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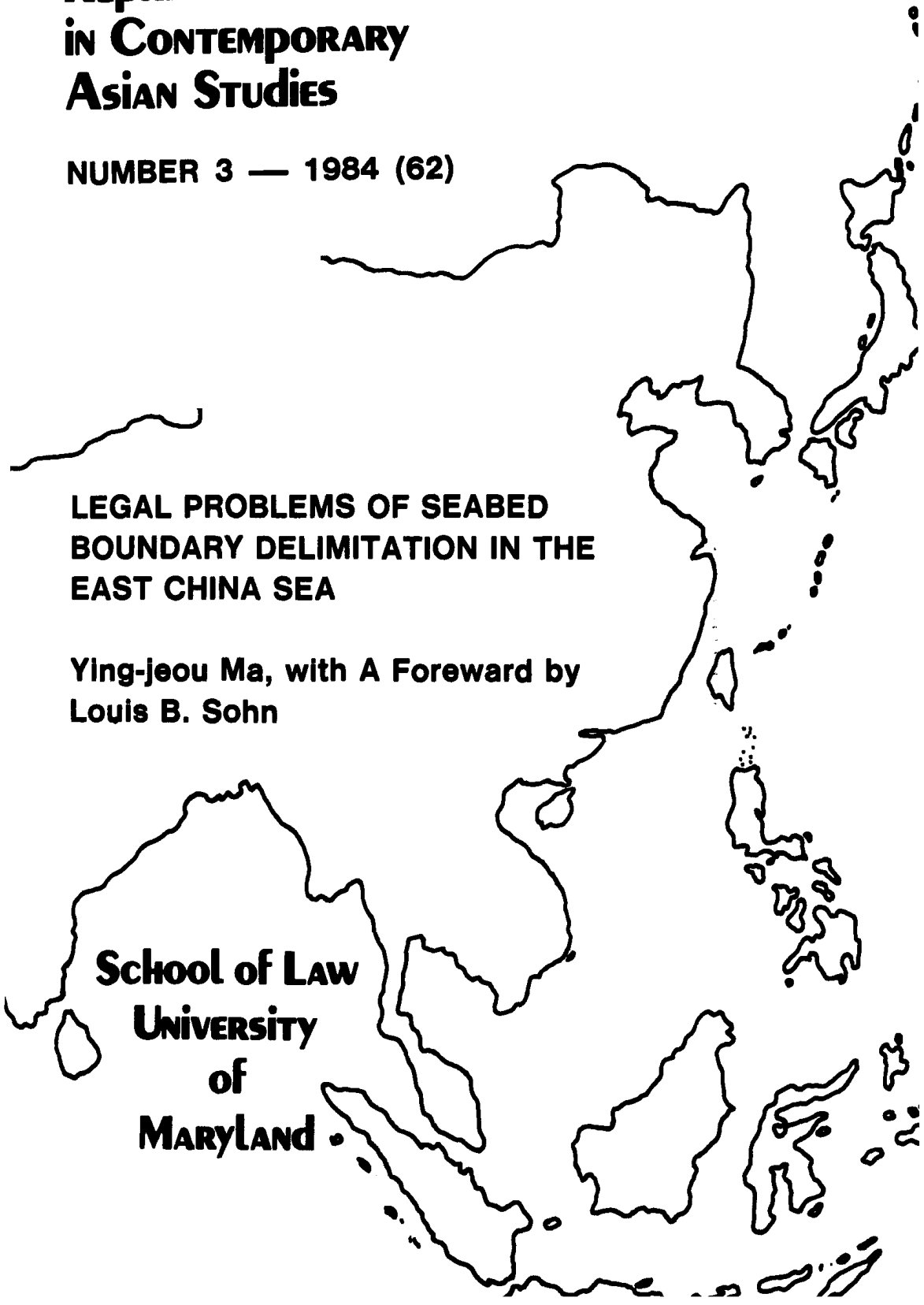
LEGAL PROBLEMS OF SEABED BOUNDARY DELIMITATION IN THE EAST CHINA SEA

Ying-jeou Ma, with A Foreward by
Louis B. Sohn



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This book is lovingly dedicated to
the memory of my grandparents
Li-an and Tun-o Ma
and my parents
Ho-ling and Hou-hsiu Ma
who taught me our family motto —
"Treasure thou not gold; but treasure books.
All is vanity except charity."

FOREWORD

Dr. Ying-Jeou Ma was one of my most diligent students, and this book is an excellent example of his ability to master the complex problems of boundary delimitation in the East China Sea and to collect the widely scattered and not easily obtainable documentation on this subject.

