOOC, but never any final confirmation. It seems that the Chinese are withholding the start because it would force the now much more assertive Japanese government to take countermeasures and render any compromise even more difficult. It is probable that the past announcements are a means by CNOOC to put pressure on the central government to allow it to proceed. When production starts, it would be easy to observe a gas flame, which goes with gas extraction.

While China became increasingly active in exploring ECS gas and oil reserves, Japan has long held back with its own explorations, with the exception of the ill-fated exploration under the 1974 Japan-South Korea treaty. Several Japanese companies applied for ECS exploration permits in the 1970s but the Japanese government turned them down. It is reported that the Ministry of Foreign Affairs did not want to upset China (Nomura 2005, p. 68; *Japan Times*, 8 September 2001; Hiramatsu 2002, p. 112). This is also in accordance with Article 83 (3) of UNCLOS, which advises states not to undertake actions which may hamper or jeopardise a final agreement. As a result, only the Ministry of Trade and Industry's Energy Agency did geological research in the ECS between 1972 and 1991, and 1996-2000, but the exact locations are not clear ([www.yomiuri.co.jp/atmoney/special/47/naruhodo168.htm](http://www.yomiuri.co.jp/atmoney/special/47/naruhodo168.htm)).

Until 2004, the Japanese government was reluctant to allow Japanese companies to survey the ECS. Only the Diet Member Takemi Keizo expressed concern since the second half of the 1990s, as we have seen. Among the media, only those on the right of the political spectrum like the *Sankei Shimbun*, later also the *Yomiuri Shimbun*, took an interest. One individual who has been writing most extensively on the Chinese economic

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

and military activities in the ECS is Hiramatsu Shigeo, a former researcher of the National Institute of Defense Studies (NIDS). He did not fail to point out the curious situation that China was given permission by the Japanese government to do `scientific research` (although it was understood that this in practice also involved energy resource and military research) while such permission was not given to Japanese companies (Hiramatsu 2002, p. 111-13).

Before changing its mind on allowing explorations by Japanese companies, the Japanese government had started to ask the Chinese in 2003, to hand over data on the Chunxiao field, but Beijing refused since it considers the area part of its EEZ. In order to enhance its leverage, the Japanese government decided in 2004 to collect its own geological information. From July to October 2004, a private company commissioned by the Energy Agency of the METI conducted on the Japanese side of the median line a geological survey, to investigate whether China was tapping into gas reserves which straddle the median line. The survey area was a 210 km north-south strip, with a width of 30 km, the lower end facing the Chunxiao and Tianwaitian gas fields on the Chinese side (Map in *Kaijo Hoan Repoto 2006*, p. 38). Incidentally, according to a Korean interpretation, a northern segment of the survey area, approx. 45 square km, lies within the area earmarked for joint development with South Korea in 1978 (Park 2006, p. 104).

China immediately reacted after the announcement of the survey and warned the Japanese to `act with caution` in what it considered to be the Chinese EEZ (<http://www.fmprc.gov.cn/chn/wjb/zzjg/yzs/gjlb/1281/1302/t142352.htm>). It was even reported that a Chinese surveillance vessel, and later two warships, tried to chase away the survey ship (*Asahi Shimbun*, 13 October 2004; *Yomiuri Shimbun*, 13 April 2005). The Interim Report of the survey, in February 2005, concluded that it was highly likely that the Chunxiao and Duanqiao geological structures were linked with those on the Japanese side of the median Line, which was confirmed as definite in the final report in April 2005 (*Yomiuri Shimbun*, 2 April 2005). The Chinese dispute any geophysical link between the two sides, maintaining the geological faults near the two gas fields do prevent such a link (*Yomiuri Shimbun*, 21 February 2005). In addition to this survey, the Japanese decided in 2004 to increase its budget allocation for exploration activities, including the acquisition of a survey ship for gas exploration in the ECS (*Asahi Shimbun*, 24 December 2004).

Pressure on the Japanese government to react mounted further in January 2005, when it announced the discovery of 12 exploration areas that had secretly been earmarked by China, three being entirely on the Japanese side of the median line, and one straddling the line. During the 1st round of the Japan-China Consultations Concerning the East China Sea and Other Matters (see further down), the Japanese government protested about this move but did not receive a clear answer from the Chinese (*Yomiuri Shimbun*, 1 January 2005). After having confirmed officially in April 2005 that the geological structures of the Chunxiao and

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

Duanqiao gas fields extended onto the Japanese side of the median line, the Japanese government announced its intention to start the procedures to award test drilling rights to private companies (Kaiyo Hakusho 2006, p. 131). In July 2005, Teikoku Oil was given a licence to drill in three areas along the Japanese side of the median line, totalling 400 square km which run along the Chunxiao and Duanqiao gas fields (*Asahi Shimbun*, 15 July 2005). To no one's surprise, China had already declared that it would consider test drilling as constituting serious damage to its interests and to its sovereignty, thus reconfirming its position about China's EEZ reaching to the Okinawa Trough (*Financial Times*, 14 July 2005). At the time of writing (April 2008), Teikoku Oil has not started any test drilling, although theoretically at least, its security concerns should have been alleviated by the above-mentioned 2007 law aimed at protecting off-shore structures. However, the company is waiting for a conclusion of the bilateral government negotiations, and even once a breakthrough has been achieved, it may take two years before it can start test drilling because of technical circumstances (*Kyodo News*, 26 May 2007).

b. Chinese research vessels and the Prior Notification Agreement of 2001

Table 1

Chronology of the Prior Notification Agreement of 2001

Japan China Consultation on the framework of mutual prior notification of the marine research (Kaiyo-chosa katsudo no Sougo-Jizentsuho no Wakugumi ni kansuru Nittyu Kyogi)

1st round of the Japan China Consultation on the framework of mutual prior notification of the marine research: September 2000

2nd round of the Japan China Consultation on the framework of mutual prior notification of the marine research: September 2000

Informal Japan China Consultation on the framework of mutual prior notification of the marine research: October 2000

3rd round of the Japan China Consultation on the framework of mutual prior notification of the marine research: November 2000

4th round of the Japan China Consultation on the framework of mutual prior notification of the marine research: December 2000

5th round of the Japan China Consultation on the framework of mutual prior notification of the marine research: December 2000

6th round of the Japan China Consultation on the framework of mutual prior notification of the marine research: January 2001

## Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

Source: China Division, Ministry of Foreign Affairs, Japan

With the ongoing Chinese development of carbon resources in the ECS and the lack of a bilaterally agreed maritime border, an increasing number of so-called Chinese research vessels entering the disputed area without prior consent by Japan (as would be required under UNCLOS if the area was part of Japan's EEZ) added to the tensions. When challenged by the Japanese coast guard, the Chinese responded either that they were operating in the open sea, or conducting legitimate research in China's EEZ, or they simply ignored Japanese warnings (Hiramatsu 2002, p. 86 ff). While in 1991 the coast guard reported four unauthorised entries into Japan's claimed EEZ, the number increased to 33 cases in 1999 (MOFA information sheet, 8 August 2000). Moreover, since 1996, Chinese research vessels increasingly also entered the waters of the Senkaku Islands, including its territorial waters. As mentioned above, nationalists from both sides conducted activities around the Senkaku Islands.

