Policy Brief | 1

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Briefing paper

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1. Introduction: the setting and the stakes

1. The dispute between China, Taiwan and Japan over the Diaoyu (Chinese name) or Senkaku (Japanese name) Islands is first and foremost a territorial dispute: which state has sovereignty over the islands? However, as will be explained below, it is a very complicated dispute and the potential presence of offshore mineral deposits is one of the sources of the current attention given to the islands.

2. The islands are located approximately 170 km from the nearest (undisputed) Japanese island to the south (Ishigaki), approximately 370 km from the nearest Chinese mainland to the west, and approximately 180 km from the nearest coast of Taiwan to the south-west (see Map 1). They are tiny and have little intrinsic value: 9 uninhabited islands and rocks with a total surface area of approximately 6.5 km² (see Map 2).

3. Territorial disputes often trigger strong public emotion, resulting in expressions of nationalist sentiment, especially when they are coupled with a particular and highly sensitive historical background of relations between the states involved. This is very much so in the present case, which is further complicated by the fact that, apart from Japan and the People's Republic of China, the Republic of China (Taiwan) is also laying claim to the islands (see paragraph 12 below).

4. The islands themselves have little military or strategic importance. Their real interest lies in the natural resource potential, both living and mineral, of the surrounding sea areas. The East China Sea is regarded as having great potential for oil and gas exploitation, although this still has to be demonstrated by exploratory drilling.

5. Under international law all islands generate maritime jurisdictional zones in which the coastal state has the authority to manage the natural resources. This starts with the territorial sea, which covers a maximum of 12 nautical miles (22 km) from the coast, beyond which an exclusive economic zone (EEZ) may be established up to 200 nautical miles (370 km) from the islands. In particular circumstances the coastal state may even exercise authority over the seabed resources of its continental shelf beyond 200 nautical miles. However, some islands, which are so small that they cannot sustain human habitation or economic life of their own, are not allowed under the UN Convention on the Law of the Sea (Art. 121, para. 3) to generate an EEZ or continental shelf. These are referred to as "rocks" in this provision. Both China and Japan are parties to the Convention, whereas Taiwan is not a state party in view of the controversy on its status in international law. However, Taiwan considers itself to be bound by the Convention, the main parts of which are widely considered to reflect customary international law.

6. It will be clear that when there are neighbouring coastal states within 400 nautical miles of each other, these maritime jurisdictional zones may overlap. This requires the delimitation of a maritime boundary between the states involved. However, this is in principle only possible if the territorial issue has been resolved, unless the states agree to provisional working arrangements pending the resolution of the territorial dispute.

7. It is these claims to offshore areas, in combination with the fact that three claimants are involved, that make the current dispute over the Diaoyu/Senkaku Islands so complicated to resolve.

The potential presence of offshore mineral deposits is one of the sources of the current attention given to the islands.

2. The territorial dispute

8 . There have been, and still are, many territorial disputes in all parts of the world, and international law has over centuries developed rules for determining which state is the lawful sovereign over particular territory in the event of a dispute. However, in specific cases it is generally difficult to determine the strength of claims without full access to all relevant materials and historical records. Given this difficulty in the present case it is therefore not appropriate in this briefing paper to speculate on the outcome of the settlement of such disputes. What can be done is to indicate what the relevant considerations are in light of the current rules of international law on "title to territory", that is, the right that allows a state to claim sovereignty over the territory.

9. Japan claims that it has had sovereignty over the Senkaku Islands since their formal annexation in 1895. According to Japan, at that time the islands were uninhabited and terra nullius, meaning that they belonged to no state. Japan claims that it carried out repeated surveys of these islands between 1885 and 1895 prior to the determination of their legal status. Such occupation of stateless territory was lawful at the time (and still is, but stateless territory in practice no longer exists). However, according to China and Taiwan, the islands at that time already belonged to China. If this were the case their annexation was unlawful, but this situation could have been redressed if China had not protested in time against their annexation. If Japan actually administered the islands for many years without any protest from China ("acquiescence"), this could have led to a transfer of sovereignty through "acquisitive prescription". Japan claims that China only started to assert claims with respect to the islands in 1971, after reports had been published that the East China Sea may be a promising area for mineral resource exploitation. Japan takes the view that since 1895 it has always peacefully administered the islands and Japanese nationals have undertaken a variety of activities on and around the islands, such as raising cattle and fishing. After the surrender of Japan in 1945, the Senkaku Islands, deemed as part of the Nansei Shoto Islands, were placed under the temporary administration of the United States. In 1972, the administrative rights were returned to Japan, whereby Japan was fully restored in the exercise of its sovereignty over the Senkaku Islands. Consequently, Japan takes the position that the Senkaku Islands are an inherent part of Japanese territory in light of historical facts and international law.

