The Conflict over the Senkaku/Diaoyu Islands: 
A Joint Development Approach

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1. **Introduction**

Conflicts between two or more States over islands are many worldwide\(^2\). However, not all can claim to be as active and latent as the conflict over the Senkaku/Diaoyu/Tiaoyu Islands.

The East China Sea has seen many conflicts in the last century; most of them were between China and Japan to control maritime lines, to grow influence on the region or to get more power. These conflicts emphasized nationalism and adversity towards other nations that still remain.

However, in early 70s the Senkaku/Diaoyu Islands became famous for ‘supposedly’ holding huge deposits of natural resources in their seabed and territorial waters. This mere assumption led to claim sovereignty over the islands by three countries: China, Japan and Taiwan. Backing the governmental claims were hundreds of activists willing to participate in demonstrations, occupations and even constructing small lighthouses in the islands. What started as a governmental and more legal claim, rapidly developed into a political weapon ready to be used when governments needed to. Before going forward, it is important to point out that this thesis will deal with claims from China and Japan, because Taiwan used the same argumentation as China. Moreover, due to the ‘One-China Policy’\(^3\) and the extensive bilateral negotiations that both governments hold, the Taiwanese claim has been, in a certain mode, absorbed by China.

Although for many activists the claim over the Islands is related to nationalism and old feelings associated to angry, sadness or revenge, the important matter underling the conflict is the control of the natural resources located in the area surrounding the Senkaku/Diaoyu Islands. In Zhongqi Pan (2007) words: “it is not just about the industry of fishery, but particularly about potential oil and gas reserves”\(^4\).

In the last decades all three economies have grown sharply but were undermined by one fact: oil crisis. Their dependence on the Middle East oil makes their economies dependant on crisis in this region and none of the governments likes it\(^5\). Thus, claiming sovereignty over vast fields of natural resources is a matter of national interest. The topic of sovereignty over the Senkaku/Diaoyu Islands for its natural resources will be the basis of this thesis. The central hypothesis, then, is:


\(^3\) A consideration needs to be taken to the “One-China Policy”. In 1982 the People’s Republic of China adopted its new constitution and in it stated: “Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland” (Preamble, paragraph nine). Moreover, in early 1990s articles related to this “One-China policy” appeared in the Republic of China Taiwan Constitution. In addition, the last decade has seen an improvement in the China-Taiwan relations, making Taiwan quieter in the claim over the Islands. Following this argument, this thesis will be focused in China and Japan, instead of including Taiwan as a separate State.


‘Joint development offers the best means of resolving the dispute over the Senkaku/Diaoyu Islands and the claim over its natural resources by China and Japan’.

Answering this hypothesis will require an analysis of the claims made by China and Japan and the substantive law from the United Nations Convention on the Law of the Sea (UNCLOS or LOS Convention) and customary international law of territorial acquisition related to these claims (Chapter 2 deals with substantive law). Moreover, procedural law of the UNCLOS will be analyzed when dealing with methods to peaceful settle international disputes (Chapter 3).

Consequently, Chapters 1, 2 and 3 will provide an answer to the hypothesis of this thesis, while Chapter 4 will dig into the joint development approach by looking at the sources of international law and see whether or not there is a legal basis for the joint development approach.

This first chapter of introduction deals with facts and information such as the history and conflict over the Islands and legal claims made by China and Japan, which will allow understanding what source of international law is needed to settle the dispute. However, as said above, the major interests of both State parties in the conflict are the natural resources located in the seabed and territorial waters of the Senkaku/Diaoyu Islands. As a consequence, an analysis of the estimations of gas and oil located in the Islands is provided in section 1.2. of this chapter.

Figure 1. The Senkaku/Diaoyu/Tiaoyu Islands

1.1. Geographic location of the islands and background of the conflict

The Senkaku Islands consist of eight tiny insular formations, five of them are volcanic islands and three are just rocky, with all having a small and dry surface during the whole year—they cover less than 7 square kilometers. All eight islands are inhabited and just in two of them grow palm trees and a bit of vegetation. They are located around 120 nautical miles northeast of Taiwan, 200 nautical miles east of China mainland and 240 nautical miles southwest of the Japanese island of Okinawa.

The conflict over the Senkaku/Diaoyu Islands started in 1968 when the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP), under the auspices of United Nations Economic Commission for Asia and the Far East (UNECAFE), conducted a geological survey in the area where the Islands are located and pointed out that “a high probability exists that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world, with potential estimated at between 10 to 100 billion barrels.” The Taiwanese government was the first one doing a move towards exploring and exploiting the Island’s natural resources with the Gulf Oil Corporation. However, Japan issued a complaint against this move while, at the same time, asked for negotiations about the adjacent continental shelf with Taiwan. Due to these negotiations, Japan, South Korea

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6 Wei Su, Steven, “The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update,” Ocean Development & International Law, 2005, p. 46
and Taiwan formed the United Oceanic Development Company, whose target was to explore and finally exploit oil reservoirs of the Senkaku/Diaoyu Islands.\(^9\)

Nevertheless, China flare up the conflict over the Islands by claiming territorial sovereignty and rejecting any agreement concluded between foreign states to explore and exploit natural resources located in them. Moreover, Chinas’ claim was fuelled by the conclusion of the 1971 Okinawa Reversion Agreement between Japan and the United States with whom the United States finally ceded control over Okinawa Island to Japan, under American control since the end of the Second World War –both, Taiwan and China partly rejected the Reversion Agreement.

De-escalation of the conflict came when the Japanese government announced its intentions to stop explorations of oil in the conflicted area and started Sino-Japanese normalization negotiations. Min Gyo Koo (2009) considers that the fact that the United States decided to take a step back and declare itself neutral over the dispute, made enough pressure to both, China and Japan, to start bilateral negotiations to solve the issue.\(^10\)

The period between 1971 and 1990 is considered relatively calm, although a few more incidents related to fishing expeditions occurred, in part related to the accession to power of Deng Xiaoping in China after Mao Zedong’s dead in 1976, and the construction of a lighthouse in 1978 on Uotsuri Island, one of the five tiny Senkaku/Diaoyu Islands. However, 1990 saw a second but short flare up of the conflict when Japanese activists issued an application to the Japanese government to declare official the lighthouse built in 1978. This application acceptance from the Japanese government led to serious demonstrations and protests in front of Japanese embassies by Taiwanese and Chinese activists, and attempts to land on the Islands by Taiwanese activists to leave an Olympic torch as a symbol.\(^11\) Moreover, the fact that China included the Senkaku/Diaoyu in its domestic legislation as part of its territory complicated a peaceful and fast settlement of the dispute.\(^12\)

As it will be explained in section 2.2 of this thesis, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) conclusion, ratification from both, China and Japan, and, finally, entry into force in 1994, complicated even more claims from all three States. The main reason for this was the expansion of the national maritime boundaries. From this moment, all three States started claiming that the disputed Islands were located or either in their exclusive economic zone or in their continental shelf. In addition, a few more incidents related to the lighthouse 1978 incident came up, as well as forceful detention of fishing boats by Japan when approaching to what Japan considered its territorial waters (September 1996). Min Gyo Koo (2009) considers that those incidents, plus the “death of David Chan, a pro-China activist from Hong Kong who drowned on 26 September after jumping in the water when the JMSA prevented

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\(^10\) Ibid, p.216.


his boat from landing on the disputed islands \(^{13}\) led to reach the highest point on the crisis between all three governments over the control of the Senkaku/Diaoyu Islands.

To calm down protests and demonstrations, and to restore confidence between China and Japan, in September 1997 the Japanese Prime Minister Hashimoto visited his homologue Li Peng in Beijing. The visit led to seven rounds of bilateral negotiations that concluded with the Fisheries Agreement signed on 11\(^{th}\) of November of 1997. The main target of this agreement was not just to calm down protests, but also to freeze temporarily sovereign claims over the islands by a shared management of fishery resources located in the Senkaku/Diaoyu Islands.

Incidents escalated in 2004 when Chinese activists landed in the Uotsuri Island on 24\(^{th}\) of March of 2004. At the same time, a few Chinese maritime research ships entered into what Japan considered its exclusive economic zone and started survey activities. However, far away from getting calm, Chinese activists started protesting in front of Japanese embassies for what they considered illegal exploitation and drilling by Japan in the territorial waters of the conflicted islands \(^{14}\). A year later, in a Japan’s effort to calm Chinese activists “proposed to China the joint development of four natural gas fields, which straddle the median line suggested by Japan and lie between the two areas proposed by China” \(^{15}\), reaching a final agreement in June 2008.

However, the fact that nationalist feelings are related to sovereign claims over the disputed Islands in the East China Sea makes difficult to freeze the conflict \(^{16}\). Examples of protests in front of embassies and activists from both countries trying to land in any of the five Senkaku/Diaoyu Islands, repeat almost every year, even though, advances in bilateral agreements have reached.

1.1.1. The Chinese claim

The Chinese argument to claim sovereignty over the Islands comes from the Fourteenth Century when they ‘peacefully’ discovered and used them to cultivate medicine plants and to protect their lands over piracy. In addition, China claims that there is documentation suggesting that the Ming and Qing dynasties’ (1644-1911) were using them as maritime defenses \(^{17}\). According to Chinese historians and studies about Ancient documents, the islands were used by Chinese fishermen as operational base.

Zhongai Pan (2007) states that the Japanese claim of terra nullius is wrong because in 1883 –one years before Japan ‘discovered them’– “Dowager Empress Cxi (Tsu Hsi) of Qing dynasty issued an imperial edict, by which she awarded the Diaoyu Islands to a Chinese alchemist who had gathered rare medical herbs on the islands” \(^{18}\).

Moreover, the Chinese argument is also linked to territorial secession. Following this second argument and always supported by the historical domination of the islands,
China says that according to Article 2 of the Treaty of Shimonoseki signed after the defeat of China by Japan in the Sino-Japanese War, 1894-1895, China ceded control over the Islands to Japan. However, after the Second World War, with the conclusion of the San Francisco Peace Treaty (1951) and the Sino-Japanese Peace Treaty (1952), the Tiaoyu/Senkaku Islands reverted to China due to, as expressed in the treaties, Japan clearly renounced “all right, title and claim to Formosa and the Pescadores” and recognized that “all treaties concluded before December 9, 1941 between China and Japan have become null and void”\(^{19}\).

Concerning the Cairo and Potsdam declarations -27\(^{th}\) November 1943 and 26\(^{th}\) July 1945, respectively– the Chinese government argues that when Japan accepted these agreements, it renounced *inter alia* future claim and control over the conflicted islands and Taiwan. In addition, “the 1951 peace treaty with Japan did not change the status of the islands because it did not involve China”\(^{20}\).

Furthermore, China claims that its position got stronger and proved to be valid when in 1972, professor Kiyoshi Inoue, from the Tokyo University, argued that “the so-called Senkaku Islands were recorded in Chinese documents in the middle of the 16\(^{th}\) century at the latest, under the names of Tiaoyu Islands (Diaoyu Island, Diaoyu Tai)”\(^{21}\).