In order to make the situation more understandable, Dr. Ma provides first a description of the geography, geology, and geomorphology of the region. As any careful reader of decisions of the International Court of Justice soon discovers, even when the Court officially discards most of these factors in a particular case, some of them are taken by the Court into account. The author, therefore, in his discussion of the claims of various coastal States, pays close attention to the particular problems faced by each State in defending its position, emphasizing one factor in one situation, and a different factor in another.

Dr. Ma analyzes also the existing conflicts between the various pairs of States, first in general and then in relation to the undersea oil deposits. He points out that some extraneous factors need also be considered, such as the territorial dispute between Japan and China concerning the Tiao-yu-t'ai (Senkaku) Islands. After such factors have been eliminated (or assuming that they have been settled by agreements), the question still remains: What are the "relevant circumstances" that need to be considered? To what extent should security and defense interests be taken into account? Are there any historical rights, and how can they be proven? Are the unity of oil deposits and the need for their effective management important? What effect should be given to fishery interests, and should the continental shelf delimitation follow the boundary of the exclusive economic zone (EEZ), or to the contrary, should the delimitation of the EEZ be related to the continental shelf delimitation? (It was the latter issue that led the Court in the recent *Gulf of Maine Case* to a decision to use factors other than those that have been devised primarily for the continental shelf or for the EEZ.)

The author had to struggle also with the hotly disputed issue whether the delimitation should be based on the equidistance principle or some equitable principle such as proportionality. Returning finally to the various geological and geomorphological factors, the author explores how they would apply to such situations as the Oki-

nawa Trough which is an important factor in the Sino-Japanese dispute.

In the last part of his book, Dr. Ma considers in depth the special problems caused by the Peiping-Taipei rivalry. Assuming that an oil deposit is being exploited that is situated in a zone claimed by both governments and the oil is brought to a foreign port, how should a foreign court determine who is the real owner of that deposit and who is the trespasser?

This short overview of the issues discussed in the book shows its importance not only for those who are interested in oil exploration and exploitation in the East China Sea, but also to all of those who are likely to encounter similar problems in other areas of the world. As the deposits close to the shore, which are situated clearly in an area under the jurisdiction of the neighboring coastal state, are exhausted, the oil explorers will have to venture further into the troubled waters where conflicts of jurisdiction already have arisen or are likely to arise. Dr. Ma's careful analysis of precedents and their applicability to various situations should be of inestimable value to all who may become involved in these conflicts.

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Woodruff Professor of
International Law
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Bemis Professor of
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Harvard Law School

Athens, Georgia
November 1, 1984

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To say that I am indebted to Professor Louis B. Sohn, formerly of Harvard Law School and now of University of Georgia Law School, and Professor Detlev F. Vagt of Harvard Law School is an understatement. As my S.J.D. thesis supervisers during 1977-81 at Harvard, both of them have, with untiring patience, read the whole manuscript during various stages of writing and offered many valuable suggestions. Professor Sohn has also done me a great favor by contributing the foreward to this book. I am also grateful to the late Judge Richard R. Baxter of the International Court of Justice, under whose guidance when he taught at Harvard I began my first research on seabed boundary issues. My thanks also go to Dean David N. Smith of Harvard Law School and Mr. Samuel A. Stern of Wilmer, Culter and Pickering, Washington, D.C. From their courses on foreign investment in natural resources I have greatly benefited. I also thank many individuals in the U.S. oil industry, the Chinese Petroleum Corporation (CPC) in Taipei and the Ministry of Economic Affairs of the Republic of China. Their provision of materials and permission for interviews have greatly enriched this study. Acknowledged as well is assistance from the late Dr. Robert D. Hodgson, former geographer of the State Department, and Drs. Lewis M. Alexander and Robert W. Smith, his successors in that position, and from Dr. K.O. Emery of Woods Hole Oceanographic Institution, Woods Hole, Massachusetts.

I am also grateful to the Chinese Society of International Law for its permission to reprint, with some revision, as Chapter 4 of this book an article of mine which was published earlier in *Chinese Yearbook of International Law and Affairs.* Vol. 1 (1982), pp. 1-44.

I owe a great deal to Professor Hungdah Chiu of the University of Maryland Law School and Mrs. Chiu, who during the past thirteen years have always provided me with good counsel and needed assistance in many ways. I am also grateful to Professor Andreas F. Lowenfeld of New York University Law School who made my first contact with international economic law an exciting experience. The generous assistance extended to my wife and me during our four-year (1977-81) stay in Cambridge, Massachusetts by Professor Jerome A. Cohen of Harvard Law School is greatly appreciated. The tedious work of editing and proofreading was done by David Salem, James C.T. Hsia, Shaiw-chei Chuang, and Mitchell A. Silk of the

East Asian Legal Studies Program at the University of Maryland Law School, to whom I would like to express my sincere thanks.