10. In turn, China claims that it enjoys undisputed sovereignty over the Diaoyu Islands, since they have been China's inherent territory in historical, geographical and legal terms. In its view, historical records demonstrate that China had already discovered and named the Diaoyu Islands by the 14th and 15th century and that the islands had a long time been part of the Ming (1368-1644) and Qing (1644-1912) dynasties. Geographically, the Diaoyu Islands belong to the island group of Taiwan (Formosa). Furthermore, the waters surrounding the islands have been used since time immemorial by Chinese fishermen. China also claims that it has for a long time performed acts of administration with respect to the islands, including piracy control. According to China, in 1895, after the Chinese-Japanese war, it was compelled to cede to Japan the island of Taiwan (Formosa), together with all islands appertaining or belonging to the island of Formosa, under the Treaty of Shimonoseki. This cession, it claims, included the Diaoyu Islands. China views this treaty as an unequal treaty. China reports that in 1900 Japan changed the name of Diaoyu to the Senkaku Islands. At the end of WWII, all Chinese territories and islands occupied by Japan were returned to China but, according to China, the United States included the Diaoyu Islands arbitrarily and wrongfully under its trusteeship of the Nansei Islands, which had been established under the Peace Treaty of San Francisco to which China was not a party. After the United States returned its administrative powers over the islands to Japan in 1972, China reports, it has consistently protested against the arrangements between the United States and Japan and it reports that the Taiwan authorities protested as well.

11. The position of Taiwan is not essentially different to that of China. It also takes the view that the Qing Dynasty was compelled to cede the islands under the Treaty of Shimonoseki of 1895 and that the Diaoyu Islands belonged to the island group of Taiwan. After WW II Japan had been required to restore the Republic of China to its full sovereignty and territorial integrity under

Article II of the Peace Treaty of San Francisco of 1951, but also under the separate Peace Treaty between Japan and Taiwan (Republic of China) of 1952, which declared all treaties and agreements concluded before December 1941 to be null and void. This reference is in turn interpreted as referring to the islands ceded to Japan by China in 1895 in the Treaty of Shimonoseki, which may be deemed to have included the Diaoyu/Senkaku Islands. Hence, in the view of Taiwan, the Diaoyu Islands were returned to China after the Japanese surrender under the 1951/1952 Peace Treaties and are therefore currently an inherent territory of the Republic of China.

12. Obviously, the existence of Taiwan as a separate entity next to the People's Republic of China on the mainland adds to the complexity of the issue. In fact, these are not two states, but two governments claiming to represent the same state: China. Only in 1972 was the PRC recognized by the UN as the lawful representative government of China. It should also be noted that Taiwan does not regard itself as a separate claimant nor can it be regarded as a separate claimant state under international law.

13. Finally, it is useful to note here that the issue of private ownership of the islands is not relevant to resolving the sovereignty question. The recent sale by the Japanese private owners of the property of some of the islands to the Japanese State, which triggered the latest eruptions of public emotion in China and Taiwan, does not at all affect their status under international law. Under Japanese law, after their annexation by Japan in 1895, the islands had been sold to private owners for economic exploitation. However, the title to sovereignty to the islands can only rest with a state, regardless whether this is China or Japan, and the issue of the title to sovereignty should not be confused with the issue of private property rights.

3. How to resolve this territorial dispute?

14. The principal rule of international law, embodied in Article 2(3) of the United Nations Charter and elaborated in Article 33, is that disputes between states must be resolved by peaceful means. The usual way to resolve a dispute is by direct negotiations between the parties. In negotiations, the states involved are entirely free to define the considerations they want to play a role. Any resolution they agree on is acceptable providing the agreement they reach does not affect the rights of a third state nor is contrary to international law.