The last Chinese argument was included when the Law of the Sea Convention was ratified and is that the Islands are located in their continental shelf that extends from its continental baseline to the Okinawa Trough. What means that, if proved, China would have exclusive control and rights to explore and exploit the seabed and subsoil of the continental shelf were the Islands are located\(^{22}\).

1.1.2. The Japanese claim

The Japanese argument is based on the discovery of the Islands, *terra nullius*, in 1884, just a few months before the Shimonoseki Treaty and the secession of Taiwan to Japan from China. They state that before annexing them as *terra nullius* many surveys and field inspections were done by the Okinawa prefecture to be sure none had been there before them, neither living nor doing fishery activities.

Related to the Second World War, Japan claims that the islands were used as warehouse for its navy, and exploited part of its natural resources. After the peace agreements, even though, it was under American control, the U.S was paying renting to the son of the first Japanese settler of the islands for using them as targets practice\(^{23}\).

\(^{19}\) Wei Su, Steven (2005), “The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update,” *Ocean Development & International Law*, p. 48


\(^{23}\) Blanchard (2000), p.102
The U.S. Navy paid an annual rent of $11,000 until 1978 –by this time U.S. secession of the islands to Japan was concluded\textsuperscript{24}.

In addition, it was no claim over the Islands while the United States controlled them till 1972 because Japan considered them to have the same status as the Ryukyu Islands, which are located close to the Senkaku/Diaoyu Islands, and were also ceded by the U.S. with the Okinawa Reversion Treaty\textsuperscript{25}. Finally, according to Japan, the Okinawa Revision Treaty explicitly returned the Senkaku/Diaoyu Islands to Japan.

The last argument used by Japan is that numerous Chinese and Taiwanese textbooks from the twentieth century explicitly stated that the Senkaku/Diaoyu Islands belonged to Japan\textsuperscript{26}.

Lastly, although the United States decided to remain neutral from an early moment of the conflict, it has a non-official will to reach a peaceful settlement of this particular dispute due to the Mutual Security Treaty, which is applicable to all territories under Japanese administration. What means that an unresolved dispute leading to an open conflict can easily draw the U.S. into a conflict with China\textsuperscript{27}.

1.1.3. Delimitation of the claims

Before going further with the conflict, it is important to underline the two major claims because they will be dealt separately in this thesis due to the substantive law and the procedure applicable to each claim is different.

The first argument is what China says ‘historical titles’ and its counterpart ‘discovery rights’. Although both concepts are different, they are dealt with customary international law of territorial acquisition. Thus, they will be dealt together in Chapter 2. Moreover, as it will be seen, the LOS Convention has not so much to say about sovereign claims.

The second argument used to claim sovereignty over the Islands, and by defect over the natural resources located in its seabed and subsoil, is the delimitation of baselines, Exclusive Economic Zones and territorial waters. As it will be seen, China claims that the Islands are located in their continental shelf, while Japan claims the use of an equitable measure and median line to draw boundaries in the narrow East China Sea. This second argument will be dealt in section 2.2. of Chapter 2, but because it has procedural mechanisms that cannot be missed, Chapter 3 will include it.

1.2. Natural resources in the Islands

In 1968 the United Nations Economic Commission for Asia and the Far East reported a studio made by the Committee for the Co-ordination of Joint Prospecting for Mineral

\textsuperscript{24} Ibid. p.97.
\textsuperscript{25} Wei Su, Steven (2005), p. 49
\textsuperscript{26} Ramos-Mrosovsky (2008), p.924
\textsuperscript{27} Ibid. p.905.
Resources in Asia Offshore Areas that suggested the location of immense reserves of natural resources under and surrounding the area of the Senkaku/Diaoyu Islands. Since then both the Republic of China (China) and Japan, have been claiming sovereignty over those Islands and their adjacent Exclusive Economic Zone (EEZ). However, these claims became stronger from both parts when in 1972 the United States declared its intention to return control of the Islands to Japan under the Okinawa Reversion Treaty.

The question, however, is whether the 1968 UN report was too broad and provided too many expectations to China, Taiwan and Japan on the exploration and exploitation of the natural resources (this thesis will just focus on oil and gas) located in the Senkaku/Diaoyu Islands seabed. This section, then, provides information and data collected by international organizations, private companies and governments, concerning estimations of oil and gas fields located in the conflicted Islands.

The U.S. Energy Information Administration (EIA) on its East China Sea Report of 25th of September of 2012 stated that “hydrocarbon reserves in the East China Sea are difficult to determine [because] the area is underexplored and the territorial disputes surrounding ownership of potentially rich oil and natural gas deposits have precluded further development”. However, it “estimates that the East China Sea has between 60 and 100 million barrels of oil (mmbbl) in proven and probable reserves”. Furthermore, the EIA adds that “Chinese sources claim that undiscovered oil reserves are as high as 70 to 160 billion barrels of oil, mostly located in the Xihu/Okinawa trough”. However, at the

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31 Ibid.
32 Ibid.
date, it is highly impossible to determine if these undiscovered reserves contain what China claims.

Moreover, if confirmation of the size of oil fields located in the East, then, adding all estimated oil reserves contained in the South China Sea, “China’s [potential] oil reserves would be larger than the confirmed reserves in Saudi Arabia of 265 billion barrels, and would be enough to meet the country’s needs for a century based on 2011 consumption data provided by BP Plc. (BP/)”33. By contrast, the Japanese government has been quiet respect numbers and estimations of oil and gas in the area, but it recognized that there are at least 94.5 billion barrels of oil in the East China Sea34.

The Chinese National Offshore Oil Corporation (CNOOC), which is already exploring and exploiting fields in the Okinawa trough, estimated in its 2011 annual report, proved oil reserves at 18 million barrels of oil35. Also, this company “listed its East China Sea proved gas reserves at 300 billion cubic feet (Bcf) in 2011”36. In the 2012 report, the CNOOC estimated proven reserves of 119 Bcf of natural gas in a field close to Taiwanese jurisdiction in the East China Sea (LS 36-1-1)

While the EIA have higher estimations than the CNOOC and state that the East China Sea natural gas fields contain between 1 and 2 trillion cubic feet (Tcf)37, “Chinese sources point to as much as 250 Tcf in undiscovered gas resources”38. Such a difference between estimations can be explained not just by the undiscovered gas sources, but also by the fact that by increasing numbers, China legitimates its claim that the natural resources located in the conflicted area are essential for their economy and are worth fighting for.

Bloomberg’s (2012) report contains a clear statement about the natural resources reserves in the East China Sea made by Gordon Kwan, Hong Kong-based head of energy research at Mirae Asset Securities Ltd: “the geophysical structure suggests it’s a hotbed for oil’s formation, but more drilling is needed before definite conclusions can be made” (…) “personally I’m optimistic that oil and gas reserves in the region should be very rich”39.

To see the estimations above in perspective and why the natural resources located in the Islands are highly valuable, some considerations are needed:

i) China became the second largest consumer of oil in the world in 2003, followed by Japan but after the US40.

ii) To maintain its double-digit economic growth, China has become the world’s largest energy consumer41.
iii) In 2007 China became a net natural gas importer for first time in decades\textsuperscript{42}.
iv) Oil and gas extraction from the East China Sea would make both countries less dependent on the Middle East oil and would avoid China and Japan spending millions a year on oil and gas transport\textsuperscript{43}.

To conclude with this section, it is worth to point out that Royal Dutch Shell and UNOCAL withdrew in late 2004 from a joint venture exploration and exploitation with CNOOC and Sinopec in the Xihu/Okinawa trough because they had serious doubts about the commercial viability of the exploitation\textsuperscript{44}. However, that one deposit is not commercial viable does not mean that other fields in different areas are the same. In fact, Chinese oil companies, with Japanese investment, already drill in the Pinghu and Chunxiao fields.

\textsuperscript{43} Drift, Reinhard (2008), p.11.
\textsuperscript{44} U.S. Energy Information Administration (2012), p. 3.
2. **Substantive Law applicable to the Senkaku/Diaoyu Islands**

What is the international law applicable to claims of sovereignty, historical title or discovery over islands? In other words, what is the substantive law applicable to the Senkaku/Diaoyu Islands? These questions will structure the first section of this chapter.

Generally, the United Nations Convention on the Law of the Sea should be the one holding the legal basis for such a claim. However, it is necessary to make clear that the UNCLOS does not deal in any way with claims of sovereignty over pieces of land or islands based in historical titles or discovery facts. In fact, Dong Manh Nguyen (2006) says that “during the negotiation at UNCLOS III, an article concerning sovereignty disputes over islands was deleted from the draft of the LOS Convention”\(^{45}\), argument also expressed by Robert W Smith and Brandfort Thomas (1998)\(^{46}\). However, States have been using the concept of maritime jurisdiction to introduce claims over islands. And this type or argumentation is the one that will be dealt in the second section of this chapter. For instance, “Malaysia has publicly based its claim to certain Spratly Islands on the fact that they fall within the continental shelf limits that it proclaimed in 1979”\(^{47}\).

In the other hand, customary international law of territorial acquisition has been proved effective in cases concerning sovereign rights gotten by discovery or historical reasons. By looking at case law and general principles recognized in customary international law, it will be possible to establish the legal basis of ‘historical titles and discovery’ claims.

Furthermore, as said above, the second section of this chapter will look at the second line of argumentation used by China and Japan referring to baselines, determination of boundaries and claims over continental shelf. The substantive law applicable to this second argumentation will be basically focused on the LOS Convention, which will lead to Chapter 3 where procedures to peaceful settle international disputes are explained.

### 2.1. Customary international law of territorial acquisition

There is no treaty, convention or covenant directly dealing with territorial acquisition, but customary international law has recognized at least five modes of territorial acquisition based on judicial decisions from the ICJ, other judicial organs, panels of arbitrators and state practice for the last few centuries\(^{48}\). The five modes of territorial acquisition are: discovery and occupation, cession, prescription, conquest and accretion.

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\(^{47}\) Ibid.

However, for the Senkaku/Diaoyu Islands case, just three of the modes are valid, and those are the first three ones.\footnote{Ibid.}

Discovery and occupation are probably the most important method of territorial acquisition but create many controversies on what is occupation and the exercise of sovereignty over an island or land. Occupation raises questions such as whether it is necessary to have nationals living in there, or if public notice is something totally needed to claim sovereignty.

The discovery principle was first used in the colonial expansion and discovery of new territories by the great powers of the fifteenth and sixteenth centuries. Nevertheless, this principle has evolved a lot since it was first used, and nowadays discovery is, \textit{per se}, not enough to provide sovereignty right to any state.\footnote{Surya P. Sharma (1997), \textit{Territorial Acquisition, Disputes and International Law}, Kluwer Law International, The Hague, The Netherlands, p. 47.} In fact, it is needed effective occupation to get sovereignty rights.

