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**Maritime Delimitation and
Joint Resource Development
in the East China Sea**

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Maritime Delimitation and Joint Resource Development in the East China Sea

Seokwoo Lee and Young Kil Park¹

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I. Recent Trends

As is generally known, the sovereignty dispute over the Senkaku Islands,² between China/Taiwan and Japan, was triggered by a report commissioned by the UN in 1968, which reported the possibility of a substantial amount of petroleum and natural gas buried in the China Sea.³ When administrative authority over the Ryukyu Islands was transferred from the US to Japan in 1972, jurisdiction over the Senkaku Islands was also transferred. As a result of the transfers, a dispute ensued between China (Taiwan) and Japan over the Senkaku Islands, which persisted, except during the period in which formal relations were established between the two states. This paper will examine the events that occurred in the 2000's surrounding the dispute between China and Japan over the Senkaku Islands and discuss recent trends and aspects of the dispute.

I.1. Trends in Major Disputes between China and Japan

On March 24, 2004, a Chinese conservative/right-wing group planned a landing on the Senkaku Islands. Seven members of the group succeeded and were arrested by Japan for their illegal landing based on violations of Japan's Immigration Control and Refugee Recognition Law. This incident was recorded as the first arrest of persons by the Japanese Government for landing on the Senkaku Islands. Japan's Ministry of Foreign Affairs lodged a protest with the Chinese Government concerning the illegal landing, but in response, the Chinese Government demanded release of the group. Those arrested were ultimately released and repatriated to China, but Japan publicly announced that no one would be able to land on the islands without prior approval. On the day of the incident, the US Department of State announced its neutrality, and stated that the U.S. would not take a position on the question of the ultimate sovereignty of the Senkaku Islands.⁴

² Japan calls the islands "Sento Shosho" or "Senkaku Retto," which means "Pinnacle Island." China terms them "Diao-yu-tai," and Taiwan uses the same Chinese characters in a different romanisation system as "Tiao-yu-t'ai." For further information on this dispute, refer to SEOKWOO LEE, TERRITORIAL DISPUTES AMONG JAPAN, CHINA, AND TAIWAN CONCERNING THE SENKAKU ISLANDS (Boundary and Territory Briefing Vol. 3: No.7), International Boundaries Research Unit, University of Durham (2002).

³ The report was written by the UN Economic Commission for Asia and the Far East (ECAFE). See Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute Over the T'iao-yutai Islets (Senkaku Gunto)*, 15 CHINESE (TAIWAN) Y.B. INT'L L. & AFFAIRS 10 (1996).

⁴ Senkaku/Diaoyutai Islands, Global Security.org
<http://www.globalsecurity.org/military/world/war/senkaku.htm> (last visited Mar. 1, 2012).

In August 2003, China announced its plans to develop the Chunxiao gas field located three miles west of the boundary line claimed by Japan, to which Japan demanded its cessation because, according to its survey of the waters surrounding the gas field,⁵ the gas field was connected to the resources on Japan's side of the median line. Seeing China's lack of a response, Japan proceeded to license civilian enterprises in prospecting the waters on its side. In May 2008, pursuant to Chinese Prime Minister Hu Jintao's visit to Japan, the two states forged a "strategic reciprocal relationship" and reached a Principled Consensus on the joint development of sea bed resources. They also agreed in June to the joint development of an area in the East China Sea. The agreements include the "Cooperation in the East China Sea," "Understanding on Joint Development in the East China Sea," and "Understanding on Participation of Japanese Legal Persons in the Development of Chunxiao Oil and Gas Field under the Chinese Law." China's passive attitude towards the participation of Japanese enterprises in the development of the Chunxiao Gas Field since the adoption of the agreement has brought about Japanese protests.

In February 2005, the Japanese Government took possession of the lighthouse erected and operated by a Japanese civilian on the Senkaku Islands since 1996. Through operation of its Coast Guard, Japan has strengthened its ability to engage other states. In June of the same year, there was an incident between a Japanese Coast Guard patrol boat and a Taiwanese fishing boat in the vicinity of the Senkaku Islands. Taiwan responded by dispatching its naval vessel, thereby escalating tensions between the two states. Aboard the naval vessel were the Taiwanese Chairman of Congress and Minister of National Defence. The incident was temporarily settled by restraint on the part of both states.

By June 2008, the friction between Taiwan and Japan was growing more intense. On June 10, a 270-ton Taiwanese fishing boat collided with a Japanese Coast Guard vessel and sank within the territorial waters of Senkaku Islands, for which Taiwan and Japan both accused each other of intentionally causing the accident.⁶ Though Japan initially detained the Taiwanese captain and demanded compensation, the captain was released in three days in order to prevent further complications in foreign relations.⁷ On the 16th of June, Taiwanese civilian activists engaged in a demonstration, approaching up to 0.4 n.m. of the main island of the Senkaku Islands under the escort of five Taiwanese Coast Guard

⁵ *Id.*

⁶ *Taiwan protests as Japan holds fishing boat captain*, REUTERS, June 12, 2008, available at <http://uk.reuters.com/article/2008/06/12/taiwan-japan-idUKPEK35756320080612> (last visited Mar. 1, 2012).

⁷ http://news.bbc.co.uk/chinese/trad/hi/newsid_7450000/newsid_7452300/7452336.stm (last visited Mar. 1, 2012).

vessels. Though the Japanese Coast Guard followed, no physical collision ensued. However, with the release of a video clip on the 20th of June revealing that the Japanese patrol ship had intentionally collided with the Taiwanese fishing boat, Japan issued a public apology concerning the incident and agreed to pay TWD 10 million (USD 310,000) as compensation to the owner of the fishing vessel. Taiwan still showed signs of protest by summoning home its envoy to Japan and declaring that it would not refrain from using military force in order to protect the islands.⁸

The conflict concerning the Senkaku Islands reached its peak on September 7, 2010, when a Chinese fishing boat collided with a Japanese patrol ship near the Islands' 12 n.m. territorial sea boundary. Following the collision, Japanese patrol arrested the Chinese sailors and arrested the ship. Unlike earlier cases, Japan sought to indict and punish the captain further by extending the detention period. China, however, demanded the immediate release of the captain and began aggressively pressuring Japan. More specifically, China summoned the Japanese Ambassador on four occasions, refused to attend a pre-arranged high-level conference, arrested Japanese civilians on espionage charges, imposed strict import/export customs clearance on Japan, and decided to stop export of rare-earth resources exclusively produced by China. Control of rare-earth resources, an essential ingredient for high-tech industries, was critical to Japan. Finally, on September 24, Japan released the Chinese captain "in consideration of the Japan-China relations and its effect on the Japanese people." After the release, China lifted the export ban of the rare-earth resources but demanded compensation for the "illegal arrest" of the captain, to which Japan responded by also demanding compensation for the damages done to its patrol ship.

