Continental Shelf cases of 20 February 1969, South Korea began to lease sea-bed areas for oil exploration in the north-eastern part of the East China Sea which overlapped some Japanese oil companies' interests. When Japan and South Korea, together with Taiwan, were having talks as to how the maritime boundaries should be delimited in the East China Sea, involving the overlapping claim areas, China made its first official protest in its morning radio broadcast on 4 December 1970. In February, 1971 China repeated its protest during what was called the Japanese-Chinese "memorandum of understanding" trade negotiations. It made a further protest on 30 December 1971 by publishing a number of historical or legal grounds for its claim to the Senkaku Islands ("Diao-yu" Islands in Chinese).[1]

The basis of China's claim is mainly historical: its nationals discovered the islands and its sovereignty over them remained uncontested over many hundreds of years.

The Japanese position is, by contrast, based more on the modern rules of international law on the acquisition of territory, although it does not deny the relevance of historical grounds. The most important thing from this point of view is the claimant's will to appropriate a given territory. From all the historical documents relied upon by China, it seems rather difficult to infer that China had an unambiguous will to appropriate the Senkaku Islands if it has evidence of having repeatedly used them as navigational aids over hundreds of years. Stability in legal relations between sovereign States requires that the claimant maintain its sovereignty over a territory in such a manner as will not allow any external interference in its ownership. Otherwise a territory may be appropriated by another claimant who comes later with an ambition to deprive the original owner of its ownership – an instance of the 'rule of capture'.

Unless a claim to territory is corroborated by an act to display the claimant's will to occupy it, it is considered as *terra nullius*, no one's territory. In the understanding of the Japanese Government no such corroboration had been provided by China when it incorporated the Senkaku Islands in the Japanese territory in 1895. The Japanese position was strengthened by the lack of protest on the part of China against their incorporation and the subsequent granting of the lease of one of the Islands to a private person who wanted to gather sea-birds' feather there. Hence the Japanese position that it has had undisputed sovereignty over them, and that there is no territorial dispute over them. It was in this state of things that the afore-mentioned scientific research was conducted by the CCOP in the East China Sea, including the sea areas around the Senkaku Islands in 1968.

Is Joint Development Possible?

Since the Japanese Government denies in principle the existence of a territorial dispute over the Senkaku Islands and yet China has a claim to them as a matter of fact, there cannot be any way of negotiation for a possible delimitation of the boundaries of the sea areas between the chain of Okinawa islands and the Chinese mainland. Can there be any prospect, or at least any possibility, of the two countries coming to terms as to whether there exists a dispute between them over territorial claims?

When it comes to the legal basis of delimitation, much the same thing would happen between Japan and China as took place between Japan and South Korea in the early 1970s: Japan invoked the median line principle while South Korea relied upon the 'natural prolongation' doctrine.

However, assuming for the sake of argument that the two countries can sit at a negotiating table putting aside the formidable issue of territorial sovereignty over the Senkakus, they may possibly be able to devise a joint-management zone for sea-bed development as they have done in respect of fisheries in the Fisheries Agreement of 11 November 1997.[3] In doing so, the two countries agreed to shelve the formidable problem of boundary delimitation of their exclusive economic zones. This experience may bear witness to a possibility that they may come to agree to shelve the same problem for the time being in favor of the development of sea-bed mineral resources. But this possibility is not altogether promising, because the 'provisional measures zone' as provided for in the Fisheries Agreement has carefully avoided involving the sea areas of the Senkakus.[4]

Perhaps they were able to work out a compromise on the zone in view of the most pressing needs of their fisheries interests. By comparison, oil and gas, given their less promising potential and huge costs of development, may not be in so pressing a demand as the fisheries resources. In this sense there may be much less incentive to negotiate a compromise zone of joint development in the disputed sea areas around the Senkakus.

