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Japan's East China Sea Ocean Boundaries: What Solutions Can a Confused Legal Environment Provide in a Complex Boundary Dispute?

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NOTES

Japan's East China Sea Ocean Boundaries: What Solutions Can a Confused Legal Environment Provide in a Complex Boundary Dispute?

ABSTRACT

This Note addresses the ocean boundary delimitation conflict between Japan, China, Taiwan, and South Korea in the East China Sea. The author considers international law on boundary delimitation and concludes that the law is unclear on delimitations between states within four hundred nautical miles of one another. The International Court of Justice has held that equity is the norm to be applied to boundary delimitation disputes but it has not resolved the competition between the natural prolongation theory of delimitation and a theory based upon the Exclusive Economic Zone. The geology of the East China Sea brings this issue to the fore. The author concludes that regardless of how this conflict is resolved, equidistance, proportionality, and other equitable concerns will apply to any boundary delimitation. The Note accounts for the political situation in the East China Sea area and concludes that the possibility of reaching a solution is greater than it has been in the past. The author nevertheless argues that it will be necessary to look to alternatives to existing legal precedents to develop a solution to the dispute in the East China Sea. These alternatives include the creation of joint development zones, a compromise of the best legal position advanced by each side and an approach based on strict proportionality.

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I. INTRODUCTION

Japan, as an island nation, is inextricably bound to the surrounding sea. Historically, the sea has provided Japan with a rich source of fish, a defense from the rest of the world, and a route for a booming export trade.¹ Since the late 1960s, possible oil reserves in the East China Sea have generated hopes of partial resource independence for this natural resource-poor country; as a result, Japan's interest in the sea floor has heightened.² Unfortunately for Japan, a complex boundary dispute involving China, South Korea, and Taiwan locks these oil reserves from its use.

1. See C. PARK, *EAST ASIA AND THE LAW OF THE SEA* 6, 59-64 (1983) (describing fishery relations between Japan and Korea and alluding to Japan's isolationism under the Tokugawa Shogunate).

2. See generally C. PARK, *supra* note 1. "The East China Sea is thought to contain 10 to 100 billion barrels of oil . . ." Valencia, *Northeast Asia: Petroleum Potential, Jurisdictional Claims, and International Relations*, 20 *OCEAN DEV. & INT'L L.* 35, 48 (1989). "The Sea of Japan and the East China Sea are also favorable loci of deposition of submarine metallic sulfides including copper, zinc, lead, nickel, cobalt, manganese, iron, gold, and silver associated with faults and spreading zones. Potential economic geothermal zones extend [throughout the region]." *Id.* at 44.

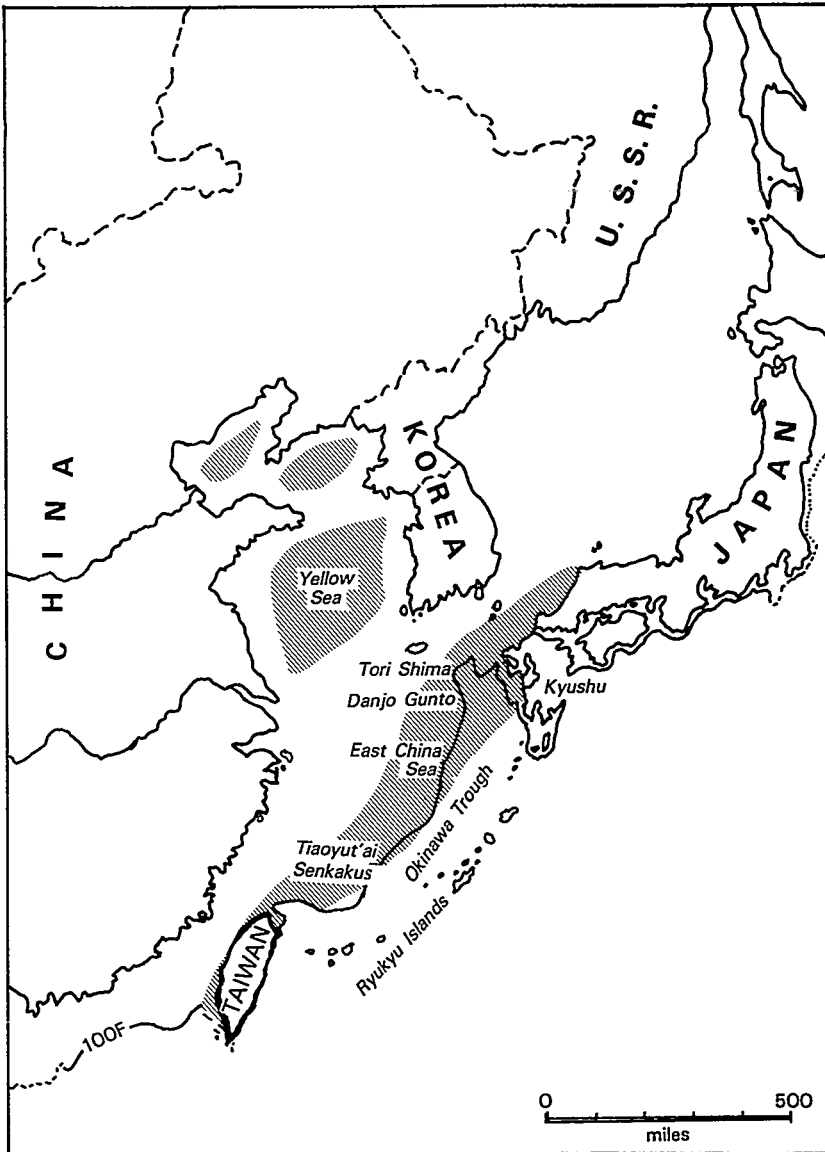


Illustration 1

Source: C. PARK, *EAST ASIA AND THE LAW OF THE SEA* 3 (1983). The illustration shows the location of the Okinawa Trough and the small islands. The shaded area indicates possible oil reserves.

This Note will describe the geographic and geomorphologic condition of the East China Sea in order to characterize the situation for analysis according to international law relating to ocean boundaries. Next, this Note will analyze the current state of international law on maritime border delimitation. Specifically, this Note will focus on the three seminal

opposite coast delimitation cases to determine how an international adjudicatory body might delimit the East China Sea boundaries. The Note will consider the role of political tension³ surrounding the earlier cases to compare and contrast that tension to the tension surrounding Japan's situation. Last, this Note will consider alternative solutions for resolving the dispute.

This Note will conclude that the East China Sea conflict may be characterized as a conflict between opposite states and solved under the corresponding analysis, but that another solution may lie in viewing Japan's Ryukyu island chain as outlying islands rather than as part of the Japanese mainland.⁴ Of prime importance in the conflict between the states involved, which are less than four hundred nautical miles apart, is the Okinawa Trough—a geomorphologic expression of the plate tectonics of the region. This trough lies closer to Japan than to its neighbors.⁵ If the Okinawa Trough is treated as marking the edge of the continental shelf⁶ of Japan, Japan could lose access to the natural resources of the shelf beyond. The treatment of such features, however, is uncertain—especially in light of such circumstances as surround the East China Sea debate.

This Note finds that international law relating to ocean boundary delimitation is not completely developed. The guiding principle is "equity," but the meaning of this principle is not highly evolved. Variables that one must consider when applying this principle to the instant matter include 1) the uncertain basis of claims within two hundred nautical miles of Japan; 2) the uncertain treatment of the uninhabited islands near Japan on the far side of the Okinawa Trough; 3) the uncertain status of the Ryukyu Islands south of the large islands of Japan; 4) the uncertain treatment to be given the Okinawa Trough; and 5) the role of other factors such as economics and prior use.

The geopolitical situation in the region has traditionally made submission of regional disputes to an adjudicatory body an unlikely means of dispute resolution.⁷ In recent years, however, the states have progressed toward mutual dispute resolution and more open relations, including the

3. The states of the region are diverse. As one author noted, they "are all states with politically and economically differentiated systems." Nakauchi, *Problems of Delimitation in the East China Sea and the Sea of Japan*, 6 OCEAN DEV. & INT'L L. 305, 305 (1979).

4. Outlying islands may be treated differently than a mainland state for purposes of boundary delimitation. See *infra* note 129 and accompanying text.

5. See *infra* notes 11-13 and accompanying illustration and text.

6. See Illustration 7 *infra* p. 592.

7. See *infra* notes 187-93 and accompanying text.

establishment of joint economic zones in two areas. Additionally, states outside the region have demonstrated that adjudication and other alternative means of dispute resolution can successfully be used between ideologically different governments. Also, commentators have suggested negotiated solutions that show potential for success. Nonetheless, observers must temper optimism with the wisdom given by an historical perspective of the region, especially in light of recent political events in China.⁸

II. GEOGRAPHY AND GEOMORPHOLOGY

The East China Sea boundary dispute involves a continental state, a peninsular state, and two island states.⁹ Japan is located less than four hundred miles from its neighbors across the southern Sea of Japan, across the Korean Strait, and throughout the East China Sea.¹⁰ It disputes the oceanic boundary between itself and each of these neighbors.

The Okinawa Trough cuts through the East China Sea.¹¹ In the Korean Strait, resolution of the boundary conflict depends partly on the treatment of two small islands—Danjo Gunto and Tori Shima—in a boundary delimitation. Both islands lie on the Korean side of the Okinawa Trough. These islands increase the amount of, and help justify Japan's claims to, the continental shelf on the Korean side of the Trough.¹²

8. See *infra* note 198.

9. China is a coastal state; South Korea is at the tip of the Korean Peninsula, and Japan and Taiwan are both island states.

10. See C. PARK, *supra* note 1, at 246. All the seas off China are "studded with so many offshore and mid-ocean islands that nowhere in the three seas does the distance from one headland or island to another approach 400 miles." *Id.*

11. See *id.* at 27.

12. *Id.* at 24. "The Japanese Government would not hesitate to take the [Danjo Gunto island] issue to the International Court of Justice, but South Korea has persistently refused. Japan also proposes to settle the issue through an exchange of notes in accord with the treaty on the peaceful settlement of disputes between the two governments. South Korea argues, however, that the issue cannot be settled by bilateral agreement." Nakauchi, *supra* note 3, at 312.

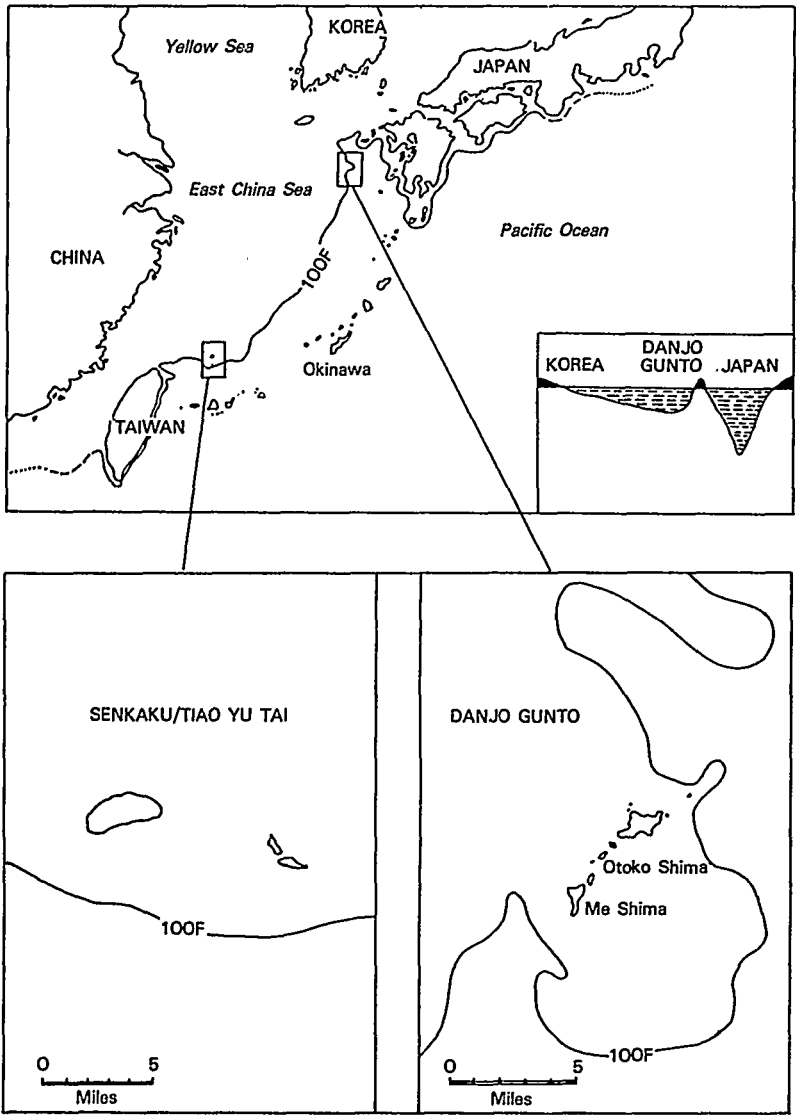


Illustration 2

Source: C. PARK, EAST ASIA AND THE LAW OF THE SEA 25 (1983). The illustration shows the location of the Okinawa Trough and the location of the Senkakus and Danjo Gunto Islands. Tori Shima is north of Danjo Gunto. See Illustration 1 *supra* p. 583.

In the southern Ryukyu island chain¹⁴ near Taiwan, there is currently

13. C. PARK, *supra* note 1, at 25.

14. The Ryukyus have been a part of Japan since they were returned by the United

a dispute over ownership of other small islands—the Senkakus—which also lie on the side of the Okinawa Trough farthest from Japan.¹⁵ The Ryukyus themselves are small compared to the four main islands of Japan; but like the four larger islands, the Ryukyus support life and civilization.¹⁶

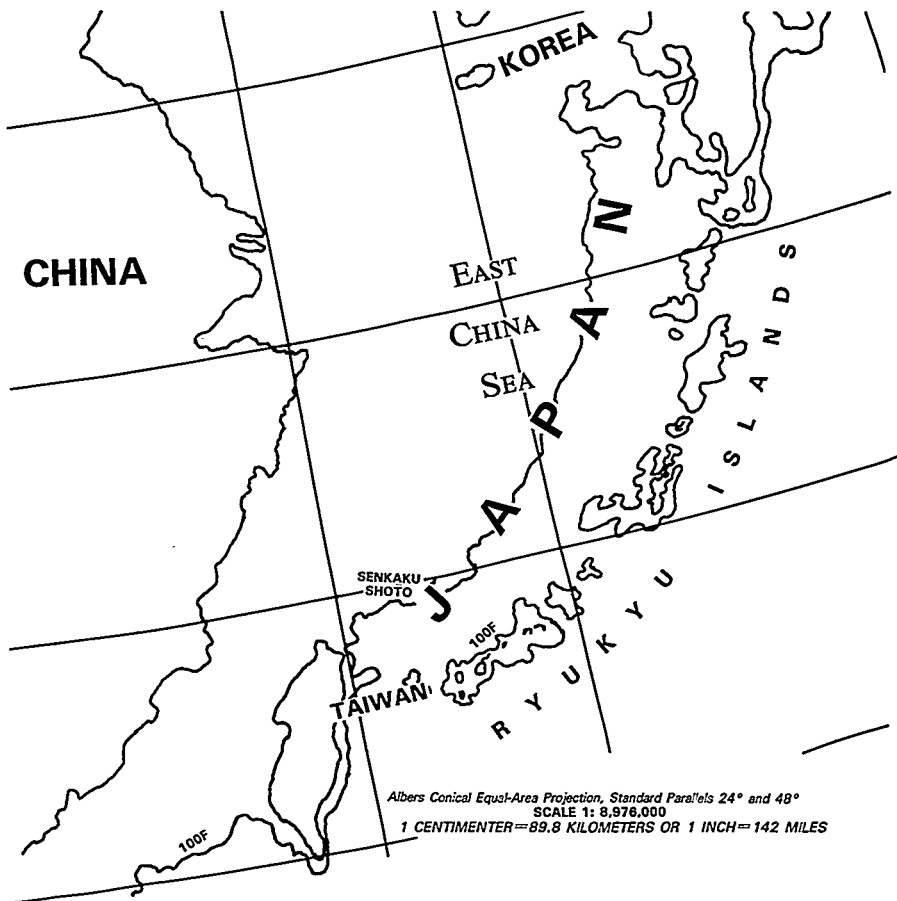


Illustration 3

Adapted from: NATIONAL GEOGRAPHIC, ATLAS OF THE WORLD 191 (5th ed. 1981)

States in 1971. *Id.* at 34.