The above incident reveals China's long hidden plans for the "Rise of the Great Nation" based on its economic power and fast growing military power unlike before. Concerning this policy, the fact that China's influence on the world economy cannot be underestimated – especially the strong possibility that China may "weaponize" the rare-earth resources used in high-tech industries, 90% of which is produced by China –which may limit the responses of states like Japan or the US. However, it is also difficult to conclude this to be a unilateral victory on the part of China because this case helped to strengthen the political and military cooperation between Japan and the US which had recently become estranged. Thus, in the long run, it could become an obstacle to China's ocean-going strategy of seeking to proceed past the Okinawa Islands into the Pacific. This case also acted as a stimulant for the strengthening of Japan's navy with regard to the placement of Self-Defence forces on Senkaku in order to strengthen

⁸ *Japan Apologises over Taiwan Boat Incident*, AFP, June 20, 2008, http://afp.google.com/article/ALeqM5iIop13n4GrM8b9z_DwLEubvoEbvq (last visited Mar. 1, 2012).

its sovereignty claim, and, the establishment of an amphibious corps (“marine corps”) as part of its Self-Defence force. Also, because of this case, Japan has been aggressively pursuing the development of elements that can be substitutes for the rare-earth resources it obtains from China in response to China’s weaponization of these resources, as well as pursuing the mining of the same in Mongolia.

Following the above incident, a Taiwanese vessel attempted to approach the Senkaku Islands in 2011, though no physical clash ensued. The tension between China and Japan has not been alleviated but is becoming even more likely than ever to result in a grave conflict. In 2011, China launched its (first?) aircraft carrier, while updating its fighter planes and military ships to strengthen its military power, in response to which, Japan has also been strengthening its marine self-defence force. China regards the territorial issue of the Senkaku Islands as one of its “core national interests,” clearly indicating that it would never be subject to compromise or negotiation. Because China is also opposed to the intervention of third parties in territorial issues between the two countries, it is highly unlikely that the Senkaku Islands issue will be peacefully resolved through negotiation or international adjudication. On January 16, 2012, the Japanese Government announced its plans to name 39 uninhabited islands, which also included the four islands forming the Senkaku Islands. China protested the announcement, stating that sovereignty over the Senkaku Islands was clearly invested in China, and postponed a scheduled conference with Japan concerning the joint development of natural gas.⁹

I.2. Position of the US

From a security perspective, the most important interested party to the Senkaku dispute after China and Japan is the US. Should the islands fall under Chinese control, the US will not lose its control over the entire East China Sea and thereby greatly affect its Northeast Asian military strategy, including its strategy with Korea. The issue of the East China Sea is also closely related to the South China Sea, which has been acutely disputed by China and ASEAN states. This explains why the US would not be able to maintain neutrality in case of an armed conflict between China and Japan concerning the Senkaku Islands. With the recent rise in tensions between China and Japan, the US Government has publically pronounced its neutral position on numerous occasions. Avoiding intervention in

⁹ *China “unwavering” on Diaoyu Islands*, PEOPLE’S DAILY ONLINE, Jan. 17, 2012, <http://english.people.com.cn/90883/7706973.html> (last visited Mar. 1, 2012).

territorial disputes between states has been the traditional position of the US, which is similarly being maintained in the dispute over the Senkaku Islands.¹⁰

On March 24, 2004, the deputy spokesperson for the US Department of State stated that since the Senkaku Islands were transferred from the US to Japan in 1972, they have been under its administration since, and, that the Islands were included in the territories under Japanese administration in the 1960 Treaty of Mutual Cooperation and Security between the United States of America and Japan, Article 5.¹¹ At the same time, the US also stated that the Senkaku Islands were a disputed territory and that it would not take a position on who has sovereignty over the islands, but, would wait for the parties to peacefully settle the issue.¹² With the situation growing more intense between China and Japan due to the arrest of the Chinese captain in September 2010, the then US Secretary of State, Hillary Clinton, confirmed the above position of the US. So, while confirming at the East Asian Summit held in Hanoi, Vietnam in October 2010 that the Senkaku Islands were included in the US-Japan Treaty, Hillary Clinton also stated that she hoped for peaceful resolution of territorial disputes between China and Japan.¹³

In truth, even if the US were to reveal its position regarding the issue of sovereignty over the Senkaku Islands, that in itself would have no international legal effect. Thus, the possibility of US military intervention alone would be the equivalent to the practical achievement of the objectives for both the US and Japan. Therefore, it is foreseeable that the US will continue to maintain neutrality on the issue of sovereignty, while strengthening its military cooperation with Japan.

¹⁰ See generally, M. Taylor Fravel, *Explaining Stability in the Senkaku (Diaoyu) Islands Dispute*, in GETTING THE TRIANGLE STRAIGHT: MANAGING CHINA-JAPAN -US RELATIONS 144-64 (Gerald Curtis et al. eds., 2010).

¹¹ This provision becomes the basis for US military intervention in case attack on Japan by third states. "Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security (emphasis added)."

¹² Senkaku/Diaoyutai Islands, *supra* note 3.

¹³ *U.S. Works to Ease China-Japan Conflict*, N.Y. TIMES, Oct. 30, 2010, available at <http://www.nytimes.com/2010/10/31/world/asia/31diplo.html?sq=senkakuunitedstates&st=nyt&adxnlx=1&scp=7&adxnlx=1330599708-DEHs72sAkDBCz/4DG6rhEg> (last visited Mar. 1, 2012).