With the further rise of incursions in 2000, the situation reached a climax by the summer, and on 8 August, the Foreign Affairs Committee of the LDP postponed a Yen17.2 billion ODA loan package to China, making release of the loan contingent on a satisfactory clarification of these incursions from the Chinese, during the meeting of Foreign Minister Kono Yohei with his Chinese counterpart in Beijing at the end of August (*Sankei Shimbun*, 9 August 2000). At the meeting on the 28 August, an agreement was reached to work out a prior notification system. As a result, the LDP Committee released the loan funds on 7 September (*Japan Times*, 8 September 2000).

To reach a solution, six official rounds of talks were held from September 2000 to January 2001 (see Table 1) and based on a verbal note (*kojoshō*), a system of prior notification for ships of both countries engaging in scientific research took effect on 24 February 2001. The verbal note has two different versions, one issued by the Japanese, one by the Chinese. Although both are in essence an agreement on prior notification (PNA) of research vessels from both sides, there are interesting differences between the two documents.

In view of the current delimitation negotiations of the ECS maritime border, it is very instructive to analyse these differences and to evaluate the agreement's efficiency. Firstly, the verbal note has no clear definition of the area to which it applies. The Chinese had made it clear from the beginning, in summer 2000, that it was the absence of an agreement over the maritime border which caused the problem, but the Japanese considered an agreement on the delimitation of the maritime border as taking too long and instead wanted to find an immediate solution. Instead of clarifying the border, the Japanese verbal note text says that the measures taken so far in case of Japanese scientific research in 'Chinese waters, except territorial waters' (*Chugoku no kinkai, ryokai wo nozoku*) should be continued. In the Chinese text, the area for which prior notification is to

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

be applied for Chinese scientific research is described elliptically as `In maritime areas of interest to the Japanese side` (Nihon gawa ga kanshin wo yu suru suiiki de aru Nihonkoku no kinkai [ryokai wo nozoku]). According to a MOFA official quoted by Hiramatsu Shigeo, the Japanese achieved China`s understanding (Chugoku gawa no rikai wo erareta) to the effect that `maritime areas of interest to the Japanese side` refers to the waters on the Japanese side of the median line (Hiramatsu 2002, p. 120-1) although Okuwaki Naoya only says that at least the Japanese understand it in this way (Okuwaki 2004, p. 60). Whatever the ultimate circumstances were, `understanding` does not imply `recognition`. Moreover, the Chinese version refers to prior notification as `voluntary measures` (jishuteki secchi) which further removes the agreement from recognising the disputed area as Japan`s EEZ. The text of both sides also speaks of `marine scientific research before the delimitation of the border is achieved`. To make both sides` legal differences even more clear, only the Chinese version stipulates that it would not influence the legal position of either party concerning the delimitation of the maritime border. The latter two points had already been stated several times by Chinese Foreign Minister Tang Jiaxuan in August and September 2000. However, the MOFA spokesman had also declared on 3 October 2000 that there was a basic assumption on *both* sides that it should not affect their respective position concerning the delineation of the maritime border and that the accord should be on a voluntary basis (MOFA Press Conference, 3 October 2000, <http://www.mofa.go.jp/announce/press/2000/10/1003.html#5>).

Secondly, the implementation mechanism of the agreement is weak. The agreement asks for notification only two months in advance, but does not require the other side to receive permission. This is in contrast with Article 246 of UNCLOS, which demands the granting of permission, although consent should be given `in normal circumstances` (Paragraph 3). Moreover, there is no penalty for any contravention to the agreement. This is in line with the 1996 guidelines to the Japanese law concerning the EEZ and continental shelf (see above).

Thirdly, the agreement speaks of oceanic scientific research but does not clarify whether this also applies to natural resources research, which was the main problem for Japan. Of course, it is often difficult to differentiate between marine scientific research, natural resources research and military-related research (Hiramatsu 2002, p. 111). UNCLOS differentiates between marine and natural resources research: according to Article 56 paragraph 1, the coastal state has sovereign rights over exploring and exploiting the natural resources in its EEZ, but only jurisdiction (i.e. to regulate, authorise and conduct marine research) over marine scientific research. However, in the absence of an agreed border, it was difficult to go any further in the verbal note. Moreover, the agreement applies only to scientific research vessels, although the rising number of Chinese navy vessels is of even greater concern to the Japanese. Warships do not need prior permission to cruise in another country`s EEZ, but may still conduct oceanographic research for which prior consent is normally needed (*Yomiuri Shimbun*, 8 April 2004). The latter issue is now at the centre of talks

## Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

about establishing an emergency consultation system between the relevant authorities of both sides. An agreement in principle to that effect was achieved on 8 July 2006 at the 6th round of the Japan–China Consultations concerning the East China Sea, which was reconfirmed during Chinese Defence Minister Cao Gangchuan`s visit to Japan in August/September 2007 (*Xinhua*, 31 August 2007).

In view of these weaknesses, it is not surprising that the practical implementation of the agreement has been restricted and spotty. The Chinese research vessels often undertake research or follow courses which were not contained in the notification. In addition, the activities of the Chinese research vessels moved from the East China Sea to the Pacific Ocean (*Asahi Shimbun*, 3 February 2004). According to information provided to the author by the MOFA, in 2004 there were 20 cases where either the information provided was not congruent with the range or scope of the activities given in the prior notification, or no prior notification was given. Most of the cases without prior notification concerned the EEZ around Okinotorishima, as well as around the Senkaku Islands. There were only four cases for the ECS area. In the case of the Senkaku Islands and Okinotorishima, the Chinese obviously wanted to make a point of their legal position, i.e. its claim to the Senkaku Islands and its non-recognition of an EEZ for Okinotorishima. The agreement did not end what the Japanese refer to as `illegal Chinese activities`, since there were four cases in 2001, two in 2002, none in 2003, four in 2004, none in 2005 and seven in 2006, where no prior notification had been submitted or the provided information was not congruent with the actual ship movement (JCG Report 2006, p. 36; JCG Report 2007, p. 23). In the end, if tensions arising from Chinese research vessels in Japan`s claimed EEZ have nevertheless declined, this may be less due to the PNA than to a shifting of China`s research activities to the Pacific Ocean, the increase of tensions arising from the developments around the Chinese oil and gas platforms and from increased activities of Chinese naval vessels.

The importance of this agreement in the context of this paper lies in the fact that it has not cleared the path for an agreement on the delimitation of the maritime border, but rather gave China time to enhance its knowledge of the whole of the East China Sea and beyond, as well as to provide China with another opportunity to refute or weaken Japan`s claim for a median line. The agreement is particularly interesting in view of the current maritime negotiations. As we will see later, there are interesting parallels, like the consensus by both sides in summer 2000 to speed up an agreement, the Japanese demand for a stop to further Chinese marine research in the contested area until the agreement was concluded (Hiramatsu 2002, p. 117), and the consensus that the agreement should not have any impact on the legal positions of either side.