During the three years since I returned to Taipei from the United States, a number of individuals have generously helped facilitate the preparation of this book. I particularly want to thank Admiral Ma Chi-chuang, Hon. Chang Tsu-yi, Dr. Liu Hou, and the late Mr. Lu Shou-chung of the Presidential Office as well as Professor Liu Tieh-cheng, Director of National Chengchi University's Graduate Law School where I teach.

Finally, I wish to express my profound appreciation to my wife Mei-ching and daughter Wei-chung as well as my four sisters I-nan, Nai-hsi, Bin-ru, and Li-chun and their husbands Dan-ho, Fu-chung, Shu-yuan, and Ko, respectively, and my other in-laws, in particular Vicky. Without their support, encouragement, and tolerance, this book would not have been possible. Needless to say, the author alone is responsible for any flaws that remain.

Ying-jeou Ma

Taipei, Republic of China
August 20, 1984

LIST OF ABBREVIATIONS

AAPG Bulletin	*The American Association of Petroleum Geologist Bulletin*
I.C.J. Reports	*International Court of Justice Reports*
ILC	International Law Commission [of the United Nations]
Limits in the Seas	*Limits in the Seas*, International Boundary Studies, Series A, 97 issues (as of 1984) Washington, D.C.: Office of the Geographer, Department of State, 1970-
NDLOS	*New Directions in the Law of the Sea*, edited by Houston S. Lay, Robin Churchill, Myron Nordquist, Jane Welch, and Kenneth R. Simmonds, 11 volumes (as of 1984), London: Oceana Publications, Inc. for the British Institute of International and Comparative Law, 1973-
Seabed Committee *Report*	*Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction*, Vol. 3, UNGAOR, Vol.28, Supplement (No.21), UN Doc.A/9021 (1973).
TIAS	*[United States] Treaties and Other International Acts Series*
UN Doc.	United Nations Document
UNCLOS I	[First] United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNECAFE/ COOP Technical Bulletin	United Nations Commission for Asia and the Far East, Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas, *Technical Bulletin*
UNGAOR	United Nations General Assembly, *Official Records*
UNLS/1	*Laws and Regulations on the Regime of the High Seas*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/1, 1951

UNLS/6	*Laws and Regulations on the Regime of the Territorial Sea*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/6, 1956
UNLS/8	*Supplement to Laws and Regulations on the Regime of the High Seas (Vols. I & II) and Laws Concerning the Nationality of Ships*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/8, 1959.
UNLS/15	*National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to the Fishing and Conservation of the Living Resources of the Sea*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/15, 1970.
UNLS/16	*National Legislation and Treaties Relating to the Law of the Sea*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/16, 1974.
UNLS/18	*National Legislation and Treaties Relating to the Law of the Sea*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/18, 1976.
UNLS/19	*National Legislation and Treaties Relating to the Law of the Sea*, United Nations Legislative Series, UN Doc. ST/LEG/SER.B/19, 1980.
UNTS	*United Nations Treaty Series*
UST	*United States Treaties and Other International Agreements*
YBILC	Yearbook of the International Law Commission

INTRODUCTION[1]

Shortly after dawn in the East China Sea on April 13, 1978, 100 Chinese fishing vessels emerged from the horizon and quietly assembled around Tiao-yu Island. The island is the largest of the eight uninhabited islets of a group situated 102 miles northeast of Taiwan and 240 miles southeast of Okinawa and claimed by both Japan and China (Peking and Taipei).[2] At 10 a.m., 32 of them, some armed with machine guns, entered the island's 12-mile territorial sea newly declared by Japan, the country which actually controlled the islets.[3] The crew on board the fishing vessels wielded signs and yelled slogans, claiming Chinese sovereignty over the islets as the fleet repeatedly circled the island. They vehemently defied demands of Japanese cutters and planes dispatched to the scene to leave the area.

Puzzling over Peking's real intentions, Tokyo reacted with caution to avoid complicating the pending negotiation of a friendship treaty with Peking.[4] It lodged a protest with the People's Republic of China (PRC) and demanded an explanation. The PRC simply repeated its position, made public in late 1971,[5] that the islets belonged

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1. Unless otherwise indicated, the factual account of the fishing-boat incident related below is based on the following sources: *New York Times*, April 14, 1978, p. A3; "Japanese—Chinese Dispute on Isles Threatens to Delay Peace Treaty," *ibid.*, April 15, 1978, p. 1; *ibid.*, April 16, 1978, p. 8, col. 1; Susumu Awanohara, "An Ill Wind from the Senkakus," *Far Eastern Economic Review*, April 23, 1978, p.10; William Glenn, "Cool Line on the Senkaku 'Bandits'," *ibid.*, May 5, 1978, p. 33; David Bonavia, "The Peking-Tokyo Minuet of Diplomacy is Inane," *ibid.*, June 23, 1978, p. 79; Tracy Dahlby, "Peace, Friendship . . and Some Uncertainty," *ibid.*, August 25, 1978, p. 11.