II. Maritime Delimitation and Joint Resource Development in the East China Sea

II.1. Maritime Delimitation

II.1.1. Maritime Delimitation Regulation in China and Japan

China's Exclusive Economic Zone and Continental Shelf Act declares an EEZ up to 200 nautical miles and provides that the continental shelf "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."¹⁴ Though there may be slight variation in terminology, it has generally accommodated the definition of continental shelf provided in article 76(1) of UNCLOS. In cases of conflicting claims with other states, China's law also provides that they "shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimiting the areas so claimed."¹⁵

On the other hand, Japan's Law on the Exclusive Economic Zone and the Continental Shelf also provides for an EEZ and continental shelf up to 200 n.m., but, provides that in cases of conflicting claims, it would reach to the median line from the baselines of each state.¹⁶

In short, China claims a 200 n.m. EEZ and continental shelf and claims to resolve conflicting claims through "the principle of equity" while emphasizing natural prolongation. Japan likewise claims a 200 n.m. EEZ and continental shelf, but, limits the boundary to the median line in case of conflicting claims. In other words, while Japan limits itself to the median line in overlapping areas, China only states that it would conclude agreements under the principle of equity so that

¹⁴ Exclusive Economic Zone and Continental Shelf Act art. 2 (effective June 26, 1998) (P.R.C).

¹⁵ *Id.* China made similar declaration when ratifying the UNCLOS. UN Oceans and the Law of the Sea: Division for Ocean Affairs and the Law of the Sea.

http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Chinaafter ratification (last visited Mar. 1, 2012).

¹⁶ Law on the Exclusive Economic Zone and the Continental Shelf (effective June 14, 1996), art. 1 (The Exclusive Economic Zone) and art. 2 (The Continental Shelf) (Japan). Article 2(2) states that the continental shelf exceeding 200 n.m. is determined "as prescribed by Cabinet Order in accordance with article 76 of the U.N. Convention on the Law of the Sea" that specifically provides for the extension method and procedure.

its jurisdiction still reaches 200 n.m. under domestic law. Therefore, from the median line to 200 n.m. on Japan's side, there is an overlap of jurisdiction under the laws of both states, while only China has jurisdiction over waters on China's side of the median line. This is similar to the relationship between Korea and China. Korea's EEZ Law declares a 200 n.m. EEZ but delimits boundaries based on agreement with adjacent states.¹⁷ This alone appears to be the same as the relevant Chinese provision excluding the "principle of equity." However, Korean law also provides that the "exercise of jurisdiction" only reaches the median line.¹⁸ Thus, while the Korean EEZ Law states that its boundaries in conflicting areas are determined by agreement with another party in writing, its exercise of jurisdiction is limited to the median line in reality, which is similar in effect to Japan's law limiting the boundary to the median line.

II.1.2. Maritime delimitation

In the East China Sea where the distance between the two coasts do not reach 400 n.m., there are several factors to consider for maritime delimitation between China and Japan.¹⁹ First is the effect of the Senkaku Islands, which is also the object if this study; second is the effect of the Okinawa Trough on the limits of the continental shelf. Also related is the theoretical issue of whether the natural prolongation of the land territory can apply within the 400 n.m. between the two coasts.

II.1.2.1. The Role of the Senkaku Islands on Boundary Delimitation

According to Article 121 of UNCLOS, "Islands" that are not "[r]ocks which cannot sustain human habitation or economic life of their own "can generate not only territorial sea up to 12 n.m. but also their own EEZ and continental shelf. Therefore, if the Senkaku Islands were to be recognized as "islands," the state exercising sovereignty over the islands can also claim EEZ and continental shelf based on these islands.

The Senkaku Islands are comprised of five small islands and three reefs. These five islands, especially the main island of Diaoyu, reaches 3.5 km² in area

¹⁷ Exclusive Economic Zone Act art 2 (effective Aug. 1996) (S. Korea).

¹⁸ *Id.* art. 5 (2).

¹⁹ "The longest distance between the coasts of China and Japan in the East China Sea is about 345 nautical miles." Jianjun Gao, *The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea*, 9 CHINESE J. INT'L L. 143, 146 n.10 (2010). Some see the distance at 360 n.m. at the widest point. Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT'L L. 903, 911 (2008).

with thickly wooded forests and fresh water. Thus, although it is currently uninhabited due to its geographical isolation, inhabitation is not impossible. Considering the abundant fishing grounds and underground resources, even independent economic livelihood appears possible. Thus, it is not too difficult to claim the Senkaku Islands as “islands.” If the Senkaku Islands belonged to Japan, it could claim the equidistant line between China and Senkaku’s coast as a boundary; but if China’s sovereignty were to be recognized, China could claim as a boundary the equidistant line between the Senkaku and the Ryukyu Islands. According to a study, the area between the two equidistant lines reach up to 67,800 km²²⁰; thus, the full recognition of Senkaku Islands in boundary delimitation would also signify the gain or loss of the same area.

An interesting point, however, is that neither China nor Japan is claiming maritime boundaries based on the Senkaku Islands. Presumably, Japan’s position is due to the fact that even if it were to declare a median line between the Ryukyu Islands and China, the Senkaku Islands would still be part of its territorial waters; so it desires to avoid provoking China, which is fiercely fighting for sovereignty over the islands, while also taking into consideration current international jurisprudence that does not fully recognize the effect of remote islands on maritime delimitation. On the other hand, China claims its boundaries based on the Okinawa Trough, which is situated on Japan’s side of the median line, between the Senkaku and Ryukyu Islands, and thus does not need to be claimed based on the Senkaku Islands. However, China’s claims are based on natural prolongation of land territory, which is irrelevant to EEZ boundaries unlike the continental shelf.

II.1.2.2. Okinawa Trough

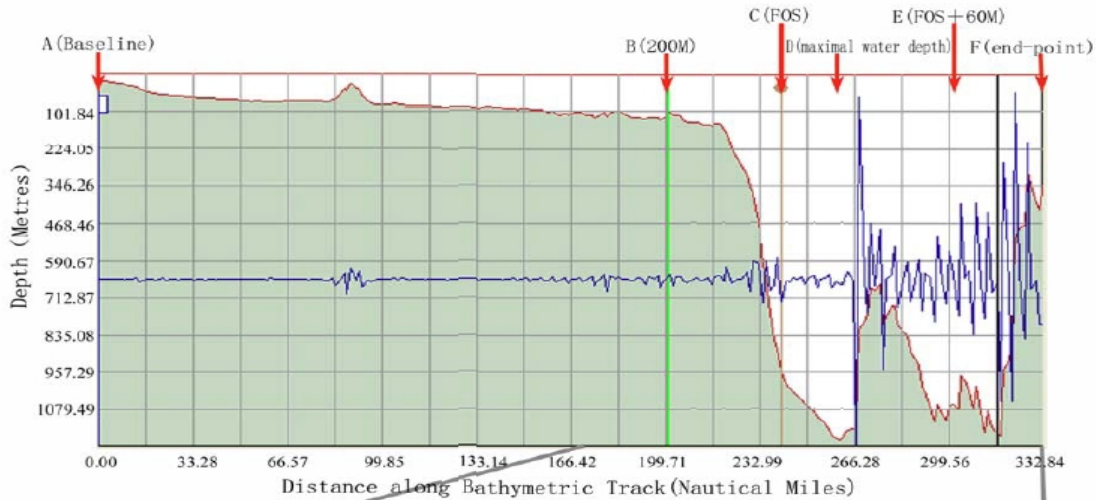
Adjacent to the Ryukyu Islands and running parallel, the Okinawa Trough is about 900 km in length and 36–150 km in width, encompassing an area of more than 100,000 km².²¹ Its depth reaches over 1000m; and considering that the average depth of the East China Sea is about 370m, it is geomorphologically distinct from the area.²²

²⁰ Victor Prescott and Clive Schofield, *The Maritime Boundaries of the World* 438 (Martinus Nijhoff, 2005).