15. Should the states involved not be able or willing to undertake direct negotiations, a third party (for example, another government, private person or international organisation) may offer, or be requested by them, to play a facilitating role, either by providing (passive) good offices or by (active) mediation. The resolution reached with the assistance of the third party would eventually still be reflected in an agreement between the disputing states.

16. A further option is that the parties decide to request a person or commission to suggest a proposal to resolve the dispute; this is called "conciliation". It still involves the possibility of basing the resolution on policy considerations, rather than on the applicable rules of international law. However, past practice shows that in these diplomatic means of settling disputes the (perceived) relative strengths of claims under international law also inevitably play a role in the process.

17. The rules of international law play a different, in fact decisive, role in cases that states decide to refer the dispute to an international court or arbitral tribunal. However, such a court or tribunal is only competent to rule upon the dispute when all claiming states involved have consented to its jurisdiction. There is no court in the world that is automatically competent to resolve international disputes; even the International Court of Justice, the principal judicial organ of the United Nations, can only perform its function if the parties to the dispute

have in some way given their consent. The same applies to proceedings instituted before the International Tribunal for the Law of the Sea. Such consent can be given ad hoc, after a dispute has arisen, or in advance, in respect of certain categories of disputes. The latter situation is termed "compulsory jurisdiction" of the court or tribunal in question. Japan accepted the compulsory jurisdiction of the International Court of Justice in 1958; its revised declaration made in 2007 attaches additional conditions. China has not accepted the compulsory jurisdiction of the Court.

18. In conclusion, it is the parties' responsibility to negotiate a solution. Direct negotiations between the states concerned are the most salient way of containing and resolving sovereignty disputes. Only if the parties agree can the dispute be submitted to an international court or arbitral tribunal. However, in view of the position the parties have taken so far in this case, this is not likely to take place in the near future. Therefore, there seems to be hardly any feasible alternative to negotiation. Such negotiation can first lead to a certain modus vivendi, which may involve the containing of the conflict ("conflict freezing") and establish some practical arrangements for managing the islands and their surrounding territorial seas. As will be explained below, some arrangements for actual co-operation in exploring the natural resources of the maritime areas can subsequently be made. In a later and final stage, some definitive agreements could be concluded as to either title to sovereignty and maritime delimitation or schemes of joint exploration and exploitation of the area in dispute.

4. How to determine maritime boundaries once the territorial dispute has been resolved?

19. Even if the territorial dispute has been resolved, the underlying claims to maritime zones can still be a cause of major dispute. The main relevant rules of international law on this issue are included in the 1982 UN Convention on the Law of the Sea, to which both Japan and China (PRC) are parties; Taiwan (ROC) is not, but is still bound by the same rules which are part of general customary international law.

20. The first issue to be addressed here would be: are the Diaoyu/Senkaku Islands "rocks"? (See paragraph 5 above.) That would make the delimitation process easier, since they would generate only a 12 nautical mile territorial sea. However, the positions of the states involved differ again: China regards them as "rocks", whereas Japan takes the position that they are islands proper and entitled as such to an EEZ and continental shelf of their own.

21. Regardless of this issue, the role the islands play in maritime delimitation could be marginal if the parties were to negotiate an "equitable" maritime boundary.

22. The basic rule of international law applicable in this case is that maritime boundaries beyond the territorial sea must be established by agreement in order to achieve an equitable solution. This usually means a three-phase approach: first, an equidistance line is drawn provisionally between the (island) coasts of the two states; second, an assessment is made whether there are relevant circumstances, which are mostly related to coastal geography, requiring an adjustment of the provisional equidistance line; third, a determination will be finalized if the resulting line is "equitable", meaning that it does not lead to a disproportional attribution of maritime areas to one of the states. If that is considered to be the case, the equidistance line will be adjusted accordingly. Any line that the two states agree

upon is regarded as being "equitable", provided it does not affect the rights of third states.

23. Under the international law of the sea, coastal states can also claim a continental shelf beyond 200 nautical miles when certain geological conditions are met. China claims a continental shelf from the mainland extending to the east of the islands, while Japan claims an EEZ/ continental shelf extending to the west of the islands, up to the median line with China's mainland coast (see Map 2). As a result, the two states also have a dispute on the location of their maritime boundaries in the area.