A detailed chronicle of events appears in *Po-shih-tuen T'ung-hsun* (Free Chinese Monthly), Vol. 7, No. 77 (May 1978), pp. 4-8. The periodical is published in Cambridge, Massachusettes.

2. "Tiao-yu-t'ai" is the Chinese name for the islet group as a whole and for the largest island in the group as well. The Japanese call them "Senkaku *Gunto*." Subsequent references to them as Tiao-yu-t'ai Islands instead of Senkaku Gunto suggest no preference for the claim of China (Peking and Taipei) or Japan. For detailed descriptions of the group, see Chapter 4 *infra* and Table 3.

Throughout this writing, the "People's Republic of China" (PRC) refers to the Communist Chinese Government in the Chinese mainland whereas "Republic of China" (ROC) refers to the Nationalist Chinese Government in Taiwan. "China" and "Taiwan" are used in their geographical sense only, unless otherwise indicated.

3. Japan declared a 12-mile territorial sea and 200-mile fishing zone on July 1, 1977. For the enabling legislation, see UNLS/19, pp. 56, 215, 218.

4. For an in-depth political analysis, see Daniel Tretiak, "The Sino-Japanese Treaty of 1978: The Senkaku Incident Prelude," *Asian Survey*, Vol. 18 (1978), p. 1235.

5. *Peking Review*, January 7, 1972, p. 12.

to it, and expressed concern over the incident's impact on the treaty negotiations. In addition, the Republic of China (ROC) in Taiwan, the third claimant to the islets, declared that its sovereignty over the group would not be affected by claims of "any other parties."[6] Subsequently, while PRC leaders tried apologetically to explain away the "accident" to the Japanese,[7] the fishing boats doubled their number to 200. The flotilla cruised in and out of the 12-mile zone before it finally left on April 26. On the next day, the Japanese further were assured that henceforth Chinese fishermen would refrain from fishing around the Tiao-yu-t'ai Islands.[8]

The incident not only dramatically suspended the PRC-Japan friendship treaty negotiations, which had been going on since the previous February,[9] but also revived a territorial dispute between the two countries. The sovereignty issue was the focus of much attention in the early 1970s by Japan, the ROC, the PRC, and the United States.[10] Japan insisted that the islets were a part of the Ryukyu Islands returned to Japan in 1972 by the U.S. under the 1971 Okinawa Reversion Treaty,[11] whereas both Chinese governments contested that view on historical, geographical, and legal grounds.[12] The issue was understandably shelved when the PRC and Japan established diplomatic ties in September 1972 and had remained dormant until the incident occurred.[13]

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6. *Chung-yang Jih-pao* (Central Daily News), April 14, 1978, p. 1. The *Central Daily News* is a Kuomintang-owned Chinese-language newspaper based in Taipei.

7. This was what Keng Piao, a PRC vice premier, told Hideo Den, leader of Japan's Democratic Socialist Union Party, in Peking. *New York Times*, April 16, 1978, p. 8.

8. This was the statement of Liao Ch'eng-chih, Deputy Chairman of the Standing Committee of the National People's Congress (the PRC's nominal parliament), and the President of the Sino-Japanese People's Friendship Association, to Utsunomiya Tokuma, a visiting member of the Japanese Diet (parliament), in Peking. *Mainichi Daily News*, April 29, 1978, p. 1.

9. Tretiak, *supra* note 4, pp. 1241-46.

10. For the body of legal literature relating to the Tiao-yu-t'ai Islands, see Ch. 4 *infra*, at note 1.

11. For the official Japanese position, see Statement of Foreign Ministry of Japan, March 8, 1972. English translation appears in Jerome A. Cohen and Hungdah Chiu, *People's China and International Law*, Princeton, N.J.: Princeton University Press, 1974, pp. 351-52 [hereinafter cited as Cohen & Chiu].

12. For the official position of the ROC, see *Chung-yang Jih-pao*, June 12, 1971, p. 1, and for that of the PRC, see *supra* note 5.

13. *New York Times*, September 30, 1972, p. 1. The joint communiqué issued in Peking by Chou En-lai, the PRC's premier, and Tanaka, the Japanese premier, made no mention of the islands. Chou reportedly said to Tanaka that "[l]et's not dispute [the islands]. After all, they are little dots hardly noticeable in a map. The question arose merely because oil is believed to lie around them." *Ming Pao* (Ming Daily), October 2,

In retrospect, the PRC's "fishing-boat diplomacy" seems to have been intended to prod the Japanese to expedite the treaty negotiations, which were losing momentum at the time.[14] Peking's interest in the early conclusion of the treaty apparently outweighed its territorial claim to the Tiao-yu-t'ais.[15] Both Peking and Tokyo have expressed interests in jointly developing resources around the islets, leaving aside the vexing territorial issue.[16] No agreement has thus far materialized, however.[17]