²¹ Jianjun Gao, *supra* note 18, at 145.

²² *Id.*

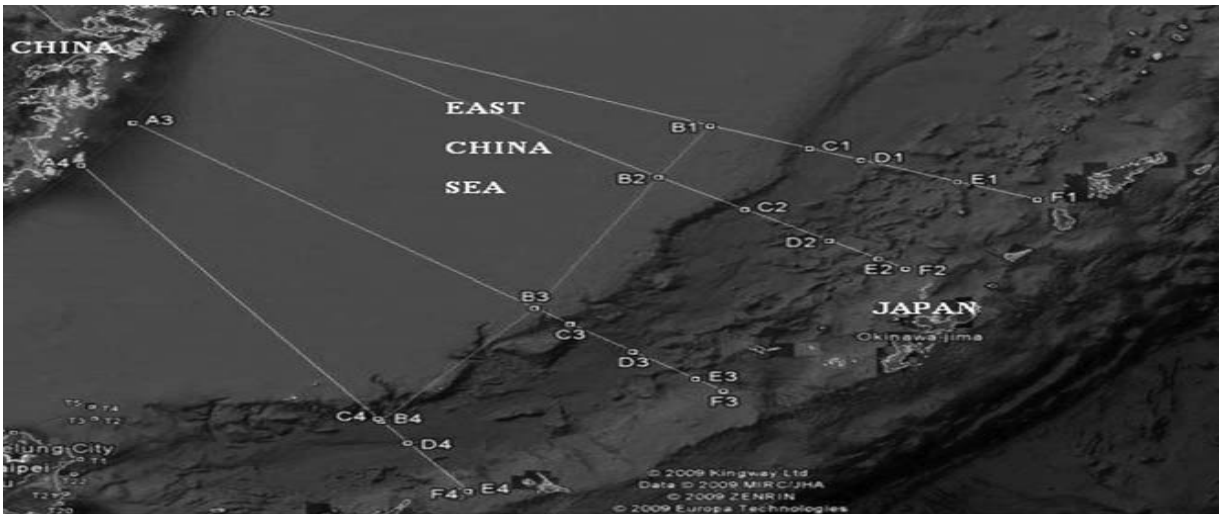
<Figure 1. Profile Map of the Okinawa Trough>²³



According to the preliminary information submitted by China to the Commission on the Limits of the Continental Shelf (CLCS) on May 11, 2009, China determined four points of foot of the continental slope (FOS) and established the outer edge of the continental shelf at 20 to 38 n.m. from the FOS. Connection of these four points forms the continental shelf boundary claimed by China, the shortest distance from China's coast being 228 n.m. and the longest 277 n.m.

²³ P.R.C., Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China, 7, available at http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf.

<Figure 2. China's Outer Limits of the Continental Shelf>²⁴



Source: blog.sina.com.cn/s/blog_56ecef30100dlrw.html (visited on 1 June 2009, modified).

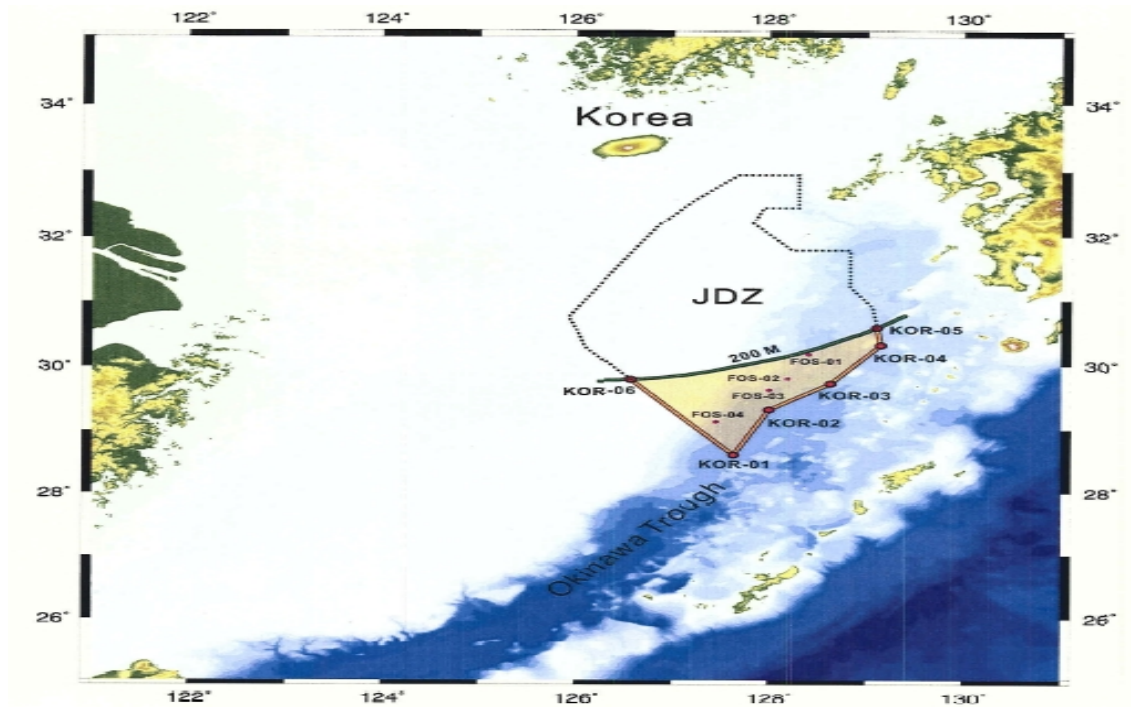
The claim to outer limits of the continental shelf made by China does not differ greatly from that of Korea. Korea submitted preliminary information to the CLCS on the same day as China, in which four points of FOS were determined to establish the outer limits that lie at the southern boundaries of the current Korea-Japan Joint Continental Shelf Development Zone.

