Methods of Settling the Sino-Japanese Dispute over the Diaoyu Islands

SONG Yuxiang*

Abstract: In international law, procedural and substantial problems of international dispute settlement are equally important. From a procedural perspective, use of force and peaceful means (including political means and legal means) are two basic methods of international dispute settlement. In the Sino-Japanese dispute over the Diaoyu Islands, since the use of force is strictly limited, peaceful means take center stage. For China, considering various aspects, political settlement is "relatively feasible but not desirable" while legal settlement is "relatively desirable but not feasible". If the dispute over the Diaoyu Islands is to be settled under the current situation, the result would probably be that China and Japan will segment the Islands. From the perspective of international law, this article intends to preliminarily explore the procedural problems of the Sino-Japanese dispute settlement over the Diaoyu Islands.

Key Words: Diaoyu Islands; Method of Dispute Settlement

I. Introduction

From ancient times, at latest since the Ming Dynasty, the Diaoyu Islands have been discovered and preoccupied by Chinese ancestors. According to the view that "all the territory belongs to the Emperor" of *Pax Sinica*, the Diaoyu Islands are inherently Chinese territory. Due to various historic reasons, the Islands were unjustly occupied by Japan. Japan obtained occupation of the Diaoyu Islands after the Treaty of Shimonoseki and occupied the Islands until now, which causes serious territorial disputes with China. This aggression hurts the feelings of the Chinese people, who are closely intertwined with political, economic, and national defense

* SONG Yuxiang, Master candidate of School of Law, enrolled in 2003 at Xiamen University. Research direction: International Law of the Sea.

factors. For this reason it has become one of the most complicated and difficult territorial disputes in the world.

From an international law perspective, the Sino-Japanese Diaoyu Islands dispute touches upon substantial and procedural problems. With regard to sovereignty of the Islands, both China and Japan, including authorities and scholars, stick to their own argument, making an utmost effort to prove that sovereignty of the Islands belongs to its own country. Japan tends to make a demonstration based on international law while China relies on historic rights by textual research of historical facts and evidence. However, there have been few scholars who performed research on how this dispute can be settled and its feasibility. For dispute settlement, proper method or procedure is as important as reasonable arguments – reasonable arguments are not always feasible.

In consequence, this article focuses neither on historic research of the dispute nor on the substantial problems in international law of the problem, but on discussing settlement methods of the dispute and their feasibility, i.e. procedure problems. Towards this goal, the author has made an in-depth comparison of different dispute settlement mechanisms, including use of force and peaceful means represented by diplomatic method and legal method, with special consideration given to China Taiwan's involvement, and has explored the best and feasible method for China to adopt.

With respect to research methods applied, this article makes use of comparative research method and correlation method. The former finds its expression in comparison among various methods of international dispute settlement and the pursuit of relatively desirable and feasible methods for China; the latter is embodied in the comprehensive consideration of the Sino-Japanese Diaoyu Islands dispute and the dispute of the continental shelf in the East China Sea. The conclusion of the present article leads towards a "paradox" for China that is determined by the overall situation of Sino-Japanese political and economic relations, which concerns not only the Diaoyu Islands dispute itself – an isolated research method would probably lead to a "utopian" conclusion.

II. Comparative Research on Settlement Methods for the Sino-Japanese Diaoyu Islands Dispute

A. Use of Force

Traditionally, international dispute settlement methods can be classified as use of force and peaceful means. "Traditional international law recognizes war is the instrument to implement State policies and is a legal means of settling international disputes. '*Jus ad bellum*' is a legal right of sovereign States."[1] Such right is inherent and self-evident, just like basic human rights in human rights law which define human beings. Hugo Grotius, the father of modern international law, values natural law and argues that "so far from any thing in the principles of nature being repugnant to war, every part of them indeed rather favours it", "for the preservation of our lives and persons, which is the end of war, and the possession or acquirement of things necessary and useful to life is most suitable to those principles of nature".[2]

However, after World War I, and especially after World War II, *jus ad bellum* was gradually subject to limitation and finally prohibited. The 1928 Pact of Paris[3] was first to limit the *jus ad bellum* of States.[4] The Covenant of the League of Nations further imposed restrictions.[5] The current regulation on the use of force is provided by the Charter of the United Nations. Article 2 of the Charter explicitly states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations", and "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". This has prohibited both *jus ad bellum* and the use of force in any other manner, except under two conditions: self-defence and actions taken or

---

1 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 236. (in Chinese)

2 Hugo Grotius, translated to English by Campbell, translated to Chinese by He Qinhua et al., *The Rights of War and Peace*, Shanghai: Shanghai People Press, 2005, p. 50. (in Chinese)

3 The full name is General Treaty for the Renunciation of War as an Instrument of National Policy, or the Kellogg–Briand Pact.

4 Article 1 of the Pact of Paris stipulates that: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article 2 stipulates that: "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

5 Article 12 of the Covenant of the League of Nations stipulates that: "in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council."

authorized by the Security Council.[6]

Recent international law has put strict limitations on the use of force by States and China is no exception in its disputes. Resorting to use of force to settle the Diaoyu dispute would have to meet these two exceptional conditions provided by the Charter of the United Nations. It is unlikely that the Security Council would authorize China to use force or directly take actions against Japan and thus whether or not China is entitled to use of force depends on whether the condition of "self-defence" is met in the Diaoyu Islands dispute.