### c. Rising military stakes in the East China Sea

With the progress of Chinese oil and gas exploration in the ECS, the Japanese also observed a growing presence of Chinese military forces in the area of the territorial disputes, as well as around Japan in general.

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

For the Japanese, this is but one aspect of what the government criticises as China's non-transparent military buildup and, together with the perceived threat from North Korea, it has provided a major impetus to the strengthening and expansion of Japanese-American military cooperation.

When Chinese fishing vessels appeared around the Senkaku Islands in 1978 during the peace treaty negotiations, some of them were reportedly armed (Ishii 2006, p. 143). Later, the involvement of the Chinese navy in China's SCS research was often unclear because some Chinese geological survey vessels (which may have belonged to the Chinese navy) were also conducting experiments which seemed to be more linked to military intelligence (e.g. salinity of water) than to the survey of hydrocarbons (Hiramatsu 2002, p. 92). In the 1990s, with the development of the Chinese navy from a coastal navy to a blue ocean navy, an increasing number of Chinese war ships cruised in the East China Sea and sometimes passed through the Japanese-claimed EEZ. The Japanese observed two cases of Chinese ships going through the Japanese EEZ in 1995, but 21 cases in 2000. On two occasions in 1996, the Chinese navy conducted military exercises in the Japanese EEZ, involving 13 and 10 ships, respectively.

In May 1999, 12 Chinese warships conducted a manoeuvre in waters north of the Senkaku islands. The exercise was the first of its kind to be carried out by China in that region. In July 1999 and March 2000, China conducted a full-scale antisubmarine manoeuvre in those waters (*Yomiuri Shimbun*, 26 July 2001). In November 2003, a Chinese navy 2,100-ton hunter-killer submarine was observed surfacing in the Osumi Strait between the Sata Promontory and Tanegashima island in Kagoshima Prefecture. It was legal because the submarine was surfaced, but it was the first time that the passage of a Chinese submarine through a Japanese strait had been confirmed (*Yomiuri Shimbun*, 6 January 2004). However, when in November 2004 a Chinese Han class nuclear submarine passed submerged through Japanese territorial waters between the islands of Miyakojima and Ishigakijima, the reaction in Japan was very sharp and the Chinese explained it as an error due to technical circumstances (*Defense of Japan* 2005, pp. 207-8; Anami 2007, pp. 205-6).

There were also increasing reports about intelligence-gathering naval ships around other areas of Japan. In May 2000, for the first time since Japan started observations, such a ship went through the Tsugaru Strait. However, warships have the right of passage through another country's EEZ, but the Japanese government considered these ship movements by China as not conducive to trust and friendship since they were suspected as being for intelligence gathering purposes (*Yomiuri Shimbun*, 15 May 2000; MOFA information sheet, 8 August 2000; Anami 2007, pp. 204-5). Obviously, the Japanese could not but see it in the context of China's growing military strength in general, the territorial conflicts in the ECS and the ongoing Chinese development of hydrocarbon resources (Hiramatsu 2002, p. 221 ff). Moreover, the Japanese must have wondered who is in control when Prime Minister Zhu Rongji declared in 2000 that neither he nor President Jiang Zemin knew about the activities of the Chinese naval vessels (*Yomiuri Shimbun*, 9 October 2000; *Asahi Evening News*, 18

## Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

October 2000). It throws an interesting light on the loss of control by the Chinese government (and the Chinese Communist Party) over the military, and the limits of diplomatic exchanges to address the territorial issues.

Tensions further increased in 2005 with Chinese and Japanese military forces confronting each other near the oil and gas platforms along the median line to observe, deter and impress the other side. As mentioned above, this was around the time when the Japanese government published two reports about its geological survey and licensed a Japanese company to engage in exploratory work along the Japanese side of the median line. In 2005, the maritime border negotiations went into full gear (see below). In January, Chinese destroyers were reportedly seen criss-crossing the Chunxiao area, and Japanese P3C reconnaissance aircraft went to observe them (*Yomiuri*, 12 April 2005). When in September 2005 (at the time of the 3rd maritime border consultation round), the Japanese protested against China's deployment of naval ships, including destroyers near the Chunxiao fields, China argued that these were normal exercises in its waters, and for its part asked Japan to cease flights by Japanese aircraft near the same fields, as they disturbed the gas exploration project. Later it was reported that during that deployment, a ship gun pointed at an aircraft of the Maritime Self Defence Force (MSDF). Also in September the Chinese Foreign Ministry spokesman Qin Gang announced that a Chinese reserve vessel squadron had been established to 'handle emergencies during peacetime, and being able to fight during wars'. The establishment of the squadron follows China's creation of two naval groups in the Bohai Sea and Yellow Sea (*Japan Times*, 30 September 2005).

The Japanese tried to show that they were willing to react. In August 2005, the government announced that Japanese and American troops would for the first time conduct in January 2006, as part of their biannual joint command post exercise, exercises for the defence of Japan's outlying islands. At the same time, the GSDF was scheduled to conduct field drills with the US Marine Corps, to step up bilateral security cooperation with the same purpose (*Japan Times*, 6 August 2005). In June, two US warships visited Yonaguni island in the Okinawa island chain (about 60 km from Taiwan) for the first time since 1972, when Okinawa was returned to Japan (*Asahi Shimbun*, 16 July 2007). The Defence Agency also announced that the ASDF's scramble activities against Chinese aircraft increased in Fiscal Year 2005, with 107 out of a total of 239 scrambles (116 against Russian aircraft) but went down to 22 in 2006 (Russia: 196) (*Japan Times*, 29 April 2007). According to the Defence Agency, there were no scrambles against Chinese aircraft in 1995 and 1996, but they had a share of 15 % in 1997, 1998 and 1999 (Information of the Defence Agency provided to the author).

These events and figures show several worrying developments. The Chinese navy is becoming more assertive and willing to utilise its increasing power, while the Japanese armed forces are also becoming more active in the East China Sea, as well as enhancing their cooperation with the US armed forces as part of a general reinforcement of the Japanese-American security treaty. While the latter is certainly to a large extent also due

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

Japan's perceived threat from North Korea, it is seen by China as an attempt to limit its access to the Pacific Ocean, deter its use of military force in the Taiwan Strait, prevent it from protecting its interest in the East China Sea and in general to contain its rise as a military power. One major reason for China to enhance its military activities in the ECS is Taiwan and its will to resist an US intervention (possibly supported by the Japanese armed forces) in case of a military show-down in the Taiwan Strait. With China's increasing military power and its willingness to protect its growing military and economic stakes in the East China Sea, the absence of an agreed maritime border could conceivably lead to a military incident.