24. If the two states cannot reach an agreement through negotiation, the same rules apply as described above with respect to submitting the dispute to an international court or arbitral tribunal; but this can only be done with the consent of both parties involved. It should be noted that in 2006 China opted out of compulsory dispute settlement provisions with respect to maritime delimitation under the UN Convention on the Law of the Sea. Japan has not made use of the option to exclude such disputes.

the two states also have a dispute on the location of their maritime boundaries in the area.

5. What to do in the interim?

25. International law stipulates that no actions may be undertaken by the parties which could aggravate the dispute. The states could agree on provisional arrangements of a practical nature, such as the joint exploration and exploitation of the natural resources. There are already such arrangements in place in many areas of the world. Examples include joint development schemes between Malaysia and Thailand, and between Vietnam and Thailand in the Gulf of Thailand, providing for the joint exploitation of natural resources in the area of overlapping claims. Reference may also be made to the agreement (but which does not provide for actual joint development) reached by China and Japan in 2008 to develop co-operatively the undersea Chunxiao/Shirakaba oil and gas field, an area located to the north of the Diaoyu/Senkaku Islands. In this agreement (called "Principled Consensus" in China), the two states have agreed, in order to make the East China Sea a "Sea of Peace, Cooperation and Friendship", to cooperate, without prejudice to their legal positions, during the transitional period pending agreement on the delimitation. Such arrangements could also be a first step for dealing with the other disputed parts of the East China Sea. However, it should be noted that the 2008 Agreement does not involve an area where a dispute over island territory is involved.

6. Summary and Final observations

26. The dispute between China, Taiwan and Japan over the Diaoyu/Senkaku Islands is first of all a territorial dispute. The principal question is which state holds sovereignty over the islands and the surrounding maritime waters. Key questions in this regard are whether or not the islands were the object of the cession by China to Japan under the 1895 Treaty of Shimonoseki (as both China and Taiwan claim), or that the islands as terra nullius were susceptible to lawful annexation or may have subsequently been acquired by prescription (as Japan claims). Answers to these questions require solid research and full access to all relevant materials and historical records, which currently are not fully in the public domain.

27. The real interest in the islands lies in the potential economic value of oil and gas exploitation as well as the fisheries of the surrounding sea areas. Both China and Japan have proclaimed a 200 nautical mile EEZ from their (island) coasts, which partly overlap. China also claims an extended continental shelf continuing east of the islands. Consequently, this requires the delimitation of a maritime boundary between the states involved. However, such maritime delimitation can only be achieved if the principal territorial issue has been resolved.

28. The issue of private ownership of the islands is not relevant to resolving the sovereignty question. Private or public property rights over the islands do not affect the sovereignty status of the islands under international law.

29. Contemporary international law contains a relevant toolbox for peaceful settlement of international disputes, as outlined in Article 33 of the UN Charter. Direct negotiations between the parties concerned appear the most pertinent avenue for resolving the territorial dispute.

30. There is no automatically competent international court or tribunal to address the issue of the sovereignty over these islands. The International Court of Justice or any other tribunal can only come into play when the parties to the dispute have in some way given their consent. This is not likely to happen in the near future.

31. If the sovereignty issue has been resolved, the parties will still have to agree on an "equitable" delimitation of their EEZ boundaries. Should they not be able to reach agreement, the dispute can only be settled by a court or tribunal if the parties have given their consent.

32. Hence, it is up to the parties to negotiate a solution. The states could agree on provisional arrangements of a practical nature, for example that no actions may be undertaken which would aggravate the dispute and to explore the natural resources co-operatively. There are already some arrangements of such a nature in place between coastal states (including China and Japan) in the East China Sea. In later and final stages, some definitive agreements could be concluded as to either title to sovereignty and maritime delimitation or schemes of joint exploration and exploitation of the area in dispute.