The Island of Palmas case,\footnote{See the Island of Palmas Case (United States v. the Netherlands) of 1928. Available at: http://untreaty.un.org/cod/riaa/cases/vol_ii/829-871.pdf} dealt in late 1920s, concerned a dispute of territorial sovereignty over the Island of Palmas between the United States and the Netherlands. This case had been used many times in judicial decisions concerning territorial disputes because Arbitrator Max Huber sentenced that discovery is not the only element needed to claim sovereignty over an island.\footnote{Arbitral Award of the Island of Palmas Case (United States v. the Netherlands) of 1928, p. 867 and 869.} Continuity exercising this title is needed to get it. Due to the fact that the United States could not provide proves of effective control by Spain or Spanish “citizens” of the Island of Palmas, and the Netherlands proved that exercised effective control over its inhabitants since late seventeenth century, Arbitrator Huber finally ruled in favor of the Netherlands. Furthermore, Huber’s judgment made clear that even though the Island of Palmas was acquired by Spain in the sixteenth century by using international law of this century, international law applying when he ruled the case was from the nineteenth century with retroactively valid.\footnote{After a long war between Spain and the United States for the control of some of the Spanish colonies, in 1898 Spain ceded the Island of Palmas to the United States. This cession was formal when the Treaty of Paris was signed in 1898.} However, for Tao Cheng (1973-74) the introduction of retroactivity in international law is a violation of the general principles of international law recognized by nations.\footnote{Tao Cheng (1973-1974), ‘The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition’, \textit{Virginia Journal of International Law}, Vol. 12, n. 2, p. 228.}

What is important for the Senkaku/Diaoyu conflict is that while Japan claims discovery, acquisition of \textit{terra nullius}, and can prove effective and continuous control over the islands, China claims that during the period since the Shimonoseki Treaty in 1884 until 1972, when China publicly stated that the Senkaku/Diaoyu Islands belonged to them, it was not in a position strong enough to claim them back or exercise effective control over them. Following the Chinese line of interpretation, some scholars say that the “requirement of continuity in the law of territorial acquisition, as interpreted in the
judicially decided cases, has never been placed on an absolute basis. The Court seems to tolerate the existence of a time gap in the course of displaying sovereignty.”

In fact, Wei Su (2005) is right when pointing out that in the Island of Palmas case a State can be a limited period of time without exercising effective control over an island and, still, getting sovereign rights when a case is brought before an international court—in this case, there was a gap of a hundred years of non-Dutch control (1726-1825). Moreover, in the Clipperton Island Arbitration case between France and Mexico, even though Arbitrator Victor Emmanuel mentioned the existence of a temporary gap on continued control over the Clipperton Island by France, finally sentenced in favor of France.

By looking at those judicial cases, Wei Su (2005) states that “the fact that China had not acted as the sovereign over the Islands for 70 years may not necessarily rule out of title, if it had already been established.” The main problem with this statement is that the Island of Palmas case already dealt with “the gap”. Arbitrator Huber clearly mentioned the needed of public notice when exercising sovereignty over an island. In other words, State authorities need to declare in public that they are exercising sovereignty over a piece of land or island. Under this argumentation, Japan’s control over the Senkaku/Diaoyu Islands was public noticed and was not rejected by China for many decades.

Supporting the concept of public rejection and counterclaim there is the Temple of Preah Vihear Case of 1962 between Cambodia and Thailand. In the judgment, the International Court of Justice concluded that from the facts, Thailand had accepted a map drawn in Annex I of the 1904 Treaty between France and Cambodia, by which France ceded the Temple to Cambodia, because in fifty years of treaty it never rejected the mentioned Annex I.

Finally, Sharma (1997) and Lee (2000) made a non-exhaustive list of methods which constitute evidence of sovereign control and occupy of a territory: “military patrols, regulation of trading, mining or other economic activity, authorizing scientific expeditions, investigating criminal activity, holding judicial proceedings, registering deeds to property, building infrastructure, census-taking, and maintaining navigational markers.” This non-exhaustive list shows an important element pointed out by Judge

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56 Steven Wei Su (2005), p. 52.
57 Ibid.
58 See the Clipperton Island Arbitration case (France v. Mexico) of 1931. Available at: http://www.ilsa.org/jessup/jessup10/basicmats/clipperton.pdf
60 Steven Wei Su (2005), p. 53.
61 Another example dealing with the concepts of effective occupation and public notice is the Legal Status of the Eastern Greenland Case (Denmark v. Norway) in 1933. Available at: http://www.icj-cij.org/picsj/serie_AB/AB_53/01_Groenland_Oriental_Arret.pdf
Alvarez of the ICJ in the Minquiers and Ecrehos Case in 1953, when in the final considerations he concluded that:

“The Parties have attributed excessive importance to historic titles and that they have not sufficiently taken into account the state of international law or its present tendencies in regard to territorial sovereignty.

He wishes to emphasize that the task of the Court is to resolve international disputes by applying, not the traditional or classical international law, but that which exists at the present day and which is in conformity with the new conditions of international life, and to develop this law in a progressive spirit.”

In other words, what Judge Alvarez remark is that nowadays, what is important is proves of occupation and effective control over the disputed area. A claim cannot be basically founded in “historical rights”. In this sense, China’s claim would be weakened because it built part of its claim on historical reasons and titles.

Cession is a second mode of getting territorial acquisition. Sharma (1997) defines cession as voluntary renounce of sovereign rights from a State authority over an island or piece of land in favor of other State. In other words, a State voluntarily accepts to transfer an island or piece of land to another State. However, problems arise when looking at reasons why a State would like to voluntarily renounce of sovereign rights over something. In many cases, treaties such as the Shimonoseki in 1884 force a State to transfer territories under its authority because it has been defeated in war or because there is a threat of force.

In the Senkaku/Diaoyu Islands conflict, China claims that the Islands were included in the Shimonoseki Treaty, even though, they were not specifically mentioned. Moreover, like the Formosa Island (also called Taiwan), which was annexed to Japan with the Shimonoseki Treaty and “ceded/lost” to the Republic of China, Taiwan, in 1945, China claims that the Senkaku/Diaoyu Islands should had returned to Chinese control after the Second World War. However, the main problem is that Japan claimed sovereign titles over the conflicted islands a few month before the Sino-Japanese war was concluded and they were never included in the Shimonoseki Treaty. To make it even more complex, the Okinawa Reversion Treaty specifically ceded titles and sovereign rights over the Islands to Japan.

The third method of territorial acquisition is prescription. Prescription has been dealt in this section when talking about the concept of public notice. It means that a State may not get title rights over an island or piece of land, because it failed to contest other State’s claim or annex. Cases of prescription are probably the most complex ones.

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65 See the Minquiers and Ecrehos Case (France v. United Kingdom) (1953), ICJ. Available at: http://www.icj-cij.org/docket/files/17/2023.pdf. It was a case related to territorial dispute over Islands and where France claimed historical reasons and the United Kingdom claimed effective control over the Islands. Finally, the International Court of Justice ruled in favor of the UK.
to deal with because there are many factors involving it and, still, there are many questions unsolved such as how many years need to pass without title claims before the sovereign State loses its rights\textsuperscript{69}. But, the clearest case of prescription was the Temple of Preah Vihear, brought before the ICJ in 1961.

In conclusion, customary international law on territorial acquisition is clear in some aspects and concepts but too broad in many others. However, what it is important to point out is that customary law requires not only discovery and occupation of a piece of land or island to guarantee sovereign rights over it, but effective control, public notice and no rejection from another state authority over the claim made. Moreover, an argument using the time gap concept in displaying sovereignty over a land or island is not a problem, \textit{per se}, if the counterpart or State exercising jurisdiction cannot prove effective control over it during this time gap. At the same time, acquisition by the ‘new State’ needs to be contested by the State losing this land or island, otherwise the temporary gap argument would not work.

Consequently, if customary international law of territorial acquisition applied to the Senkaku/Diaoyu conflict, the one with the strongest position is Japan\textsuperscript{70}. However, judicial decisions and \textit{opinio juris} might decline the balance to China. Nevertheless, it is difficult that Japan would accept to bring the case before an international court or an arbitral court due to it already exercises control and sovereignty over the Islands.

### 2.2. Law of the Sea applicable: Regime of islands in the 1982 Convention

Territorial claims, and more specifically claims over small islands or rocks, particularly in the South East China Sea and the South Chinese Sea, have increased significantly since the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982. Dong Manh Nguyen (2006) points out that those claims are the result of the “introduction of the concept of the exclusive economic zone and the broadening of the continental shelf margin in the LOS Convention”\textsuperscript{71} because due to this concept, states can maximize and expand their sovereign rights over the sea and natural resources found on this areas. As Article 56 (1)(a) UNCLOS states:

\begin{quote}
\textit{In the exclusive economic zone, the costal State has:}

\textit{Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds ”.}
\end{quote}

\textsuperscript{69} Ibid, p. 916.
\textsuperscript{70} Carlos Ramos-Mrosovsky (2008), p. 928.
However, Robert W. Smith and Bradford Thomas (1998) do not accept Dong Manh Nguyen’s (2006) point of view related to the causes of the increase of claims over islands, because they argue that, for instance, China has been claiming sovereignty over islands in the South Chinese Sea for centuries\(^{72}\).

Under the LOS Convention it is provided that each coastal state has up to 12 nautical miles (nm)\(^{73}\) of territorial sea and up to 200 nm of exclusive economic zone from the baseline\(^ {74}\). In addition, depending on specific features of coasts, a continental shelf can be claimed out to 350 nm from the baseline\(^ {75}\). Following this features, Smith and Thomas (1998) estimated that “a zone of 200 nautical miles around a small island can generate about 125,600 square nautical miles of ocean space”\(^ {76}\). This means that effective control over islands where different types of natural resources can be found is not just a matter of sovereign and cultural rights, but a possible improvement of the nationals’ economy and a gain of power in geopolitics.

Nevertheless, whereas Article 121(1) of the UNCLOS defines an island as “a naturally formed area of land, surrounded by water, which is above water at the high tide”, the same Article, paragraph 3, provides fuel for discussion between claiming States because it states that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”. Although nowadays technology is capable to provide those elements of sustainability for humans, still the question of ‘what is a “rock” that cannot generate exclusive economic rights or continental shelf” remains unanswered\(^ {77}\). Moreover, Bowett (1993)\(^ {78}\) and Smith and Thomas (1998)\(^ {79}\) go further and consider that to decide whether or not an island has exclusive economic zone and continental shelf it is necessary to “look to the island’s size, political status, and the nature of the island itself”. Thus, the distinction between a rock and an island is important since it provides EEZ and a possible claim for shelf to the State holding sovereignty over it.

In addition, Article 77 of the UNCLOS provides further rights to islands with natural resources because it extends, if applicable, sovereignty over “non-living resources of the seabed and subsoil”\(^ {80}\). In other words, those islands which can be claimed continental shelf have sovereign rights to explore and exploit oil, natural gas and other minerals located in their seabed. As it will be shown, Article 77 of the UNCLOS might be applicable to the Senkaku Islands.