The present author believes that China still enjoys the inherent right of self-defence for the Diaoyu Islands. Considering the exercise of the right to self-defence, the International Court of Justice has pointed out in the judgment of the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* case that, "whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence".[7] The criteria of "necessity" and "proportionality" are two indispensable conditions for the exercise of self-defence. The former means self-defence can only be exercised when the State is under "an armed attack", which is a precondition for invoking the right of self-defence; the latter is a principle that should be complied with in the process of defensive attack. It requires that the right of self-defence exercised in response to the armed attack should be proportionate to damages suffered and is aimed at returning to the status quo that existed prior to the attack. Since the 1970s, when Japan began to exercise its military control over the Diaoyu Islands and the surrounding sea area, it drove away or even shelled fishermen from China Taiwan and the civil Diaoyu Islands defending activists, resulting in injuries and deaths.[8] Such military control and blockade is obviously

---

6 Article 51 of the Charter of the United Nations stipulates: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Article 42 stipulates: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

7 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, pp. 124~125. (in Chinese)

8 Records of the Diaoyu Islands Preservation Movement over the Years, at http://www.diaoyuislands.org/fwl/1.html, 22 May 2006. (in Chinese)

a form of armed attack. Although promptness is an important content of necessity, Japanese military control and blockade of the islands are continuous, meaning that China has always been under an armed attack. As stated by Hans Kelsen, "as long as the status of the territory is that of belligerent occupation, and that means as long as there is a state of war between the occupied State and the occupying State."[9] Since the state of war continues, exercise of self-defence is unobjectionable. Therefore, if the state of armed attack continues, under the situation that other measures cannot solve the Diaoyu Islands dispute, self-defence is not contrary to the requirement of promptness, i.e. necessary. Professor Wang Tieya has stated in commenting the Gulf War, "the occupation of all Kuwait territory by Iraq in 1990 constitutes a continuing armed attack, making the exercise of the right of self-defence legalized".[10] Such a "continuing armed attack" is exactly the same as Japanese military control and blockade over the Diaoyu Islands and China certainly has the right to self-defence.

Even if Japan has occupied the Diaoyu Islands illegally, its scholars advocate the use of force to settle the dispute. They strongly argue that the Diaoyu Islands fall into the scope of the Treaty of Mutual Cooperation and Security between the United States and Japan, hoping to protect its actual control over the Diaoyu Islands through force with the help of America. It even threatens the U.S. with war to contain the opposing views of the latter: "for the behavior of yelling conflicts in theories while remaining calm and changing attitudes randomly, we cannot help but think of the inconsistent behavior of President Wilson in the Versailles Peaceful Conference, which has caused mistrust of Japanese on the United States and will further lead to the war against the United States".[11] This type of straight forward behavior of advocating war has exposed Japan's attitude of not obeying international law, which serves as a foil to the importance for China of exercising the right to self-defence.

---

9 Hans Kelsen, translated by Wang Tieya, *Principles of International Law*, Beijing: Huaxia Publishing House, p. 243. (in Chinese)

10 Hans Kelsen, translated by Wang Tieya, *Principles of International Law*, Beijing: Huaxia Publishing House, p. 125. Emphasis added by the original author. (in Chinese)

11 Katsunori Nakamura, The Treaty of Mutual Cooperation and Security between the United States and Japan and the Senkaku Islands, in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 79. "The behavior" refers to the fact that the United States remained neutral on the Sino-Japanese Diaoyu Islands dispute and excluded the Islands from the application scope of the Treaty of Mutual Cooperation and Security between the United States and Japan.

B. Peaceful Means

1. Political Means

Peaceful settlement of international disputes refers to settlements by means other than the use of force, i.e. settling international disputes through political means (diplomatic means) or legal means.[12] Political means, sometimes also referred to as diplomatic means, is the method of settling international disputes between the two interested parties through peaceful means other than legal method. It can involve a third party besides the two parties concerned, and generally includes: negotiation, consultation, investigation, mediation, intervention and reconciliation.[13] Whatever the name or the form it carries, its essence is that the disputing parties enjoy dominant status for dispute settlement and the binding force of the final result completely depends on the consent of the disputing parties; even if a third party is involved, its decision is of no binding force on the disputing parties, unless consent from the parties is given.

In choosing peaceful means of international dispute settlement, "States tend to believe in and be accustomed to the diplomatic methods and the wisdom of negotiations outside a court".[14] This is especially true with powerful States. Different from the ultimate purpose of judicature which is to pursue fairness, diplomatic method is based on power. Powerful States often do not need to resort to judicial process. They can obtain more national interest by settling disputes through diplomatic efforts based on power rather than through judicial processes. Consequently, powerful States are inclined to settle disputes through political means and explicitly reject international arbitration or judicature and limit or refuse intervention of a third party. As a matter of fact, legal method is the dispute settlement method which less powerful States prefer; to some extent, legal method is of assistance to less powerful States. "Under the condition that national power is not sufficient to contend against powerful States, resorting to international organizations and international judicial mechanisms is an opportunity for less powerful States to realize their own interest demand and find international

---

12 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 569. (in Chinese)
13 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 569. (in Chinese)
14 Su Xiaohong, Why Powerful States Dislike International Judicature, *Law Science*, No. 11, 2003. (in Chinese)

justice". [15] Both China and Japan are States with significant and equivalent national power. Since powerful States are confident in solving disputes through diplomatic negotiations, they are obviously in favor of the diplomatic method.