15. *Id.* at 32-33.

16. *See* Illustration 3.

The Japanese land mass is an island arc system resulting from a subduction zone; that is, the oceanic crust is being subducted beneath the continental plate upon which China sits on the Pacific Ocean side of the islands. The island arc was formed over the subducting plate and, in back of the arc, a spreading back-arc basin system formed the Japan Basin and Okinawa Trough.¹⁷

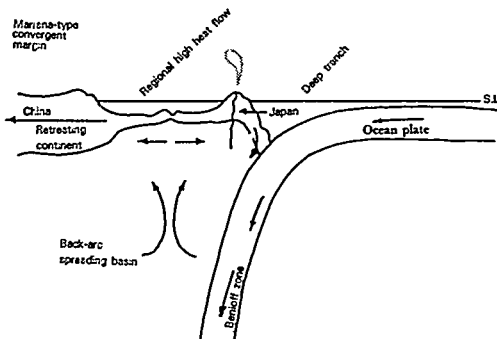
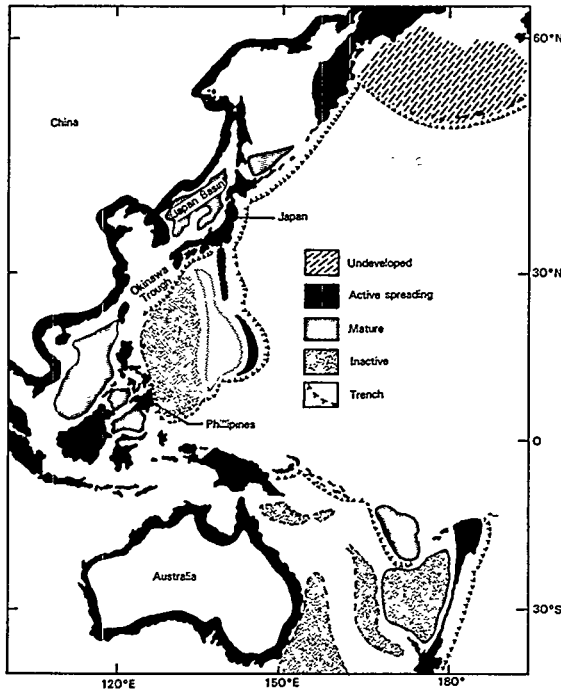


Illustration 4

Source: J. KENNETT, *MARINE GEOLOGY* 359, 371 (1982). The illustration demonstrates the tectonics of the Okinawa Trough and the tectonic activity in the region.

17. See J. KENNETT, *MARINE GEOLOGY* 370-71 (1982).

The Okinawa Trough reaches depths greater than two thousand meters¹⁸ and is therefore much deeper than continental shelves which extend between one and three hundred meters below sea level and shallower than the ocean floor which generally plunges between three and six thousand meters.¹⁹

1000s
of meters

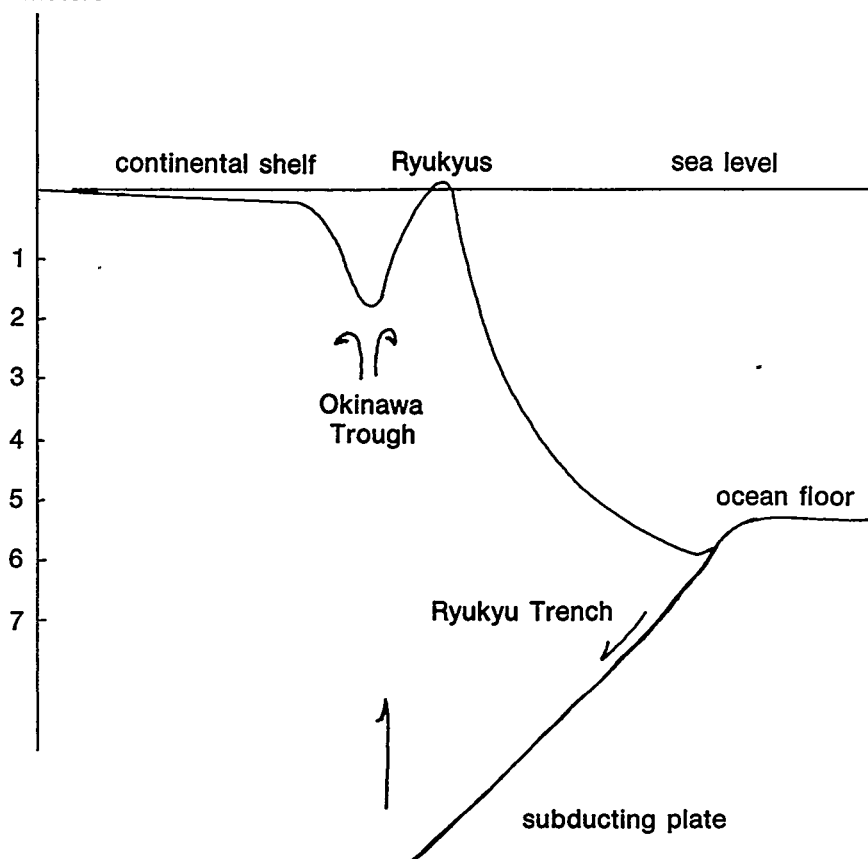


Illustration 5

Adapted from: THE TIMES ATLAS OF THE OCEANS 17 (A. Couper ed. 1983) and J. KENNETT, MARINE GEOLOGY 27 (1982).

18. THE TIMES ATLAS OF THE OCEANS 20 (A. Couper ed. 1983) [hereinafter TIMES ATLAS].

19. See J. KENNETT, *supra* note 17, at 27-37. "Most of the East China Sea has water of depths less than 200 m[eters]" throughout the shelf area—an exploitable depth. Valencia, *supra* note 2, at 42. For a synopsis of the geology of the region and the implications for oil exploration, see *id.*

The Okinawa Trough lies closer to Japan than to the other disputant states and lies completely within two hundred nautical miles of the Ryukyu Islands,²⁰ giving rise to the claim that Japan's ocean rights are restricted by the Trough.²¹



Illustration 6

Source: C. PARK, *EAST ASIA AND THE LAW OF THE SEA* 247 (1983).

20. See Illustration 1 *supra* p. 583.

21. See C. PARK, *supra* note 1, at 116. For a contrasting argument, see *THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE* 82-83 (C. Park & S. Park eds. 1987) [hereinafter *EAST ASIAN PERSPECTIVE*] (statement of Akio Suda, Legal Affairs section of the Treaty Bureau of Japanese Foreign Ministry).

III. THE LEGAL ENVIRONMENT

History reveals an evolution in the law of maritime boundary delimitation. The modern notion of the freedom of the high seas is the product of an historical struggle between those states that favored an open sea (*mare liberum*) and those states that hoped to appropriate the ocean to their exclusive use (*mare clausum*).²² The press to close the seas abated somewhat after the pre-eminence of the British Navy, however, and states began to claim a right only to the relatively small area of the sea that they could control off their shores.²³ States began to assert claims to the ocean shelf after President Truman issued a proclamation that the United States held legal title to the continental shelf off its shores.²⁴ Thus, the most recent round of claims to offshore territorial sovereignty were rooted in geology. One writer warns, however, that "it is not possible to devise any legal formula that take[s] into account all the vagaries of geology."²⁵ Although the selection of geology as a basis for determining maritime boundaries seems natural, it has produced considerable difficulties.

Following the issuance of the Truman Proclamation, the International Law Commission codified the emergent continental shelf regime in the

22. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 238 (3d ed. 1979). The opening of the high seas is attributed to the ascendancy of the British Navy, as Sellar and Yeatman observe in a popular send-up of British history:

Alfred noticed that the Danes had very long ships, so he built a great many more much longer ones, thus cleverly founding the British Navy. From that time onwards foreigners, who, unlike the English, do not prefer to fight against long odds, seldom attacked the British Navy. Hence the important International Law called the Rule Britannia, technically known as the Freedom of the Seas.

W. SELLAR & R. YEATMAN, *1066 AND ALL THAT* 11 (1931). This struggle continues today—with less ferocity perhaps but with the same fervor. A. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 5-6 (1981) ("In the 20th century, the tension between pressures for enclosure and for maritime freedom has continued. . . . In the second half of the 20th century the tide has turned substantially in favor of the forces for enclosure.").

23. I. BROWNLIE, *supra* note 23, at 238. The area that nations could control was about three miles or the distance of a cannon shot. A. HOLLICK, *supra* note 22, at 5.

24. Policy of the United States with Respect to the Natural Resources of the Subsoil and the Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945), *reprinted in* L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, *INTERNATIONAL LAW* 1299-1300 (2d ed. 1987) [hereinafter HENKIN]; *see also* R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 110 (1985) ("It is customary to regard the proclamation made by President Truman of the USA in 1945 as the first clear assertion of the idea that a continental shelf belongs to the coastal State.").

25. Jain, *Continental Shelf—Some Geological Aspects*, *INDIAN J. INT'L L.* 564, 579 (1972).

1958 Geneva Convention on the Continental Shelf (Continental Shelf Convention).²⁶ The Continental Shelf Convention acknowledged sovereign rights in coastal states over their continental shelves for the purpose of exploration and exploitation.²⁷ Broadly speaking, the continental shelf is the natural prolongation of the land offshore from the littoral state that drops at a gradual angle to the more steeply breaking continental slope.

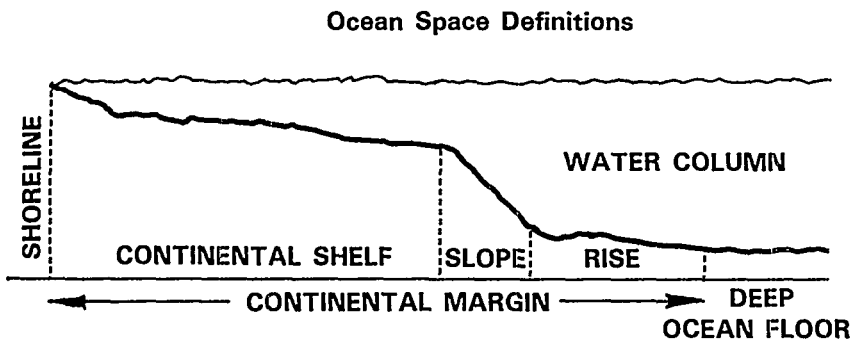


Illustration 7

Source: A. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 7 (1981).

The Convention also provided that when, absent special circumstances, the claims to the continental shelf of adjacent or opposite states overlap and the states cannot agree among themselves on the boundary, the states shall divide the shelf based on the principle of equidistance.²⁸

The International Court of Justice (I.C.J.) validated the theory of "natural prolongation" of a state's sovereignty from the land to the continental shelf in the *North Sea Continental Shelf Cases*.²⁹ The Court held:

[T]he rights of the coastal State in respect of the area of continental shelf

26. Geneva Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter *Continental Shelf Convention*].

27. *Id.* art. 2(1).

28. *Id.* art. 6(1)-(2). "Equidistant lines" are those lines that are everywhere "equally distant" from both states' baselines. In the case of two opposite coasts the equidistant line is in the "middle" of the sea between them. *Id.*

29. *North Sea Continental Shelf Cases* (W. Ger. v. Den./W. Ger. v. Neth.), 1969 I.C.J. 3, *reprinted in* 8 I.L.M. 340 (1969).

that constitutes a natural prolongation of its land territory into and under the sea exist . . . as an extension of [the land] in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.³⁰

The Court, however, did not find that the equidistance-special circumstances rule of dispute resolution is part of customary international law.³¹ Rather, it found that boundary divisions in international law are based upon "equitable principles."³²

When the Third United Nations Conference on the Law of the Sea (UNCLOS III)³³ convened, the parties "had great difficulty in finding an acceptable provision concerning delimitation."³⁴ This difficulty stemmed in part from a newly-emerged basis for claims to the continental shelf known as the Exclusive Economic Zone (EEZ). The EEZ concept validates claims to economic uses of the seafloor within two hundred nautical miles of a coast regardless of the shape of the ocean floor.³⁵ The concept grew from dissatisfaction with the results of the existing continental shelf regime and from the desire for more certain access to the continental shelf.³⁶ The success of this re-emergence of *mare clausum* thinking derived largely from the efforts of several Latin American states, that convinced underdeveloped states of the need to fence off the sea to frustrate the desire of developed states for broad oceanic influence.³⁷

Today, "there are . . . two legal bases [namely, EEZ and "natural prolongation" theory] for coastal State rights in relation to the sea bed."³⁸ The Convention adopted at UNCLOS III, the Law of the Sea

30. *Id.* at 2, 8 I.L.M. at 357.

31. *Id.* at 41, 8 I.L.M. at 373; see R. CHURCHILL & A. LOWE, *supra* note 24, at 116; Cook, *Filling the Gap—Delimiting the Australia-Indonesia Maritime Boundary*, 10 AUSTL. Y.B. INT'L L. 131, 138 (1987); Lee, *Troubles under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea*, 18 OCEAN DEV. & INT'L L. 585, 592 (1987) ("The equidistance method does not possess an inherent quality as a legal norm for delimitation.").

32. 1969 I.C.J. at 53, 8 I.L.M. at 384.

33. UNCLOS III ultimately produced the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter LOSC].

34. R. CHURCHILL & A. LOWE, *supra* note 24, at 117.

35. *Id.* at 125; see also Charney, *The Delimitation of Ocean Boundaries*, 18 OCEAN DEV. & INT'L L. 497, 520 (1987).

36. *Cf.* A. HOLLICK, *supra* note 22, at 9.

37. The result, ironically, has favored developed and richer developing nations. See *id.* at 170-71.

38. R. CHURCHILL & A. LOWE, *supra* note 24, at 111.

Convention (LOSC), embodied these alternate and conflicting bases without resolving the conflict between them.³⁹ The failure to resolve the conflict creates problems when state claims predicated upon each theory overlap. For example, in the East China Sea dispute, China claims the broad shelf off its coast on the basis of natural prolongation theory, whereas Japan hopes to divide the shelf with a median line in order to obtain title to the sea-bed.⁴⁰

It is unclear under existing international law whether a state's claim to the ocean floor within two hundred nautical miles of its coast is properly based on natural prolongation or EEZ theory. This uncertainty adds confusion to the process of ocean floor division between states that are less than four hundred nautical miles apart.⁴¹

IV. SUMMARY OF THE BOUNDARY DISPUTE

The development of the law on ocean boundaries and the geography of the East China Sea have combined to produce a situation of overlapping claims to that area.⁴² China, Korea, and Taiwan claim that Japan has no legal right to the ocean floor beyond the Okinawa Trough and, consequently, no right to share in the oil and other oceanic resources of the sea-bed there.⁴³ These states assert that the Trough naturally divides

39. Article 83(1) states:

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.