Japan has not accepted the claims of China and Korea – that the Okinawa Trough should form the outer limits of the continental shelf. Instead, Japan claims that, because the Trough is a mere dent in the natural prolongation of land territory, the boundary should be the median line between the coasts of the two states.²⁵

²⁴ The figure below was taken from Jianjun Gao, *supra* note 18, at 151. For detailed information concerning each of the FOS, refer to the Preliminary Information, *id.*

²⁵ Jianjun Gao, *supra* note 18, at 146.

<Figure 3. Korea's Claim to the Outer Limits of the Continental Shelf>²⁶



Because China has not yet formally made a submission to the CLCS, the Commission cannot consider the issue of the Okinawa Trough. However, even if China were to make a formal submission, the Commission is not likely to consider the issue because the East China Sea is an area of dispute concerning the sovereignty over and maritime delimitation around the Senkaku Islands. Even if the Commission were to consider the issue and make recommendations based on the findings, it would not affect the boundary delimitation between the two states.²⁷ The Annex to the Rules of Procedure of the CLCS also provides that in case of land or maritime dispute, the Commission would not consider or qualify a submission without the prior consent of all states that are party to the dispute.²⁸

²⁶ S. Korea, Preliminary Information regarding the Outer Limits of the Continental Shelf, 7, available at

http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/kor_2009preliminaryinformation.pdf.

²⁷ See UNCLOS art. 76 (10) and Annex 2 (CLCS) art. 9. See also Rules of Procedure of the CLCS (2008) Annex 1.

²⁸ Rules of Procedure of the CLCS Annex 1 Article 5 (a) provides, "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any

In short, even if the Okinawa Trough were deemed to be a geological break between China and Japan as claimed by China, under the current international legal system, delimitation would be difficult without the prior consent of Japan. Furthermore, what weakens China's claim is the fact that the distance between the two coasts does not reach 400 n.m. as further discussed below.

II.1.2.3. Limits of the Continental Shelf within 400 n.m.

UNCLOS defines the continental shelf in two ways in Article 76(1). It states that the continental shelf comprises the seabed and subsoil of the submarine areas that extend "throughout the natural prolongation of its land territory to the outer edge of the continental margin," or, "to a distance of 200 nautical miles from the baselines" where the outer edge does not reach 200 n.m. In short, the Convention simultaneously provides for the natural prolongation criteria as well as the 200 n.m. distance criteria, the latter of which does not take geological and geographical factors into consideration. In the case of the East China Sea, the greatest width reaches 345 n.m.; and though the Okinawa Trough lies beyond 200 n.m. from China, it is situated less than 100 n.m. from Japan. Thus, China asserts the natural prolongation of land territory, while Japan asserts the distance criteria for determining the outer limits of the continental shelf. What then should be the standard for boundary delimitation?

As is well known, the International Court of Justice (ICJ) in the North Sea Continental Shelf Cases of 1969 supported the natural prolongation of land territory criteria,²⁹ which influenced the conclusion of the Agreement between the Republic of Korea and Japan concerning Joint Development of the Continental Shelf. However, with the advent of the 1982 UNCLOS emphasizing an "equitable solution" of boundary delimitation, the natural prolongation criteria receded. In the same year, in the Continental Shelf case between Tunisia and Libya, the ICJ held that, of the two criteria given in Article 76 of the Convention, natural prolongation of the land territory is the main criterion and that the 200 n.m. is the basis of title for coastal states in "certain circumstances."³⁰ Three years later, however, in the 1985 Continental Shelf case between Libya and Malta, the ICJ held that for boundary delimitation at a distance of under 200 miles from the

of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute."

²⁹ North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.) 1969 ICJ 3, para.101(C)(1) (Apr. 26).

³⁰ Continental Shelf (Tunis./Libya), 1982 ICJ 18, para.47 (Feb. 24).

coast, and where the coasts of the parties are less than 400 miles, title depends solely on the distance from the coasts and that geological or geomorphological characteristics are immaterial.³¹ Such a decision of the ICJ signified that the distance criteria has replaced the geomorphological criteria except in cases of extending the limits of the continental shelf beyond 200 n.m., as identified in the dissenting opinion of Judge Oda.³²

Pursuant to the Libya/Malta case above, only the distance criteria should be applicable to the East China Sea, in which case China's assertion of the Okinawa Trough as the boundary would be rejected, and, Japan's assertion of the median line would become the boundary, although such a boundary may be slightly altered according to "relevant circumstances." However, there are also critiques of the above decision. Professor Jianjun Gao categorizes the cases in which the distance between two states does not reach 400 n.m. into three situations. First is where the distance to the continental break does not reach 200 n.m. for both states; second, where there is no continental break; and third, where the distance to the continental break does not reach 200 n.m. for one side but exceeds 200 n.m. for the other. Professor Gao does not raise issues with the first two categories to which solely the distance criteria, particularly the median line principle, applies. Concerning the third category, however, he asserts that it is inconsistent for one state to apply the distance criteria to the waters within 200 n.m. of the coast and the geomorphological criteria to the waters beyond the 200 n.m. and therefore should only apply the geomorphological criteria.³³ The Libya/Malta case where the maximum distance was 183 n.m. is an example of the first category, while China's case in the East China Sea is an example of the third

³¹ Continental Shelf (Libya/Malta), 1985 ICJ 13, para.39 (May 23). "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the "rift zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary." (emphasis added).

³² *Id.* at para.61 (Dissenting Opinion of Judge Oda). See also, Jianjun Gao, *supra* note 18, at 164-65.

³³ Jianjun Gao, *supra* note 18, at 171-72.

category. In other words, in the latter example where the continental break lies beyond 200 n.m. from the coast, it would be inconsistent to apply the distance criteria up to 200 miles and the geomorphological criteria beyond it; therefore, only the geomorphological criteria should be applied. In asserting that the geomorphological criteria ought to be applied to the East China Sea where the distance from the Chinese coast to the Okinawa Trough exceeds 200 n.m., Professor Gao refers to the 1997 Maritime Boundary Treaty between Australia and Indonesia. This treaty differentiated between the boundaries of the EEZ and the continental shelf; although the limits of the continental shelf were set beyond 200 n.m. from Australia, in the areas adjacent to the Indonesian coast, the boundaries were set at the Timor Gap where the continental break was located.³⁴

In the third category, it is possible to be critical of Professor Gao's proposal since it only defends the position of states whose continental break lies beyond 200 n.m. and fails to take into consideration the position of states that do not reach 200 n.m. The issue in the third category then is whether, while one state asserts geomorphological criteria while the other asserts the distance standard and the two positions are incompatible, the application of geomorphological criteria alone can be seen as an "equitable solution" provided for in UNCLOS Article 83(1).