However, the result of any diplomatic settlement, especially when it is based on negotiation between States of equivalent national power, is always a give-and-take compromise and neither a complete win nor a complete loss. This is because under the condition that neither party can suppress the other party with its power, a complete loss is not acceptable for disputing parties. If a compromise of interest is not reached, it means negotiations have failed. Consequently, settling the Diaoyu Islands dispute through diplomatic means would probably result in the segmentation of the Islands between China and Japan. If China or Japan obtains the full sovereignty of the Islands they would at the same time pay compensation of interest in other aspects to the other party.

As for the result of segmenting the Diaoyu Islands by negotiation, although there still leaves much to be desired for both China and Japan, the result is grudgingly acceptable compared to a complete loss.

2. Legal Means – International Arbitration and International Judicial Settlement

Legal means of international dispute settlement mainly refers to settlements through arbitration and judicial judgment,[16] namely legal means mainly includes arbitration and judicature. Its fundamental character is that the consent of the disputing States is required prior to arbitration or judicature. Once consent is given, the dominant power of settling the dispute is controlled by a third party, and its adjudication or judgment has legally binding force on the disputing parties even without the consent of them.

Compared to the diplomatic method, settlement by legal method is based on legal rules, including substantial rules and procedural rules, rather than power or negotiation skills. It is usually relatively fair to disputing parties and the result is relatively fair. In addition, international courts and arbitral tribunals have comprehensive experience in dealing with cases of territorial disputes and

---

15 Su Xiaohong, Why Powerful States Dislike International Judicature, *Law Science*, No. 11, 2003. (in Chinese)

16 Traditional international law has divided methods of international dispute settlement into two categories: compulsory and non-compulsory. Non-compulsory ones are further classified as political ones and legal ones, the latter including arbitration and judicature. See Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 453. (in Chinese)

delimitation of continental shelves. Their judgment or adjudication is comparatively convincing and generally will be executed effectively. Furthermore, legal decisions are usually definite, final and permanent. The dispute will be completely solved and once it is solved, there would be no controversy in the future. From the perspective of the overall situation of Sino-Japanese relations, solving the Diaoyu Islands disputes in a final and permanent way by submitting it to an international arbitration or judicature benefits the reduction of frictions and conflicts and helps the positive development of relations between the two States.

Despite all of the above, adoption of legal means is not realistic or feasible because of the particular circumstances of the Sino-Japanese Diaoyu Islands dispute. Under the situation of "international anarchy", both the adoption of arbitration and judicature require the consent of the disputing States. Without the States' consent, even the International Court of Justice cannot exercise its jurisdiction. According to Article 36 of the Statute of the International Court of Justice, there are three categories of jurisdiction of the International Court of Justice: (1) any cases submitted by the disputing States which are not limited to those of legal nature, i.e. voluntary jurisdiction; (2) matters or disputes specially provided for in the Charter of the United Nations or in treaties and conventions in force, i.e. conventional jurisdiction; (3) all legal disputes declared by States in advance over which they recognize the jurisdiction of the International Court of Justice as compulsory *ipso facto*, i.e. optional compulsory jurisdiction.[17] However, the author believes it is hardly possible for both China and Japan to give consent to submit the disputes to arbitration or judicature for various reasons, mainly including:

a. Common Reasons for China and Japan

The special character of the Diaoyu Islands dispute is its close link to politics. In fact, it is political matters rather than legal matters that make the dispute difficult to solve.

In modern history, China's territorial borders were affected by Japanese aggression, and therefore any territorial disputes are increasingly sensitive. China

17 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 590 (in Chinese). Article 36 of the Statute of the International Court of Justice provides: (1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. (2) The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes.

perceives Japan's territorial claim over the Diaoyu Islands as the resurgence of the Japanese militarism that harmed China in the past. This is deeply engraved in Chinese peoples' minds. A scholar has expressly pointed out that national feelings of the Islands is an issue for relevant parties, especially for Chinese people (including Mainland and Taiwan) who directly suffered from this aggression in modern history.[18] Japan also regards China's territorial claim as the resurgence of its nationalism and is sometimes afraid of China's revenge for its own aggression. In consequence, both parties have been vigilant about territorial problems.

More sensitively, the Diaoyu Islands dispute is closely related to the continental shelf delimitation in the East China See and directly determines the ownership of oil and gas resources in the area. The continental shelf surrounding the Diaoyu Islands has abundant oil and gas resources.[19] The United Nations Economic Commission for Asia and the Far East (ECAFE) conducted a geophysical investigation in the East China Sea area with a United States investigating ship during 12 October 1968 and 29 November of the same year. The report was published in May the next year and concluded that the continental shelf between China Taiwan and Japan is probably one of the most abundant deep-sea oil fields in the world. The continental shelf of the Taiwan Strait Basin which is approximately 200 thousand kilometers, contains abundant oil resources that at least match those in the Persian Gulf. The most conservative estimation would be of 80 billion barrels.[20] The Diaoyu Islands are located exactly at the edge of the basin that is rich in oil and gas. With the establishment of the legal system regarding continental shelf in the law of the sea after World War II, the importance of the Diaoyu Islands in delimiting continental shelf in East China Sea began to emerge. The sovereignty of the Islands directly involves the ownership of oil and gas resources in the East China Sea. The significance of these oil and gas resources is self-evident for Japan,

---

18 Phil Deans, The Diaoyutai/Senkaku Dispute: The Unwanted Controversy, at http://www.kent.ac.uk/politics/research/kentpapers/deans.html, 20 March 2006.