LOSC, *supra* note 33, art. 83(1). Article 76(1) provides:

The continental shelf of a coastal State comprises the sea-bed 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 . . . where the outer edge of the continental margin does not extend up to that distance.

Id. art. 76(1). Article 55 establishes the EEZ, and article 57 provides that the EEZ may extend up to two hundred nautical miles. *Id.* arts. 55, 57. The interplay of these articles allows one to read either that the EEZ provision applies only when the continental shelf is less than two hundred nautical miles wide, or that the continental shelf provision applies only when the shelf is wider than two hundred nautical miles. *See* Lee, *supra* note 31, at 588-89 (sketching the conflict at UNCLOS III); Reid, *Petroleum Development in Areas of International Seabed Boundary Disputes—Means for Resolution*, 1985 AUSTL. MINING & PETROLEUM Y.B. 544, 547.

40. Lee, *supra* note 31, at 592-95; Valencia, *supra* note 2, at 44, 55.

41. *Cf. infra* notes 208-217 and accompanying text.

42. *See* Illustration 11 *infra* p. 611.

43. *See* C. PARK, *supra* note 1, at 6-13. *But see infra* note 151.

the ocean floor between them. Japan claims that the Trough does not legally split the sea-bed and, alternatively, that the geomorphologically-blind EEZ regime, not the continental shelf regime, governs the sea-bed within two hundred nautical miles of a state. If neither of these Japanese claims are valid, Japan asserts that it nevertheless has territory on the far side of the Okinawa Trough in the form of two small sets of islands, giving it rights to the shelf beyond the Trough.⁴⁴ Adding to the confusion is the uncertainty whether the states should treat the Ryukyu island chain as outlying islands or as part of the four large islands of Japan; if deemed outlying islands, the Ryukyu chain may command less ocean floor.⁴⁵

Beyond these disputes in interpretation of international law and regional geomorphology, political disputes, such as the governance of Taiwan, and a number of other non-adjudicatory options compound the situation.⁴⁶ Moreover, the region has never resolved its differences peacefully.⁴⁷ There has been progress, however, in ocean boundary dispute resolution, and opportunities exist for resolving the situation in the East China Sea.

Japan's boundary disputes in the potentially oil-rich seas to its west revolve primarily around the following four major physical and legal contentions: 1) the effect to be given the small islands, Danjo Gunto and Tori Shima, that lie on the Korean side of the Okinawa Trough; 2) the ownership of and effect to be given to the Senkaku islands near Taiwan, that also lie on the far side of the Trough; 3) the effect to be given the Ryukyu Islands that continue the arc of Japan's four main islands; and 4) the effect of the Okinawa Trough itself on Japan's claim to territorial sovereignty over the shelf beyond the Trough, given the proximity of the coasts in the East China Sea.⁴⁸ There are also complicating political factors arising from the Chinese view of the region.⁴⁹ Finally, adjudication

44. See Lee, *supra* note 31, at 597-98.

45. See *infra* notes 222-26 and accompanying text; see also *infra* notes 125-28 and accompanying text.

46. See *infra* Part VI, section B.

47. See *infra* note 177.

48. One commentator asserts that most of the boundary disputes in the region "are concerned with the ownership of islands." Valencia, *supra* note 2, at 46. While islands are involved in most of the disputes and complicate the issues, I would put more emphasis on the Okinawa Trough because the islands are relatively small and detached from any state, and therefore will probably not weigh heavily in the mind of a boundary-drawer.

49. See *infra* Part VI. Briefly, these complications are: 1) China claims rights to all of the shelf beyond the Okinawa Trough on the basis of the "natural prolongation"

is not the only, nor necessarily the primary, option for resolving this dispute.⁵⁰

V. THE *ANGLO-FRENCH*, *GULF OF MAINE*, AND *LIBYA-MALTA* PRECEDENTS

The three most recent and relevant contentious cases regarding opposite coast border delimitation decided by international adjudicatory bodies are the *Anglo-French* arbitration,⁵¹ the *Gulf of Maine* case,⁵² and the *Libya-Malta* case.⁵³ These will be discussed in turn.

A. *The Anglo-French Arbitration*

The *Anglo-French* arbitration is important for understanding the legal situation in the East China Sea because it deals with opposite coasts, the role of median line principles in equitable delimitation, and the effect given to dependent islands. In this case, the United Kingdom and France agreed in principle to lay out a boundary in the English Channel between them, but they did not agree to all the particulars.⁵⁴ Specifically, they could not agree on how to treat the populated Channel Islands, that belong to Britain but lie close to the French coast.⁵⁵ Neither could they agree on the effect to be given two small sets of islands off the coast of each state.⁵⁶

theory; 2) China and Taiwan both claim to represent the Chinese people; and 3) China refuses to negotiate with South Korea because it does not recognize South Korea as a state. See *infra* notes 150, 175-76 and accompanying text.

50. See Valencia, *supra* note 2, at 56-58 (setting forth a number of options for dispute resolution).

51. Case Concerning the Delimitation of the Continental Shelf (U.K. v. Fr.), 18 R.I.A.A. 3 (1978), reprinted in 18 I.L.M. 397 (1979).

52. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, reprinted in 23 I.L.M. 1197 (1984).

53. Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, reprinted in 24 I.L.M. 1189 (1985).

54. 18 R.I.A.A. at 5, 18 I.L.M. at 400.

55. See Illustration 8 *infra* p. 597.

56. *Id.*

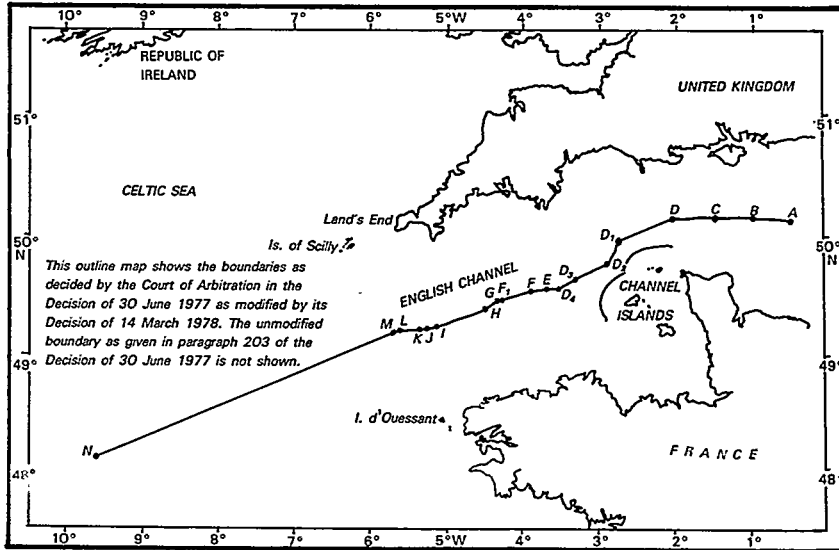


Illustration 8

Source: 18 R.I.A.A. 3, 338 (1978), 18 I.L.M. 397, 494 (1979).

Because the two states were unable to negotiate a solution, they agreed to submit their dispute to binding arbitration.⁵⁷

In reaching its decision, the Court of Arbitration selected by the parties had to determine the applicable law. The Court found that the United Kingdom had ratified the Continental Shelf Convention.⁵⁸ France had also ratified the Convention, but had made reservations that the United Kingdom rejected.⁵⁹ Consequently, the Court found that customary international law applied by default in all areas that the French reservations were intended to affect, and that the Continental Shelf Convention applied to all other areas of dispute.⁶⁰ Nonetheless, the Court found that “the rules of customary law lead to much the same result as the provisions” of the Continental Shelf Convention.⁶¹

The “same result” the Court referred to was the achievement of equity that it found mandated by the reasoning of the I.C.J. in the *North*

57. *Id.* at 4-5, 18 I.L.M. at 399-400.

58. *See supra* notes 26-28 and accompanying text.

59. 18 R.I.A.A. 27-40, 18 I.L.M. at 412-18.

60. *Id.* at 42, 18 I.L.M. at 419.

61. *Id.* at 44, 18 I.L.M. at 420. This opinion was echoed by Judge Oda in his dissent in *Libya-Malta* in which he argued the primacy of the equidistance-special circumstances rule. 1985 I.C.J. 13, 144-45, 24 I.L.M. 1189, 1255 (1985). It is not unreasonable, however, to assume that the Continental Shelf regime had a greater effect in this case than in later cases.

Sea Continental Shelf Cases and by the Convention.⁶² The Court specifically found the "equidistance-special circumstances" method worked equity and was especially applicable to cases involving opposite coasts.⁶³ Acknowledging that in customary international law the rule of equidistance-special circumstances has no obligatory effect, the Court agreed with the parties that, in principle, the Court should apply this method to the instant case because the parties were opposite states and the Convention and the I.C.J. interpretations of customary international law supported application of that method.⁶⁴

The Court proceeded to consider what effect to give the Channel Islands and the Atlantic islands; it found that both sets of islands had to be treated specially to avoid inequity.⁶⁵ The Court employed the principle of "proportionality" in considering whether it would be equitable to include the Channel Islands in the baseline of the United Kingdom.⁶⁶ Finding the coastlines roughly equal, the Court determined that it would be inequitable to account directly for the Channel Islands and instead drew a median line through the English Channel that ignored the islands altogether.⁶⁷ Recognizing, however, that the Channel Islands were densely populated and entitled to some territorial sea, the Court drew a twelve mile enclave enclosing the Islands' territorial fishing regions to the north and northwest.⁶⁸

In the case of the islands off the states' Atlantic coasts, the Court found that a strict median line would again produce an inequitable distorting effect and accordingly adjusted the line to take less account of the British islands that protruded west.⁶⁹

Another important aspect of the *Anglo-French* arbitration that relates

62. "[T]he Court was led to conclude that in customary law the basic principle of delimitation is that, failing agreement, the boundary must be determined in accordance with equitable principles." 18 R.I.A.A. at 50, 18 I.L.M. at 423. "[T]he combined 'equidistance-special circumstances rule' [of the Convention], in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles." *Id.* at 45, 18 I.L.M. at 421.

63. *Id.* at 51, 18 I.L.M. at 424.

64. *Id.* at 52-53, 18 I.L.M. at 424-25.

65. *Id.* at 93, 18 I.L.M. at 443-44.

66. *Id.* at 93-94, 18 I.L.M. at 444. "Proportionality" is a label for the comparison between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast. *North Sea Continental Shelf Cases (W. Ger. v. Den./W. Ger. v. Neth.)*, 1969 I.C.J. 4, 54.

67. 18 R.I.A.A. at 93-94, 18 I.L.M. at 444.

68. *Id.* at 95-96, 18 I.L.M. at 444-45.

69. *Id.* at 96-97, 18 I.L.M. at 455.

to Japan's situation is that the Court discounted any effect of the Hurd Deep, a trough and fault zone that runs on the French side of the median line from near the Atlantic to the Channel Islands.

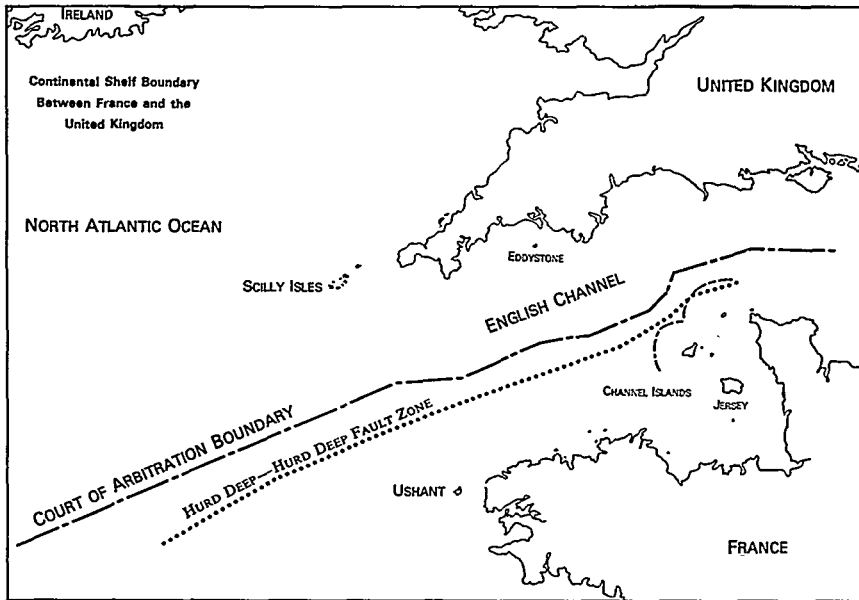


Illustration 9

Source: Merrills, *The United Kingdom-France Continental Shelf Arbitration*, 10 CAL. W. INT'L L.J. 314, 315 (1980).

The Court held that the Hurd Deep, with a depth no greater than two hundred meters,⁷⁰ was not significant enough to warrant a finding that it was a shelf discontinuity.⁷¹ The Court also indicated it would be anomalous to allow the United Kingdom to make a claim based on the Hurd

70. See *TIMES ATLAS*, *supra* note 18, at 17.

71. 18 R.I.A.A. at 60-61, 18 I.L.M. at 428. The definitional issue raised by the term "shelf discontinuity" is discussed below. See *infra* notes 156-66 and accompanying text.

Deep since the United Kingdom had forgone a claim on the two hundred meter deep⁷² Norwegian Trough when dividing the North Sea between itself and Norway by treaty.⁷³ The Court suggested that taking account of the Hurd Deep "would run counter to the whole tendency of State practice on the continental shelf in recent years."⁷⁴

B. *The Gulf of Maine Case*

The *Gulf of Maine* case came to a chamber of the I.C.J. by way of a Special Agreement⁷⁵ between Canada and the United States. This Agreement requested a final and binding determination of a single line dividing the continental shelf and superadjacent waters between the United States and Canada.⁷⁶ The Court agreed to accept some limits on the line it could draw under the principle that an agreement of the parties should first determine the ocean boundary delimitation.⁷⁷ The Court also noted that this case, unlike those it had previously considered, required that a line actually be drawn instead of merely indicated, and that this line relate not only to the shelf but also to the exclusive fishing zone.⁷⁸ The *Gulf of Maine* case is pertinent to this Note's inquiry because 1) the Court characterized the area as primarily about opposite coasts with the special feature that the water column was being delimited in addition to the continental shelf; 2) the Court considered the question of geomorphologic discontinuity; 3) the Court considered the effect of dependent islands; and 4) the Court considered the role of other fac-

72. See C. PARK, *supra* note 1, at 29; TIMES ATLAS, *supra* note 18, at 17; see *infra* notes 153-55.

73. 18 R.I.A.A. at 60, 18 I.L.M. at 428; see also Millard, *The Legal Environment of the British Oil Industry*, 18 TULSA L.J. 394, 401-402 (1983) (explaining the Norwegian Trough situation).

74. 18 R.I.A.A. at 60, 18 I.L.M. at 428.

75. The Special Agreement is annexed to the Treaty between the Government of the United States of America and the Government of Canada to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area, March 29, 1979, 33 U.S.T. 2797, T.I.A.S. No. 10204, *reprinted in* 20 I.L.M. 1378 (1981). This Note will refer to this I.C.J. Chamber as the "Court."

76. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 263-64, *reprinted in* 23 I.L.M. 1206 (1984).

77. *Id.* at 266, 23 I.L.M. at 1207.

78. *Id.* at 267, 23 I.L.M. at 1208. The parties to the *Anglo-French* arbitration also required that the Court of Arbitration actually draw a dividing line. Case Concerning the Delimitation of the Continental Shelf (U.K. v. Fr.), 18 R.I.A.A. 3, 5 (1978), *reprinted in* 18 I.L.M. 397, 400 (1979).

tors.⁷⁹ The case was decided by a margin of four to one.⁸⁰

The applicable law in this case, as in the others, was general international law.⁸¹ The Court considered customary international law and concluded that the governing norm “is ultimately that delimitation, whether effected by direct agreement or by the decision of a third party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result.”⁸²

The Court discounted the geologic factor because the parties agreed that the continental shelf in the region is essentially continuous geologically.⁸³ The United States, however, made a *geomorphologic* argument that the Northeast Channel, which lies near Nova Scotia, is a “special feature” that the Court ought to consider in its delimitation.⁸⁴

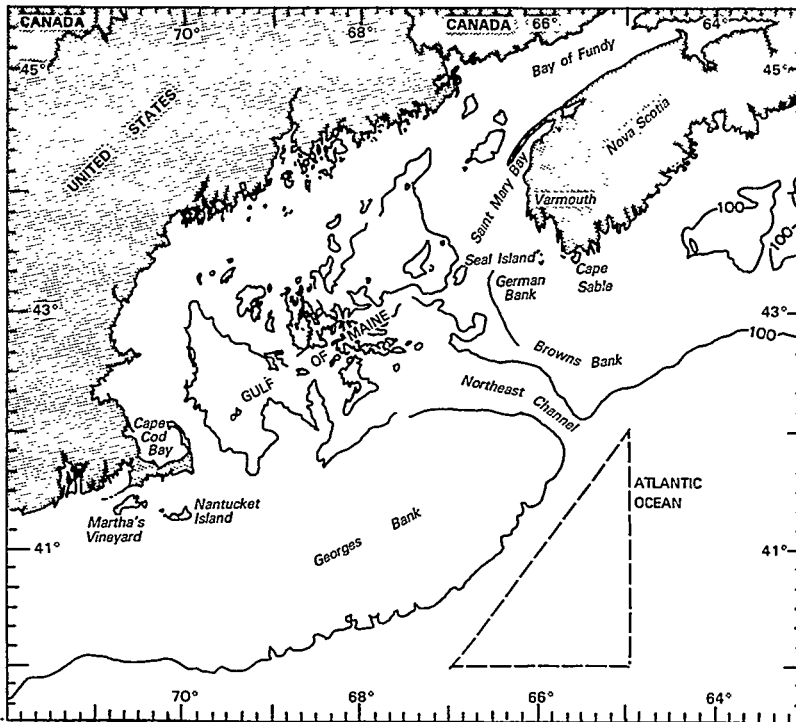


Illustration 10

Source: 1984 I.C.J. 246, 269, 23 I.L.M. 1197, 1209 (1984).

79. 1984 I.C.J. at 331, 326-27, 336-37, 341-44, 23 I.L.M. at 1240, 1237-38, 1242-43, 1245-46.

80. Schwebel, J., wrote a separate opinion and Gros, J., dissented.

81. 1984 I.C.J. at 288, 23 I.L.M. at 1218.

82. *Id.* at 300, 24 I.L.M. at 1224.

83. *Id.* at 273, 24 I.L.M. at 1211.

84. *Id.* at 259, 23 I.L.M. at 1204. Geomorphology is a branch of geology that emphasizes landforms.

The Court looked at the treatment of the Hurd Deep in the *Anglo-French* arbitration and found that, geomorphologically, the Northeast Channel was even less significant and should not be considered.⁸⁵ The Court said that the "Northeast Channel . . . does not have the characteristics of a real trough marking the dividing-line between two geomorphologically distinct units."⁸⁶ While not committing itself beyond the facts of the case before it, the Court found that the Gulf of Maine situation was "different from the situation that *may prevail* in areas where a natural separation does exist from the factual viewpoint."⁸⁷ Later the Court noted recognition by the United States that the channel was not a "geological fault which would make it possible to ascribe to it . . . the function of a natural boundary between distinct areas of sea-bed."⁸⁸ The Court divided the overlapping area equally, partly because the Court concluded that this was not "a concrete situation where distinctive geological characteristics can be observed in the continental shelf, such as might have special effect in determining the division of that shelf and the resources of its subsoil."⁸⁹ The Court seemed to indicate that some geomorphologic discontinuity may be sufficient to divide a continental shelf but that none existed in the instant case.

Like the panel in the *Anglo-French* arbitration, the Court in the *Gulf of Maine* case gave only half effect to small dependent islands in calculating the relative proportionality between the coasts.⁹⁰

The Court compared the ratio of coastline lengths between the United States and Canada and found that the United States coastline was somewhat longer. Based on this difference and ignoring the small dependent islands, the Court determined the ratio was 1.38 to 1.⁹¹ Therefore, the Court shifted the line toward Nova Scotia and away from Massachusetts.⁹²

The parties also raised arguments based upon historical use,⁹³ eco-

85. *Id.* at 274, 23 I.L.M. at 1211.

86. *Id.*

87. *Id.* at 275, 23 I.L.M. at 1212 (emphasis added).

88. *Id.* at 276, 23 I.L.M. at 1212.

89. *Id.* at 327, 23 I.L.M. at 1238. In other words, a sufficient geologic discontinuity did not support the geomorphologic discontinuity. The Court also considered the effect of dependent islands, proportionality, and other factors discussed below. *See infra* Part V, section D.

90. 1984 I.C.J. at 336-37, 23 I.L.M. at 1242-43.

91. *Id.* at 336, 23 I.L.M. at 1242.

92. *Id.* at 336-37, 23 I.L.M. at 1242-43.

93. *Id.* at 340-41, 23 I.L.M. at 1244-45.

conomic dependence,⁹⁴ natural fish stock groupings,⁹⁵ the broad directions of the coastlines,⁹⁶ and activity in the area showing responsibility and perhaps acquiescence.⁹⁷ The Court rejected these arguments, declaring that if it applied the method of equal division based on coastal geography and adjusted on considerations of proportionality of coastline length and special effects of some geographic phenomenon, such as islands and protrusions, these other arguments were inappropriate or inapplicable.⁹⁸ The Court did, however, refer to these criteria to assess the equity of the line that it finally drew.⁹⁹

C. *The Libya-Malta Case*

The *Libya-Malta* case came before the I.C.J. by special agreement between Libya and Malta.¹⁰⁰ Libya and Malta, which are within four hundred miles of one another, could not agree on how to draw a boundary between them to divide the potentially oil-rich sea-bed.¹⁰¹ The Court rendered judgment by the margin of fourteen to three.¹⁰²

Libya-Malta dealt with a number of issues applicable to the East China Sea dispute. The Court addressed the issues of geology and the continental shelf, the rules of delimitation, the relative importance of equidistance and proportionality, the shelf area an island may be accorded, and the effect given some miscellaneous factors.

The Court found that, according to the agreement of the parties, customary international law governed.¹⁰³ Only Malta had acceded to the Continental Shelf Convention, and, although both countries had joined the LOSC, this latter Convention was not yet in force.¹⁰⁴ While this fact need not prevent the LOSC from being referred to as evidence of international law, the LOSC may not stand as international law without the

94. *Id.* at 341, 23 I.L.M. at 1245.

95. *Id.* at 276, 23 I.L.M. at 1212.

96. *Id.* at 258, 23 I.L.M. at 1203.

97. *Id.* at 259, 310, 23 I.L.M. at 1204, 1229.

98. *Id.* at 326-28, 341-42, 23 I.L.M. at 1237-38, 1245; *see also* Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 A.J.I.L. 539, 571, 573 (1985).

99. 1984 I.C.J. at 246, 340-44, 23 I.L.M. at 1197, 1244-46.

100. Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 15-17, *reprinted in* 24 I.L.M. 1189, 1190-91 (1985).

101. R. ST. JOHN, *QADDAFI'S WORLD DESIGN* 88 (1987).

102. 1985 I.C.J. at 56, 24 I.L.M. at 1211.

103. *Id.* at 29, 24 I.L.M. at 1197.

104. The LOSC has not yet received the sixty signatures required before it enters into force. *See* LOSC, *supra* note 33, art. 308.

support of state practice and *opinio juris*.¹⁰⁵ Nonetheless, the Court found that it could look to the LOSC as evidence of customary international law,¹⁰⁶ although the Court did not point out the Convention's basis in state practice and *opinio juris*.¹⁰⁷

The Court agreed with the parties and found, as did the arbitral tribunal in the *Anglo-French* arbitration, that the area should be delimited in accordance with equitable principles to achieve an equitable result.¹⁰⁸ A similar position was also reached in the *Gulf of Maine* case.¹⁰⁹

While the parties agreed on the applicable law, they disagreed on the legal basis of title to the continental shelf and sea-bed. Libya proposed that the legal basis of title rested on the theory of natural prolongation of a state's continental shelf—a geomorphologic fact. Malta, on the other hand, argued that the concept of natural prolongation had been modified so that geomorphology was a relevant consideration only after claims within two hundred nautical miles of a state's coast were recognized.¹¹⁰ Malta's argument centered on the recognition in the LOSC of the EEZ.¹¹¹ The argument was significant because closer to Malta than Libya are a series of deep troughs reaching depths in excess of one thousand meters that Libya argued were a "rift zone."¹¹² Libya, therefore, argued that the troughs were the natural boundary between two distinct continental shelves.¹¹³ The Court found it proper to ignore the "rift zone" and stated:

105. See generally HENKIN, *supra* note 24, at 37 ("[T]he definition of custom comprises two distinct elements (1) 'general practice' and (2) its acceptance as law."); Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986).

106. 1985 I.C.J. at 29, 24 I.L.M. at 1197.

107. See Charney, *supra* note 105, at 995. Professor Charney notes that the I.C.J. in *Libya-Malta* mentioned the importance of finding state practice and *opinio juris*, but reached its conclusion without doing so explicitly. He suggests that this could reduce the I.C.J. statement about the relevance of the LOSC to the status of *obiter dictum*. *Id.*

108. 1985 I.C.J. at 30-31, 24 I.L.M. at 1198.

109. See *supra* note 98 and accompanying text.

110. 1985 I.C.J. at 31-32, 24 I.L.M. at 1198-99; see *supra* note 39.

111. *Id.* at 32, 24 I.L.M. at 1199. The EEZ concept is found in article 76 of the LOSC and gives each sovereign state territorial rights over the sea-bed up to two hundred miles from its coast. LOSC, *supra* note 33, art. 76; see R. CHURCHILL & A. LOWE, *supra* note 24, at 124-47. Churchill and Lowe report that by 1982, fifty-five states had independently claimed two hundred mile EEZs. *Id.* at 126; see *supra* note 35 and accompanying text (describing the EEZ concept).

112. A "rift zone" is an area where new crust is created in the gap between continental plates that are moving apart. See J. KENNETT, *supra* note 17, at 329.

113. 1985 I.C.J. at 34, 24 I.L.M. at 1200.

The Court . . . 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.¹¹⁴

In addition, the Court found that it would have been too difficult to determine whether the discontinuity represented by the troughs was "so scientifically 'fundamental,' that it must also be a discontinuity of a natural prolongation in the legal sense."¹¹⁵

Despite the Court's agreement with Malta on the insignificance of geologic features within two hundred nautical miles, the Court found that the EEZ concept did not mandate use of equidistance in reaching an equitable solution.¹¹⁶ Instead the Court looked to the following factors:

- (1) the general configuration of the coasts of the Parties, their oppositeness, and their relationship to each other within the general geographical context;
- (2) the disparity in the lengths of the relevant coasts of the Parties and the distance between them;
- (3) the need to avoid in the delimitation any excessive disproportion between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast¹¹⁷

The Court found that the starting point for drawing an equitable line in the case of opposite states was an equidistant line.¹¹⁸ After drawing this line between Libya and Malta, the Court moved the line back toward Malta because it found that Libya's coastline was much longer.¹¹⁹

114. *Id.* at 35, 24 I.L.M. at 1200 (emphasis added).

115. *Id.* at 36, 24 I.L.M. at 1201. This supports the sentiment alluded to earlier that it is impossible to account for all the vagaries of geology in a legal formula. Jain, *supra* note 25, at 579.

116. 1985 I.C.J. at 37, 24 I.L.M. at 1201.

117. *Id.* at 57, 24 I.L.M. at 1211.

118. *Id.* at 46-47, 24 I.L.M. at 1206. The Court denied any implication that it must start with an equidistance line and noted that such a requirement failed in UNCLOS III. *Id.* at 37, 24 I.L.M. at 1201. In the case of *opposite* states, however, the Court found equidistance the most judicious starting point, in accord with the *North Sea Continental Shelf Cases*. *Id.* at 46-47, 24 I.L.M. at 1206.

119. *Id.* at 52-56, 24 I.L.M. at 1209-11. The Court used a rather loose procedure for adjusting the line, that Judge Oda objected to in his dissent. *Id.* at 133, 24 I.L.M. at 1249 (Oda, J., dissenting). The Court first found the median line between Sicily and Italy, setting this as the farthest the boundary could be adjusted. Then the Court compared the coast of Malta facing Libya to the Libyan coast between Tunisia and the

The Court, without revealing any specifics, indicated that there may be an analytical difference between dependent islands, such as the Channel Islands of the *Anglo-French* arbitration, and island states.¹²⁰ The Court stated only that “[t]his aspect of the matter is related not solely to the circumstances of Malta being a group of islands, and an independent State, but also to the position of the islands in the wider geographical context, particularly their position in a semi-enclosed sea.”¹²¹ When the Court considered how equity mandated movement of the line, it relied on the fact that the islands of Malta are a “relatively small feature in a semi-enclosed sea” and there is a difference in coastline length.¹²² The Court moved the dividing line north toward Malta on the basis of these factors. In his dissent, Judge Oda charged that these considerations were not appropriate in changing the Malta-Libya median line and gave that line “short shrift.”¹²³ He contended that the Court merely adjusted the line to reflect a division of the sea between Italy and Libya and noted that the line that the Court drew, admittedly imprecisely, just happened to line up perfectly with the southernmost Italian claims in the area.¹²⁴

Judge Oda argued that the majority in *Libya-Malta* incorrectly applied the “partial effect” doctrine that the Court of Arbitration applied to islands in the *Anglo-French* arbitration. Whereas in the *Anglo-French* arbitration the islands were a small distorting portion of a larger territory, *Libya-Malta* involved a whole state.¹²⁵ Regardless of whether Judge Oda is correct in his accusations, the Court’s decision, by accounting for proportionality of coastlines in its delimitation rather than bisecting lines radially connecting the two coasts, limited the amount of shelf an island state like Malta can claim.¹²⁶ Nonetheless, the Court measured the Maltese coast by measuring its facing baseline rather than its

mouth of the Gulf of Sidre. Noting that there was a significant discrepancy between the two, the Court moved the line toward Malta, selecting “around three-quarters” as equitable. *Id.* at 51-52, 24 I.L.M. at 1208-1209.

120. *Id.* at 42, 24 I.L.M. at 1204.

121. *Id.*

122. *Id.* at 52, 24 I.L.M. at 1209.