As Ramos-Mrosovsky (2008) indicated, in any narrow sea separating two countries with less than 400 nautical miles (the East China Sea has around 360 nm across), conflicts with maritime boundaries will appear because basically each state

\(^{72}\) Robert W Smith and Bradford Thomas (1998), p.15

\(^{73}\) Article 3 of the UNCLOS.

\(^{74}\) Article 57 of the UNCLOS.

\(^{75}\) Article 76(5) of the UNCLOS


\(^{77}\) Ibid. p.15.


\(^{80}\) Article 77 of the UNCLOS
wants to have a territorial sea, an exclusive economic zone and, if applicable, a continental shelf extension (Figure 4).

Moreover, if those conflicts were not enough, problems with mechanisms used to delimitate baselines will appear. Japan and China claim different ways of determining their base lines and the extension of their EEZ. However, international courts such as the ICJ have recognized in their jurisprudence that when there is a conflict over maritime boundaries the most often applicable principle is the equidistance one. In other words, jurisprudence has established that both parts in a conflict will have approximately the same nautical miles of territorial sea and exclusive economic zone. Nevertheless, there is an exception to this basic principle, when any of the parties can demonstrate that its seabed is lying in a continental shelf that cannot be separated.

China’s claim over the Senkaku/Diaoyu Islands is not just based on historical reasons, but also on what it is called continental shelf rights and, by “natural prolongation”, those rights are extended to the “Okinawa Trough” (Figure 4). Nevertheless, it is important to underline that claiming continental shelf rights, and the fact that a positive judgment might provide effect to this claim, does not mean that it gives sovereignty over an island located in the continental shelf claimed. In fact, it might happen that the United Nations Commission on the Limits of the Continental Shelf (CLCS) and an arbitral tribunal sentence that China’s jurisdiction is extended to the Okinawa Trough, but particularly the Senkaku/Diaoyu Islands belong to Japan. In addition, the CLCS, which deals with claims over continental shelf, has not competence to settle legal disputes because it deals with technical issues such as confirming or not the existence of a continental shelf, this is the reason why a judicial body or other types of peaceful settlement methods are needed.

However, if Japan’s claim is won, then its maritime jurisdiction would increase substantially in terms of EEZ, and it would undermine China’s argument that the

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82 See Denmark v. Norway, Case in Maritime Delimitations in the Area Between Greenland and Jan Mayen (1993), the International Court of Justice 38, 58.
83 Ibid, p. 913.
“Trough creates a natural boundary”\textsuperscript{85}. To avoid conflicts over the delimitation of the territorial waters and EEZ, Shigeru Oda (1995), following Articles 74(1) which state: “[T]he delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”\textsuperscript{86}, argues that the best way to reach an equitable solution is to make that both conflicted parts freely negotiate and reach a bilateral agreement\textsuperscript{87}. As said above, probably the best solution, while dealing with the continental shelf claim, is to set boundaries by using the equidistance principle.

On the other hand, Article 83(1) of the UNCLOS states that “the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”\textsuperscript{88}, the only one ways which a continental shelf claim can be settled is through the CLCS or, in case of already existing mining of the seabed bringing it before the Seabed Authority\textsuperscript{89} established in the LOS Convention. In any case, final recommendations from any of the two institutions are final and binding, and need to be respected. Moreover, both states in conflict need to accept jurisdiction from the CLCS and Seabed Authority to deal with the specific type of controversy\textsuperscript{90}. As a consequence, although the CLICS has a technical character, the Seabed Authority is a judicial mechanism to settle disputes when exploitation has started that might not be the first option for any of the conflicted parts\textsuperscript{91}. The main reason for not using a judicial mechanism is that normally one part gets a lot and the other loses even more\textsuperscript{92}.

\textsuperscript{85} Ibid.
\textsuperscript{86} Article 74(1) of the UNCLOS
\textsuperscript{88} Article 83(1) of the UNCLOS.
\textsuperscript{90} Torbjørn Pedersen (2007), p. 351.
\textsuperscript{91} Ian Brownlie (2009), p. 281.
\textsuperscript{92} An exception to it was the Arbitration between Eritrea and Yemen in 1998, which divided the islands in groups and ceded sovereignty to Eritrea or Yemen depending on how close they were to their base lands and the historical control over them.
3. International legal regimes: settlement of international disputes over islands

Before going further with the conflict over the natural resources located in the Senkaku/Diaoyu Islands, it may be helpful to explain what mechanisms are often used in international law to settle international disputes over delimitations of baselines, territorial waters, Exclusive Economic Zones and continental shelf. In this sense, there are two main sources of international law, applicable in this case, where mechanisms to settle international disputes are available: the United Nations Charter and the LOS Convention. In addition, the principle of settling international disputes by peaceful means underlines all type of conflicts. This principle can be found in Article 2(3) of the UN Charter and in the General Assembly Resolution 2625 (XXV): Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. The UN Charter states:

“3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All 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.”

However, as it will be explained, simple application of international law will not solve a conflict that remains since early 1970s. Bringing the conflict before the International Tribunal for the Law of the Sea (ITLOS) or to the International Court of Justice (ICJ) may be the first idea for most of people, but not for the parts in conflict.

Chapter VI of the United Nations Charter provides mechanisms for peaceful settlement of international disputes. As Article 33(1) of the UN Charter states:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice “.

Why attempts towards settling a conflict are better than leaving it frozen, un-latent or unsolved? In Simmons (2002) words: “there are tremendous positive benefits to getting borders settled, some of which are “joint gains”, that are rarely considered explicitly. Mutually accepted borders themselves are valuable international institutions

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93 General Assembly Resolution 2625 (XXV): ‘Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations’, p. 122.
94 Article 2(3) and (4) of the United Nations Charter.
that provide the stability necessary for private actors to invest and engage in cross-border exchange.\(^95\)

An explanation of the different methods available use in international law to settle disputes over islands will be provided in this third chapter. At the same time, dealing with reasons why China and Japan might accept, or not, jurisdiction from the ITLOS, ICJ or an arbitrator will be a central part in this chapter.

The main reason why this chapter follows a structure which deals first with the law of the sea, then other judicial means such as arbitration, and finally goes into bilateral negotiations ending in joint development, is because it follows the concept of exclusion of available alternatives to peaceful settlement of conflicts. In other words, bilateral negotiations and the joint development approach are basically the only option available by China and Japan to settle the dispute over the Senkaku/Diaoyu Islands, but to reach this conclusion it is important to explain why judicial means are not possible in this specific case.

Finally, a clarification must be done; this section will deal with settlement of international disputes according to international law. Reference to natural resources in international law and its management is the main target of the next chapter.

### 3.1. Law of the sea applicable

Both, China and Japan ratified the LOS Convention the 6\(^{th}\) of June of 1996 and the 20\(^{th}\) of June of 1996, respectively. By ratifying it, conflicts regarding issues on seas, maritime boundaries, continental shelf, etc. may be subjected to UNCLOS law and its formal procedures of settlement of disputes.

Ian Brownlie (2009) defines disputes as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two States. They may also relate to a question of attribution of title to territory, to maritime zones, to movables or to parts of the cultural heritage of a State”.\(^96\) Moreover, he states that it should be a “distinction between legal and political disputes”.\(^97\) In the case of the Senkaku Islands, there is a legal issue unsolved due to lack of political willing, what means that the conflict evolved from a legal issue to a political dispute. Furthermore, because both countries claim that they own them for historical and discovery reasons, the LOS Convention may have limited jurisdiction to deal with the conflict. Although, the UNCLOS has established a procedure to settle conflicts related to delimitations of maritime boundaries. This second claim is the one that is dealt in section 3.1.

Dong Manh Nguyen (2005) states that the success of this Third Conference on the Law of the Sea was that finally “the LOS Convention indeed provides a board legal framework determining the legal status of all oceans spaces and governing the legal

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96 Brownlie, Ian (2009), p.268.
97 Ibid.
regime of all major uses of the sea and their natural resources”\textsuperscript{98}. Moreover, the 1982 Convention added balance and coordination to the usage of oceans and seas, and will promote peaceful solutions to conflicts impossible to solve with the old LOS Conventions\textsuperscript{99}. In fact, Articles dealing with settlement of disputes are all over the document, but specially in Part XV, UNCLOS, giving them a more prominent status. Nevertheless, not all ocean disputes have a specific mechanism of settlement and those that are specified in the LOS Convention are not subjected to compulsory settlement\textsuperscript{100}. Like Article 2 of the UN Charter, Article 279 of the LOS Convention states that:

“States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter”.

In addition, although Article 279 says that State Parties shall choose any peaceful means to settle disputes\textsuperscript{101}, Article 287 clarifies that:

“1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

\textsuperscript{98} Ibid, p.162.
\textsuperscript{99} Ibid.
3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree”.

However, at the same time Part XV states that the mechanisms of settlement of disputes established in Article 287 UNCLOS, will be applied if the conflicted State Parties are not able to chose by their own a settlement dispute mean. In this sense, it is important to notice that when State Parties have reached an agreement on what mechanisms will be used to settle a conflict, then those mechanisms chosen will prevail over any procedure provided in the LOS Convention.

Finally, it is important to say that under Section 3 of Part XV of the LOS Convention, there are exceptions and limitations to the mechanisms established in Article 287 of the UNCLOS. Following Article 298, Section 3, China made a reservation stating that it will not accept any of the procedures provided for Part XI, Section 2 with respect to “disputes referred in Article 298, paragraph 1 (a), (b) and (c) of the Convention”. Those disputes are:

“(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of

\[\text{References}\]


103 Article 282 UNCLOS.

104 Articles 280 and 281 of the UNCLOS.

105 See reservations made by China to the UNCLOS. Available at: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm
that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.”

Furthermore, for other disputes not established in article 298, paragraph 1 (a), (b) and (c), China has not declared what mechanism of article 287 would prefer or would like to reject.

By contrast, Japan, on date April 2013, has not done any declaration under article 287 and/or 298, what means that it is accepting any of the peaceful mechanisms of settlement of disputes of article 287, but just if there is no agreement on choosing any mechanism to settle a dispute between conflicted State Parties.

In any case, Japan and China, while dealing with an issue not included in Chinas’ reservation on article 298 of the LOS Convention, will be bound by the compulsory procedure laid down in Part XV and will not be able to escape from it.

In addition, following article 287 of the LOS Convention, Dong Manh Nguyen (2006) states that “if a State fails to declare the preference or if the state party instituting a proceeding and the respondent state party has not chosen the same forum, arbitration will be used”. In other words, arbitration will be a procedure applicable to any conflict, in accordance with Annex VII, if States Parties haven’t accepted the same procedures or haven’t decided any other mechanism different from those established in article 287 of the UNCLOS.