19 Ozaki Shigeyoshi, Sovereignty of the Senkaku Islands (Part I), in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 228. See also Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands before the Sino-Japanese War of 1894-1895: Also a Queryto Professor Okuhara Toshio and Others*, Beijing: Social Sciences Academic Press, 1994, pp. 7~8. (in Chinese)

20 Ozaki Shigeyoshi, Sovereignty of the Senkaku Islands (Part I), in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 228. See also Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands before the Sino-Japanese War of 1894-1895: Also a Queryto Professor Okuhara Toshio and Others*, Beijing: Social Sciences Academic Press, 1994, pp. 7~8. (in Chinese)

a State with limited territory and even more limited resources; for China, with the rapid development of its national economy, the demand for oil and gas resources grows with each year. Since becoming a net importer of oil products in 1993 and a net importer of crude oil in 1996,[21] China has imported 120 million tons of crude oil in 2004. In 2010, the demand for oil in China would reach 350~380 million tons and the degree of dependence on import would be as high as 51.4%~52.6%,[22] which will create a great shortage of oil and gas resources. For these reasons, having ownership of the Diaoyu area resources can directly influence both China and Japan's future economic development. However, due to its fundamental importance, this issue traverses into the political realm.

Traditionally, disputes involving fundamental political and economic interests of a State, for instance, dispute of honor, are "non-justiciable disputes". As claimed by a scholar, "[a]ccording to a widespread opinion, existing international law is not applicable to all possible disputes between States, since there are disputes which, by their very nature, cannot be settled by the decision of an international tribunal applying existing international law to the dispute. Such disputes, frequently excluded in treaties of arbitration from the jurisdiction of international tribunals established by these treaties, are disputes which affect vital interests, or the independence, or the honor of a party to the dispute."[23] The Sino-Japanese Diaoyu Islands dispute is highly non-justiciable due to national feelings, political and economic factors. Moreover, "sovereignty disputes of offshore islands in modern Northeast Asia are not likely to be solved by judicature or intervention of a third party,"[24] China and Japan are of no exception.

As far as the Sino-Japanese Diaoyu Islands dispute is concerned, applying a legal method would always result in either a complete win or a complete loss. If submitting to international arbitration or judicature, China or Japan, whichever wins the case, will obtain full sovereignty over the Diaoyu Islands. Namely, either

---

21 Xuan Xiaowei, Solving the Difficulties of Importing Oil for China, at http://www.china.org.cn/chinese/OP-c/727528.htm, 23 April 2006.(in Chinese)

22 National Development and Reform Commission, The Degree of Dependence on Imported Oil Will Exceed 50% in 2010, at http://news.xinhuanet.com/fortune/2005-02/16/content_2583742.htm, 23 April 2006. (in Chinese)

23 Hans Kelsen, translated by Wang Tieya, *Principles of International Law*, Beijing: Huaxia Publishing House, p. 318. (in Chinese)

24 Choon Ho Park, Some Negative Factors in Solving Territorial Disputes in Northeast Asia, in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 74.

China or Japan will possess the Islands as a whole and segmentation will not take place. This is because evidences of China and Japan all support the result of a complete win or a complete loss: if Chinese evidence is effective and admitted by the court or arbitral tribunal, the Diaoyu Islands will be considered *terra nullius* before 14 January 1895 and sovereignty of all the Islands will be obtained by China; in contrary, if Chinese evidence is declared invalid by the court or arbitral tribunal and Japan's evidence is effective, the Diaoyu Islands before that date had already been obtained by Japan through its preoccupation and they were not *terra nullius* any more, then Japan will acquire all of the Islands. However, a complete loss is unacceptable for both China and Japan. It will be a political disaster for the authorities in power. Therefore, both parties would be more cautious in submitting the dispute to judicature or arbitration and in fact, both parties have explicitly refused to solve the dispute by arbitration or judicature: Japan issued a press release on 19 July 1996, in which it stated that the Japanese government does not believe there is any reason for resorting to a regional court to solve the dispute, since there is no territorial dispute at all as a matter of fact. China also warned the United States not to intervene in the current dispute in October 1996. The spokesman of Ministry of Foreign Affairs of China once expressed: "the dispute involves China and Japan, a third party is not allowed to intervene".[25]

b. Respective Reasons for China and Japan

(a) Japan's Particular Reasons for Refusing Judicature or Arbitration

Japan is currently exercising control over the Diaoyu Islands and occupies a better position in the Sino-Japanese Diaoyu Islands dispute. In international law, the act of "*de facto* control" results in certain legal effect. To some extent, facts generate rights and "control is half of the law".[26] Japan intends to consolidate the established fact of its "*de facto* control" with the lapse of time, and offset the illegitimacy of its aggression by exercising long-time "*de facto* control". It is definitely not in favor of submitting to judicature or arbitration. Furthermore, Japan even refuses to solve the Diaoyu Islands dispute in any other manner, since it believes that there is no dispute at all with regard to sovereignty over the

25 Jr. William Schachte, My View on Diaoyu/Senkaku Islands Dispute, in Taiwan Law Society (TLS) and Taiwan Institute of International Law (TIIL) eds., *The Seminar on International Law of the Diaoyu Islands: Records of Discussion and Essays*, 1997, p. 62. (in Chinese)

26 Choon Ho Park, Some Negative Factors in Solving Territorial Disputes in Northeast Asia, in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 73.

Diaoyu Islands and claims its "legitimate" sovereignty groundlessly by taking the advantage of being in control of the Islands.

(b) China's Particular Reasons for Refusing Judicature or Arbitration

In solving the Diaoyu Islands dispute, China's refusal to submit to judicature or arbitration is based on its historic experiences, differences between Chinese and western culture and the current situation of separate governance of China Mainland and China Taiwan.