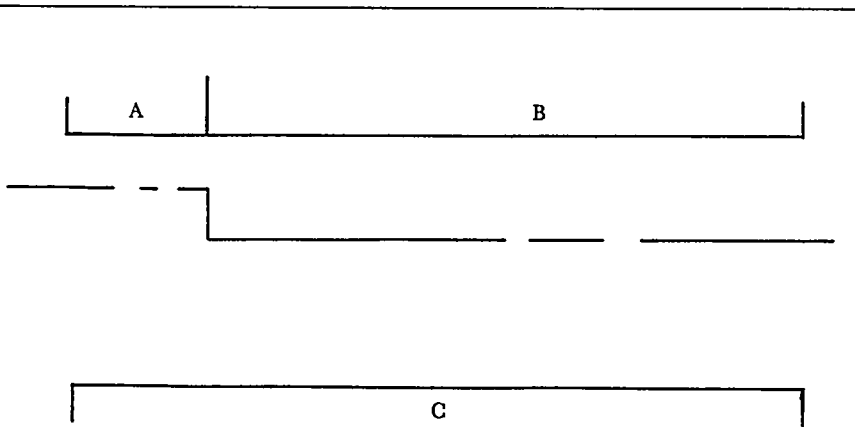
123. *Id.* at 139, 24 I.L.M. at 1252 (Oda, J., dissenting).

124. *Id.*

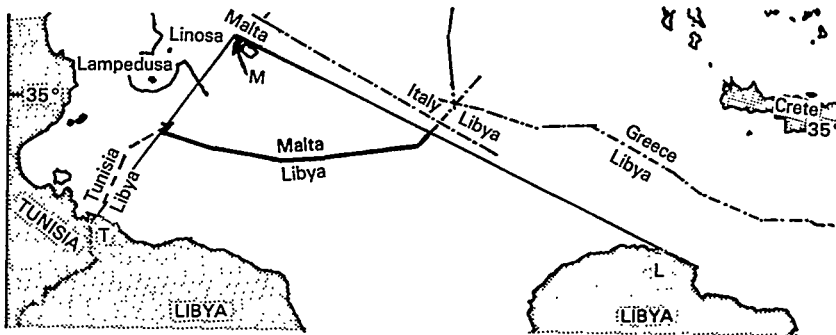
125. *Id.*

126. Query whether the Court would have applied this same method of proportionality in a case similar to the one diagrammed below.

actual facing coastline.¹²⁷ This suggests that island arc systems, like that of Japan, may be less threatened by the use of proportionality because



In this illustration, Malta can be seen as country A with a relatively small coastline. Country B would correspond to Libya and country C to a mythical third state with a very long baseline. The Court's arguments suggest that C should have a larger area than B which in turn should get more ocean bed than A. In this situation, Judge Oda's method of connecting baselines and halving them, as illustrated below, seems to make more sense. In the above case, his method would result in an equidistant line.



1985 I.C.J. at 171, 24 I.L.M. at 1268-1269.

127. A "baseline" is a line connecting certain projections of a coastline that are determined by formula for the purpose of measuring sea claims. LOSC, *supra* note 33, art. 7. By "actual" coastline, this author intends to point out that, in the case of islands, one must connect points of land separated by water. Thus, the resulting line is much longer than the cumulative length of the land along the islands' coast. *See id.* art. 47 (archipelagic baselines).

their facing baselines cover very large areas.¹²⁸

The last issue arising in *Libya-Malta* that may be applicable to the East China Sea dispute is the issue of uninhabited islands. The Court refused to consider several uninhabited islands off the coast of Malta in delimiting the shelf.¹²⁹ This decision suggests that small uninhabited islands will not significantly help a country extend the area of its territory and foreshadows a difficulty that Japan may face in its arguments based on the uninhabited Danjo Gunto and Senkaku island groups near Taiwan.

D. Summary of the Precedents

All three of these boundary delimitation cases between opposite states were decided primarily on the basis of customary international law. The adjudicatory body in each case agreed that equity was the rule applicable to the delimitation of sea-bed boundaries. Equity, however, is not clearly defined in any of the cases and appears to be context specific.

In the *Anglo-French* arbitration, the Court invoked equity to uphold a median line division between the opposite coasts and to modify the seaward projection of the line in order not to favor small dependent islands as the situation came more to resemble adjacent states. Fairly large populated islands within the English Channel were denied effect to avoid the inequity of depriving France of use of the English Channel. The Court found that the opposite nature of the states led to application of a median line as an *expression* of equity. In both *Gulf of Maine* and *Libya-Malta*, equity was used to modify the median line to account for lack of proportionality between coastal lengths.

Proportionality was considered in all three cases. In the *Anglo-French* arbitration and *Gulf of Maine*, the courts gave small dependent islands less effect in the overall boundary delimitation. The *Anglo-French* Court failed to give fairly large populated islands effect, yet in *Gulf of Maine*, the Court gave Nova Scotia full effect,¹³⁰ suggesting that treatment of

128. *But see* Y. MA, LEGAL PROBLEMS OF THE SEABED BOUNDARY DELIMITATION IN THE EAST CHINA SEA 163-64 (University of Maryland School of Law, Occasional Papers/Reprints Series in Contemporary Asian Studies No. 3-1984 (62), 1984) (arguing that the principle of proportionality should apply to move the dividing line toward Japan).

129. 1985 I.C.J. at 48, 24 I.L.M. at 1207.

130. Telephone interview with Professor Jonathan I. Charney, Vanderbilt University School of Law (July 3, 1989) [hereinafter Charney Interview]. Professor Charney was an expert assistant to the Legal Advisor of the United States Department of State in the *Gulf of Maine* case.

islands varies. In *Libya-Malta*, uninhabited islands received no effect, and Malta itself arguably suffered by being an island.

In none of the cases was a geomorphologic discontinuity found controlling. However, in *Gulf of Maine*, the Court appeared to reserve judgment on whether such a situation could occur in another context.¹³¹

Other considerations appeared unimportant in the initial boundary delimitation.¹³² As stated above, the LOSC codified the principle that parties should agree, but when agreement is not possible a tribunal should use equitable principles to reach an equitable delimitation.

In sum, the following is true regarding boundary delimitation between opposite states separated by less than four hundred nautical miles:

- A. Boundary delimitation *will be* influenced by
 - (1) equitable considerations;
 - (2) proportionality between coastlines;
 - (3) populated dependent islands to a varying degree depending on size and location.
- B. Boundary delimitation *will not be* influenced by the presence of uninhabited dependent islands.
- C. Boundary delimitation *may be* influenced by:
 - (1) median line principles initially;
 - (2) the presence of geomorphologic features;
 - (3) other factors to the extent that they allow the adjudicator to check the equitable nature of the division;
 - (4) the island nature of the state.¹³³

131. The deeps considered reach two hundred meters in the case of the Hurd Deep; over one thousand meters in the rift zone off Libya; and over two hundred meters in the Gulf of Maine. See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 264, 276, *reprinted in* 23 I.L.M. 1206, 1212.

132. Dr. Ying-jeou Ma, an East China Sea scholar, concluded that claims of defense and security interests, navigation interests, historical title interests, unity of deposits interests, and fishing and EEZ interests would all be irrelevant in the East China Sea. Y. MA, *supra* note 128, at 127-32. Additionally, Dr. Ma classified the Ryukyus as a partially relevant circumstance that may not generate "full entitlement in a shelf boundary delimitation." *Id.* at 132-33.

133. Compare Cook, *supra* note 31, at 157 with Lee, *supra* note 31, at 590. Lee finds three relevant factors:

- (1) the configuration of the coastlines of the parties;
- (2) the geological and physical structure, and natural resources of the continental shelf area involved;
- and (3) a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to the coastal state and the length of its coast measured in the general direction of the coastline.

Id.; cf. Charney, *supra* note 35, at 520 ("Non-geographic factors may be almost com-

VI. JAPAN AND THE EAST CHINA SEA-BED

A. *Application of the Anglo-French, Gulf of Maine, and Libya-Malta Cases*

The *Anglo-French*, *Gulf of Maine*, and *Libya-Malta* decisions provide distinct guidance for a tribunal in any suit to settle the boundaries between Japan and its neighbors. Regardless of whether the dispute is ever submitted to the I.C.J., or otherwise resolved in accordance with international law, it is inevitable that international legal principles will affect the way in which the merits of the controversy are argued and resolved.¹³⁴

Three states in the region—China, South Korea, and Japan—have ratified the LOSC,¹³⁵ although that Convention is not yet in force. Taiwan has not ratified the LOSC.¹³⁶ The older Continental Shelf Convention is also inapplicable to this dispute.¹³⁷ Therefore, customary international law governs any boundary disputes between Japan and its neighbors.¹³⁸

Japan has granted oil concessions on the continental shelf in the East China Sea that conflict with claims and concessions made by one or more of the three other above-named states.

pletely irrelevant in all cases of boundary delimitations within 200 nautical miles from the coastline.”).

134. C. PARK, *supra* note 1, at 19.

135. OFFICE OF OCEAN AFFAIRS AND THE LAW OF THE SEA, PUB. NO. 11, LAW OF THE SEA BULLETIN 1-5 (1988); Ma, *The East Asian Seabed Controversy Revisited: Relevance (or Irrelevance) of the Tiao-Yu-T'ai (Senkaku) Islands Territorial Dispute*, 2 CHINESE Y.B. INT'L L. & AFF. 1, 5 (1982).

136. Ma, *supra* note 135, at 26.

137. While Taiwan is party to this treaty, China, Japan, and Korea are not. U.S. DEP'T OF STATE, PUB. NO. 94-33; I. KAVASS & A. SPRUDZS, TREATIES IN FORCE 325 (1988); see Lee, *supra* note 31, at 588.

138. See Lee, *supra* note 31, at 588 (discussing the development of international law on boundary delimitations in relation to the East China Sea).

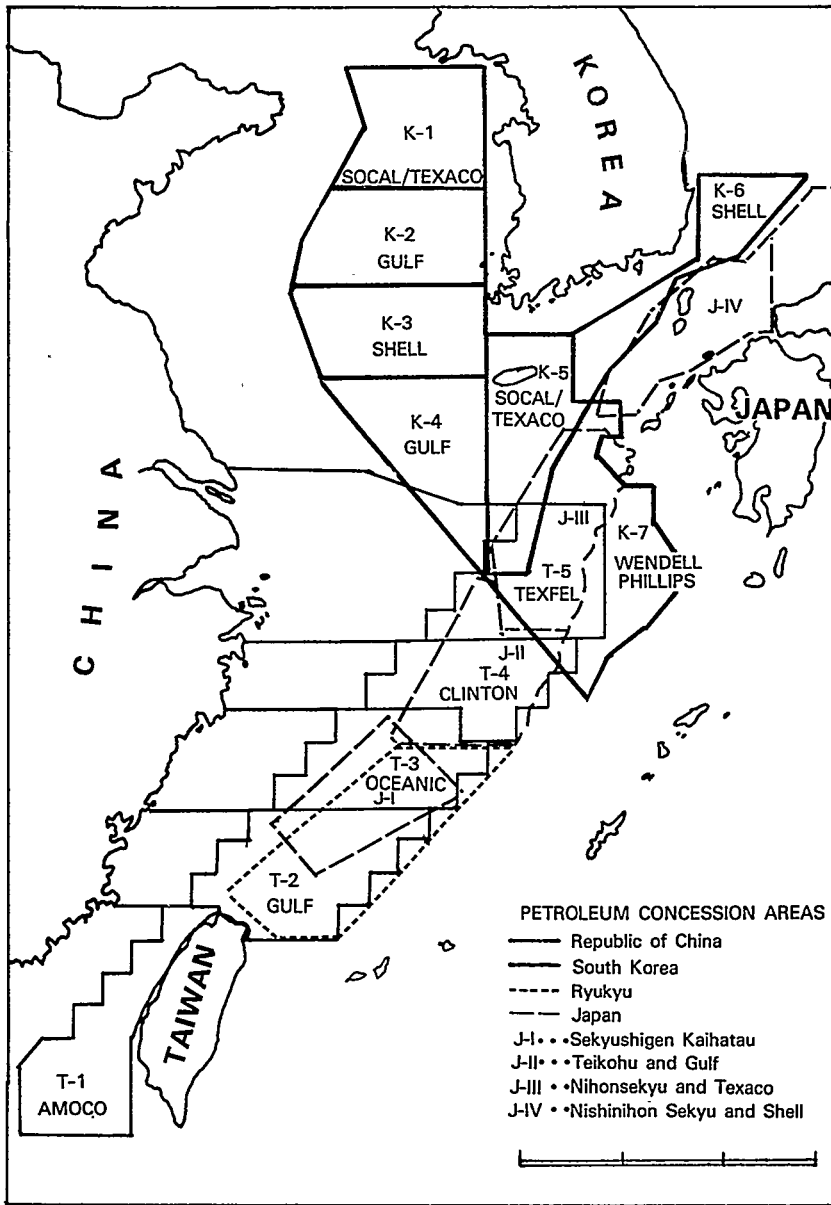


Illustration 11

Source: C. PARK, EAST AND THE LAW OF THE SEA, 348 (1983). The illustration shows the overlapping claims of the region.

Two of these concessions conflict with claims and concessions made by

both China and Taiwan; one conflicts only slightly with claims made by Korea; and the last conflicts with claims made by all three other states.¹³⁹ This last area was the subject of a Japanese-Korean joint-development agreement in 1974.¹⁴⁰ The Chinese protested immediately after the agreement was made, and Japan balked before finally ratifying the document.¹⁴¹

The overlap in claims between Japan and Korea in the Korean Straits area is perhaps the simplest to resolve.¹⁴² The oil concessions made by each state appear to reflect a median line principle and only overlap slightly.¹⁴³ It is likely that a tribunal would find that the parties already implicitly accept a median line principle, even if they do not do so expressly in their submission to the tribunal's jurisdiction. Any tribunal would likely proceed to draw such a line.

In contrast, the disputes in the East China Sea are intense and not easily resolved. Claims there depend partly on title to the islands.¹⁴⁴ The Danjo Gunto and Senkaku islands, which lie on the far side of the Okinawa Trough from Japan, help establish Japan's legitimacy as a claimant to the shelf. The islands, however, are uninhabited and nearly useless.¹⁴⁵ The I.C.J. undercut the effectiveness of a successful claim by Japan to these islands when it failed to account for similarly useless uninhabited islands in the *Libya-Malta* case.¹⁴⁶ Likewise, the LOSC provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or conti-

139. See Illustration 11 *supra* p. 611.

140. C. PARK, *supra* note 1, at 115.

141. *Id.* at 116-17, 133-34.

142. *Id.* at 23; see also Nakauchi, *supra* note 3, at 312 ("Delimitation based on the principle of equidistance would not put [North Korea, South Korea, and Japan] in an exceptionally disadvantageous position from the standpoint of sharing living and nonliving resources in the Sea of Japan.").

143. C. PARK, *supra* note 1, at 23.

144. The islands are "not really appropriate for habitation" and are primarily valuable "only in relation to the possibly tremendous offshore oil reserves around them." Nakauchi, *supra* note 3, at 312-313. Nakauchi writes:

It is hard to believe that the supposed median line . . . on the Chinese side would be unconditionally accepted by China or that Japan would accept the same line on the Japanese side. It does not seem fair or equitable that the Senkaku Islands be used as a base point for delimiting the continental shelf, thus giving rise to the title to the oil reserves and the respective shares of economic benefits.

Id. at 313.