## 5. **Bilateral negotiations**

### a. After 1997

As we have seen, the legal claims of both Japan and China concerning the Senkaku Islands had allowed only 'shelving' of the issue, followed by the Japanese government claiming that there was no territorial issue to discuss. The only achievement in coming to some compromise in the ECS was, apart from the flawed Prior Notification Agreement, the 1997 Fisheries Agreement. As a result of both countries having ratified in 1996 UNCLOS, the bilateral 1975 Fisheries Agreement had to be replaced, and negotiations to this end started in April 1996, ending successfully in November 1997 (see Table 2), to become effective in June 2000. The agreement circumvented the territorial disputes by establishing 'joint fishing areas' in lieu of EEZ boundaries. This was done by establishing three different zones where different fisheries regimes apply. The area south of 27° N, including the area around the disputed Senkaku Islands, remains unregulated high seas (Valencia & Amae 2003, p. 195). Tokyo's original proposal of the median line was rejected by Beijing. Moreover, the agreement states that it does not affect their positions on other legal matters, including the issue of disputed islands and boundary delimitation of their EEZs and the continental shelves, and is therefore a provisional agreement. Moreover, there is no effective dispute settlement mechanism. Finally, South Korea protested the Sino-Japanese Agreement and demanded trilateral talks because one of the designated areas overlaps its claimed EEZ (Valencia & Amae 2003, p. 196).

Table 2

### Chronology of Fishery Consultations 1996-1998

1. Informal Japan-China Consultation on the Law of the Sea and Fishery: April 1996
2. Informal Japan-China Consultation on the Law of the Sea and Fishery: August 1996
3. 1st round of the Japan-China Consultation on the Law of the Sea and Fishery: December 1996
4. 2nd round of the Japan-China Consultation on the Law of the Sea and Fishery: February 1997

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

5. 3rd round of the Japan-China Consultation on the Law of the Sea and Fishery: April 1997
6. 4th round of the Japan-China Consultation on the Law of the Sea and Fishery: June 1997
7. Informal Japan-China Consultation on the Law of the Sea and Fishery: June 1997
8. Informal Japan-China Consultation on the Law of the Sea and Fishery: July 1997
9. 5th round of the Japan-China Consultation on the Law of the Sea and Fishery: August 1997
10. 6th round of the Japan-China Consultation on the Law of the Sea and Fishery: August 1997
11. 7th round of the Japan-China Consultation on the Law of the Sea and Fishery: August 1997
12. 8th round of the Japan-China Consultation on the Law of the Sea and Fishery: November 1997

Source: China Division, Ministry of Foreign Affairs, Japan

These negotiations were superseded by the 'Consultations on the Law of the Sea and the Delimitation of the EEZ' (see Table 3) from August 1998 onwards. These 'consultations' consisted mostly of an annual meeting and were conducted at the Deputy Director General level. They achieved no progress at all because both sides insisted on their legal positions, the Chinese continued with their explorations and extractions of energy resources, and the Japanese tried to maintain the status quo. Moreover, the Koizumi era, with the Prime Minister's Yasukuni war shrine visits, was not conducive to progress.

As we have seen above, the Chinese made proposals several times for joint development, which were also submitted during the maritime border negotiations. However, they were rather vague and did not lead anywhere. This vagueness in China's proposals for joint development could also be observed in similar Chinese proposals submitted to the other claimants in the South China Sea. It has also often been unclear whether the vagueness was for tactical purposes or the result of differences among the various Chinese actors (Buszynski & Sazlan 2007, p. 151). Moreover, the Japanese made joint development in the ECS dependent on the prior settlement of the ownership of the Senkaku Islands, and the delimitation of the maritime border in the ECS according to the median line approach. Tokyo was encouraged in its insistence on the latter point by the fact that China had so far implicitly recognised the median line by not erecting any extraction structures on the Japanese side of the line, although it had conducted extensive explorations there (including the use of a floating exploration rig). The Japanese government continued to explain to the Chinese that, as long as no compromise for the maritime border was found, even the maritime area up to 200 nm from the Japanese coast was contested and theoretically part of Japan's claimable EEZ, including the Chinese fields in the Pinghu area which lies well on the Chinese side of the median line. Therefore, since 2004, the government has been demanding that the Chinese stop all further development work until a compromise is found. To emphasise its claim to a potential 200 nm EEZ pending an agreement, in 2005 the government gave Japanese names to the Chinese oil and gas fields in that area:

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

Chunxiao - Shirakaba

Longqing - Asunaro

Duanqiao - Kusunoki

Tianwajian - Kashi

Lengquan - Kikyo

From March 2006 onwards, Japan also protested several times to the Chinese government when gas production was about to start in the Bajiaoting gas field, 6 km northeast of the Pinghu field (interview with a high ranking MOFA official, 22 November 2006). Earlier, in August 2003, faced with China's relentless progress in the Chunxiao field, the Resource Bureau of METI had demanded from the Chinese data about the field, this demand being repeated by Foreign Minister Kawaguchi when she met her Chinese counterpart Li Zhaoxing on 21 June 2004. This Japanese demand would be justified according to UNCLOS if Japan's claimed median line was bilaterally agreed. Since China does not accept Japan's claim, the Chinese refused to provide data, and Li suggested instead to shelve both sides' differences and to embark on joint development (Urano 2005, p. 219).

b. Since 2004

Around the turn of the millennium, Japan's negotiating stance had become weakened by several circumstances which adversely affect the chances for joint development. At the same time, the Chinese must also have realised that its unilateral progress in the ECS and the growing military connotations of the two countries' disputes was not in its long-term interest to establish itself as a non-threatening power in Asia.

Firstly, China had made more progress in exploring the whole ECS and had actually started to extract oil and gas, increasingly approaching the median line, whereas Japan had started with a survey at its side of the median line only in 2004. This imbalance will be very difficult for Japan to rectify by its own efforts, particularly as long as China refuses to share its geological information. As a result of the imbalance of information and 'sunk cost', the example of the 2004 agreement between China and the Philippines, as well as the 2005 agreement between China, the Philippines and Vietnam for seismic research in the South China Sea, would therefore not be easy to apply, because in the South China Sea China's partners are more or less on an equal knowledge-level, while it is still far from clear whether there will be joint exploration in future without a solution of the sovereignty issue (Buszynski & Sazlan 2007, p. 161, 164-65).