Apart from the political dimension, there are complicated legal

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1972, p. 4. *Ming Pao* is an independent Chinese-language newspaper published in Hong Kong. The Peking correspondent of Japan's *Mainichi Shimbun* reported that shelving the Tiao-yu-t'ais issue was agreed upon by Japan and the PRC as a precondition for establishing diplomatic ties. Since the islands were in actual control of Japan at the time, the report continued, the PRC's consent to shelve the issue amount to waiver of its claim. *Chung-yang Jih-pao*, April 18, 1978, p. 1; *New York Times*, April 15, 1978, p. 1.

14. Tretiak, *supra* note 4, p. 1246.

15. The PRC's senior Vice Premier Teng Hsiao-p'ing reportedly told Japanese Foreign Minister Sonoda in Peking before signing the treaty in mid-August that "there would be no recurrence of the Senkaku incident." *Washington Post*, August 13, 1978, p. A26. Peking also reacted mildly when Japan was constructing a heliport on the Tiao-yu Island. *New York Times*, May 23, 1979, p. A7. A photograph of the heliport by the Associated Press appeared in *Lien-ho Pao* (United Daily News), May 25, 1979, p. 1. (The *United Daily News* is an independent Chinese-language newspaper based in Taipei.) The PRC stated that the Japanese government should be "prudent" less the friendship between the two countries be damaged. *Hua-chiao Jih-pao* (China Daily News), May 28, 1979, p. 1. (The *China Daily News* is a pro-Peking Chinese-language newspaper published in New York).

On July 22, 1981, the PRC's Foreign Ministry expressed regrets about a survey of fishing resources in the Tiao-yu-t'ai Islands and nearby waters conducted by Japan's Okinawa Prefecture and demanded the incident not happen again. Statement on Japanese Fishery Resources Survey on Our Tiao-yu-t'ai Islands by Spokesman of the Information Department, Foreign Ministry of the People's Republic of China. *Chung-kuo kuo-chi-fa nien-k'an 1982* [Chinese Yearbook of International Law 1982], p. 465.

16. The PRC was reported to have taken the initiative in bringing up the idea through its ambassador to Japan Fu Hao, while he was visiting Okinawa. *Lien-ho Pao*, May 13, 1979, p. 1, citing a May 12 report by *Mainichi Shimbun* from Tokyo. Japan reportedly reacted favorably. *Lien-ho Pao*, July 11, 1979, p. 1. As of late 1980, governmental negotiations have continued between Peking and Tokyo. *Jen-min Jih-pao* (People's Daily), Nov. 29, 1980, p. 4. (*People's Daily* is the official Chinese-language newspaper of the Chinese Communist Party.)

17. In effect, both sides approached the joint development idea under the assumption that the islands were their own territory. This was why no agreement had been reached. George Lauriat and Melinda Liu, "Pouring Trouble on Oily Waters," *Far Eastern Economic Review*, September 28, 1979, pp. 19, 20-21. In April 1983, Peking again announced, through its vice premier Yao Yi-ling who was visiting Tokyo, that it favored an international program to jointly develop the oil riches of the Tiao-yu-t'ai Islands while leaving the sovereignty dispute to be settled later. *Lien-ho Pao*, April 9, 1983, p. 1 (citing a UPI dispatch from Tokyo).

issues involved. During the 1970s, a number of studies were done on these issues. These studies invariably concluded that the territorial and the seabed issues were inseparable; settlement of the former was a *conditio sine qua non* to that of the latter.[18] As nationalistic feelings ran high in both China and Japan, these commentators seemed pessimistic about the likelihood of a pacific settlement. Their pessimism was reinforced by the existing vague rules of international law on continental shelf delimitation and the regime of islands. The latter half of the 1970s witnessed, however, a revolution of the legal regime of the ocean, primarily as a result of deliberations at the Third United Nations Conference on the Law of the Sea (UNCLOS III), beginning in 1974. The Convention on the Law of the Sea (hereinafter the LOS Convention), which was signed at Montego Bay, Jamaica, on December 10, 1982,[19] reflecting the general consensus of more than 120 signatory states, has substantially altered some of the assumptions on which previous studies were based. Indeed, the changing law of the sea calls for a fresh look at the present dispute.

As will be discussed in Chapter 2 *infra*, the continental shelf claims of the coastal states in the East China Sea, namely, China (the ROC and the PRC), the Republic of Korea (ROK), and Japan (the Democratic Republic of Korea (DPRK) has no coastal front in the East China Sea) are vague. While the ROC has declared a 200-mile exclusive economic zone (EEZ) and Japan a 200-mile fishing zone, the PRC and the ROK have declared neither.[20] Moreover, all of

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18. *See* Chapter 4 *infra*.