145. Ma, *supra* note 135, at 6-8. Although small, these peaks of underwater mountains protrude as high as 383 meters and can be used for navigation. *Id.* at 8.

146. Case Concerning the Continental Shelf (*Libya v. Malta*), 1985 I.C.J. 13, 48, reprinted in 24 I.L.M. 1189, 1207 (1985).

mental shelf."¹⁴⁷ Thus, even if Japan successfully claims title to these islands, this fact will not appreciably advance its claims to the continental shelf.¹⁴⁸ Nonetheless, the Danjo Gunto and Senkaku Islands may still legitimize Japan's claim that an EEZ extending from the Ryukyu Islands should include the continental shelf on the far side of the Okinawa Trough.

The general treatment of islands raises questions about how the populated but small Ryukyus will be treated. The Ryukyus are smaller than the Channel Islands of the *Anglo-French* arbitration. Since the Channel Islands were not given effect in the general division of the English Channel, the Ryukyus arguably should not be given effect. The Ryukyus are different, however, because they continue along the geographic line of the larger Japanese islands and appear much more integrated to the state than do the Channel Islands.¹⁴⁹

As was the dispute in *Libya-Malta*, the dispute over the East China Sea is framed in terms of different interpretations of the origin of the title to ownership. Like Libya in *Libya-Malta*, China, Korea, and Taiwan base their claims on natural prolongation theory.¹⁵⁰ These states take the position that the Okinawa Trough marks the end of the continental shelf and presents a natural barrier that Japan's claims cannot cross.¹⁵¹ Some Japanese scholars, predictably, feel that a median line

147. LOSC, *supra* note 33, art. 121(3); see Ma, *supra* note 135, at 28-30 (discussion of the ambiguity surrounding the interpretation of the meaning of inhabitability). Dr. Ma describes the Senkakus and concludes that they should not be granted a continental shelf or an EEZ. *Id.* at 42-44; see also Chao, *East China Sea: Boundary Problems Relating to the Tiao-Yu-T'ai Islands*, 2 CHINESE Y.B. INT'L L. & AFF. 45, 96.

148. See Nakauchi, *supra* note 3, at 313-14 (arguing that claims to the islands only destroy settlement prospects); Valencia, *supra* note 2, at 57 (arguing that the Senkakus should have no effect on the boundary delimitation).

149. See *infra* notes 222-26 and accompanying text; see also *supra* notes 125-28, and *infra* note 172 and accompanying text.

150. C. PARK, *supra* note 1, at 27-28.

151. *Id.*; see Chiu, *Some Problems Concerning the Application of the Maritime Boundary Delimitation Provisions of the 1982 United Nations Convention on the Law of the Sea Between Adjacent or Opposite States*, 9 MD. J. INT'L L. & TRADE 1, 14 (1985). Chiu writes:

[W]hen the Republic of China made a declaration on its economic zone on September 6, 1979, it specifically pointed out:

The sovereign rights enjoyed by the Republic of China over the continental shelf contiguous to its coast as recognized by the Convention on the Continental Shelf of 1958 and the general principles of international law shall not be prejudiced in any manner by the proclamation of the present exclusive economic zone or the establishment of such zones by any other state.

principle should resolve boundary disputes between opposite states.¹⁵² The only early guidance for treatment of the Okinawa Trough is the treaty between Great Britain and Norway that disregarded the Norwegian Trough in its delimitation of the North Sea.¹⁵³ Dr. Choon-ho Park notes, however, that there are great differences between the Norwegian and Okinawan troughs.¹⁵⁴ Although Dr. Park does not seriously consider the geological differences, he notes that one significant difference is depth.¹⁵⁵

Geologically, the Okinawa Trough marks a spreading zone associated with the subduction of a plate,¹⁵⁶ whereas the Norwegian Trough cuts a region of continental shelf subsidence resulting from the opening of the Atlantic and is likely the result of glaciation.¹⁵⁷ In *Gulf of Maine*, the I.C.J. seemed to reserve the issue of whether the Court is required to recognize geologic discontinuity in boundary delimitation.¹⁵⁸ Tectonic discontinuity, the most severe geologic discontinuity, is the most likely feature to serve as a boundary limit if any such discontinuity is deemed a sufficient divider.¹⁵⁹ Yet, the *Libya-Malta* decision ignored one thousand meter deeps¹⁶⁰ (about half the depth of the Okinawa Trough) within two hundred nautical miles of the coast.¹⁶¹ This holding helps legitimize

Id.; see also Yuan, *The United Nations Convention on the Law of the Sea from a Chinese Perspective*, 19 TEX. INT'L L.J. 415, 431 n.71 (1984). Yuan observes:

China adheres to the following principles in shelf delimitations with its neighboring countries:

1. application of the concept of natural prolongation;
2. delimitation through consultation;
3. consultations shall be conducted on equitable principles, taking account of all the relevant circumstances.

Id. (citing a speech by Wang Tieya of Beijing University).

152. Lee, *supra* note 31, at 595.

153. See *supra* notes 72-73 and accompanying text.

154. C. PARK, *supra* note 1, at 29.

155. *Id.* at 29-30 (The Norwegian Trough is about two hundred meters deep, whereas the Okinawa Trough runs from two hundred meters to two thousand meters in depth.).

156. See *supra* notes 17-19 and accompanying illustration and text.

157. See E. SHEPARD & R. DILL, *SUBMARINE CANYONS AND OTHER SEA VALLEYS* 289, 293-94 (1966); see also V. LITVIN, *THE MORPHOSTRUCTURE OF THE OCEAN FLOOR* 12 (1984).

158. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 275, *reprinted in* 23 I.L.M. 1197, 1212 (1984).

159. See Cook, *supra* note 31, at 150-51.

160. These deeps are the physical manifestation of a spreading zone—also a tectonic feature resulting from a plate boundary. See *supra* note 112.

161. *Case Concerning the Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 34-

Japan's claim that the Okinawa Trough should not be a consideration in delimiting the continental shelf within two hundred nautical miles of the Japanese coast. The Japanese can now point to a tectonically related geomorphologic feature of similar size that did not terminate claims over the far continental shelf.

The *Libya-Malta* case apparently contradicts the *Gulf of Maine* case by suggesting that no discontinuity is sufficient to serve as a boundary limit. While the Court in *Gulf of Maine* hinted at some other sufficient discontinuity, in *Libya-Malta* the Court found insufficient a rift zone, which marks plate boundaries and is as significant a discontinuity as nature provides. Judge Oda questioned the majority position in *Libya-Malta* that customary international law had developed to the point of disregarding geologic factors within the two hundred nautical mile zone off a state's coast.¹⁶² He wrote that the majority's position "would have been open to challenge, had the sea-bed in the . . . case featured, not a rift zone, but the outer edge of a continental margin."¹⁶³ Judge Oda would limit the effect of geologic factors to that specific instance when a continental shelf drops off to the deep sea.¹⁶⁴ Additionally, he argued that the EEZ regime has superseded the theory of natural prolongation within two hundred nautical miles of a coastline.¹⁶⁵ The Court must decide what Judge Oda correctly points out as inconsistent: whether the continental shelf regime is superseded within two hundred nautical miles or whether the idea of "sufficient discontinuity" has any meaning. This issue is crucial to the East China Sea area. The geology of the region shows that Japan is separated from the continental shelf. The Okinawa Trough is a spreading zone that marks a continuing separation of the Ryukyus from China and is classified as a "mature" trough.¹⁶⁶ Distinction of the Okinawa Trough leaves very few situations that might satisfy the discontinuity principle.

In the case of opposite states, both the *Anglo-French* and the *Libya-Malta* cases found that the median line was the best starting point for reaching an equitable solution in the case of opposite states.¹⁶⁷ If Judge

35, reprinted in 24 I.L.M. 1189, 1200 (1985).

162. 1985 I.C.J. at 157, 24 I.L.M. at 1261 (Oda, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.* Islands do not have continental shelves and yet may possess an EEZ. LOSC article 121(2) provides: "[T]he exclusive economic zone . . . of an island [is] determined in accordance with the provisions of this Convention applicable to other land territory." LOSC, *supra* note 33, art. 121(2).

166. J. KENNETT, *supra* note 17, at 371.

167. See *supra* Part V, section D.

Oda's position prevails and the equidistance-special circumstances method becomes the preferred method of boundary delimitation—with equity serving to modify the initial results—there is yet a further question: would a modification of the equidistance principle take account of the Okinawa Trough as an equitable consideration? In the *Anglo-French* decision, the Court found that the outlying islands of the United Kingdom inequitably distorted the median line as it ran into the Atlantic. In *Libya-Malta*, the Court found that the relative proportions of the two opposite coastlines made a strict median line inequitable.¹⁶⁸ While the Ryukyu island chain is, conceivably, a group of outlying islands, they are certainly different from the outlying islands in the *Anglo-French* case. In the *Anglo-French* arbitration, the line drawn extended to water beyond the islands and was not limited to water between the islands. Even if, as it seems in *Libya-Malta*, proportionality inherently counts against island states,¹⁶⁹ Japan arguably is not affected since the coastline is traditionally measured along the baseline.¹⁷⁰ Japan's baseline extends in an even arc parallel to the outward edge of the Asian continent and bears nearly a one-to-one proportion with the Chinese coastline. This approach is generally consistent with treatment of archipelagic states under the LOSC.¹⁷¹ Professor Cook, analyzing a similar situation between opposite states with a dividing trough off the coast of Australia, concludes that the outcome of an international adjudication is presently uncertain, but he believes that such an adjudication would probably favor an equidistant division.¹⁷²

Although the result of adjudication is unclear, the evolution of boundary delimitation cases suggests that initially a tribunal would divide the East China Sea along a median line due to the opposite nature of the states. The line would probably be moved toward Japan because of the Okinawa Trough and because the southern reaches of Japan are composed of smaller islands. This result is not certain, however, since an adjudicatory body could reasonably find either that the Trough divides the sea floor, or that the Ryukyus should be given full effect.

168. *Id.*

169. *See supra* notes 120-28 and accompanying text.

170. Dr. Park predicted this result in 1975. C. PARK, *supra* note 1, at 112-113; *see also* EAST ASIAN PERSPECTIVE, *supra* note 21, at 291.

171. *See* LOSC, *supra* note 33, arts. 47 (baselines), 48 (measurement of continental shelf and EEZ).

172. Cook, *supra* note 31, at 166-75. Professor Cook finds that "the EEZ will probably prevail in cases of overlap with the continental shelf." *Id.* at 166.

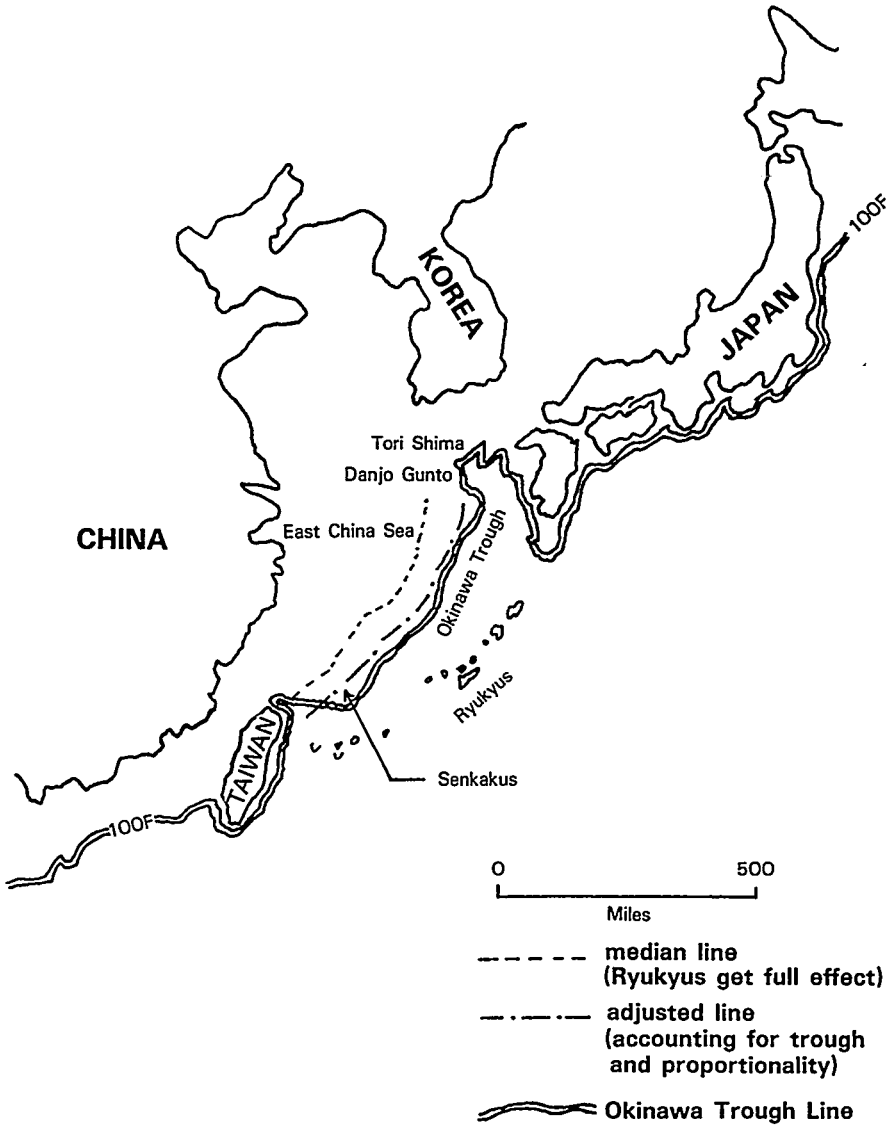


Illustration 12

B. Political Considerations Preceding Resolution of the Boundary Dispute in the East China Sea

While it is possible to predict the outcome of boundary dispute resolution by an international tribunal with varying degrees of certainty, the prediction does not answer whether that method of dispute resolution is feasible. To predict whether Japan and its neighbors can resolve their boundary dispute as Libya and Malta or the United Kingdom and France have done requires analysis of the similarities and differences in

the political situations of these separate cases.

Dr. Park, in a series of essays, set out the intricacies of the political dynamic that has halted progress in resolving the boundary dispute in the East China Sea. He identifies several characteristics of the region: 1) all the states involved except China are oil importers;¹⁷³ 2) China's ocean boundary claims are unspecific;¹⁷⁴ 3) China and Taiwan both claim to represent the Chinese people;¹⁷⁵ 4) China does not recognize separate Korean governments;¹⁷⁶ 5) the region has a history of solving disputes with force;¹⁷⁷ 6) resolution of claims in the East China Sea may adversely affect China's interest in other areas along its coasts.¹⁷⁸

The three oil-hungry neighbors have already attempted jointly to develop the shelf off their coasts. In 1970, the three came to an agreement for joint shelf development that was nevertheless thwarted by Chinese claims, asserted for the first time, to the same shelf area.¹⁷⁹ Because all of the parties took the Chinese threats seriously, all activity essentially stopped for a time.¹⁸⁰ Then, in 1972, Japan and Korea drew up an agreement for joint development that both states subsequently ratified,

173. C. PARK, *supra* note 1, at 4-6, 307.

174. EAST ASIAN PERSPECTIVE, *supra* note 21, at 281.

175. C. PARK, *supra* note 1, at 10-12; *see also* Lee, *supra* note 31, at 586 ("[T]he Beijing government will not negotiate with the Taipei government unless Taiwan is willing to become an autonomous province of the People's Republic of China . . ."). Taiwan in turn has threatened to cut its trade with Japan should Tokyo and Beijing ever reach a compromise that threatens Taipei's claims to the sea-bed. Valencia, *supra* note 2, at 54. Taipei's position appears to be having the intended effect despite Japan's announcement in 1972 that it would only settle the dispute in this area with China. *Id.* at 47.