Secondly, in contrast to the 1970s and 1980s, China is now technologically and financially much more advanced and less dependent on foreign technology and capital to engage in off-shore oil and gas extraction. Japan therefore no longer has its technological prowess to offer as an incentive to come to a solution of the

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

disputes. At the same time, the Chinese will have been concerned by the withdrawal in October 2004 of Shell and Unocal from their participation in the exploration and extraction of oil and gas in the Xihu Trough of the ECS. This involvement not only promised to provide welcome funding, technology and risk sharing, but also offered some sort of international cachet to its claims in the disputed area. The companies had concluded an agreement with China National Offshore Oil Corporation (CNOOC) and Sinopec about joint gas exploration in the Chunxiao and Baoyunting area in August 2003, after at least eight years of negotiations, but decided to leave the project only one year later. The companies came to the conclusion that the financial rewards of the project were too low given the project risks. Among these risks was the Japanese-Chinese territorial dispute about the ECS maritime border (*Asia-Pacific Upstream Insights*, October 2004; *International Herald Tribune*, 20 August 2003). The Japanese government had explained to the two foreign companies its concern about China trespassing the median line (interview with a senior Japanese diplomat, 19 October 2004). The departure of these two foreign companies signified the exit of the last non-Chinese energy companies from the ECS, and it also proves that China is willing and able to continue the exploration and extraction of gas and oil in the region even on its own.

Thirdly, the Chinese navy has become more developed and has extended its range to protect its energy installation in the whole area. On the one hand this has weakened Japan's position; on the other hand, adding impetus to a reinforcement of Japanese-American military cooperation was also not in China's interests. But despite their closer military links, Japan cannot expect much help from the US, which is interested in maintaining a workable relationship with China despite many bilateral problems, and does not make any official public statements on either side's territorial claims, as mentioned before.

Finally, the overall Japan-China relationship had deteriorated and reached a low point under Prime Minister Koizumi (2001-2006), when the territorial dispute reached its climax. The year 2004 saw anti-Japan demonstrations during the Asia Soccer games in China, and other incidents before and afterwards, such as Prime Minister Koizumi's annual visits to the Yasukuni shrine. Mounting concerns that China was effectively going to tap oil and gas reserves in fields straddling the median line put pressure on the Japanese government to react. But at a time when nationalist politicians were riding high in Japan, developments seemed to get out of hand by tit-for-tat reactions, such as the Japanese name-giving to the Chinese oil and gas fields, or the licensing of a Japanese company to test drill in the disputed area. The Japanese Lower House's Security Committee passed a resolution at the end of March 2004 calling for the preservation of territorial integrity and asking the government to represent Japan's interest more strongly. In May 2004, one of the most prolific writers on the territorial issue, Hiramatsu Shigeo, flew over the Chunxiao gas field and wrote a much-noticed article on the construction of a natural gas extraction facility there (*Tokyo Shimbun*, 28 May 2004). The METI, notably under its very outspoken and right-wing minister Nakagawa Shoichi, tried to present itself as the true defender of Japanese interests in comparison with the MOFA, which had gained a reputation of being 'soft'

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

on China. The situation reversed when Nakagawa was replaced in October 2005 by the more pro-China politician Nikai Toshihiro, whereas the new Foreign Minister Aso Taro took a more hard line approach towards China, hinting at unspecified countermeasures if Beijing started production in the Chunxiao gas field (*Asahi Shimbun*, 20 March 2006). China, on the other hand, did not tolerate Japanese test drilling even on Japan's side of the median line, and in general found it difficult to adjust to a much more assertive Japanese stance after so many years of Japanese deference.

All these circumstances may have prompted both sides to relaunch their efforts to find a solution to the disputes even while Koizumi was still prime minister. A new round of negotiations was proposed by Foreign Minister Li Zhaoxing when he met his Japanese counterpart Machimura at the beginning of October 2004 in Hanoi (*Japan Times*, 27 October 2004). Earlier on 21 June at a meeting in Qingdao, he had suggested to his Japanese counterpart (then Kawaguchi Yoriko) joint development in the ECS, but Kawaguchi reiterated that Japan first needed geological data from China (MOFA Press Conference, 22 June 2004). However, it seems that the Chinese at that time made a concrete proposal. According to newspaper reports quoting a MOFA official, Li suggested an area for joint development to be created by evenly dividing the area between Japan's median line and China's claimed border (*Yomiuri Shimbun*, 22 June 2004). This would not meet China's demand for entitlement of an EEZ up to the Okinawa Trough on the basis of the natural prolongation of the continental shelf, nor would it meet Japan's demand, and its sacrifice would be greater than China's. Moreover, it would be only a provisional agreement, like the 1997 Fisheries Agreement, by excluding a final resolution of the maritime border delimitation and the legal title to the Senkaku Islands.

The ministerial meeting resulted in the beginning of what the Japanese officially calls the `Japan-China Consultations concerning the East China Sea and Other Matters` (Higashi Shinakai to ni kansuru Nittyu Kyogi, hereafter ECSOM). On the one hand, this title is less precise than the previous one because of the dropping of the reference to the EEZ, but on the other hand, it is more precise by referring specifically to the East China Sea and dropping the very general reference to the Law of the Sea, which in any case is the legal basis of such talks. The Chinese name of the negotiations is `China-Japan Consultations regarding the East Sea` (Zhong Ri guanyu Donghai wenti cuoshang).

According to the Japanese press reports, there was no new proposal from Beijing during the 1st round on 25 October 2004 and, confronted with the Chinese insistence on joint development, the Japanese simply repeated their demand for data and a stop to China's activities (interview with Kyodo News Agency in Beijing, 29 October 2004). One can only assume that the Chinese again suggested the above-mentioned compromise formula for the area of joint development, and that the Japanese did not consider it worthwhile responding.

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

A new development occurred only when during the 2nd round of the ECSOM in May 2005, the Chinese government proposed two specific areas for joint development. Both areas were, however, on the Japanese side of the median lines (*Japan Times*, 1 June 2005; *Asahi Shimbun*, 30 September 2005). The Japanese found this proposal unacceptable and insisted again on the provision of geological data of the area along the median line, threatening to do their own geological survey. Beijing further complicated the matter by apparently situating the two areas in the Senkaku Islands` EEZ and near or possibly partly overlapping with the Japan-South Korea Joint Development Zone. The geographic information from the Chinese was not very precise and China later described the latter as `adjacent` to the Chinese Longqing field (*Yomiuri Shimbun*, 11 March 2006).

At the 3rd round in September 2005, it was Japan which created a new departure when for the first time it formally called for joint development, proposing an area equally divided by Japan`s proposed median line, and including the Chunxiao, Duanqiao, Tianwaitian and Longqing gas and oil fields (*Yomiuri Shimbun*, 2 October 2005; Anami 2007, p. 210). According to the Japanese diplomat Hamamoto, Japan also proposed that both sides would agree that China could explore and develop energy resources to the west of the median line and Japan could do so on the east side. Until a final agreement could be reached, China would stop exploration in the Chunxiao, Duanqiao, Tianwaitian and Longqing gas and oil fields (Hamamoto 2007, p. 32). For the first time China offered to provide geological data, in case concrete progress on joint development was achieved, but refused to suspend the ongoing drilling on its side of the median line. Moreover, Japan protested about China`s deployment of warships near the contested gas fields (*Japan Times*, 2 October 2005). China, however, rejected the Japanese joint development area proposals during the 4th round from 6-7 March 2006 ([www.cima.gov.cn/zuijinziliao/zjzl-11.htm](http://www.cima.gov.cn/zuijinziliao/zjzl-11.htm)). Yet, the main achievement was that both sides now agreed for the first time on the concept of joint development as an interim arrangement, which should not affect future negotiations over territorial delimitation (MOFA statement, 1 October 2005). This understanding was further developed during the 5th round in May 2006 when both sides agreed to shelve the delimitation of the EEZ border because it would take too long to do so, and that the emphasis should now instead be on joint development (*Sankei Shimbun*, 31 May 2006). Japan also agreed that it would share costs of areas already developed by China (*Financial Times*, 21 March 2007; *Yomiuri Shimbun*, 20 September 2007).