Firstly, modern international law has caused immense harm to China, leaving permanent historic scars. Since being forced into the modern international law system in the middle of the 19th century, international law has almost never sought justice for China; on the contrary, it helped western powers invade China. The customary legal system exercised by China over thousands of years is *Pax Sinica*, which has been implemented effectively and successfully. Since the Opium War in 1840, the invasion of western powers gradually ruined this customary order and thoughts of modern international law were introduced. However, after the collapse of *Pax Sinica*, "it was not substituted by the modern international order based on sovereign States system, but the order of unequal treaties. It is the unequal treaties, rather than rules and principles of international law, that have been applied in China's foreign relations."[27] Western powers declined to apply modern international law order to China, but applied one of its basic principles – "*pacta sunt servanda*" to China, in order to force it to observe the unequal treaties, which resulted in serious violations of Chinese sovereignty in politics, economy, national defence, culture and other various fields. This caused significant losses of territory in northeast, northwest and southwest areas of China. After World War I, China attended the Paris Peace Conference as a victorious State and invoked the famous principle of "fundamental change of circumstances" to recover Shandong and abolish unequal treaties, but it only faced resistance from the United Kingdom, France, the United States and other powerful States. The Conference finally refused China's legitimate request to abolish unequal treaties and transferred Germany's rights in Shandong, China to Japan.

Secondly, China has its own cultural tradition that is different from western cultures. Such cultural traditions have a unique mode of thinking and expression of language, namely it adopts image thinking and substantial logic, rather than the

---

27 Wang Tieya, Introduction of International Law, Beijing: Peking University Press, 1998, p. 391.

rigorous formal logic that is present in western culture. "The dividing line of legal culture in China and western States has generated different manifestations and characteristics in value idea, political organizations, power operations, political logical thinking and other fields... The international rule of law which is centered on international judicature, originates from a western cultural background and its basic principles and operation methods are full of western characteristics, which are incompatible with Chinese local cultural tradition and intrinsic thinking method."[28]

Such mode of thinking and expression of language leads to a situation where western scholars cannot fully and reasonably understand China's real intentions of the evidence it provides for its claims. Ancient Chinese evidence regarding the Diaoyu Islands which is definite and sufficient then will become uncertain and even distorted. The work report written by the officer sent to the Ryukyu Islands in the Ming Dynasty and Qing Dynasty concerning "Heigou" or "Jiao" as the territorial boundary between China and foreign States, except for the intentional distortion by some hired Japanese scholars, could only be interpreted as the boundary between *terra nullius* and foreign territory by modern international law that originated from western cultural tradition.[29]

---

28 Su Xiaohong, An Analysis of Difficulties and Measures for China to Engage in International Judicial Proceedings, *Journal of East China Normal University (Philosophy and Social Sciences)*, No. 3, 2004. (in Chinese)

29 Kangxi 23th year in Qing Dynasty (1683), The Record of the Mission to the Ryukyu Kingdom, the work report by Wang Ji, the officer sent to the Ryukyu Islands stated: "(24th day) passed Pengjia Hill during the period from 7 a.m. to 9 a.m. and passed the Diaoyu Islands during the period from 5 p.m. to 7 p.m. ... Saw the hill on the 25th day, first Huangwei, then Chi Yu, shortly reached Chi Yu and no longer saw Huangwei Yu. Passed the Jiao (or Gou) at dusk... What does the Jiao mean? Answer: Boundary between China and foreign land. How to determine the boundary? Answer: Guess. However, the slope is right there and the guess is not ungrounded." The work report of Zhang Xueli had similar records in Kangxi 2nd year in Qing Dynasty (1663). However, for the statements, Japanese hired scholars, for instance Okuhara Toshio, interpreted the above content as: "since the work report was written by Chinese, if Chi Yu were Chinese territory with Kumejima Island as the boundary, everyone would undoubtedly record this, for example, Chi Yu is the boundary hill of China and the Ryukyu Islands. However, the logic of Mr. Yang (referring to Yang Chongkui, a Taiwanese scholar) ignored that before determining whether the island belongs to China or the Ryukyu Islands, there may be a situation where the island belongs to neither China nor the Ryukyu Islands. That's where the problem lies." Quoted from Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands before the Sino-Japanese War of 1894-1895: Also a Queryto Professor Okuhara Toshio and Others*, Beijing: Social Sciences Academic Press, 1994, p. 52 (in Chinese). He means that measuring Chinese traditional customary order in ancient times by modern international law, if Chinese government did not label Chiwei Yu as "Chinese Chi Yu", the Island becomes *res nullius* in international law. However, according to the territory view of "all the territory belongs to the Emperor", there is no *res nullius* as such in *Pax Sinica*.

The historic harm modern international law has inflicted upon China and the differences of Chinese and western cultural tradition resulted in a lack of Chinese trust in modern international law. An example is the withdrawal by the government of the People's Republic of China in 1972 of the declaration made by the government of the Republic of China in 1946 on accepting compulsory jurisdiction of the International Court of Justice. Western international law scholars had an explicit statement on this problem: "Among the political factors which affect the effectiveness especially of the ICJ, the most prominent ones are doubts concerning the impartiality of the bench, fears connected with the lack of clarity of international law and finally a growing tendency to demonstrate overt disregard for the pronouncements of the Court... Judges from the Third World represent a cultural background which tends to favor a drastic change in the substance of traditional rules to bring them into line with present-day needs of less-developed countries. Therefore, countries which uphold the more legalistic approach feel hesitant about bringing a dispute before the Court…"[30] Until now, China has never submitted any Sino-foreign political or territorial disputes to judicature or arbitration. Such a trust crisis seriously hinders China from submitting the Diaoyu Islands dispute to judicature or arbitration.