176. EAST ASIAN PERSPECTIVE, *supra* note 21, at 292; *see also* Lee, *supra* note 31, at 586 (China will not negotiate "with South Korea, because North Korea is recognized by the P.R.C. as the only legitimate government in Korea."); Valencia, *supra* note 2, at 56, 58.

177. EAST ASIAN PERSPECTIVE, *supra* note 21, at 295; *see also* Valencia, *supra* note 2, at 50 ("Northeast Asia contains probably the most deeply divided regional pattern of state relations in the world."). *But see* Lee, *supra* note 31, at 595 ("[I]ncreasing economic ties together with appreciation of the value of the bilateral diplomatic relationship between China and Japan since 1970 indicate that resort to armed force is not anticipated.").

178. EAST ASIAN PERSPECTIVE, *supra* note 21, at 256. Apparently this political dynamic even obtains to the natural prolongation theory that is so important to China in the East China Sea, but which would work to its disadvantage in its boundary disputes with Vietnam. *Id.* at 258.

179. C. PARK, *supra* note 1, at 130-31.

180. *Id.* at 133; *see also* Valencia, *supra* note 2, at 54 (The parties included the United States, which told its oil companies they were on their own in the region.).

although Japan waited six years to do so.¹⁸¹ China has disputed this agreement since its inception.¹⁸² Dr. Park suggests that Japan was slow to ratify in part because of China's protest but more probably because of a perception that the ocean regime was swinging back toward a median-line principle.¹⁸³ Despite its concerns, Japan did ratify and subsequently unsuccessfully pursued the possibility of a similar joint development with China in the presumably oils rich Senkaku island area in 1979.¹⁸⁴ In addition, Japan is a recent partner in the development of the Yellow Sea between China and Korea.¹⁸⁵ Thus, these states are moving together on the resource issue, an issue that is closely tied to the concept of sea-bed jurisdiction. Despite Dr. Park's early pessimism, he now suggests that at some point the pressure will become too great for China to hold up resolution of this dispute—if China does not act, it may be left out.¹⁸⁶

Even if the states of the East China Sea began to solve their disputes over resources in the sea, would they honor a tribunal's edict on boundary delimitation? Historically, China has discounted international law as a tool of the bourgeois capitalist states.¹⁸⁷ Nonetheless, "China has taken a 'pick and choose' attitude toward some of the judicial decisions of the [I.C.J.],"¹⁸⁸ choosing those that emphasize natural prolongation and

181. C. PARK, *supra* note 1, at 133-34. Korea ratified the agreement in 1974 and Japan ratified the agreement in 1978. Japan's official explanation for accepting the joint development zone, which lies entirely on the Japanese side of the median line, is as follows:

(1) the continental shelf in the joint development zone is considered as part of the natural prolongation of mainland China and Korea; (2) the recent LOS Conference had a tendency to strengthen the theory of the natural prolongation of the continental shelf . . . ; and (3) the establishment of such a joint development zone, therefore, is neither unfavorable nor disadvantageous to Japan.

Nakauchi, *supra* note 3, at 313.

182. Valencia, *supra* note 2, at 47.

183. EAST ASIAN PERSPECTIVE, *supra* note 21, at 292.

184. That attempt failed when China reportedly "responded affirmatively, on the condition that the joint attempt would in no way affect its stand on the territorial issue." *Id.* at 295 (emphasis added); Valencia, *supra* note 2, at 55; *cf.* Lee, *supra* note 31, at 600; Cheng, *China's Japan Policy in the 1980s*, 61 INT'L AFF. 91, 105 (1984-85).

185. Richardson, *Jan Mayen in Perspective*, 82 A.J.I.L. 443, 451 (1988).

186. EAST ASIAN PERSPECTIVE, *supra* note 21, at 296. Note also that export of crude and refined oil products made up twenty to twenty-five percent of China's exports over the last four years. Valencia, *supra* note 2, at 52.

187. Yuan, *supra* note 151, at 423. The attitude described is still prevalent today. *Id.* at 426-47.

188. *Id.* at 426.

promote China's self interest.¹⁸⁹ As to the political feasibility that the states might submit to a tribunal's authority, the *Anglo-French and Gulf of Maine* cases provide poor analogies because the states involved in these disputes have a history of co-operation that is lacking among the states of the East China Sea.

The *Libya-Malta* case, nevertheless, suggests that states with little in common can successfully use international adjudication. Relations between Libya and Malta are historically tense, Malta having once served as a base for threatening British and NATO forces.¹⁹⁰ Relations between the two states ameliorated somewhat after the base was removed. One author observes:

Albeit not without controversy, diplomatic relations between Libya and Malta were generally cordial over the next few years [after the base was removed]. In 1976, for example, the two states agreed to refer an offshore oil dispute to the International Court of Justice As in a similar dispute with Tunisia, the question of offshore oil rights with Malta was an extremely sensitive one for Libya. Both disputes involved potential new oil discoveries likely to become operational in the 1990s, when Libya's onshore production would begin to decline.¹⁹¹

The *Libya-Malta* case shows that dispute resolution by an international tribunal provides an alternative for politically delicate situations. Advantages of submission to the I.C.J. include an opportunity for leaders to shift the blame for the result; a chance to depoliticize the issue; and an opportunity to encourage the growth of international legal order in the region.¹⁹² There are, however, serious drawbacks to submission; these include the loss of control; the risk of national humility in a region sensitive to such special consequences; and the danger to China in pro-

189. *Id.* Professor Yuan translated a 1957 article from the Chinese People's Daily newspaper which exemplifies this attitude:

International law is one of the instruments for settling international problems. If this instrument is useful to our country, to the socialist cause, or to the cause of peace of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to the socialist cause, or to the cause of peace of the people of the world, we will not use it and should create a new instrument to replace it.

Id. at 428 (quoting Chu, *Refute Chen Tichiang's Absurd Theory Concerning International Law*, People's Daily, Sept. 18, 1957). This is consistent with China's efforts to delete article 309 from the LOSC so that reservations to the Convention would be allowed. See Lee, *supra* note 31, at 593.

190. R. ST. JOHN, *supra* note 101, at 87.

191. *Id.* at 88.

192. Lee, *supra* note 31, at 596.

moting what it sees as an inherently flawed international legal order.¹⁹³

C. *Alternative Solutions*

This author would add one more factor to Dr. Park's region-defining characteristics—China's new openness to foreign investment and to the joint development zone.¹⁹⁴ Park notes that China historically used a policy of strict self-reliance that foreclosed foreign help in development of oil reserves.¹⁹⁵ The recent consideration of a joint development zone¹⁹⁶ and the change in China's position on self-reliance suggest that resolution of the boundary disputes of the region is not as chimerical as it once was. Joint development is attractive because, as commentator Elliott Richardson observed in the context of the Jan Mayen conciliation, it "minimiz[es] the potential for conflict, often by eliminating competition over the ownership of the resources. . . . It converts the otherwise intractable issue of ownership into a question of distribution and of quantity . . ." ¹⁹⁷ Finally, Japanese-Chinese cooperation in the Yellow Sea and Soviet-United States co-operation in the Berents Sea are evidence that po-

193. *Id.* at 597. Valencia writes:

In the context of the great economic and political movements in Northeast Asia, maritime issues are a relatively minor affair. However, some maritime issues may be so crucially situated in time or substance vis-a-vis the balance of much greater issues that they could have a significant impact on political relations in the region. Disputes over islands or boundaries in areas of great petroleum potential may be such issues.

Valencia, *supra* note 2, at 52.

194. See, e.g., Yuejiao, *A Brief Introduction to Recent Laws and Regulations Concerning the Absorption of Foreign Direct Investment in the People's Republic of China*, 4 CHINA L. REP. 125. China apparently desires open relations with the rest of the world community despite the strains that its actions at Tiananmen Square have placed on those relations. See, e.g., Butler, *Peking's Old Men Blind to World Horror at Killings*, *Fin. Times* (London), June 23, 1989, at 4, col. 6.

195. C. PARK, *supra* note 1, at 345-50.

196. See, e.g., Lee, *supra* note 31, at 600 (noting China and Japan agreed to joint development in the Bohai Gulf); Valencia, *supra* note 2, at 40. China also suggested solutions to its conflict with Taiwan, including the establishment of a joint development zone. *Id.* at 56.

197. The Jan Mayen conciliation recommended use of a JDZ to settle a boundary dispute between Iceland and Jan Mayen (Norway). Richardson, *supra* note 185, at 448-49; see also Lee, *supra* note 31, at 600 (suggesting a JDZ between China and Japan). Lee notes that two hurdles must be cleared before a JDZ is feasible in the East China Sea: 1) the sovereignty dispute with Taiwan; and 2) the fact that China criticized the Japan-Korea precedent for trying to resolve the issue without recognizing China's legitimate claims. *Id.* Also, Japan does not want to jeopardize its economic ties with Taiwan. *Id.*

litical and ideological rivalry need not necessarily stand in the way of joint development.¹⁹⁸ Despite the positive support for joint development zones (JDZs) they are not universally embraced. By their nature, JDZs depend on cooperation and lack finality.¹⁹⁹

There exists an important theoretical precedent for the possibility that a more receptive China could reach an alternative agreement in the situation off the coast of Australia. The geologic situation of Australia and Timor closely resembles the geology of Japan and its western neighbors. The Timor Sea, situated off the northern coast of Australia, is cut by

a significant submarine feature, the Timor Trough [that] continues the line of the Sunda Trench, a deep submarine depression running parallel to and south of the island arc The Trough is situated between 30 and 60 [nautical miles] from Timor, over 200 [nautical miles] from the Australian coast, and is up to 3,400 meters in depth.²⁰⁰

The entire distance between the two states is less than four hundred nautical miles.²⁰¹ Finally, geologists place Australia and Timor on separate, converging tectonic plates.²⁰² "The distinctive topographic feature resulting from . . . convergence is a great oceanic trench often accompanied by a parallel island arc" like that in Australia-Timor and China-Japan.²⁰³

198. Richardson, *supra* note 185, at 451, 456. For an argument favoring this approach, see Valencia, *supra* note 2, at 57. China's execution of student demonstrators in the summer of 1989 appears to have evoked a mixed reaction in Japan. See Weisman, *Tokyo Faults U.S. Sanctions For Chinese*, N.Y. Times, June 22, 1989, at A11, col. 1. Japan suspended new economic aid to China but has taken care not to ostracize China. Japanese businessmen, who began travelling on tourist visas to establish or maintain business ties, drew government criticism. *Id.* While commentators predict a short-term slowdown they do not foresee long term effects on China's relations with other countries. See, e.g., *Leninism and After*, Fin. Times (London), June 22, 1989, at 26, col. 1. There is already evidence that the slowdown will not be permanent. Kido, *Japan Moving to Normalize China Ties*, 27 Japan Econ. J. 1378, at 1, col. 2 (weekly ed. Aug. 26, 1989); cf. *id.* at 4, col. 4; Bruce & Riddell, *Tough Sanctions on China Agreed*, Fin. Times (London), June 27, 1989, at 1, col. 3.

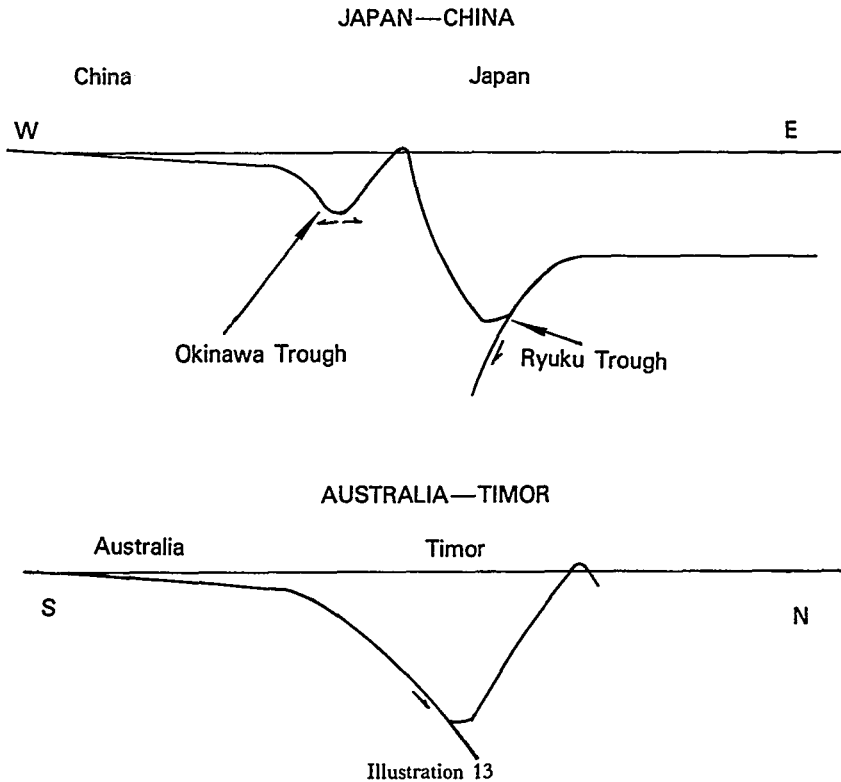
199. Cook, *supra* note 31, at 165.

200. *Id.* at 132.

201. *Id.*

202. *Id.* at 150-51. The only significant difference is that while Australia and Timor are converging, China and Japan are diverging with the convergence of plates taking place on the ocean side of Japan.

203. *Id.*; see J. KENNETT, *supra* note 17, at 355 (classifying both continental margins in a chart). The two situations are very similar insofar as the states making claims are located on different continental blocks on either side of a subduction zone. The margin difference is that, in the case of the Ryukyus, it is the ocean on the far side that is



Comparing the tectonics in the Japan-China and Australia-Timor regions.

subducting, while in the case of the Sunda Trench, the Australian continent is being subducted. See Illustration 11 *supra* p. 611. Because the Okinawa Trough is more geologically complex than the Timor Trough, Japan could claim that any discontinuity between Japan and China is not quite as severe as that which exists between Australia and Timor. Although both result from similar tectonic activity, the Okinawa Trough on the continental side of the Ryukyus is a spreading zone that results less directly from subduction than does the Timor Trough, that directly overlays its subduction zone. The trench corresponding to the Timor Trough in the Ryukyus is the Ryuku Trench on the oceanic side of the islands. There is no trough corresponding to the Okinawa Trough in the Timor regime. Recall that in *Libya-Malta*, the Court did not recognize that a rift or spreading zone was a significant discontinuity, although technically such a zone does represent the boundary between plates. See *supra* notes 112-15 and accompanying text.