A further rapprochement of sorts between the two sides` divergent positions occurred in March 2006 at the 4th round when China suggested joint development of two areas in the EEZ, one in the EEZ of the Senkaku Islands and the other in the north near the Longqing field. But, in contrast to their proposal in May 2005, only the area near the Senkaku Islands is on the Japanese side of the median line, whereas the northern area is located on the Chinese side of the median line (*Yomiuri Shimbun*, 11 March 2006). The proposal had the advantage for China to reconfirm its refusal of the median line, to exclude the most controversial gas fields around Chunxiao and Tianwaitian and thus to turn down Japan`s proposal of September 2005, while making

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

an indirect point about its claim to the Senkaku Islands. Moreover, while the location in the EEZ of the Senkaku Islands was bound to be rejected by Tokyo in order to prevent China gaining any foothold in the area, the other location was responding to Japan`s demand that joint development fields should be on both sides of the median line. However, in order not to compromise its stance on the median line and on the Chinese explorations near the median line, Japan turned down both proposals during the 5th round on 18 May 2006 ([www.cima.gov.cn/zuijinziliao/zjzl-11.htm](http://www.cima.gov.cn/zuijinziliao/zjzl-11.htm)). During the next round in July 2006, only an agreement on establishing a panel of experts and on a hot line between the Japanese coast guard and its Chinese counterpart to prevent incidents in future was agreed upon. The first and only expert panel meeting took place on 6 April 2007.

Table 3

Chronology of East China Sea consultations 1998-

Japan-China Consultation on the Law of the Sea and the Delimitation of EEZ (Kaiyoho ni kansuru Nittyu Kyogi)

1st round of the Japan China Consultation on the Law of the Sea: August 1998

2nd round of the Japan China Consultation on the Law of the Sea: January 2000

3rd round of the Japan China Consultation on the Law of the Sea: September 2000

4th round of the Japan China Consultation on the Law of the Sea: December 2001

5th round of the Japan China Consultation on the Law of the Sea: November 2002

6th round of the Japan China Consultation on the Law of the Sea: December 2003

Japan-China Consultations concerning the East China Sea and Other Matters (Higashi Shinakai to ni kansuru Nittyu Kyogi) Director General level

1st round of the Japan-China Consultations concerning the East China Sea and Other Matters: 25 October 2004

2nd round of the Japan-China Consultations concerning the East China Sea and Other Matters: 30-31 May 2005

3rd round of the Japan-China Consultations concerning the East China Sea and Other Matters: 30 September- 1 Oct 2005

Informal Japan-China Consultations concerning the East China Sea and Other Matters: January 2006

4th round of the Japan-China Consultations concerning the East China Sea and Other Matters: 6-7 March 2006

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

5th round of the Japan-China Consultations concerning the East China Sea and Other Matters: 18 May 2006

6th round of the Japan-China Consultations concerning the East China Sea and Other Matters: 8-9 July 2006

7th round of the Japan-China Consultations concerning the East China Sea and Other Matters: 29 March 2007

8th round of the Japan-China Consultations concerning the East China Sea and Other Matters: 25 May 2007

9th round of the Japan-China Consultations concerning the East China Sea and Other Matters: 26 June 2007

10<sup>th</sup> round of the Japan-China Consultations concerning the East China Sea and Other Matters: 11 October 2007

11<sup>th</sup> round of the Japan-China Consultations concerning the East China Sea and Other Matters: 14 November 2007

1<sup>st</sup> Ministerial Meeting: 1 December 2007

Vice-Ministerial Meeting in Beijing, 22-23 February 2008

Vice-Ministerial Meeting in Beijing, 14 April 2008

Source: Japanese Ministry of Foreign Affairs and news reports

c. Toward the end game? Negotiations after 2006

With the arrival of Prime Minister Abe in September 2006 and an implicit agreement with the Chinese during his October visit to Beijing not to visit the Yasukuni Shrine, prospects for an agreement became brighter. The political environment of the Japanese-Chinese relationship had greatly suffered during the time of Prime Minister Koizumi (2001 – 2006) and had further encouraged nationalist surges on both sides. The Japanese had been unable to understand the willingness of the new Hu Jintao regime in 2002 to improve the bilateral relationship, and Hu was finally unable to continue his overtures towards Japan in the face of internal disagreements over a more conciliant Japan policy in the face of a number of Japan-China incidents and Koizumi's repeated visits to the Yasukuni Shrine. The Hu Jintao leadership was now, however, in much firmer control after having ousted most of the remaining Jiang Zemin followers (known to be less positive towards Japan), which showed when Hu Jintao reacted very positively to the new Japanese prime minister Abe Shinzo by agreeing to invite him immediately after assuming power in October 2006. At the summit in Beijing, the two leaders published a joint statement in which they promised to `accelerate the process of consultation on the issue of the East China Sea, adhere to the broad direction of joint development and seek for a resolution acceptable for the both sides ...in order to make the East China Sea a "Sea of Peace, Cooperation and Friendship" (Joint Statement, 8 October 2006).

This change on the Japanese political side had an immediate effect at least on the atmospherics of the ECS negotiations. During the next round on 29 March 2007, China apparently proposed an area for joint development which is north of the Senkaku Islands' EEZ and south of the Japan-Korea Joint Development Zone. Although it is on the Japanese side of the median line, the area is closer to the latter line than to the

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

Okinawa Trough line (*Tokyo Shimbun*, 4 April 2007). The negotiation process was given further impetus by Prime Minister Wen Jiabao's Japan visit in April 2007. The two leaders reached a consensus on five points, '...making the East China Sea a sea of peace, cooperation and friendship, and carrying out joint development based on the principle of mutual benefit as a temporary arrangement pending the final demarcation and without prejudice to the positions of either side on matters concerning the law of the sea'. They also agreed to carry out 'joint development in larger waters acceptable to both' (Chinese Foreign Ministry Spokesperson, 25 May 2007). The major breakthrough was that both foreign ministers set a deadline for the negotiation by agreeing to submit a plan for joint development by autumn 2007, thus going further than the Abe-Hu agreement in October 2006, which spoke only about accelerating the pace of the negotiations (MOFA Press Conference, 22 June 2007; Chinese Foreign Ministry Press Spokesman, 29 May 2007). In addition, the phrase 'larger area acceptable to both sides' was meant to make it easier to agree on an area for joint development which would not just be limited to one area in the north and one in the south of the ECS as proposed by China, but would also not be limited to the Chunxiao gas field group either as demanded by Japan.