II.1.2.4. Conclusion

The major factors affecting the East China Sea delimitation between China and Japan depend upon the recognition of the effects of the Senkaku Islands and the Okinawa Trough. Even if the Senkaku Islands that are currently under an intense sovereignty debate are recognized as "islands" generating its own EEZ and continental shelf, neither China nor Japan currently assert boundary delimitation based on these islands. Therefore, the key factor in the delimitation between the two states is whether the Okinawa Trough can be seen as a continental break; and even if it were to be so, there still remains the issue of whether the geological concept of natural prolongation of land territory can be applied where the distance between the states does not reach 400 n.m. Unlike Japan's claim that the Okinawa Trough is a mere dent, the view that it should more properly be seen as a continental break appears to be predominant.³⁵ Even so, there are strong doubts as

³⁴ Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries (effective Mar. 14, 1997), *available at*

www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1997EEZ.pdf.

³⁵ PRESCOTT AND SCHOFIELD, *supra* note 19, at 439.

to whether the geological criteria alone should be applied without consideration of distance where the distance does not reach 400 n.m, more so because the ICJ clearly held in the Libya/Malta case that the distance criteria is to be applied in such cases.

Furthermore, unlike the continental shelf, there is no room for application of geological concepts in the EEZ boundaries. Therefore, China's claim of the Okinawa Trough as a maritime boundary is ultimately asserting that the EEZ and the continental shelf require different boundaries.³⁶ Although the EEZ includes the seabed and subsoil, or the continental shelf, within 200 n.m., states may determine different boundaries for the upper waters and the seabed and subsoil, as we can see in the Maritime Boundary Treaty between Australia and Indonesia. UNCLOS takes this into consideration in providing that "[t]he rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI."³⁷

While Japan claims the median line for both the EEZ and continental shelf, China's position does not seem so clear. In other words, though it claims the Okinawa Trough as the maritime boundary, China has not clarified whether this is limited to the continental shelf or whether it includes the EEZ. Because China's Exclusive Economic Zone and Continental Shelf Act, as well as UNCLOS Article 57 both prohibit the extension of the EEZ beyond 200 n.m., it is clear that the Okinawa Trough lying beyond 200 n.m. from the Chinese coast cannot be the boundary of its EEZ. Such obscurity is also evident in China's boundary delimitation with Korea, as it claims boundaries beyond the median line based on geological grounds; but it is questionable whether this can be applied to EEZs as well.

In conclusion, the maritime boundary has yet to be determined between China and Japan; and as the positions of both states still remain acute, any consensus in the near future looks difficult. In the midst of this, issues concerning the development of rich natural gas and oil resources were also raised. Resource development is intimately related to boundary delimitation; but as such delimitations cannot be waited for, there have been unilateral developments or joint developments sought after. There have been frictions in the development process, however, which will be further discussed in the next section.

II.2. Issues in Joint Resource Development

II.2.1. Negotiation Process concerning Joint Resource Development and the Principled Consensus

³⁶ *Id.*

³⁷ UNCLOS Art. 56 (3).

Following the ratification of UNCLOS in 1996, China and Japan began discussing maritime delimitation under the title of “Consultations on the Law of the Sea.” Although negotiations took place 14 times until 2003, they were unfruitful. In 2004, discussion continued under the title of “Consultations on the Issues of the East China Sea.” When no apparent result ensued despite continued negotiations, China proposed that they put behind issues of serious conflict of interest such as sovereignty and maritime delimitation and focus on joint development of oil and natural gas, a.k.a. “shelving disputes and joint development.”³⁸ After Japan’s acceptance, the two states issued the China-Japan Joint Press Communiqué on April 11, 2007.³⁹ This Communiqué included eight items, promising the development of both states in politics, economics, culture, etc., six of which concerns the joint development in the East China Sea.⁴⁰

Consultations continued in order to materialize the above agreement; and on June 18 of the following year, the two states agreed to joint development of the East China Sea.⁴¹ Entitled “Principled Consensus on the East China Sea Issue,” this 2008 Consensus is comprised of three sections. The first section concerns cooperation between China and Japan in the East China Sea in order to make the East China Sea “a sea of peace, cooperation and friendship” until delimitations are made. The second section concerns the understanding of joint development zones, while the third section concerns the understanding of participation of Japanese legal persons in the development of Chunxiao oil field. These will be further discussed below.

II.2.2. Establishment of Joint Development Zones

³⁸ See Gao Jianjun, Joint Development in the East China Sea: Not an Easier Challenge than Delimitation, 23 INT’L J. MAR. & COASTAL L. 39, 39-40 (2008).