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106 Article 298 of the UNCLOS
107 Article 286 of the UNCLOS
Finally, following Article 297 of the LOS Convention, Judge Shigeru Oda (2003) summarized the disputes mechanism in the UNCLOS:\(^{110}\):

<table>
<thead>
<tr>
<th>Topic</th>
<th>Subject to the compulsory settlement procedures</th>
<th>Not subject to the compulsory settlement procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercise by a costal state of its sovereign rights or jurisdiction provided in the LOS Convention</td>
<td>Disputes with regard to the freedoms and rights of navigation, over flight or the laying of submarine cables and pipelines or other internationally lawful uses of the sea specified in Article 58 and Article 297, Para 1(a) and (b). Disputes relating to the alleged contravention by a coastal state of specified international rules and standards for the protection or preservation of the marine environment (Article 297, Para 1 (c)).</td>
<td>All other disputes</td>
</tr>
<tr>
<td>Marine scientific research</td>
<td>All other dispute</td>
<td>Disputes relating the exercise by the coastal state of a right or discretion in accordance with Article 264 (Article 297, Para 2(a)(i)). Disputes relating decision by the coastal state to order suspension or cessation of a research project in accordance with Article 253 (Article 297, Para 2(a)(ii)).</td>
</tr>
<tr>
<td>Fisheries</td>
<td>All other disputes</td>
<td>Disputes relating the sovereignty rights with respect to the living resources in the exclusive economic zone or their exercise (Article 297, Para 3(a)).</td>
</tr>
<tr>
<td>Sea boundary delimitation or historic bays or titles</td>
<td></td>
<td>A state may declare not to accept the compulsory procedures (Article 298, Para 1(a)).</td>
</tr>
<tr>
<td>Military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction</td>
<td></td>
<td>A state may declare not to accept the compulsory procedures (Article 298, Para 1(b)).</td>
</tr>
</tbody>
</table>

In respect of which the United Nations Security Council exercises the functions assigned to it by the United Nations Charter

A state may declare not to accept the compulsory procedure (Article 298, Para 1(c)).

3.1.1. Problems with the procedure of settlement of disputes in the LOS Convention and the Senkaku/Diaoyu Islands

There are many reasons why the UNCLOS is not working in solving the conflict over the Senkaku/Diaoyu Islands. Some of them are due to a lack of political willing, but others are related to the dispute settlement procedure established in the 1982 LOS Convention.

In one hand, many conflicts have not been included in the dispute settlement mechanism. For instance, conflicts over sovereignty, like in this case, cannot be solved thru the LOS Convention. The lack of any mechanism to settle sovereign disputes over islands lead to an increase of sovereign claims over islands and their duration for decades. Although, other scholars such as David Whiting (1998) argue that any territorial dispute would be dealt in the International Tribunal for the Law of the Sea by “using previously existing international law”, but just if the Court is asked to deal with it.

In the other hand, the most important problem related to the procedure of settlement of disputes in the LOS Convention, is that China made a reservation on the procedures described in Article 287 of the UNCLOS with respect to “disputes referred to Article 298, paragraph 1(a), (b) and (c) of the Convention”. In other words, China does not accept the ITLOS, the ICJ or any arbitral tribunal constituted in accordance with Annex VII of the UNCLOS jurisdiction to settle a dispute related to boundary delimitations of territorial waters, EEZ and continental shelf, or disputes related to historic titles.

3.2. Other international methods of peaceful settlement of international disputes

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115 See reservations made by China to the UNCLOS. Available at: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm
As seen above, there are as many modes of peaceful settlement of disputes as the parts in conflict can think about and are willing to accept\textsuperscript{116}. However, the most common ones are specified in Chapter VI of the United Nations Charter\textsuperscript{117}: i) judicial settlement by international tribunals; ii) bilateral negotiations; iii) mediation & good offices; iv) inquiry; and, v) multilateral negotiations. Nevertheless, the main modes to settle international disputes are judicial/arbitration, pre-ordinary settlements and direct negotiation between State parties\textsuperscript{118}.

Moreover, settlement of international disputes has two basic principles: the principle of genuine consent of the parties and the principle of application of international law agreed for both State parties\textsuperscript{119}. In addition, the principle of genuine consent is applied separately to each issue in conflict. For instance, a State party can declare consent to settle part of the conflict but reject jurisdiction to specific matters.

The main difference between modes of settlement of international disputes is that while judicial settlement emphasizes adjudication, non-judicial methods produce settlement in accordance with political and legal means, emphasizing a better win-win outcome\textsuperscript{120}.

Furthermore, it is important to clarify that most of times, dispute mechanisms are many and States decide to choose a specific mechanism in a concrete forum depending on their past experience, their binding international obligations and the possibility of success that States think might have\textsuperscript{121}.

3.2.1. Judicial settlement and arbitration

The Senkaku/Diaoyu Islands conflict may be difficult to settle by judicial means due to two main reasons. First, China made a reservation to the procedures established by Article 287 of the LOS Convention, to settle disputes described in Article 298 of the same convention. Indeed, this reservation makes impossible for the ITLOS, the ICJ and arbitral courts/tribunals to intervene in the conflict. Furthermore, China has never recognized jurisdiction from the International Court of Justice. At the same time, Japan’s recognition of jurisdiction from the ICJ on 9\textsuperscript{th} July 2007 was followed by a declaration stating:

\begin{quote}
“This declaration does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement.

This declaration does not apply to any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International
\end{quote}

\textsuperscript{117} Article 33(1) of the UN Charter.
\textsuperscript{118} Brownlie, Ian (2009), p. 268.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid, p. 270.
\textsuperscript{121} Krista E. Wiegand and Emilia Justyna Powell (2011), p. 53.
Court of Justice only in relation to or for the purpose of the dispute; or where
the acceptance of the Court's compulsory jurisdiction on behalf of any other
party to the dispute was deposited or notified less than twelve months prior to
the filing of the application bringing the dispute before the Court.

This declaration shall remain in force for a period of five years and thereafter
until it may be terminated by a written notice"\textsuperscript{122}.

In other words, Japan’s declaration does not allow using the ICJ judicial
mechanism to settle international disputes if the other State party in conflict with Japan
has accepted ICJ jurisdiction only for a specific dispute or if the other State party has
accepted the compulsory jurisdiction\textsuperscript{123} less than twelve month before bringing the case
before the International Court.

The second reason was that in accordance with customary international law of
territorial acquisition and judicial decisions respect this issue, China would have the
weakest position\textsuperscript{124}. Moreover, the fact that Japan already controls the conflicted Islands
makes a judicial settlement almost impossible because of the principle of genuine
consent of both parts.

However, theoretically, it would be possible for China to make a reservation of
their reservation to the procedures established in Article 278 of the UNCLOS, stating
that they may accept jurisdiction from an arbitrator for the Senkaku/Diaoyu conflict. In
practice, States prefer to bring a dispute before an arbitrator rather than in already
established courts\textsuperscript{125}. Nonetheless, this might be highly impossible for two main
reasons: 1) it would create a precedent for other conflicts, plus losing would undermine
Chinese claim over islands located in the South China Sea\textsuperscript{126}; 2) the other State parties
to the LOS Convention need to agree with this second reservation, or at least they do
not need to disagree with it. In practice, Japan might reject this reservation of a prior
reservation if they see any chance of losing control over the Islands.

3.2.2. Bilateral negotiations: joint development

Since judicial settlement is almost impossible in the conflict over the Senkaku/Diaoyu
Islands, bilateral negotiations between China and Japan may be the best solution. In
addition, in bilateral negotiation, like in arbitration, a negotiator has to be accepted by
both parts, everything needs to be discussed, and the terms of negotiation need to be
clearly accepted and understood by both State parties, leading to a position where both
parties in a conflict feel more comfortable\textsuperscript{127}. In fact, Krista E Wiegand and Emilia

\textsuperscript{122} See the declaration made by Japan recognizing the International Court of Justice jurisdiction. Available at:
\textsuperscript{123} Article 36(2) of the ICJ Statute.
\textsuperscript{124} Carlos Ramos-Mrosovsky (2008), p. 928 and 929.
\textsuperscript{125} Alheritiere, Dominique (1985), ‘Settlement of Public International Disputes on Shared Resources: Elements of a
\textsuperscript{126} Ibid, p. 938.
\textsuperscript{127} Simmons, Beth A (2002), p. 836.
Justyna (2011) analyzed most of conflicts between States during 1945-2003 and their settlement procedure and they concluded that during this period of time, 77% of all conflicts were faced by bilateral negotiations, 17% used a ‘nonbinding third party’, and 6% were brought before a judicial mechanism\textsuperscript{128}. The problem with bilateral negotiations is that they can be blockade in national parliaments or tribunals by opposite parties or state authorities that have interests against a settlement. Because of it, judicial settlements are more often used when Prime Ministers or Presidents of state fear political opposition\textsuperscript{129}. In other words, bilateral negotiations have a highly political nature\textsuperscript{130}. However, the degree of formalization and use of legal international codes in negotiation is low in the sense that everything needs to be accepted and accorded by the conflicted parts. This low degree of settings gives more power to interpretations of international law codified treaties, conventions and legal principles. Moreover, interpretation can lead to a long process and time-wasting negotiations of what is the real interpretation of international law\textsuperscript{131}. For instance, China and Japan have been negotiating for the last 15 years about the territorial dispute over the Senkaku/Diaoyu Islands, and still disagree on whether the First LOS Convention or the 1982 UNCLOS is applicable\textsuperscript{132}.

Clearly, the Senkaku/Diaoyu conflict is highly politicize and reaching a solution by judicial means, as explained above, is likely impossible. Although, considering the 1971 Agreement between Japan, South Korea and Taiwan, and the 1997 Fisheries Agreement between China and Japan, it is possible to try a new approach to resolve and/or froze the dispute that is not banned by China and Japan: joint development. Furthermore, the 2008 Joint Development Agreement between China and Japan to explore and exploit gas fields located close to the Senkaku/Diaoyu Islands was a further development of this new approach to deal with international disputes in the maritime domain\textsuperscript{133}.

The 1997 Fisheries Agreement

The 1997 Fisheries Agreement was not just the outcome of bilateral negotiations between China and Japan to avoid an escalation of the conflict over the Senkaku/Diaoyu Islands, but came from the necessity of managing one of the most important economic activities for the population of both countries living in the area.

\textsuperscript{128} Krista E. Wiegand and Emilia Justyna Powell (2011), p. 46.
\textsuperscript{129} Both, Simmons, Beth A (2002), p. 834; and Krista E. Wiegand and Emilia Justyna Powell (2011), p. 35; reach the same conclusion.
\textsuperscript{131} Krista E. Wiegand and Emilia Justyna Powell (2009), p. 5-6.
\textsuperscript{132} Ibid.
After seven rounds of negotiations, the Agreement was concluded the 11th of November 1997 and established two different zones (Figure 5) where different fisheries regimes applying, plus a management body. The first zone is called exclusive fishing zones, which is extended from the baseline of each state up to 52 nm. Within this first zone, the principle of territorial sea applies and each State party has jurisdiction. The second zone (PMZ) is regulated by fishing quotas, which need to be determined each year, and is based on the principle of common interest. The parties need to agree how many boats and quotes of catch are allowed to each part. To manage and enforce the Agreement, a Joint Fisheries Commission was set up.