As one concrete measure, the Japanese have initiated a forum to help China with energy- and environment-saving technologies. This realises the October 2006 agreement to create a relationship guided by 'strategic interests based on mutually beneficial relations', and also, probably in a nod to joint development in the ECS, demonstrates to China how useful it is to work together with Japan in the energy field. In 2006, Tokyo hosted a Japan-China forum for technical experts on energy-saving technologies, and on the occasion of Prime Minister Wen Jiabao's visit to Japan in April 2007, an energy dialogue was organised at short notice which was attended by about 650 Japanese and Chinese business executives from oil, gas, electricity and other energy-related companies which is to be held annually (*Japan Times*, 13 April 2007). The second comprehensive forum on energy conservation and environmental protection was held on 27 September 2007 in Beijing. Both fora took place along with a bilateral ministerial meeting of the ministers in charge of energy. Other Japanese bargaining chips are more cooperation on the environment, the recognition of China as a 'market economy' and the visit by the Japanese emperor during the opening ceremony of the Olympic Games in Beijing in 2008.

The atmosphere in the relationship improved further when Fukuda Yasuo became prime minister in October 2007, as a result of the sudden resignation of Prime Minister Abe Shinzo. Known as a politician with greater sympathy for China, he immediately made clear that he would not visit the Yasukuni Shrine. The Chinese expressed their appreciation of the change when it received six Japanese ministers for a ministerial meeting at the beginning of December 2007. Although Foreign Minister Masahiko Komura was given the unprecedented honour of meeting with President Hu Jintao, as well as with Prime Minister Wen Jiabao, even the elevation of the ECSOM from bureau chief level to ministerial level did not lead to a breakthrough. In his meeting with his Chinese counterpart Yang Jiechi on 1 December, both sides merely agreed to conclude the talks before the

planned visit by Prime Minister Fukuda to China, thus abandoning the agreement of April 2007 to achieve a framework for joint development by autumn. At the beginning of 2008 there was a clear acceleration of meetings between both sides at various levels from which few details emerged.

### **Conclusions, solutions and outlook**

The investigation of the Japanese-Chinese territorial disputes in the ECS provides an illustration of how Japan has changed its general approach to China, and how it is attempting to balance a much more assertive approach with the relative decline of its power towards China. On the Chinese side we see a move away from a very centralised control of the disputes to a decision-making process where individual ministries, oil companies and particularly the navy, increasingly gain more autonomy.

After the territorial dispute over the Senkaku Islands began with China's claim in 1970, the Japanese government tried to keep the conflict under wraps while still asserting its legal title. The Chinese leadership, notably Zhou Enlai and later Deng Xiaoping, were willing to shelve the issue because at the time they had more important issues to address. Unfortunately the dispute did not go away, but rather became more complex when China started to unilaterally go ahead with the exploration and extraction of gas and oil and when both countries signed UNCLOS in 1996.

As this investigation shows one cannot put the blame completely on China since we have seen that both sides have, at different times, gone ahead without achieving prior consent from the other side. The Chinese will remember that in 1974, Japan concluded an agreement with South Korea for the exploitation of carbon resources in the north of the ECS, although the Chinese government considered the agreement as violating its rights in the area. Despite these protests, the Japanese went ahead with exploration and abandoned it only when no commercially viable resources were found. Thereafter, however, the Japanese showed great restraint in surveying even the area on the eastern side of its proposed median line, and did so already before the ratification of UNCLOS in 1996, which advises partners to a maritime border dispute not to do anything which would jeopardise or hamper a final agreement (UNCLOS Article 74 paragraph 3 and Article 83 paragraph 3). Secondly, the Japanese government blocked several semi-private Japanese and Chinese attempts, and official Chinese proposals attempting to find a compromise, by insisting on linking it with the title to the Senkaku Islands. Of course, the Chinese proposals were either rather vague openings or proposals aimed merely at a provisional agreement (by excluding a final resolution of the sovereignty issue and the maritime border), but at least the Japanese government could have made better use of its most important leverage in the 1970s and 1980s, i.e. its access to off-shore exploration, extraction and transportation technologies. Moreover, after the conclusion of the Peace and Friendship Treaty in 1978 and the beginning of a relatively stable and positive bilateral relationship during the 1980s, there was a golden opportunity for tackling remaining

## Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

bilateral issues.

But not only did the Japanese government overplay its territorial claim to the Senkaku Islands, while underplaying its technological advantage and the opportunity offered by a stable relationship, it reinforced the Chinese perception that it did not care much about China beginning explorations, and was instead implicitly condoning them through its silence. The lateness of the 2007 law on the protection of maritime structures is indicative. The Japanese government even directly and indirectly financed two pipelines and other associated installations for the Pinghu oil and gas field (despite claiming now that part of this field lies within the disputed EEZ area), between 1997 and 2001, at a time when negotiations had finally started to address the maritime border as a result of both countries having signed UNCLOS in 1996. In addition, the Japanese government did not allow any company to explore the disputed area until 2004, even on the Japanese side of the median line, without even trying to get something in return from China. The Japanese government seemed to be content as long as the Chinese were implicitly respecting the median line, even though there were reports in 1995 and later that Chinese exploration rigs went beyond it.

### Japan`s changing approach

So why did the Japanese government change its position at the beginning of the new millenium and abandoned its hitherto restraint? Jin Yongming of the Shanghai Chinese Academy of Social Sciences suggests the following rather conspiratorial reasons: a) Japan`s hope to continue importing oil from China vanished when China became a net oil importer itself, b) Japan`s appetite for the carbon resources of the ECS was awakened by China`s successful exploitation, and c) Japan wants to impede China`s overall development because of the growing rivalry between the two countries (Jin 2006, pp. 52-3). This does not seem to be an isolated opinion since the author was given a similar explanation by another Chinese international law scholar (interview, 30 November 2007). Of course, the Japanese silence was due to a rather more complex set of reasons. Japan`s China policy, until at least the second half of the 1990s, was in the hand of the MOFA, which was keen to protect the increasingly fragile relationship from several negative domestic influences over which it had no control. These included, for example, the textbook issue, and other problems related to Japan`s difficulties in coming to terms with its past, in a way that is acceptable to its Asian neighbours. However, it had control over the agenda-setting as related to the territorial disputes, another example being the ending of ODA loans. But as in the latter case, the temporising and ignoring of the problem as a result of lack of foresight or political wisdom on both sides, allowed the decision-making process to be ultimately hijacked by the general deterioration of Japanese-Chinese political relations, which was driven by growing Japanese concerns over China`s political, military and economic developments (Drifte 2006).