Lastly, the current situation of separate governance of China Mainland and China Taiwan determines that the Diaoyu Islands dispute will not be likely to be submitted to arbitration or judicature.

For historic reasons, the situation is that two separate administration across the strait have been formed: one in China Mainland and the other in China Taiwan. The China Taiwan area enjoys a *de facto* high degree of self-autonomy. A legitimate national government – the government of the People's Republic of China exists in China Mainland, which is also recognized by most States in the world. The situation of separate governance causes severe internal friction of power on the Chinese side in solving the Diaoyu Islands dispute.

For China Taiwan, avoiding China Mainland and unilaterally resorting to arbitration or judicature with Japan may result in a legal recognition of China Taiwan's "independent" status. This is possible, since, through either international arbitration or judicature, the parties involved in a territorial dispute must be

---

30 Max Planck Institute for Comparative Public Law and International Law ed., translated by Chen Zhizhong and Li Feinan, *Encyclopedia of Public International Law*, Guangzhou: Sun Yat-Sen University Press, 1998, pp. 110~111. (in Chinese)

States or similar entities. Such entities that are entitled to initiate litigations in the International Court of Justice are limited to "States".[31] Arbitration also provides high-level legal support for the "independence" of China Taiwan. In consequence, if China Taiwan unilaterally decides to solve the dispute with Japan by arbitration or judicature, it will certainly move towards "independence".[32]In such a case it would definitely face strong opposition from China Mainland. Furthermore, if Japan cannot solve this dispute through consultations with China Mainland, and if China Taiwan follows the above mentioned course of action, it means that Japan will probably intervene in China's internal affairs and efforts towards unification. If China Mainland cannot secure its interests in other disputes, Japan is likely to use China Taiwan's desire for "independence" to coerce China Mainland and further suppress China in its international relations and strategy. China Mainland will definitely not acquire sovereignty over the Diaoyu Islands at the price of China Taiwan's independence, not to mention that it is still uncertain if China will acquire sovereignty over the Islands by legal means.

For China Mainland, it is the only legitimate government that is recognized by Japan. Therefore, if cases were submitted for arbitration or judicature, only the China Mainland and Japanese governments would be able to engage in such a process. If China Taiwan wants to participate in arbitration or judicature proceedings, it can only participate as the Chinese side, namely they together constitute one party of the dispute. Any other manner that treats China Taiwan as an independent party or an intervening third party will not be accepted. However, if treating the government of China Mainland and Taiwan authorities together as one entity, it will not be accepted by China Taiwan since, to some extent, it signifies its consent for Chinese unification. But China Taiwan currently has no strong intention to unify with China Mainland. Yet, if the course of action excludes China Taiwan, it will aggravate the already tense relations between China Mainland

---

31 Article 34(1) of the Statute of the International Court of Justice stipulates: "The Court shall be open to the States parties to the present Statute".

32 In the Conference of International Law Regulating the Diaoyu Islands, Yilan, Taiwan, 1997 held by Taiwan Law Society (TLS) and Taiwan Institute of International Law (TIIL), many scholars made suggestions on resorting to the International Court of Justice avoiding China Mainland. Yu Shyi-kun, the then Yilan Magistrate, advocated to "preserve sovereignty of Taiwan" and "improve international status of Taiwan in the future" by solving the Diaoyu Islands disputes. For details see Taiwan Law Society (TLS) and Taiwan Institute of International Law (TIIL) eds., *The Seminar on International Law of the Diaoyu Islands: Records of Discussion and Essays*, 1997. (in Chinese)

and China Taiwan. It will also increase Taiwanese citizens' resentment and will provide excuses for China Taiwan's "pro-independence" tendencies, although it is an entitlement for China Mainland, as the legitimate national government, to adopt such methods.

On the other hand, an important aspect of China Mainland's consistent claim of sovereignty over the Diaoyu Islands is that they constitute an indispensable part of China Taiwan. If China wins in the adjudication or judgment, from a theoretical law perspective, although a central government has the authority to determine administrative divisions, it is more reasonable to incorporate the Diaoyu Islands to China Taiwan's local governments' jurisdiction, which is also more acceptable for Taiwanese. If the current situation persists, in which China Mainland and China Taiwan are not unified and the trend of Taiwan's "independence" continues to develop, such a method will not be acceptable by the government of China Mainland.

In conclusion, in a situation of "international anarchy", since compulsory jurisdiction in domestic law does not exist in the international society, submitting to arbitration or judicature is based on the mutual trust between disputing parties and the trust of international courts and international law as applicable rules in the judgment. China and Japan have both accumulated rancor and strong defensive feelings against each other and China has always been skeptical about international arbitration, judicature and international law. There is no practice or precedent that China has ever submitted a dispute to international arbitration or judicature. In addition, the Diaoyu Islands dispute significantly influences State territory and political and economic interests. The traditional Chinese order, logic of language and thinking mode are far from modern international law. The legal method does not favor China, neither. Moreover, on the Chinese side, the situation of separate governance of China Mainland and China Taiwan causes internal friction in efforts aimed at solving the Diaoyu Islands dispute. Solving the dispute at a time when China Mainland and China Taiwan are not unified will inevitably affect the political status across the strait. In consequence, the possibility that China submits to international arbitration or judicature is reduced. Adopting legal methods is relatively desirable, but not feasible for China.

C. Possible Outcomes of Sino-Japanese Diaoyu Islands Dispute

With respect to solving the Sino-Japanese Diaoyu Islands dispute, several

results may occur due to a combination of relevant evidence and different methods of settlement.