19. United Nations Convention on the Law of the Sea, UN Doc. A/CONF.62/122, 7 August 1982; *New York Times*, December 11, 1982, p. 1. There were 117 states that signed the Convention on December 10, 1982. The number of signatory states has exceeded 130 as of this writing in August 1984.

20. Japan extended its territorial sea from 3 miles to 12 miles and declared a 200-mile fishing zone in 1977. See note 3 *supra*. The ROC also extended its 3-mile territorial sea to 12 miles and declared a 200-mile EEZ on September 6, 1979. The declaration states:

> 1. The territorial sea of the Republic of China shall be measured from the baselines and shall extend to the outer limits of the water area of twelve nautical miles from such baselines.
> 2. The exclusive economic zone of the Republic of China shall be measured from the baselines from which the territorial sea is measured and shall extend to the outer limits of the water area of two hundred nautical miles from such baselines.
>   (1) The Republic of China shall have in the exclusive economic zone sovereign rights for purposes of exploration and exploitation, conservation and utilization of the natural resources, and such jurisdiction the exercise of which is recognized under international law.
>   (2) Where the exclusive economic zone of the Republic of China extends over any part of the exclusive economic zones as proclaimed by other

them have signed[21] the LOS convention of 1982 except the ROC whose participation in UNCLOS III has been effectively blocked by the PRC since 1973 as a result of the expulsion of the ROC from the United Nations in 1971.[22] In view of the practically identical boundary delimitation provisions for the continental shelf (Article 83) and the EEZ (Article 74) in the LOS Convention and the recent trend toward delimiting a single boundary that would serve both purposes,[23] one might wonder if a single boundary could be delimited in the East China Sea. There are essentially two reasons why a single boundary would be infeasible. First, among the coastal states only the ROC has thus far declared an EEZ. Before other states follow suit,[24] no necessity for EEZ delimitations exist. Second, there lies in the East China Sea such a prominent undersea geological feature as the 2,000-meter-deep Okinawa Trough, which constitutes a distinct break in the essential continuity of the continental shelf and is less relevant to the geographical, distance-oriented concept of the EEZ.[25] Even if all the coastal states had delineated their own EEZs, a single boundary would hardly accommodate the different considerations

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states, the boundaries shall be determined by agreement between the states concerned or in accordance with generally accepted principles of international law on delimitation.

(3) Other states may enjoy in the exclusive economic zone of the Republic of China the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and engage in such other activities with respect to navigation and communication as permitted by international law.

3. 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.

Chung-yang Jih-pao, September 7, 1979, p. 1; English translation appeared in Hungdah Chiu, Rong-jye Chen and Tzu-wen Lee, "Contemporary Practices and Judicial Decisions of the Republic of China Relating to International Law," *Chinese Yearbook of International Law and Affairs*, Vol. 1 (1981), pp. 151-152.

21. The PRC, the ROK and the DPRK signed the LOS Convention on December 10, 1982. *United Nations Press Release*, SEA/MB/13 (December 10, 1982), p. A2. Japan did not sign at the time, but later signed it in early 1983.

22. For details, see Chapter 4, note 82 and accompanying text.

23. *See generally* Edward Collins, Jr. and Martin A. Rogoff, "The International Law of Maritime Boundary Delimitation," *Maine Law Review*, Vol. 34 (1982), pp. 4-24.

24. There is no urgency for the PRC, the ROK, and Japan to declare an EEZ which, they fear, might complicate the already intractable continental shelf boundary problems. For a concise discussion see Choon-ho Park, "Maritime Claims in the China Seas: Current State Practices," *San Diego Law Review*, Vol. 18 (1981), pp. 445-48.

25. For an elaborate discussion on questions relating to the Okinawa Trough, see text accompanying notes 223-300 of Chapter 5 *infra*.

underlying the EEZ and the continental shelf boundaries. Thus, only the delimitation of a continental shelf boundary in the East China Sea is examined in this study.

Given the fact all the East China Sea's coastal states except the ROC have signed the LOS Convention, one might also wonder why it is necessary to study the claims and moves of the coastal states, as will be done in Chapter 2 *infra*. The delimitation of continental shelf and the EEZ have been one of the most intractable issues negotiated in UNCLOS III. The rivalry between the "equidistance principle" school and the "equitable principles" school had reached such a magnitude that a compromise formula tolerable to all was finally adopted to avert a hopeless deadlock.[26] The compromise was Article 83 of the LOS Convention, the key provision of which states that "[t]he 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 (ICJ), in order to achieve an equitable solution."[27] As Article 38 of ICJ's Statute refers to various sources of international law,[28] it is of little practical help in identifying specific criteria for delimitation. One therefore has to examine the coastal states' claims and moves *qua* state practice which is potentially capable of becoming customary law.