### Growing Chinese pluralism

Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

The deteriorating situation has not been helped by growing pluralism and loosening of central control in China. As we have seen with the various semi-private contacts between Japanese and Chinese companies, differences among several economic players on the Chinese side contributed to the failure of past attempts to negotiate joint development in the ECS. The announcements by CNOOC about the start of gas extraction from the Chunxiao field demonstrate the strength of the oil company which cannot be called a private enterprise in the Western sense. In October 2004, the Japanese government found that 12 mining concessions designated by China, extended into the area claimed by Japan as its EEZ. According to the sources, four mining fields were secret, one that crosses the median line and three that are completely inside Japan's EEZ. All these fields lie tens of kilometers northeast of the Senkaku Islands. The three mining fields set in the area designated by Japan as its EEZ include an area registered in July 2001 by CNOOC for a mining licence of five years (*Japan Times*, 18 October 2004; *Yomiuri Shimbun*, 1 January 2005). In October 2005, the Japanese government announced that it had protested about the start of gas extraction from the Tianwaitian field, as a gas flare had been observed over the platform, an unmistakable sign of gas extraction (*Japan Times*, 2 October 2005). The Tianwaitian gas field is one very near the median line and always included in Japanese proposals for joint development.

Another example is the various groups of nationalist protesters from the mainland as well as from Hong Kong who managed to go by ship to the Senkaku Islands, which could not have happened without at least tacit approval by some Chinese authorities. The growing influence of the military is particularly ominous. In the 1990s, the navy started to increasingly assert its role. We have seen the role the navy apparently played in the 1992 law on China's territorial waters, insisting on explicitly mentioning the Senkaku Islands. In April of the same year, a Chinese navy deputy commander was quoted in the Chinese press as saying it was high time that China readjusted its maritime strategy and make more efforts to recover the oil and gas resources in the South China Sea, thus reinforcing the seriousness of Chinese motives and highlighting its energy problems (*International Herald Tribune*, 19 June 1992). Faced with the acute crisis in summer 2000, Prime Minister Zhu Rongji professed his ignorance of the navy's activities in the ECS. The existence of competing interests and factions in the Chinese elite has also been observed in China's policy towards the South China Sea (Buszynski & Sazlan 2007, pp. 150-52).

However, this pluralism also depends very much on the cohesion and strength of the central leadership which is weakest during a changeover. By 2007, the Hu Jintao leadership was much more in control and could afford to react positively to the advent of a more pro-China leadership in Japan. Moreover, the Taiwan issue is currently seen as a very urgent issue. As a result, the central leadership is, for example, succeeding in banning the visits of Chinese activists to the Senkaku Islands (*Asahi Shimbun*, 13 December 2007).

### Toward joint development?

Although the two sides have not achieved an agreement in 2007 as planned, a compromise allowing at least joint development has now become more realistic than , if the Fukuda government can maintain itself, despite a very difficult domestic environment and the sudden emergence of various disputes with China (i.e. the Chinese ravioli food poisoning case and the impact on Japan`s public opinion of the Chinese clampdown on demonstrations in Tibet). But even if an agreement on joint development can be achieved, one can assume the basis of the above analysis that there will always be new developments which will confront the two countries time and again with the fundamental problems of an unresolved territorial claim, and an undelineated maritime border, arising from the conflicting position of both sides on the disputed area: China considers it to be that between the median line and the Okinawa Trough, Japan regards it to be the overlapping area of the 200 nm EEZ. Moreover, joint exploration is not a panacea to solve the problem of delineating a maritime border (Hamamoto 2007, p. 36). The White Paper 2007 of the Chinese Foreign Ministry even confirmed the country`s right to the continental shelf up to the Okinawa Trough, even while the bilateral negotiations seemed to have been in their final stage (*Kyodo*, 16 September 2007).

The most predictable case for a flare-up (apart from China starting to extract oil and gas near the median line) is the requirement to submit applications for extension of the continental shelf to the UN Committee on Limits of Continental Shelf by May 2009. This will also require extensive surveying activities in the ECS. After oil and gas there is the issue of deep sea mining of nodules, containing raw materials, which China will need for its expanding manufacturing industry even more quickly and in greater quantity than Japan. In March 2008, the Japanese cabinet adopted a basic maritime development plan which states that immediate steps should be taken to research and develop oil, natural gas, methane hydrate and sea-floor hydrothermal deposits in the nation's EEZ (*Yomiuri Shimbun*, 19 March 2008). At the same time, the activities of the Chinese navy can only increase in the ECS as a result of the unresolved Taiwan conflict, China`s desire to access the Pacific Ocean and Japanese-American military countermeasures.

How then could these two territorial problems be resolved once and for all? We have seen that there is room for a compromise, although the two countries` hardened legal positions and growing competition and rivalry make finding a solution more difficult. Shared economic interests in the wider sense (i.e. trade, investment, ODA, energy-related technologies, etc.) have helped to soothe tensions and may create the environment for finding a temporary solution in the shape of joint development of the ECS, but these positive factors may not carry developments to a solution of the territorial disputes. The territorial claim to the Senkaku Islands seems to be a zero-sum situation, but there are precedents for joint sovereignty (for example, France-UK joint sovereignty over New Caledonia), or jointly exploiting the natural resources of a territory (particularly in the absence of any population). Valencia suggests as one fundamental prerequisite that Japan will have to concede

## Japanese – Chinese territorial disputes in the East China Sea – between military confrontation and economic cooperation.

that the Senkaku Islands cannot be used as the basis for an EEZ, as a basic concession to separate the sovereignty issue from the boundary issue (Valencia 2007, p. 158). By having now agreed to open up the waters outside of the territorial waters for joint development, Japan has gone a long way (interview with a senior MOFA official, 25 May 2007).

The median line is negotiable according to Japanese law. In the case of both disputes, the concerned parties (which at some point will have to include South Korea) can resort to the various dispute settlements as foreseen in Part XV of UNCLOS. Unfortunately, China has never accepted the use of the International Court of Justice or any other compulsory dispute settlement for territorial disputes and made a declaration to this effect on 25 August 2006 (Sakamoto 2007, p. 24). Concerning the Senkaku Islands, in 1997, the Japanese Press Secretary declared that ` We have never been asked by any party to file this case with the international court. However, we firmly believe that the Senkaku Islands are an integral part of Japan, and there is no argument about this`, which basically rejects recourse to international litigation as well (Press Conference, 27 May 1997, <http://www.mofa.go.jp/announce/press/1997/5/527.html#7>). The same negative stance applies to the maritime border (Anami 2007, p. 195).

In the end, as Valencia argues, the fundamental barrier to the resolution of these disputes is not oil but `unresolved historical grievances and the politics of national identity` (Valencia 2007, p. 157). The economic stakes in the ECS are too different between Japan and China to allow them to rely on a purely economic-interest based motivation leading to a resolution. International law can give some guidance, but ultimately – as even Hiramatsu Shigeo concedes – there has to be a political solution, particularly in view of both sides refusing international litigation (Hiramatsu 1999, p. 10). For a political solution there has to be a positive atmosphere and strong leadership, which allows both sides to understand that a constructive relationship is an absolute necessity for the national interests of both countries and to act upon it.

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