Moreover, each State needs to take measures conservation measures to avoid over-exploitation in the shared management area or second zone. In addition, notification of the conservation measures taken by each State party is required.

As Gao and Wu (2005) argue, “the Agreement is by nature provisional pending boundary delimitation of the EEZ and the continental shelf”. Although, the Fisheries Agreement, per se, constitutes a step forward on negotiating towards a bigger Agreement on joint management over the conflicting area.

To sum up, this chapter has dealt with mechanism to peaceful settle international disputes, and, specifically with the disputes and claims over the Senkaku/Diaoyu Islands. However, as seen above, judicial mechanisms will be rarely applicable to this conflict. Thus, the only mode to settle disputes, already applied in the Fisheries Agreement and in the 2008 Joint Development agreement, with real chances to succeed is negotiation towards joint development.

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137 Ibid.
4. Joint development as a new approach for the conflict

Societies around the world have been using joint management of any type of natural resources for centuries. Yet, some of the old agreements were formal and written contracts and others were based on mutual trust by allies or territorial neighbors. However, since early 1990s scholars have been paying a lot of attention to this kind of agreements that provide mechanisms to freeze conflicts.

The joint development approach does not resolve territorial conflicts and boundaries international jurisdictions between conflicting State parties over rights to living and non-living natural resources, but it is better than taking no action to freeze a conflict139. Moreover, as more successful precedents of shared management of natural resources by two or more states are, as more conflicts will be dealt with this new approach.

In addition, shared resources management would provide enough legal security to multinational oil companies or investors to develop research and exploitation projects over oil and gas located in a conflicting area140.

This fourth chapter will deal with the international legal basis for the joint development or shared management approach by looking at the work of the International Law Commission, the principle of cooperation in international law, the general principle of equity, the LOS Convention, and, finally, case law supporting shared management of natural resources.

4.1. Introduction to the concept

The concepts of joint development, joint management, shared development or shared management are all synonyms and were first developed in the early 1970s. Rainer Lagni was one of the first scholars defining joint development as “co-operation between States with regard to the exploration for and exploitation of certain deposits, fields, or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims”141. However, most of definitions of joint development are incomplete because do not adapt to the features of territorial disputes over natural resources of nowadays. In this sense, the British Institute of International and Comparative Law provided probably the most accurate definition of joint development: “[i]t is] an agreement between two States to develop so as to share jointly in agreed proportions by inter-State co-operation and national measures the offshore oil and gas in

140 Ibid, p. 216.
141 See Keyuan, Zou (2006), p. 89.
designated zone of the sea-bed and subsoil of the continental shelf to which both or either of the participating States are entitled in international law.”

In general terms, the concept provided by the British Institute of International and Comparative Law has four characteristics: (i) it is an agreement between two countries, although multilateral negotiations for joint management of oil and gas fields in the South China Sea already exist; (ii) it is generally used in overlapping territorial or maritime boundaries; (iii) it is a provisional agreement that tend to freeze a dispute until a settlement mechanism is decided to apply to the conflict; and (iv) its main target is to develop jointly oil and gas in the disputed area.

Recently, Masahiro Miyoshi (1999) provided one of the most used definitions of joint development by scholars. “[Joint development is] an inter-governmental arrangement of a provisional nature, designed for functional purposes of joint exploration for and/or exploitation of hydrocarbon resources of the seabed beyond the territorial sea.”

Nevertheless, both definitions provided above have some limitations in their scope and application in certain models of joint development. David M. Ong (1999) establishes three models of joint development, plus two more added by Guo Rongxing (2010) reflecting new practices between States on agreements for joint development of natural resources. The three existing models according to Ong (1999) are:

(1) One of the States cedes total management of deposits located on the disputed area to the other State authority. It is the simplest mode of joint development because it requires not much cooperation in management of the oil and gas fields. The State managing will be charged with all costs, will get all profits of exploiting, and will give a percentage of the profits to the other State party.

Examples of this model are the 1958 Agreement between Saudi Arabia and Bahrain, the 1969 Abu Dhabi-Qatar Agreements, and the First 1989 Australia-Indonesia Timor Gap Treaty.

(2) The second model is called joint venture model and “consists of an agreement establishing a system of compulsory joint ventures between the interested states and their national or other nominated oil companies in designated joint development areas.” This model creates different subzones in the conflicted area, which are explored and exploited by each State depending on how close

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143 As David M. Ong, one of the most recognized scholars dealing with joint development, argues, shared management of natural resources is basically focused on offshore hydrocarbon deposits such as gas and oil. However, it can be referred to fisheries or conservation of living and non-living resources located in seabed. Ong, David M. (1999), ‘Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?’, The American Journal of International Law, Vol. 93, p. 771
147 Most of the examples of joint development provided in this section will be detailed in the last section of this chapter.
they are to their baseline. However, control over natural resources located in these areas is retained by both states, which need to approve joint operations. Thus, a joint commission is established but it does not have decision and enforcement powers. Its main target is to coordinate both States.

The 1974 Agreement between Japan and South Korea, the 1974 Convention in the Bay of Biscay between France and Spain or the 1993 Treaty between Colombia and Jamaica are examples of this model.

(3) The last model established by Ong (1999) is the most complex one because requires high coordination between State authorities. In general terms, States agree on creating an international joint institution or commission with “legal personality, licensing and regulatory powers, and a comprehensive mandate to manage the development of the designated zone on these states’ behalf”\textsuperscript{150}. Like in the second model, both states share revenues provided by the exploitation of gas and oil\textsuperscript{151}.

Examples of this third model are: the Sudan-Saudi Arabia Agreement of 1974. The main difference between this Agreement and the other two 1974 Agreements between France-Spain and Japan-South Korea, is that the joint commission for the Sudan-Saudi Arabia Agreement had substantially more powers on decision-making and implementing than the other two\textsuperscript{152}. Recent examples are, the 1989 Timor Gap Zone of Co-operation Treaty between Australia and Indonesia and the 1993 Agreement and its 1995 Protocol between Guinea-Bissau and Senegal.

Following new development on agreements and treaties dealing with joint developments of natural resources, Guo Rongxing (2010) proposed two more models:

(4) A \textit{parallel development model}, where each State will develop, explore and exploit by its own natural resources located in the area\textsuperscript{153}. However, this model creates many troubles such as exploration and exploitation race of gas and oil fields, uncontrolled drillings, difficulties when claiming liabilities for environmental damage and intensification of the boundary conflicts when scarcity of resources appears.

(5) The last model established a third party authority to completely manage explorations and exploitations of natural resources. Strictly, it would not be a joint development because all rights are ceded to a third party, which will share revenues equally to both parts\textsuperscript{154}.

\textsuperscript{150} Ibid, p. 791.
\textsuperscript{152} Ong, David M. (1999), p. 791.
\textsuperscript{154} Ibid, p. 16.
4.2. **Regimes existing in international law for shared management of offshore natural resources**

Joint development models for exploitation and exploration of natural resources exist all over the world and it is a growing method to settle/freeze international disputes between bordering countries. In consequence, it is important to find the international legal basis for the joint development approach.

This section will provide answers to questions such as; does international law provide any basis for the joint development approach? Is any general principle of law applicable to shared management, which could be violated, racing liability or compensation to the ‘affected’ party of an agreement? At the same time, it is important to note that joint development as a mechanism to settle or freeze maritime boundary disputes over oil and gas, is not mandatory for states. Actually, it is an optional mode which has not been codified in any international treaty or convention, but which enjoys broad state practice.

Nevertheless, a step forward was made by the British Institute of International and Comparative Law when wrote a model agreement to be followed by state for joint development for natural resources, particularly oil and gas, in 1985\(^{155}\). Although it was a major step forward towards a framework for joint development, in practice it has not been as successful as expected.

4.2.1. **The work of the International Law Commission**

Peace, security and refrain from the use of threats or force in international relations are the core principles of the United Nations Charter\(^{156}\). Thus, mechanisms for peaceful settlement of international disputes are provided in Chapter VI of the UN Charter. Moreover, Article 52 promotes regional arrangement to settle international disputes before bringing it to the Security Council. In this sense, several texts considered soft law recognize shared management of natural resources as a mechanism to settle international disputes\(^{157}\).

In 1978, the UN Environmental Programme (UNEP) Working Group of Experts on Natural Resources Shared by Two or More States approved the draft principles of conduct related to settlement of environmental disputes and shared management of natural resources\(^{158}\). The principles proposed by some of the UNEP members (Canada, Finland, Greece, Italy, Mexico, Norway, the Philippines and the United States) were sent to the UN General Assembly were 28 governments expressed their will to adopt them, but others issued strong criticisms for considering them an invasion of the internal affairs of States. Finally, the General Assembly decided to “take note” of the

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\(^{156}\) Article 2 of the UN Charter.


\(^{158}\) Ibid.
principles\textsuperscript{159}. Although those principles are not considered soft law, they were a starting point for the recognition of joint development as an optional mechanism to settle international disputes.

Recently, the International Law Commission (ILC) included the topic of shared natural resources in its 2003\textsuperscript{160} agenda\textsuperscript{161}. By including it in its agenda, the ILC forces States to talk and negotiate about an issue that does not have rules relating the use of shared natural resources and joint development by two or more States\textsuperscript{162}. The ILC already recognized state practice in shared natural resources and its “internationalized” degree in the 1994 ILC on non-navigational uses of international watercourses\textsuperscript{163}. Indeed, the adoption of the ILC’s Draft Articles on the Law of the Non-navigational Uses of International Watercourses (LNNUIW)\textsuperscript{164} can be seen as the basis for the after work on shared natural resources on Transboundary aquifers and Oil and Gas\textsuperscript{165}.

However, the main problem for the ILC is that the Draft Articles (or Convention) on the LNNUIW have not been a real success. While in 1997 the UN General Assembly adopted the Draft Articles\textsuperscript{166} by 103 votes in favor, 3 against and 27 abstentions, by April 2013 the Convention has been signed by 16 States, and ratified by 30.

As a consequence of the failure of the 1997 Convention, some scholars argue that the ILC will be more cautious within the topic of shared natural resources in other areas less known than non-navigational uses of international watercourses\textsuperscript{167}. Thus, the ILC on its 60\textsuperscript{th} session, 2008, adopted the Draft Articles on the Law of Transboundary Aquifers, which were sent to the UN General Assembly to be taken in note, encouraged in between States and included in the provisional agenda of the GA Sixty-six session (2011)\textsuperscript{168}.