Part I of this study sets forth, in three chapters, the geophysical, political, and economic backgrounds of the East China Sea oil controversy, reviews the conflicting claims and overlapping concessions of the coastal states, and defines the issues to be pursued in subsequent chapters. Part II deals with the question of title to oil in three aspects. Chapter 4 examines, in light of various sources of interna-

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26. For an account of the negotiating process, see Bernard H. Oxman, "The United Nations Conference on the Law of the Sea: The Tenth Session (1981)," *American Journal of International Law*, Vol. 76 (1982), pp. 14-15.

27. Article 83 is quoted *in toto* in text accompanying note 1 of Chapter 5 *infra*.

28. Article 38 of the Statute of the International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

tional law, including the LOS Convention, the relevance of the Tiao-yu-t'ai territorial dispute to the seabed boundary issue. Chapter 5 takes a fresh look at the decade-old seabed boundary problem, drawing upon recent developments during and after UNCLOS III. A solution is proposed on the basis of this legal analysis. Chapter 6 analyzes a unique dimension of the present controversy—the relevance of the Peking-Taipei rivalry to the seabed dispute. Questions of recognition of governments in divided states are considered in the context of a hypothetical legal battle fought in a third-country court over the title to oil produced from the disputed seabed.

PART I THE SETTING: THE EAST CHINA SEA OIL DISPUTE

CHAPTER 1 EAST CHINA SEA: GEOPHYSICAL ENVIRONMENT AND THE POTENTIAL FOR HYDROCARBONS

In the present study,[1] "geography" refers to physical surface features of the earth; "geomorphology" denotes the topography and relief features of the earth; "geology" refers to the underlying rock structure of land or submarine relief features; and "bathymetry" alludes to the measurement of water depth.

A. Geography

The East China Sea is a marginal, semi-enclosed sea of the Pacific Ocean surrounded by China's mainland and Taiwan, Japan's Ryukyu Islands and Kyushu, and Korea's Cheju Island (Map 1). According to the International Hydrographic Bureau,[2] two imaginary lines delimit the northern frontier of the East China Sea: one runs at a latitude of 33°17 North from the Chinese mainland to Cheju Island (which is also the East China Sea/Yellow Sea boundary); the other extends from Cheju Island to the Japanese island of Fukue. The East China Sea's eastern boundary largely follows the outer limits of the Ryukyu Islands which separate it from the Philippine Sea. In the south, the boundary is a line connecting the Hai-t'an Island of China's Fukien Province and the northern tip of Taiwan. South of this line is the Taiwan Strait. The line extends easterly until it reaches the Yonagami Island of the Ryukyu group.

The East China Sea has an area of 752,000 square kilometers (sq. km) (or 290,348 square miles (sq. mi))[3] and is 300 to 400 miles

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1. Usage of the terms "geography", "geomorphology", "geology", and "bathymetry", in this study is based on *Webster's New World Dictionary of the English Language Unabridged*, 1976.

2. *See* International Hydrographic Bureau, *Limits of the Oceans and Seas*, Special Publication No. 23, 3rd ed., Monte-Carlo: Imprimerie Monégasque, 1953, p. 31. *But cf.* Su-yu Yeh and Hsiang-tien Liu, *Chung-kuo Tsu-jan Ti-li Tsung-lun* (A General Treatise on the Physical Geography of China), Peking: Commercial Press, 1959, p. 37 (the northern limit of the East China Sea is defined as a line connecting the northern bank of the Yangtze River to Cheju Island, and the East China Sea is defined to include the Taiwan Strait).

3. Rhodes W. Fairbridge, ed., *The Encyclopedia of Geomorphology*, Encyclopedia of Earth Science Series, Vol. 3, New York: Reinhold Book Corporation, 1968, p. 184 (Table 13) [hereinafter cited as *Encyclopedia of Geomorphology*). Unless otherwise indi-

long (north-south) and 140-280 miles wide (east-west). Two seaward curving arcs, formed by the Chinese mainland coast and the Kyushu-Ryukyu islands chain, nearly converge at the southern frontier of the East China Sea near Taiwan. These two arcs respectively delineate the general configuration of Chinese and Japanese coastlines in the East China Sea. Although fringes of islands abound along the coasts of the Chinese mainland[4] and Kyushu, the East China Sea is virtually devoid of midway islands other than the Ryukyus. The only exceptions are the disputed Tiao-yu-t'ai Islands in the south and the Japanese islands of Danjo Gunto and Tori Shima in the north, off Kyushu.