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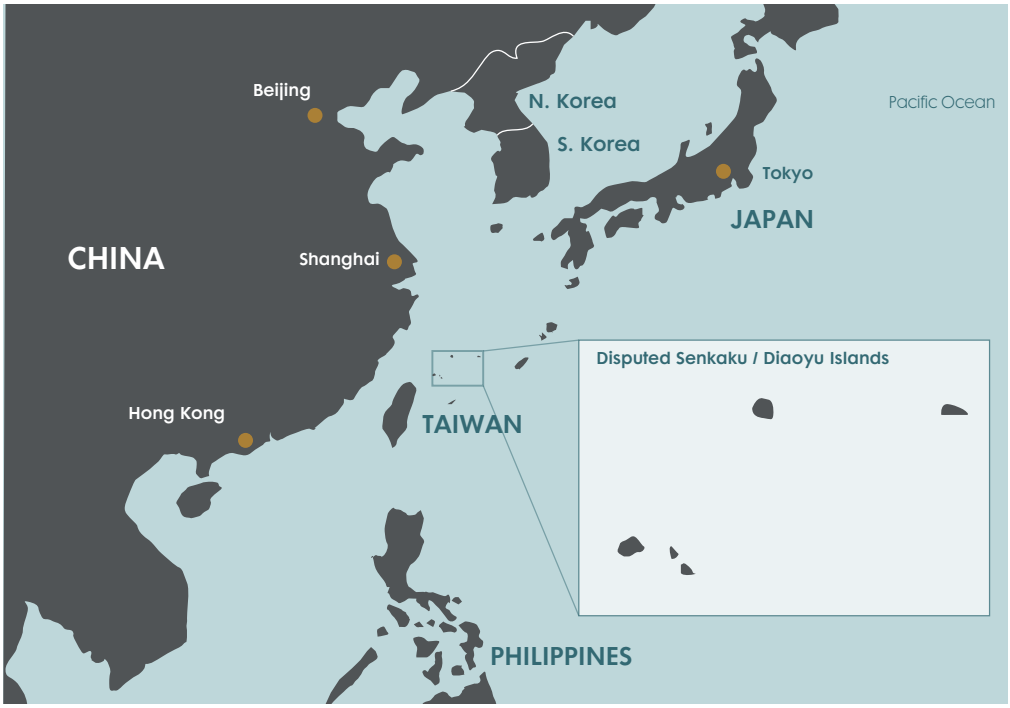
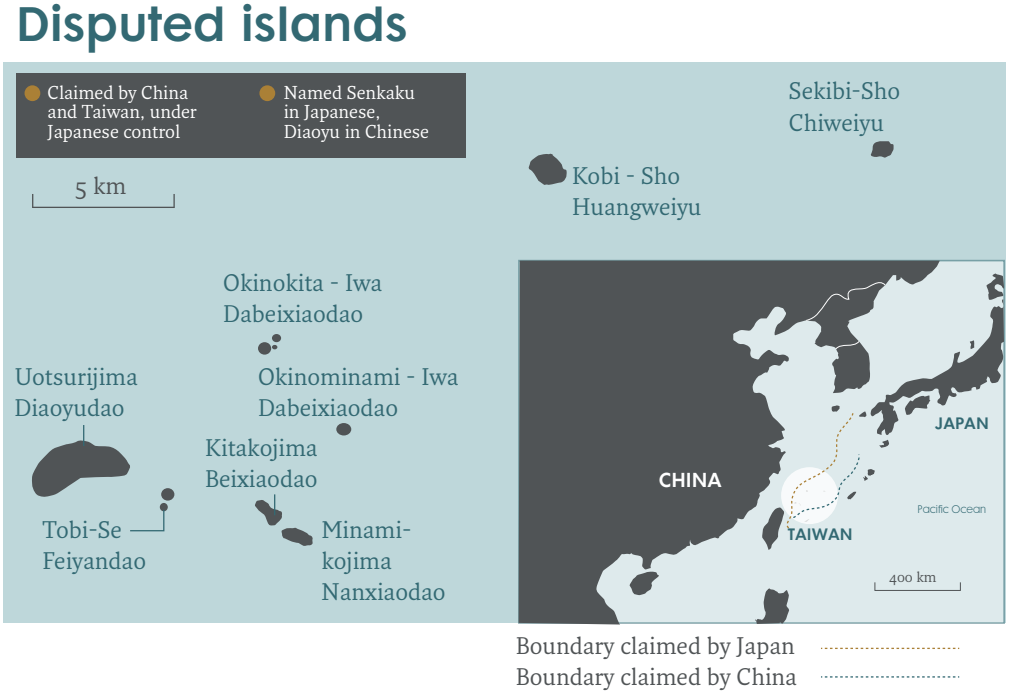
Annex I: ***MAP I***



Annex II: ***MAP 2***



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