4.2.2. The Law of the Sea Convention and the principle of co-operation

The United Nations Convention on the Law of the Sea stipulates duties and rights for the conservation and exploitation of living and non-living resources located in the Exclusive Economic Zone of a coastal State\textsuperscript{169}. However, those conservation duties and rights are just focused on living resources when dealing with the continental shelf. Only Article 81 of the UNCLOS talks about non-living resources and states that “the coastal

\textsuperscript{159} UN General Assembly Resolution 186 U.N. GAOR (107\textsuperscript{th} plenary meeting) (1979).
\textsuperscript{160} The ILC of 2002 took the decision to include the topic of shared natural resources in its 2003 programme of work.
\textsuperscript{161} Report from the International Law Commission titled ‘Shared natural resources (Law of transboundary aquifers)’ and Report on ‘Shared natural resources (Oil and Gas)’. Last update December 12, 2012.
\textsuperscript{163} Ibid, p. 324.
\textsuperscript{165} Rainne, Juha (2006), p. 325.
\textsuperscript{166} A/RES/51/229 of 21\textsuperscript{st} of May 1997, adopting the Convention on the Law of the Non-navigational Uses of International Watercourses.
\textsuperscript{168} Res. 63/124 of the 11 December 2008
\textsuperscript{169} Articles 56(1) and 61 of the UNCLOS
State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes”.

It is then when the general principle of co-operation is used as a base for the legality of the joint development approach in international law. There is no convention or well-established rules of customary international law for cooperation in boundary conflicts for natural resources. However, some treaties and case law address cooperation in an indirect mode. For instance, Chapter VI of the UN Charter urges in general terms for cooperation in the resolution of international conflicts. In a general terms, the UN General Assembly 2625 (XXV) recognizes co-operation as a principle that must be followed among states:

States have the duty to co-operate with one another, irrespective of the difference in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.170

Specifically, the 1974 Charter of Economic Rights and Duties of States, states that:

In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.171

Moreover, the Governing Council of the UN Environment Programme (UNEP) took note and recognized the need to co-operate in respect of shared natural resources between two or more States for environmental protection172, based on the Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States.

At the same time, Article 62(1) of the LOS Convention provides basis for an optimum utilization of the living resources inside the EEZ, but not in the continental shelf. However, the fact that there is a lack of detail on what optimum utilization is and how co-operation must be done, joint development of overlapping areas in continental self and its exploitation is unavailable in the LOS Convention173. The same argument is provided in Part IX of the UNCLOS related to enclosed and semi-enclosed seas. Article 123 of the LOS Convention provides rights and duties to States bordering to enclosed or semi-enclosed seas, but they are all related to living resources and not hydrocarbon resources.

170 General Assembly Resolution 2625 (XXV): ‘Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations’, p. 123.
172 GA Res. 34/186, 107th plenary meeting, 18 December 1979.
Regardless what said in the last few paragraph, some scholars see the legal basis for joint development in Article 83(3) of the UNCLOS:

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

Article 83 is, in general, specific but vague in content, in the sense that it does not specify what type of co-operation and arrangements States shall enter into while pending for an agreement on delimitation of territorial boundaries. Nevertheless, the fact that this provision is vague gives an open interpretation of what types of arrangements can be. Is in this context where scholars see a legal basis for joint development of natural resources.

Furthermore, the provision that provides “[States] shall make every effort to enter into provisional arrangements” has been interpreted in the sense that negotiations needs to be done in good faith to reach a provisional agreement. Thus, the North Sea Continental Shelf Cases emphasized that negotiation is not just a recommendation, but a mandatory rule before bringing a case before an international court. However, the final argument for joint development was provided in the 2007 Award Arbitration between Guyana and Suriname, under Annex VII of the UNCLOS:

477. The Tribunal rules that Guyana also violated its obligation to make every effort to enter into provisional arrangements by its conduct leading up to the CGX incident. Guyana had been preparing exploratory drilling (...) and should have, in a spirit of cooperation, informed Suriname directly of its plans. Indeed,

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175 Ibid.
176 Article 83(3) of the UNCLOS
177 Not just scholars have reached this interpretation. The Arbitral Tribunal for the Guyana v. Suriname case found that “negotiation in good faith” has many approaches, but one of them is joint development. See, the Award of the 2007 Arbitration between Guyana and Suriname, p. 153, paragraph 461.
notification in the press by way of CGX’s public announcements was not sufficient for Guyana to meet its obligation under Articles 74(3) and 83(3) of the Convention. (...) Steps Guyana could have taken consistent with efforts to enter into provisional arrangements include (1) giving Suriname official and detailed notice of the planned activities, (2) seeking cooperation of Suriname in undertaking the activities, (3) offering to share the results of the exploration and giving Suriname an opportunity to observe the activities, and (4) offering to share all the financial benefits received from the exploratory activities.\(^\text{180}\)

The Arbitral Tribunal for the case Guyana v. Suriname makes clear that there is a direct relation between the provision to “make every effort to enter into provisional arrangements” and the concept of joint development of natural resources. Moreover, the Tribunal argues that negotiations in “good faith” have many approaches, but one of them is joint development of natural resources.\(^\text{181}\) It also adds that “joint exploitation of resources” has been encouraged by international courts and tribunals such as the Eritrea v. Yemen Arbitration or the North Sea Continental Self Cases.\(^\text{182}\)

Finally, although cooperation is necessary, the parties involved in a joint development adventure must communicate each other and accept what the other part will do prior doing it.\(^\text{183}\)

It is important to distinguish between rules recognized in international law, and soft law or practices that might lead to obligations under international law for States. In this case, the principle of co-operation is a well-recognized principle in international law, which has strong basis, but when related to joint development it loses its mandatory status because states have the ultimate decision on whether or not applying it.

4.2.3. The principle of equity

Its general meaning is that law must be interpreted in its best mode to serve its purposes.\(^\text{184}\) Although this principle has never been codified and was not included neither in Article 38(1)(c) of the Statute of the International Court of Justice nor in the UN General Assembly 2625 (XXV) on the general principles of international law, it has been broadly recognized as a principle within many legal systems of the world.\(^\text{185}\) However, the principle of equity it is also considered vague and difficult to recognize in general terms, only applied in each particular case is when it gets wide State recognition.\(^\text{186}\) Some scholars argue that the equity principle is part of the sovereign equality principle, although they have different international law basis.

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\(^\text{180}\) See the Award of the 2007 Arbitration between Guyana and Suriname, p. 159–160, paragraph 477.
\(^\text{181}\) Ibid, p. 153, paragraph 461.
\(^\text{182}\) Ibid, p. 153, paragraph 463.
\(^\text{183}\) Article 142(2) of the UNCLOS.
\(^\text{185}\) Ibid, p. 109.
\(^\text{186}\) Ibid, p. 116.
In the sphere of maritime boundary conflicts, the principle was recognized in the North Sea Continental Shelf cases of 1969 when the final judgment stated that a concluding agreement in between the State parties involved in the dispute must follow the principle of equity\textsuperscript{187}. Nonetheless, in this particular case, the principle of equity was used in accordance with drawing equitable boundaries for the States in conflict.

At the same time, as Ong (1999) says that reaching an equitable solution for a dispute is a duty of the states that must be fulfilled in good faith, whether or not it involves joint development\textsuperscript{188}. Although there is an obligation to restrain in maritime boundaries disputes, it is not clear what will happen if one of the State parts does not want to negotiate an agreement with equitable solutions for each State party, or it simply does not want to negotiate at all. In this scenario, the risk of infringement the right of exploration and exploitation of oil and gas fields is highly possible\textsuperscript{189} leading to more confrontation between parts. This argument was also pointed out in the Aegean Sea case of 1976\textsuperscript{190}.

As a consequence, the main problem is if this principle is effectively applicable to the joint development approach. Until the date and as far as this research went, it has not been literally stated in any international agreement the need of an equitable basis for joint ventures among States, although it has been applied by international courts in a general way\textsuperscript{191}. Indeed, the general rule is to negotiate between parties in a joint development expedition until reaching an agreement on what will be the cost/profits shared by each State party. At the same time, depending on the needs of each state, equity will be more or less applied\textsuperscript{192}. For instance, in the Nigeria-São Tomé and Príncipe Agreement of 2001, Nigeria got a better percentage of the profits shared, but São Tomé and Príncipe accepted it because if benefited from the experience of Nigeria as one of the largest oil producers in the world\textsuperscript{193}. A second example is the Timor Gap Treaty of 1989 between Australia and the Republic of Indonesia, which has some concepts leading to think that the base of this treaty were the principle of co-operation and the principle of equity:

\begin{itemize}
  \item \emph{(a)} This Treaty gives effect to international law as reflected in the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 which under Article 83 requires States with opposite or adjacent coasts to make every effort to enter into provisional arrangements of a practical nature pending agreement on the final delimitation of the continental shelf between them in a manner consistent with international law. This Treaty is intended to adhere to such obligation.

  \item \emph{(b)} Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting East Timor’s or
\end{itemize}

\textsuperscript{187} North Sea Continental Shelf cases (1979), ICJ, Final judgment, para. 85.
\textsuperscript{188} Ong, David M. (1999), p. 800.
\textsuperscript{189} Ibid.
\textsuperscript{190} Aegean Sea Continental Shelf (Greece v. Turkey) of 1976, ICJ, para. 30.
\textsuperscript{191} Rongxing, Guo (2010), p. 12.
\textsuperscript{193} Ibid, p. 66.
Australia’s position on or rights relating to a seabed delimitation or their respective seabed entitlements\textsuperscript{194}.

But like in the Nigeria-São Tomé and Principe Agreement, in the Timor Gap Treaty equity is defined by giving title of 90 per cent of the petroleum produced to Indonesia, and only 10 per cent to Australia\textsuperscript{195}.

Moreover, it is important to point out that some States have developed national legislation regarding joint ventures and equity. Specifically, China adopted the Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures in 1979, subsequently amended in 1990 and 2001 (also called Law of the People’s Republic of China on Joint Ventures Using Chinese and Foreign Investments)\textsuperscript{196}. What is important in an international public law perspective from this ‘law’ is the fact that Article 3 states: “[parties to a joint venture shall share profits, risks and loses] in proportion to their contributions to the registered capital”\textsuperscript{197}.

Consequently, although the principle of equity has been applied in maritime boundary delimitation disputes, when applying it in a more business perspective, like the joint development for natural resources approach, it loses part of its international recognition because it becomes related to the pre-negotiations and final agreement between State parties about how costs and profits of the exploitation of oil and gas will be shared.

4.2.4. Case law

The work of the International Law Commission and the few UNCLOS Articles that can be related to joint development, together with state practice, are not enough to confirm the joint development approach as a legal option available for States when settling territorial conflicts over natural resources. Yet, it is important to look at the international case law to confirm the legal value of joint development.

The North Sea Continental Shelf cases

The judgment in the North Sea Continental Shelf cases of 1969 (F.R. of Germany v. Denmark & F.R. of Germany v. the Netherlands) is a clear example of the legal value of joint development as legal approach. By eleven to six votes in favor, the Court found that the continental shelf would be limited in accordance with equitable


\textsuperscript{195} Article 4 of the Timor Gap Treaty.


principles and by agreement. Moreover, more important is the fact that the Court recognized joint exploitation as a regime for the overlapping areas in between the parts.