Firstly, "all or nothing", i.e. the Diaoyu Islands will be obtained by either China or Japan as a whole.

This is a result of settling by legal means, arbitration or judicature, since evidences of China and Japan all support a result of "all or nothing". As stated above, if Chinese evidence is valid and admitted by the court or arbitral tribunal, the Diaoyu Islands will obviously be regarded as "*terra nullius*" before 14 January 1895 and they will be obtained by China as a whole; on the contrary, if Chinese evidence is declared ineffective by the court or arbitral tribunal and Japanese evidence is valid, Japan would have already preoccupied the Diaoyu Islands before that crucial date and the Islands will not be "*terra nullius*". Japan will obtain the Islands as a whole.

Diplomatic means will obviously not lead to a similar result. Since settling the dispute by diplomatic means, "nothing" will not be accepted by the two involving parties. Negotiation would have broken down before reaching such a result.

Secondly, "partly got and partly lost", i.e. the Diaoyu Islands will be segmented between China and Japan.

This is usually a result of a diplomatic settlement. A diplomatic solution is always a compromise of interests of the parties involved. If the Diaoyu Islands dispute is solved by diplomatic means, taking into account the characteristics of negotiation and both parties' power, it is highly likely that the Diaoyu Islands will be segmented between China and Japan. Based on the geographic distribution and size of the Islands, China will probably acquire the Diaoyu Island while Huangwei Yu, other small surrounding islands and Chiwei Yu will probably go to Japan. Even if the Islands are obtained by one party as a whole, it has to make interest compensation in other fields.

Thirdly, China and Japan "shelve differences and seek joint development" of the Diaoyu Islands and the surrounding sea area.

This is China's consistent policy in recent years in dealing with maritime delimitation and offshore islands issues. For instance, in the issue regarding the islands in the South China Sea, China has always maintained this position, which helps reduce international resistance to Chinese national macroscopic strategy. However, the proposal of "shelving differences and seeking joint development" has not been recognized and implemented by other relevant States, and it seems to be China's own wishful thinking. In its implementation, the proposal is always only

claimed by China and only China has unilaterally put aside disputes, which in the end encourages other States to further nibble away at China's interests.

Fourthly, China and Japan waive sovereignty claim over the Diaoyu Islands permanently, but not *vis-à-vis* a third State, and jointly exclude possession from a third party.

This result has three characteristics. First, waiver is mutual; second, waiver is permanent; third, waiver is not *vis-à-vis* a third party. This means that for a third party, the Islands are not abandoned and thus cannot be obtained by occupation.

This result is relatively more acceptable for both China and Japan, which also helps reduce resistance of delimitation of the continental shelf in the East China Sea and promotes resource exploitation. However, there has been no similar State practice so far. Although this method avoids determining sovereignty over the Diaoyu Islands, use of the Islands will still be controversial. The possibility of this result is rather reduced.

Fifthly, eliminate the disputed object, namely, destroy the Diaoyu Islands with nuclear weapons.

This method and result is only an extreme position held by non-governmental figures.[33] Since the disputed object is eliminated, China, Japan and their nationals will not be able to take advantage of it. This is a malicious damage to the property of human beings given by nature and is immoral. Hence, this result is also solely a theoretical assumption, which will only come true under the most extreme circumstances.

III. The Relationship between the Diaoyu Islands Dispute and the Delimitation of the Continental Shelf in the East China Sea

A. Settling in One Bundle

In the East China Sea, two serious disputes exist between China and Japan, namely the Diaoyu Islands dispute and the delimitation of the continental shelf and

33 China Should Flatly Respond to Military Provocation of Japan, at http://www.ren-jian.com/index.asp?act=ViewEachArticle&ArticlelD= 69, 22 April 2006. (in Chinese)

the exclusive economic zone.[34] The former relates to islands sovereignty; the latter relates to ownership of seabed, water and resources. The two issues are closely related in international law.

With regard to the relationship between the two disputes, there are two methods, either settling in one bundle or settling each matter independently. Which method should be adopted by China in solving the two issues? The present author argues that settling both issues as one package is of significant disadvantage to China. Settling them separately may lead to a result that favors China more.

Land territory is the fundamental basis of claiming continental shelf.[35] If solving the two issues together, sovereignty over the Diaoyu Islands has to be the precondition for delimitation of continental shelf in the East China Sea. Since Japan is currently at the dominant position in the Diaoyu Islands dispute, if the Diaoyu Islands belong to Japan, Japan would probably further claim the continental shelf in the East China Sea by using the Diaoyu Islands as a springboard.

Although the 1982 United National Convention on the Law of the Sea provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf",[36] the Convention does not explicitly define terms of "human habitation", "economic life of their own" and "rocks". This will easily cause ambiguity: (1) Does "human habitation" refer to temporary habitation or permanent habitation? Can exploiting natural resources of their own or surrounding resources in exchange of what is needed for human habitation be understood as sufficient to "sustain human habitation"? If so, any island with certain area can be inhabited by human beings after exploitation. (2) How to understand "economic life of their own"? Should it be understood as "human life"? The Diaoyu Islands have vegetation, birds of a large amount and fresh water. Is the existence of these organisms sufficient to sustain "economic life of their own"? (3) Can the Diaoyu Islands be classified as "rocks"? The Diaoyu Islands are full of vegetation, which means the existence of thick soil. Can it still be classified

---

34 Considering delimitation of the continental shelf in the East China Sea is even more complicated and more representative, the present article only deals with the relationship between the dispute of the Diaoyu Islands and the dispute of delimitation of the continental shelf in the East China Sea.