Scenario For Joint Development

Is there absolutely no possibility of co-operation for joint development of sea-bed petroleum in the disputed sea areas then? Should Japan and China be able to put aside the formidable and intricate question of sovereignty over the Senkakus in favour of practical demand for oil or gas deposits in the neighboring sSi.3(si4A5.3(to)t-6.2(c)6(e n)5.3(e n(ovy)7.9( ).2(? seinr of -5.3(2se)76(tera)125.7(m)115(.p)o-6..5(T)66-Tth (t)6.7we2d()5.4(cn)-5.4uintresf -5.3handconcludhasc

and co-ordinated program of exploitation without prior boundary delimitation or partition.[6] Subsequently the Neutral Zone Partition agreement of 1965 delimited an international boundary line, which extended from the land territory to the territorial sea.

be a parallel between this case and the Senkakus where the sovereignty issue is in the forefront of the dispute.

The *Malaysia-Thailand* Memorandum of Understanding of February, 1979 effected a broad agreement between the two countries for joint development of the continental shelf in a defined zone in the Gulf of Thailand. While they pledged to

Co-operation would have prompted the negotiations for the 1989 treaty.

The *Malaysia-Vietnam* Memorandum of Understanding of June, 1992 is an "interim arrangement for the purpose of exploring and exploiting petroleum in the seabed in the overlapping area" in the Gulf of Thailand,[12] where the two countries failed to delimit their boundary lines. In a later commercial agreement of August, 1993 between PETRONAS for the Government of Malaysia and PETROVIETNAM for the Government of Vietnam, it was provided to establish an eight-member Co-ordination Committee for the implementation of the skeleton Memorandum of 1992. An interesting feature of this entire arrangement is that as Vietnam was not well prepared for the scheme of co-operation with Malaysia, PETRONAS was to carry out all joint development operations and remit to PETROVIETNAM its equal share of the net revenue free of any taxes, levies or duties, and that perhaps in return for this the petroleum law of Malaysia was to apply in the relevant joint area.[13]

In the *Colombia-Jamaica* treaty on maritime delimitation of November, 1993, the two countriesmb.2(e)7.8(r)ta1(m)1bient joi.

noted that nothing in the conduct or content of any meetings between the two countries must be interpreted to mean a change in the position of either country with regard to “the sovereignty or territorial or maritime jurisdiction over the Falklands Islands, South Georgia, the South Sandwich Islands and the surrounding maritime areas”.[15] A series of subsequent British acts, including the Governor’s Proclamation of November, 1991, the Continental Shelf Ordinance of 1991 by the Legislative Council of the Colony of the Falklands Islands and the Offshore Minerals Ordinance of October, 1994, provided a framework for preliminary exploration of the continental shelf within the designated areas. On the other hand, Argentina has claimed the islands well over a hundred years, and continues to pass legislation pertaining to the islands. But the two countries made the Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic in

Saudi Arabia-Sudan agreement of May, 1974, the *Iceland-Norway* agreement of October 1981, the *Libya-Tunisia* agreement of 1988, and the *Guinea-Bissau – Senegal* agreement of October, 1993.[18] All these cases of joint development were designed on the basis of successful maritime boundary delimitation, toati7(ty b)-5itati.314

experience shows.[19] Although this is not the immediate economic effect, its peace-inducing function would be worth trying.

The Senkakus are barren and uninhabitable islands in the normal sense of the word, and have little value in themselves. What has made them seemingly valuable is the alleged potential of hydrocarbon resources on the sea-bed around them. The interest of the claimants is in the possible economic profit from the potential resources. But they must be exploited within a defined sea area of jurisdiction, and this in turn is derived from the sovereignty over the land territory which faces the sea area in question. Thus the claimants insist on their ownership of the land territory. Consequently, should there be no or little prospect or potential of such resources in the disputed sea areas, the claimants might lose interest in their ownership of the islands. This will all depend on scientific findings in the future.

NOTES

[1] Subsequently China promulgated the Law on the Territorial Sea and the Contiguous Zone on 25 February 1992 which provides in Art. 2(2): "The land territory of the People's Republic of China includes … Taiwan and all islands appertaining thereto including the *Diaoyu Islands* …." (Emphasis added)

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[18] Miyoshi, *op. cit.*, pp. 29-41.

[18-a] Donaldson and Pratt, op. Cit., p. 504

[18-b] Ibid., p. 508

[19] Wälde, Thomas, "Financial and Contractual Perspectives in Negotiating Joint Petroleum Development Agreements", in Fox, Hazel (ed.), *Joint Development of Offshore Oil and Gas*, Vol. II, London: The British Institute of International and Comparative Law, 1990, p. 156.