The ICJ in this case, also held that an important issue to be considered when delimiting areas is the principle of unity of deposit. This principle is referred to the fact that two parties cannot exploit a deposit, located in between boundaries, separately by drilling from two different places, because there are environmental risks (the outcome of the North Sea Continental Shelf cases bans the possibility of using the fourth joint development model included by Guo Rongxing, 2010). Thus, the Court held that joint development is the best option for this kind of situations.

In its separate opinion of the judgment for the North Sea Continental Shelf cases, Judge Jessup defends a joint control and exploitation of the natural resources located in the seabed of the North Sea because it is the “simplest way to achieve an equitable apportionment with respect to [natural] resources.” In addition, Judge Jessup sees a broader international acceptance of the joint development approach than the ICJ judgment because he is able to point out many examples of joint exploitation by two or more states such as F.R. of Germany and the Netherlands in the Ems Estuary; the 1965 Agreement between the Netherlands and the United Kingdom; the Agreement between Italy and Yugoslavia of 1968; and, the 1965 Agreement between Kuwait and Saudi Arabia.

The Conciliation Commission for the Continental Shelf case between Iceland and Norway

Following the principle of cooperation, the Conciliation Commission settled for the continental shelf conflict between Iceland and Norway in 1981, recommended a “joint development and exploitation of natural resources located in overlapping areas” rather than issuing a recommendation about drawing maritime boundaries. What it is surprising of the recommendations of the Conciliation Commission is that it provided an exhaustive recommendation for joint development, with stages on exploring and drilling to be followed from both State parties, and modes of sharing revenues from the exploitation of the oil and gas located in the conflicted area.

Although none of the recommendations were binding, in the subsequent 1981 Agreement on the continental shelf between Iceland and Norway, most of them were literally included, allowing the implementation of a joint development approach.

198 North Sea Continental Shelf cases (1979), ICJ, Final judgment, para. 101 (C)(1).
200 Ibid, para 97 and 99.
201 North Sea Continental Shelf cases (1979), ICJ, Judge Jessup Separate Opinion, p. 74.
202 Ibid, p. 81-82.
205 See recommendations of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen (Norway), 1981, p. 25-34.
The Eritrea v. Yemen Arbitration

The Eritrea/Yemen Arbitration of 1998 dealt with territorial sovereignty over the “Red Sea Islands”. What it is important from this case is the relevance that the arbitral tribunal gave to joint development based on the shared agreement that Yemen and British Petroleum concluded in 1990. However, the shared agreements proposed by the arbitral tribunal were not possible to conclude because in its conclusions, the tribunal decided to split the “Red Sea Islands”, giving jurisdiction of groups of rocks/islands to each State party in the conflict.

As seen above, the joint development approach has emerged as an optional legal model to settle international disputes. State practice and case law show a strong support for the approach, but its main weakness is the fact that there is no international treaty, convention or general principle of international law supporting and empowering joint development. Consequently, joint development may be an option to be considered by states, arbitral tribunals, international tribunals and conciliation commissions when settling conflicts over natural resources. However, as long as state practice keeps increasing towards this approach, its relevance in international law will continue growing and might become customary international law to settle this kind of conflicts with joint development modes.

4.3. An approach applicable to the Senkaku/Diaoyu Islands?

The conflict over the Senkaku/Diaoyu Islands has developed dramatically during the last four decades due to the discovery of “big” oil and gas fields located in its seabed waiting to be explored and exploited. In fact, the conflict could be dealt in already established legal methods, but as seen in the second and third chapters of this thesis, political blockades and reservations made on international treaties made the issue a political conflict rather than a legal one. As a consequence, it has been proposed to use a joint development approach to settle or, at least, freeze the conflict.

However, there are still questions with complex answers because they will depend on how much both States are willing to “give up” in their claim over the Islands. In fact, four out of the five modes of joint development explained above require certain degree of negotiations and cession of sovereign rights to be “used” or “shared” by the Parties. In this sense, it is important to analyze the method used in the broad but short 2008 Agreement between China and Japan for joint development of the Chunxiao oil and gas field, which is located south-west of the Japan-South Korea Fisheries agreement (Figure 5).

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207 Ibid, para. 527.
208 Upon confirmation of estimations and expectations of oil and gas reserves, the proper adjective to be used is big. Both, the EIA and Bloomberg, reports are also cautious of using adjectives because oil and gas estimated reserves are not proved yet.
The 2008 document issued on 18 June 2008 has no title such as “agreement” or “treaty”. The Chinese, in their translation to English, considered it as a “Principled Consensus” document between China and Japan for the exploitation of the Chunxiao oil and gas field, “under the principle of mutual benefit”. However, the fact that this “document” is made under Chinese law and Japanese companies are invited to participate in joint development makes clear that China retains ownership rights of the field. Thus, it can be said that the model used in this case is the third one explained in chapter four of this thesis, but without a supervisory commission that regulates everything, or, at least, by the information provided until the date, there is no mention of it.

Strictus sensus the 2008 “Principled Consensus” document is applicable only to the specific case of the Chunxiao oil and gas field. But, a broader agreement, less general and based on international law, instead of national law like the 2008 agreement, may deal with the entire Senkaku/Diaoyu area. Taking in consideration the 1997 Fisheries Agreement and the 2008 Agreement, the most suitable mode of joint development might be a mix between models two and three. In other words, considering the precedent agreements, a future joint development model might include exclusive areas of exploitation for each State party, other areas with joint development – probably the most sensitive ones and the ones located close to the hypothetical median line claimed by Japan – and everything would be controlled by a specialized committee composed by members of both States that decides, for instance, on quotes of exploitation and legal issues. To avoid political or ideological blockades of the committee during any conflict, it would be helpful to add a chair for a neutral authority or personality that would act as a mediator for both parts and with decisional power to pass over blockades.

Nevertheless, the Okinawa Trough is as deep as 8,912 feet (2,716 metres), which would make difficult and expensive to build a pipeline in between the gas and oil fields and the Japanese coastline. Consequently, Japan’s profit for the exploitation of the natural resources located in the area would be less, than the Chinese once.

Although the 2008 “document” is not an international treaty, it set the first steps for cooperation in between China and Japan towards reaching “mutual benefits in the East China Sea”. Moreover, the joint development mode proposed in this thesis is not just a mere propose that could benefit both States and would allow to freeze the conflict over the Senkaku/Diaoyu Islands, but also it would provide substantive profits for the exploitation of oil and gas located in its seabed. At the same time, even though the proposal made is, a priori, the best approach since it considers the principles of co-

209 The 2008 China-Japan “document” establishes 7 sets of locations for the Chunxiao oil and gas field:
1) Latitude 29°31' North, longitude 125°53'30'' East; 2) Latitude 29°49' North, longitude 125°53'30'' East; 3) Latitude 30°04' North, longitude 126°03'45'' East; 4) Latitude 30°00' North, longitude 126°10'23'' East; 5) Latitude 30°00' North, longitude 126°20'00'' East; 6) Latitude 29°55' North, longitude 126°26'00'' East; and, 7) Latitude 29°31' North, longitude 126°26'00'' East


operation and equity as basic in the settlement of the conflict, it is not the only mode to freeze the dispute and getting profits of it, there are as many joint development methods as states agree with. China and Japan only need to agree on the best for them and apply it in a good faith.

Importantly, the conflict is considered as national interest by both States, their public opinions have a strong opinions and positions about it and would be difficult to change it in a short period of time. Neither China, nor Japan want to lose this ‘legal battle’ but neither both want to reach a situation where a peaceful solution is not an option because it would be against the international legal order. Finally, to make the picture even more complex, any kind of joint development venture will need to be approved by the Japanese Parliament and the Chinese Politburo, with the possibility of being blockade by political reasons.
5. Conclusion

As technology develops and possibilities of exploring and exploiting offshore oil and gas fields and sea beds containing all kind of natural resources increase, is more likely that claims of sovereignty by two or more nations will also grow. Is in this sense that joint development agreements are more likely to occur\textsuperscript{214}. Actually, Noussia (2010) already points out that “most of the existing joint development zones were devised to deal with the issue of boundaries or competing claims of sovereignty and jurisdiction”\textsuperscript{215}.

Moreover, latent conflicts over natural resources, but in general terms all conflicts, do not attract investment from States or private investors such as multinationals. The fact that joint development force all parts in a conflict to sit and negotiate a binding agreement provide the basic legal insurance for these investors to invest on it, which in the mid-long term it should positively affect the economy of the states conflicting and its citizen\textsuperscript{216}.

If \textit{a priori} the two lines of argumentation used to defend China’s and Japan’s claim over the Islands\textsuperscript{217} were dealt separately due to have different substantive and procedural law applicable, at the end, proper bilateral negotiations are able to deal with them in a joint mode because the territorial acquisition & historical title claim gets frizzed by using a joint development, which theoretically gives sovereign rights to both State parties, and the maritime boundaries claim needs to be settled or, at least, agreed before any exploitation starts. Consequently, the fact that none of the States conflicting has chances to has substantial loses, as it can happen with a judicial decision, States are more likely to agree on using this method to settle their disputes over offshore natural resources.

The hypothesis of this thesis was: ‘\textit{Joint development offers the best means of resolving the dispute over the Senkaku/Diaoyu Islands and the claim over its natural resources by China and Japan}’. The second and third chapters of this thesis were meant to check if this hypothesis was true or false. Explaining what substantive law was applicable in the particular case of the Senkaku/Diaoyu Islands dispute was essential for focus the research on peaceful modes of settlement of conflicts applicable with the substantive law applicable in this case. Thus, the third chapter did not only follow the concept of exclusion of options till reaching the only possible one, bilateral negotiations leading to a joint development approach, but it also followed the order settled by Article 279 of the LOS Convention, although as seen, neither the UNCLOS nor any judicial mechanism cannot provide any solution, it was worth to follow this logic order.

Moreover, the fact that chapter 3 provided a positive answer to the central hypothesis of this thesis led to a ‘new approach’ in international law, not well-studied and defined. As a consequence, the basis for joint development were analyzed and

\textsuperscript{214} Noussia, Kyriaki (2010), p. 64.
\textsuperscript{215} Ibid, p. 65.
\textsuperscript{217} With an extensive explanation of the two major arguments made by China and Japan when claiming sovereignty over the Senkaku/Diaoyu Islands explained in page 9 of this thesis, basically the he first one was territorial acquisition & historical titles, and the second one delimitation of maritime boundaries
concluded that state practice is likely to be the most important basis in international law for this ‘new’ optional dispute settlement mechanism.

Both the 1997 Fisheries Agreement and the 2008 Joint development Agreement between China and Japan provide the basis for a larger joint venture agreement which could cover not only all the disputed area surrounding the Senkaku/Diaoyu Islands, but a settlement of the Chinese and Japanese maritime boundaries in the narrow East China Sea. However, the joint development option will only be possible if both States firmly decide to start bilateral rounds of negotiation having in mind a final and real settlement of the conflict.
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