35 Article 76(1) of the United Nations Convention on the Law of Sea provides: "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin".

36 Article 121(3) of the United Nations Convention on the Law of the Sea.

as rocks? Apparently, from a perspective of common meaning, defining the Diaoyu Islands, especially the Diaoyu Island itself as "rocks which cannot sustain human habitation or economic life of their own" is not satisfactory.

Although some scholars from China Taiwan propose that "as far as international law (mainly the new law of the sea), in delimitation of the continental shelf in the East China Sea, the Diaoyu Islands, which are of small area, no human habitation, long distance from land and disputed sovereignty, shall have no effect on any delimitation".[37] However, whether this conclusion will be admitted by the arbitral tribunal or international court is uncertain. It is only an analysis in theory. In international arbitration and judicial practice, "islands far from land and close to the assumed middle line of the delimitating States, (in delimitation) are often granted partial effect".[38] In negotiating delimitation of the continental shelf between China and Japan in the East China Sea, Japan apparently based its claim of continental shelf on the Diaoyu Islands.[39] If the Diaoyu Islands are declared to be under Japanese sovereignty, it is most likely that this claim will be taken into account by international arbitral tribunals or courts.

In conclusion, settling the disputes as one is not advisable for China.

B. Settling Separately

Settling separately means that the Sino-Japanese Diaoyu Islands dispute and delimitation of continental shelf in the East China Sea dispute are settled independently. The present author argues this method is more advisable for China. The reasons are as followed:

Firstly, the Diaoyu Islands dispute only involves two parties, China and Japan while the dispute of continental shelf in the East China Sea concerns third parties, for instance, South Korea. Due to the existence of new parties, settling the disputes in one bundle would increase the complexity of the disputes, which is also rather inconvenient for South Korea.

---

37 Ma Ying Jeou, *Analyzing the Diaoyu Islands and Delimitation of East China Sea from the Perspective of the New Law of the Sea*, Taipei: Cheng Chung Book, 1986, p. 156. (in Chinese)

38 Kuen-chen FU, *Equitable Ocean Boundary Delimitation*, Taipei: 123 Information Co., 1989, p. 252.

39 Oil and Gas Resources Battle Exposing Its Territorial Ambition, Japan Demands an Outrageous Price in East Sea Negotiation, at http://military.china.com/zh_cn/head/83/20051008/12718181.html, 24 April 2006. (in Chinese)

Secondly, the main basis for China's claim over the continental shelf in the East China Sea is the principle of natural prolongation and the principle of equity. Even not considering the effect of Chinese territory – the Diaoyu Islands in the delimitation of the continental shelf, China could still argue that the continental shelf is the natural prolongation of its land which ends at Okinawa Trough. At the same time, since the Diaoyu Islands dispute is not settled and sovereignty over the Islands is still in controversy, the Islands cannot be the basis of Japan's claim to the continental shelf in international arbitration or judicial practice and will hardly be taken into account by the arbitral tribunal or court – since the sovereignty of territory itself is disputed, it is certain that any right derived from the territory is disputed as well. Without the authority to determine sovereignty of the islands, the arbitral tribunal or court will hardly determine those derivative rights.

In addition, settling the disputes independently also concerns the order of solving the disputes, namely whether to solve the Diaoyu Islands dispute first or solve the dispute of delimitating the continental shelf in the East China Sea first. For China, it seems more desirable to solve the dispute of delimitating the continental shelf in the East China Sea before the Diaoyu Islands dispute. The reasons have been discussed above, i.e. the main basis of China's claim over the continental shelf in the East China Sea is "the principle of natural prolongation", which does not need to consider the Diaoyu Islands. However, if the Diaoyu Islands dispute is solved first and Japan obtains the Islands, the Islands will probably be a basis for Japan's claim over the continental shelf in the East China Sea, which will do harm to China's dominant position in the dispute of the continental shelf.

IV. Conclusion

With respect to the procedure or method of settling the Diaoyu Islands dispute, for China, based on its cultural tradition, experiences in modern history, current political situation and reality of its national power, diplomatic settlement is "relatively feasible but not desirable" while legal settlement is "relatively desirable but not feasible". If the dispute over the Diaoyu Islands has to be settled under the current situation, the result would probably be that China and Japan divide the Diaoyu Islands through diplomatic means. As for whether China will decide to solve the dispute and which method will be chosen, it depends on the Chinese government's willingness to accept certain results, i.e. can the Chinese government only accept a complete win, or a segmentation of the Diaoyu Islands, or even a

complete loss?

It is notable that despite the Diaoyu Islands dispute is a severe territorial dispute between China and Japan, it does not represent all of the relations between the two countries, and it is not even their most significant aspect. Considering other circumstances, it is predictable that in the near future, this dispute will probably not influence the overall political and economic relations between China and Japan. Once the dispute influences the overall relations between the two States, the dispute may be put aside – as a matter of fact, "shelving differences and seeking joint development" is an important Chinese policy for dealing with territorial and sea area delimitation issues, even though this policy is not very favorable for China and the Diaoyu Islands dispute cannot be protracted.

In the Diaoyu Islands dispute, the Chinese side faces great internal friction due to separate governance of China Mainland and China Taiwan, of which Japan takes advantage. Both sides should be concerned more about the overall national interest and not focus on its own rights. This will lead to a result favoring China and is also necessary for the national rejuvenation.

Translator: LI Zongyao
Editor (English): Vasile Gadinceanu