In 1973, Australia legislatively confirmed its 1953 claim to the entire continental shelf off the Australian coast.²⁰⁴ In 1980, Indonesia claimed a two hundred nautical mile EEZ that overlapped the Australian claim and created a situation similar to that in the East China Sea.²⁰⁵

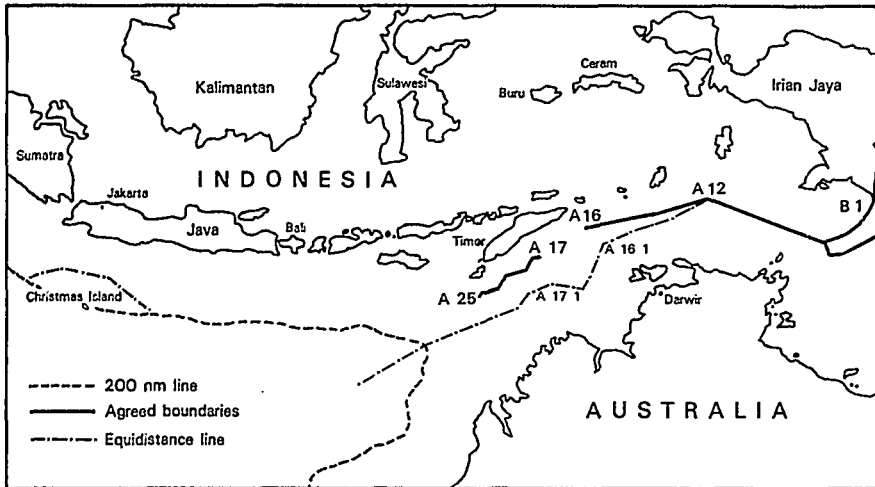


Illustration 14

Source: Cook, *Filling the Gap—Delimiting the Australia-Indonesia Maritime Boundary*, 10 AUSTL. Y.B. INT'L L. 131, 135 (1987)

Although the Australian situation involves fewer parties, some of the same political considerations involved in the East China Sea dispute obtain there. Professor Cook points out that “[r]ight in the middle of the gap in the agreed boundary, opposite East Timor, lies the Kelp Structure or Prospect [that] is estimated to contain oil reserves of between 500 million and 5 billion barrels.”²⁰⁶ The relationship between Indonesia (which controls the island of Timor) and Australia has historically been

204. Cook, *supra* note 31, at 133.

205. *Id.* at 134. The “agreed boundary line” approximately traces the Timor Trough. *Id.*

206. *Id.* at 135. Other estimates confirm that at least fifty to 250 million barrels may exist in this zone. Reid, *supra* note 39, at 553 (criticizing the higher estimates as “irresponsible”).

tense. The two states, however, began talks once Australia recognized Indonesian sovereignty over Timor in 1985.²⁰⁷

Professor Cook reached many of the same conclusions as this Note when he analyzed the guidance international law provides to the boundary delimitation between Australia and Indonesia. Professor Cook found that the LOSC gives little guidance on the topic and looked instead to the decisions of international tribunals.²⁰⁸ He found that none of the cases dealing with opposite coast delimitation set up a hard and fast rule,²⁰⁹ and he decided accordingly that the broadest possible conclusions are that 1) the theory of natural prolongation is subordinate to equity;²¹⁰ 2) geographic considerations predominate in reaching an equitable solution;²¹¹ and 3) the evolution of the concept of the EEZ has further subordinated the theory of natural prolongation within two hundred nautical miles of a state's baseline.²¹² After analyzing the rules regarding EEZ delimitation, Professor Cook also concluded that "[t]he search for norms of international law on delimitation of the EEZ between adjacent or opposite States is a frustrating and fruitless one."²¹³ Professor Cook extended his analysis to include state practice in each of these areas and found that in areas where no intervening plate boundary exists, states tend to apportion their shelves by drawing a median line and, failing that, by creating a JDZ.²¹⁴ Additionally, he found that, in delimiting EEZs, states tend to use a median line out of acquiescence, not obligation.²¹⁵

Because of the conflict between the continental shelf regime and the principles of the EEZ, Professor Cook seeks, as others have sought, a solution outside the traditional means of boundary delimitation. Com-

207. Reid, *supra* note 39, at 552.

208. Cook, *supra* note 31, at 155; *see also* Reid, *supra* note 39, at 547; Chiu, *supra* note 151, at 16 ("The provisions on delimitation of the exclusive economic zone/continental shelf between states with opposite or adjacent coasts in the 1982 [UNCLOS] are too general and therefore give rise to some difficult problems in their application to a concrete case.").

209. Cook, *supra* note 31, at 160.

210. Chinese scholars feel this hierarchy is backwards. *See* Yuan, *supra* note 151, at 426.

211. Cook, *supra* note 31, at 147-48; *see also* Charney, *supra* note 35, at 520 ("Non-geographic factors may be almost completely irrelevant in all cases of boundary delimitations within 200 nautical miles from the coastline.").

212. Cook, *supra* note 31, at 160.

213. *Id.* at 163.

214. *Id.* at 153.

215. *Id.* at 162-63. A sense of legal obligation, or *opinio juris*, is necessary for the formation of international law. HENKIN, *supra* note 24, at 37.

mentators suggest a JDZ for the Australia-Timor Gap²¹⁶ and the states have conducted talks on the subject.²¹⁷

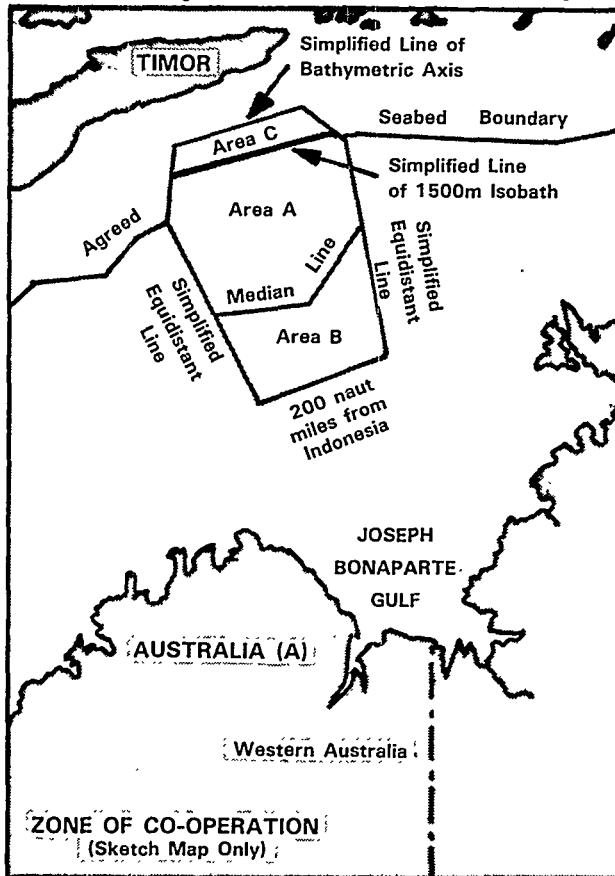


Illustration 15

Source: 59 AUSTL. FOREIGN AFF. REC. 387 (1988). The illustration shows the agreement reached by officials making proposals to the governments of Australia and Timor for resolution of the boundary dispute.

216. See, e.g., Reid, *supra* note 39, at 553. Reid suggests that this solution is supported by the LOSC and customary international law which, he declares, require states to seek a good faith agreement on the division of common deposits of petroleum. *Id.* at 547-48.

217. See, e.g., *Zone of Cooperation Proposed for Timor Gap*, 59 AUSTL. FOREIGN AFF. REC. 387 (1988) [hereinafter *Zone of Cooperation*]; *Australia-Indonesia Relations: Officials' Talks on Maritime Borders*, 57 AUSTL. FOREIGN AFF. REC. 566 (1986); *Australia-Indonesia Relations: Officials' Talks on Maritime Boundaries*, 57 AUSTL. FOREIGN AFF. REC. 555 (1986). Australia initially proposed the idea of a joint authority for administering the area. Valencia, *Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas*, 23 SAN DIEGO L. REV. 661, 680-81 (1986).

Professor Cook dislikes this solution because it requires cooperation and entails a lack of finality. He believes that such a solution creates a potential for future conflict if relations sour between the states. He suggests instead an equal division of the overlap between the claims of the two states.²¹⁸

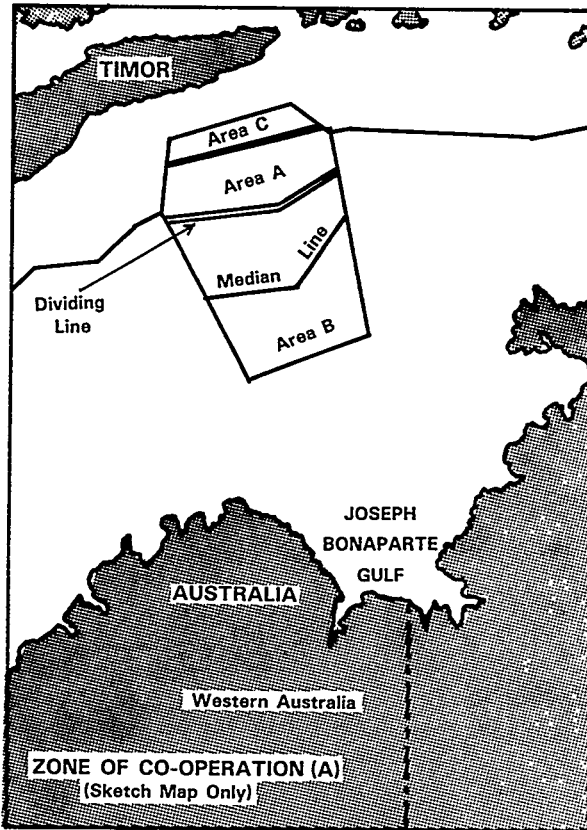


Illustration 16

Modified from: 59 AUSTL. FOREIGN AFF. REC. 387 (1988). The illustration shows the line dividing the best claims made by each side.

218. Cook, *supra* note 31, at 166-68. Professor Cook believes that within the area defined by an EEZ, the EEZ regime will eventually subsume the continental shelf regime in international law. *Id.* Australia and Indonesia recently agreed to try a solution different than either of these two proposals. The agreed solution establishes a JDZ in the area of overlap roughly between the median line and the Timor Trough. It gives the areas outside this zone to the jurisdiction of the closest country. See *Zone of Cooperation*, *supra* note 217.

Professor Cook's solution, however, does not aid the development of international boundary delimitation because it merely encourages maximalist claims and adds uncertainty to the process.²¹⁹ Despite the identified shortcoming of Professor Cook's solution, either his proposal or a JDZ could be made to work in the discrete situation of the East China Sea. Professor Cook's solution seems especially apt, particularly in light of the struggle between Taiwan and the People's Republic of China, as well as the recent unrest in China.²²⁰

Dr. Ying-jeou Ma has proposed a solution based on proportionality that achieves a similar result.²²¹ Dr. Ma finds that a comparison of the land to water ratio along the coast of the Ryukyu islands to the unbroken continental coast of China precludes finding broad equality between the coasts.²²² Dr. Ma believes that the land mass of the four main Japanese islands distinguishes that part of Japan from the Ryukyus to the south.²²³ Dr. Ma computes that this coastal difference favors China by a ratio of approximately sixty-five to thirty-five.²²⁴ He would use these figures to "serve as a guideline to the range of proportions an equitable delimitation ought to bring about."²²⁵ Treating the Japanese islands in this manner²²⁶ advantageously utilizes an established basis of delimita-

219. Charney Interview, *supra* note 130. Instead of encouraging development of a principle that can be applied in non-judicial settings, Professor Cook's solution gives parties an incentive to make extreme claims that will have to be factually verified and then resolved by a third party. Cook, *supra* note 31, at 165-69.

220. The Taiwan-China "rivalry remains a major stumbling block to any peaceful settlement of the Sino-Japanese sea-bed dispute in the East China Sea." Chao, *supra* note 143, at 97. The advantage of Cook's suggestion is that it is easier for Taiwan and the People's Republic of China to reach an accord because to do so does not presuppose that either must lose the governmental dispute. Additionally, agreement does not presuppose an on going relationship between the two parties. Nonetheless, there is no incentive for these two states to compromise their claims and to help Japan since they would remain unable to develop the area until their own dispute is resolved. Overcoming this obstacle requires ingenuity on the part of the Japanese, but they have great incentive for ingenuity that may result in clear title to a part of the shelf from which they are presently at some risk of being excluded. On China's unrest, see *supra* note 198.

221. Y. MA, *supra* note 128, at 157-58.

222. *Id.* at 157. This conclusion is similar to the result achieved on the basis of an analysis treating the Ryukyus as offshore dependent islands rather than as part of the mainland. See *supra* note 148 and accompanying text.

223. Y. MA, *supra* note 128, at 158.

224. *Id.* at 164, 259.

225. *Id.* at 164; *cf.* Cook, *supra* note 31, at 173 (considering the relation between the Indonesian archipelago and the Australian mainland without taking account of proportionality concerns).

226. *Cf.* Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13,

tion (proportionality), favoring China and others in this area, yet giving Japan a stake in the oil reserves purportedly on the far side of the Okinawa Trough.

Japan may be able to seek one of the methods of cooperation in the East China Sea as a means for securing its ability to continue its policy of economic expansion.²²⁷ Such action also coincides with the general call for Japan to take the international initiative; it accommodates the stated Japanese ideal of harmonious relations within the Asian community; and it allows Japan access to the area's oil.

VII. CONCLUSIONS AND COMMENTS

The I.C.J. in the *Gulf of Maine* case stated that general international law forbids unilateral boundary delimitation between adjacent or opposite states and requires that parties to a boundary dispute submit to dispute resolution if negotiations fail.²²⁸ Accordingly, the neighbors on the East China Sea are obligated to work out a boundary or submit the dispute to a third party; yet, fulfillment of this obligation still rests with the parties. Whether they will be motivated to seek third party resolution or to resolve the issue among themselves depends on a number of factors, including 1) perceptions of the law such a body would apply; 2) economic need for the resources of the region; and 3) the relations between the neighbors. Analysis of the situation suggests that the application of the law is uncertain in the East China Sea primarily because that law does not yet definitively address how to treat troughs like the Okinawa Trough or islands like the Ryukyus. These uncertainties in turn stem from uncertainty as to interpretation of "equity," the fundamental norm of boundary delimitations. Analysis also suggests that many historical problems that have prevented resolution of the dispute still exist, although some have recently abated allowing for a greater chance for resolution of this complex boundary dispute.

Even though the *Libya-Malta* case demonstrates that international

reprinted in 23 I.L.M. 1197 (1984). *But cf. supra* note 171 and accompanying text. China was silent as to this article in deference to Third World wishes. H. CHIU, CHINA AND THE LAW OF THE SEA CONFERENCE 17 (University of Maryland School of Law, Occasional Papers/Reprints Series in Contemporary Asian Studies No. 4-1981 (41), 1981).

227. See generally K. VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER (1989) (discussing the structure of the Japanese political system and finding that while there are no Japanese political leaders in the traditional sense of the word there is nevertheless a policy of continued economic expansion to which one can appeal).

228. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 299, reprinted in 23 I.L.M. 1197, 1224 (1984).

tribunals are a viable means of dispute resolution for states of different ideologies, that case does not offer enough security to recommend judicial resolution by the I.C.J. as the best means of settling the boundary dispute in this case. The situation in the East China Sea is not as simple as it was in *Libya-Malta*: more states are involved; some of the states have no diplomatic relations with their neighbors; and resolution of the East China Sea dispute could have political implications outside that area for one major player—China. Still, the recent opening of China to foreign joint ventures and the tentative first success of such a joint venture in the Yellow Sea suggest that there is a possibility for agreement. If resource management issues are solved independently, boundary lines in the region may be easier to draw and states may be more willing to submit to an international tribunal. Recent trends in international law and the political climate in China suggest, although with recent cause for concern relating to the student outbreak and the Chinese Government response in Tiananmen Square, that Japan may have a greater chance to benefit from pursuit of such a course of action than it had in the past.

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