³⁹ China-Japan Joint Press Communiqué, Apr. 11, 2007, *available at*

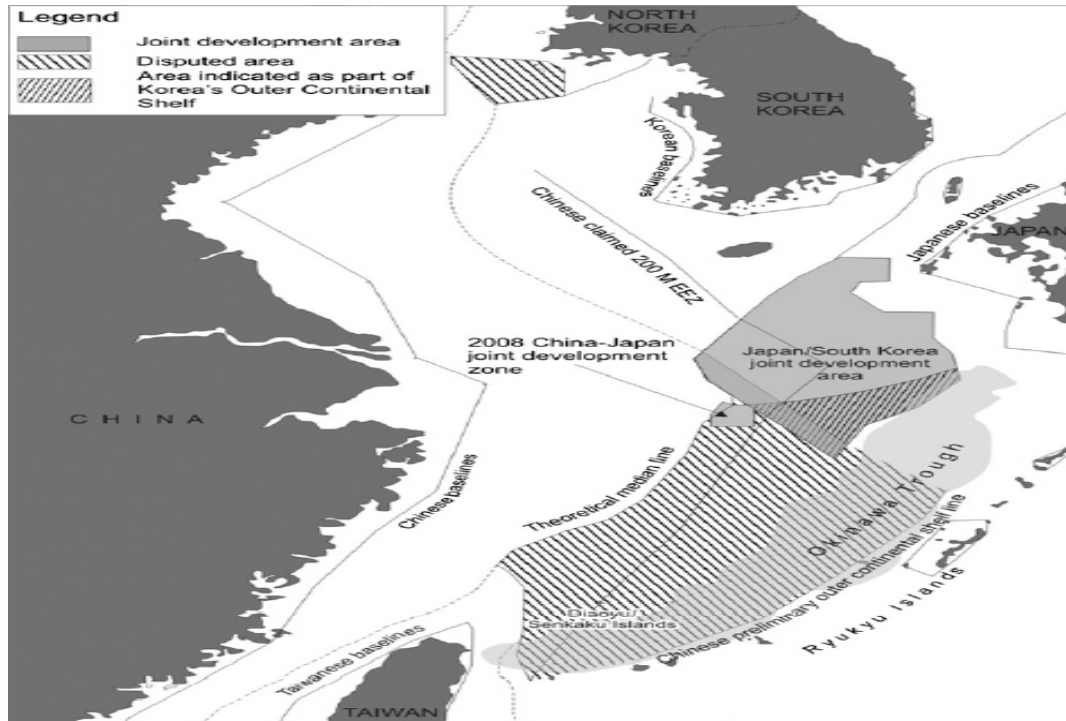
<http://www.fmprc.gov.cn/eng/wjdt/2649/t311005.htm> (last visited Apr. 2, 2012).

⁴⁰ “VI. The two sides reached the following common understanding on properly addressing the East China Sea issue: 1. Both sides are committed to making the East China Sea a sea of peace, cooperation and friendship. 2. They agreed to carry out joint development based on the principle of mutual benefit as a temporary arrangement pending the final demarcation and without prejudice to the positions of either side on matters concerning the law of the sea. 3. They will conduct consultation at higher level when necessary. 4. They will carry out joint development in larger waters acceptable to them. 5. They will speed up consultations and hope to submit a detailed plan on joint development to the leaders of the two countries in autumn this year.” (*emphasis added*).

⁴¹ The formal title of the agreement is “Principled Consensus on the East China Sea Issues,” *available at* <http://www.fmprc.gov.cn/eng/xwfw/s2510/t466632.htm> (last visited Apr. 2, 2012).

The Joint Development Zone, as agreed to on June 18, 2008, is a small polygonal area formed by connecting seven coordinates in the northern region of the East China Sea.⁴²

<Figure 4. China-Japan Joint Development Zone and the Overlap of Jurisdictions>⁴³



The above joint development zone straddles the median line which Japan claims as its maritime boundary.⁴⁴ This can be seen as a compromise between the two competing claims between China's Okinawa Trough and Japan's median line for the limits of the continental shelf. An interesting point is that the joint

⁴² The 7 coordinates are as follows: 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; 7. Latitude 29°31' North, longitude 126°26'00"East.

⁴³ Clive H. Schofield and Ian Townsend-Gault, *Choppy waters ahead in "a sea of peace cooperation and friendship"?: Slow progress towards the application of maritime joint development to the East China Sea*, 35 MAR. POLICY 27 (2011).

⁴⁴ Gao Jianjun, *supra* note 37, at 292.

development zone is not limited to the area of overlapping claims but also includes the waters on China's side of the median line that is asserted by Japan. In other words, the area on China's side of the median line is included in the Joint Development Zone even though it is not part of the disputed area.⁴⁵ This area, as can be seen in the map above, is adjacent to but does not overlap with the Korea-Japan Joint Development Zone. The fact that the zone is estimated to have a significant amount of buried resources also draws attention. Despite the "principled consensus" to joint development in 2008, however, there has not been actual progress up to the present.⁴⁶

II.2.3. Development of Chunxiao Gas Field

The third section in the 2008 "Principled Consensus" provides that Chinese enterprises would welcome the participation of Japanese legal persons in the development of the Chunxiao oil and gas fields. Unlike the Joint Development Zone, the Chunxiao gas field are located on China's side close to the median line asserted by Japan. However, China's unilateral development without permitting participation of Japanese legal persons brought about strong objections from Japan. In particular, Japan strongly protested China's unilateral development in January of 2009, to which China responded by stating that the oil fields were not a disputed area but belonged under Chinese jurisdiction and therefore were subject to China's sovereignty.⁴⁷

Though the 2008 Principled Consensus does permit the participation of Japanese legal persons, the following condition needs to be heeded, namely that they are permitted "in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources." In other words, because Japanese enterprises are participating in the oil field development of Chinese enterprises, matters of discussion relate to investment of technologies and capital and mining rights between enterprises of the two states. Discussions between the two governments are thus limited to the memoranda of understanding concerning the protection of investment agreements.⁴⁸ Major Chinese laws related to the development of

⁴⁵ China stated that the establishment of the Joint Development Zone was not a recognition of the median line asserted by Japan. Gao Jianjun, *id.*, at 300 n.27 (citing the declaration of the spokesperson for Chinese Foreign Ministry Jiang Yu on June 18, 2008).

⁴⁶ Xinjun Zhang, Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation, 42 OCEAN DEV. & INT'L L. 53 (2011).

⁴⁷ Gao Jianjun, *supra* note 37, p.294; Zhang, *id.*, at 54.

⁴⁸ Gao Jianjun, *id.*, 295.

petroleum resources provide for the coastal petroleum resource development in cooperation with foreign enterprises, according to which China National Offshore Oil Corporation (CNOOC) takes overall responsibility for development.⁴⁹ Thus, the issue of participation of Japanese enterprises in the Chunxiao gas field according to section three of the 2008 Consensus differs in nature from the establishment of Joint Development Zone according to section two.

II.2.4. Joint Development in Other Regions

In section two of the 2008 Principled Consensus providing for joint development, it provides in paragraph (d) that “[t]he two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.” This phrase raises the question of what “other parts of the East China Sea” exactly refer to. While China considers this to be areas which both states would need to agree upon, Japan considers them to be the oil fields in the area in which China is currently developing near the median line.⁵⁰

II.2.5. Legal Nature of the 2008 Principled Consensus

As observed above, the 2008 Principled Consensus (“2008 Consensus”) is not being properly implemented, which raises the issue of whether the 2008 Consensus is a document with legal binding force, as this leads to the issue of state responsibility.

Formally, the 2008 Consensus does not meet the requirements of a treaty in a number of ways. First, the title does not utilize the term treaty or agreement but rather “Principled Consensus.” Second, the points of agreement were announced by a representative of the Chinese Foreign Ministry, without the signature of the state representatives. Third, Japan indicated that the two states would “negotiate for the conclusion of necessary treaties” for the implementation of consented terms, which shows that Japan saw the Consensus as being a stepping stone to a treaty.⁵¹

While some thus consider it difficult to accept the 2008 Consensus as a treaty, there are opinions that still argue that it should be recognized as a treaty. For example, Professor Gao states that fact section two specifically establishes the joint development zones and provides for implementation by both states, while

⁴⁹ *Id.*

⁵⁰ Prior to the 2008 Consensus, China has been developing the following four oil fields, all of which are located close to the median line asserted by Japan: Longjing, Duanqiao, Tianwaitian, Chunxiao. *Id.*

⁵¹ *Id.*, p.297.

section three provides for the specific guarantee of the participation of Japanese enterprises in the development of the Chunxiao oil fields give rise to legal obligations that are binding upon both states.⁵²

The authors are of the opinion that, although the 2008 Consensus includes specific items as stated by Professor Gao, considering that the document does not contain the signatures of state representatives or bear other formalities, it is difficult to conclude that both states intended the document to be a binding treaty. Thus, it would be difficult for Japan to hold China liable for non-performance of the agreement.

II.2.6. Unilateral Resource Development of China and the “Rule of Capture”

Japan strongly protests against the development of oil fields on China’s side of the maritime boundary or the median line and argues for joint development. Japan’s reasoning is that although China’s oil field development does occur beyond the median line, they are connected in geomorphological terms and that the oil fields on Japan’s side of the median line will ultimately be absorbed into China’s side. Here, the issue can be raised as to whether, in a situation without maritime delimitation, it is in accordance with international law to unilaterally develop resources near the boundary asserted by another party.

UNCLOS provides that pending agreement, the states “shall make every effort to enter into provisional arrangements of a practical nature” and “not to jeopardize or hamper the reaching of the final agreement.”⁵³ These provisions place two obligations on states, namely the practical provisional arrangement and prohibition of jeopardizing the final agreement. As observed earlier, China and Japan established a Joint Development Zone pursuant to the 2008 Consensus, but China did not reach any agreements with Japan concerning the four oil fields on its side of the median line. However, China cannot be held liable for not concluding agreements because, although the provision requires “every effort” to enter into agreements, this expression cannot be deemed to be legally binding.⁵⁴

More important is the second obligation “not to jeopardize or hamper the reaching of the final agreement.” The issue then is whether China’s development of oil fields without the participation of Japan affects the future maritime delimitation between the two states. In truth, artificial boundaries such as the median line do not exist in the oil fields in the sea bed; therefore, if the oil fields are indeed connected at the median line, unilateral resource development of one

⁵² *Id.*

⁵³ UNCLOS arts. 74 (3) & 83 (3).

⁵⁴ Deniz Tas, Oil and gas in the East China Sea: Maritime Boundaries, Joint Development and the Rule of Capture, 2 INT’L ENERGY L.R. 48, 58 (2011).

state would affect the rights of another state, which would “jeopardize or hamper” the final agreement concerning boundary delimitation.

With regard to this issue, the legal theory of the “Rule of Capture” has been alluded to. This is a civil law rule of prior occupation, under which the first person to acquire an ownerless item or captures a wild animal becomes its owner. In the US, this theory is applied to underground resources, where “[t]he owner of a tract of land acquires title to the oil or gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands.”⁵⁵ However, there is the question of whether this “Rule of Capture” recognized in the US can be generally applied in international law because international law does not permit the violation of another state’s rights for the exercise of a state’s own rights. In particular, as mentioned above, UNCLOS clearly prohibits acts affecting boundary delimitation. Thus, as long as China’s oil fields are connected to the oil fields on Japan’s side of the median line, the resource development on China’s side will be in violation of international law.⁵⁶

III. Conclusion

Though China and Japan are fiercely fighting for sovereignty over the Senkaku Islands, neither state claims maritime boundaries based on the islands. Currently, China claims the Okinawa Trough as the boundary based on the natural prolongation theory, while Japan claims the median line between the two coasts. This is because one asserts geological or geomorphological criteria while the other asserts a simple distance criteria, where the distance between the two sides does not reach 400 n.m. In the 1985 Continental Shelf case between Libya and Malta, the ICJ held that in cases where the distance between two states does not reach 400 n.m., only the distance criteria applies. Whether the Libya/Malta decision is clearly upheld in future decisions will greatly influence the delimitation between China and Japan.

Furthermore, if it is as China asserts, China will have to claim different boundaries for its EEZ and continental shelf because the Okinawa Trough lies beyond 200 n.m. from the Chinese coast. However, it is still unclear as to where China claims as the boundary of its EEZ. Even if it were to claim boundaries equal to its continental shelf pursuant to the principle of equity, this would be difficult to accept in light of the UNCLOS limiting the EEZ to 200 n.m., as well as Chinese law accommodating this provision.

⁵⁵ *Id.* at 60; Robert E. Hardwicke, *The Rule of Capture and its Implications as Applied to Oil and Gas*, 13 Tex. L. Rev. 391, at 393 (1935).

⁵⁶ *Tas*, *supra* note 53, at 61.

Maritime delimitation between China and Japan has impacts on Korea as well. A portion of the central waters south of Jeju Island that is a part of the Korea-Japan Fisheries Agreement, and much of the Korea-Japan Joint Continental Shelf Development Zone, overlaps with the Provisional Measure Zone of the China-Japan Fisheries Agreement. The 200 n.m. boundary claimed by China also overlaps with the median line asserted by Japan. Thus, because the claims of Korea, China, and Japan overlap in the northern part of the East China Sea, the three states must reach an agreement to determine a tri-point area. If such an agreement is difficult, a joint development zone with the participation of all three states could also be considered.

Though China and Japan agreed to joint resource development in 2008, the agreed zone was a very small area adjacent to the Korea-Japan Joint Continental Shelf Development Zone, and the points of agreement have not been implemented. China has been developing four oil fields including Chunxiao in its waters adjacent to the median line asserted by Japan. However, China also has been excluding the participation of Japan, while Japan has been strongly objecting to the unilateral development of oil fields by China. If indeed the oil fields on China's side are connected past the median line asserted by Japan, then China's unilateral development will infringe upon the potential sovereign rights of Japan, thereby violating international law.