B. Geomorphology

The seabed of the East China Sea slopes gently seaward from the mainland Chinese coast (Map 2). The 40- to 60-meter isobaths are far from shore. The smooth shelf extends in certain localities more than 250 miles seaward. Two-thirds of the East China Sea is supported by the continental shelf in waters of less than two hundred meters. At the 120-meter isobath the flat seabed abruptly plunges into the Okinawa Trough which has a maximum depth of 2,717 meters[5] at its deepest part near Taiwan. The Trough, extending from Taiwan to Kyushu along the inner side of the Ryukyus, has more than half of its area deeper than 1,000 meters and one-fifth deeper than 2,000 meters.[6] East of the Ryukyus the seabed steeply slides

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cated, "square mile" (sq. mi) refers to square statute mile whereas "mile" refers to nautical mile. One nautical mile (6,076 feet) equals 1.15 statute miles (5,280 feet) or 1.85 km. One sq. mi equals 2.59 sq. km. Abbreviated forms of these words will be used hereinafter in texts and notes.

4. According to one early study, 2,252 islands fringe along the Chinese coast in the East China Sea, which are about two-thirds of China's total islands, i.e., 3,338 islands excluding Taiwan and nearby islands. *See* Ch'ing-yuan Li, "Chung-kuo Yen-hai San-ch'ien-san-pai-san-shih-pa Tao-yu Mien-chi Tsu-pu Chi-suan (A Preliminary Areal Calculation of 3,338 islands along China's coast), *Ti-Li Hsueh-pao* (Journal of Geography), Vol. 2 (1935), pp. 88-91. Recent geographical publications in the PRC put the figure at more than 2,500. Editing Group, Shanghai Teacher's College, *Chien-ming Chung-kuo Ti-Li* (A Concise Textbook on China's Geography), Shanghai: Shanghai People's Publisher, 1974, p. 82.

5. Rhodes W. Fairbridge, ed., *The Encyclopedia of Oceanography*, Encyclopedia of Earth Sciences Series, Vol. 1, New York: Rhinhold Book Corporation, 1966, pp. 238, 240 [hereinafter cited as *Encyclopedia of Oceanography*].

6. *See* T. Chase, H. Menard & J. Mammerickx, *Bathymetry of the North Pacific*, Chart No. 5, La Jolla: Scripps Institution of Oceanography and Institute of Marine Resources, 1970. This chart and Map 2 in the Appendix are based on largely the same information.

again into the Ryukyu Trench which, with most of its floor between Japan and Taiwan deeper than 6,500 meters,[7] is the deepest part of the region. It is in fact part of the marginal trenches of the Pacific Ocean, including the Aleutian Trench, Kuril Trench, Japan Trench, and the Philippine Trench.

Parallel to the Ryukyu Trench, the Okinawa Trough is separated from it by the Ryukyu ridge, the peaks of which rise above water surface to form the Ryukyu Islands. The Trough, however, is connected with the Trench by numerous submarine sills cutting across the Ryukyu ridge[8] ranging in depth from 500 to 1,000 meters. North of 30°N latitude, the water depth in the Trough drops to less than 900 meters. It further shoals up to less than 500 meters before the Trough reaches the vicinity of Kyushu, leaving a modestly wide belt of shelf along the coast. The Trough, the ridge, and the Trench stand out as one of the two geomorphological provinces in the East China Sea, the other being the vast shelf to its west.[9] The Trough therefore separates the geological shelf of the East China Sea on its western part from the Ryukyu Islands on its eastern part.

C. Geology

1. Introduction

Before discussing the regional geology and oil prospects of the East China Sea, one must have an elementary understanding of marine geology, petroleum geology, and offshore oil exploration.[10]

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7. *Ibid.* See also K.O. Emery et al., "Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea," *UNECAFE/CCOP Technical Bulletin*, Vol. 2 (1969), pp. 26-27. This is the well-known "Emery Report." It was revised in John M. Wageman, Thomas W.C. Hilde, and K.O. Emery, "Structural Framework of East China Sea and Yellow Sea," *AAPG Bulletin*, Vol. 54, (1970), p. 1611.

8. A submarine sill is a submarine barrier that separates two or more depressions such as undersea canyons, troughs, or basins. *Encyclopedia of Geomorphology*, *supra* note 3, p. 1081.

9. Emery *et al.*, *supra* note 7, p. 13.

10. The introduction to marine geology is based on the following sources: *Encyclopedia of Geomorphology, supra* note 3, pp. 1079-97; K.O. Emery, "An Oceanographer's View of the Law of the Sea," in *Symposium on the International Regime of the Seabed*, ed. by Jerzy Sztucki, Rome: Accademia national dei Lincei, 1969, p. 47; Hollis D. Hedberg "Continental Margin from Viewpoint of the Petroleum Geologist," *AAPG Bulletin*, Vol. 54 (1970), p. 3 [hereinafter cited as Hedberg (1970)]; Hollis D. Hedberg, "Ocean Floor Boundaries," *Science*, Vol. 204, No. 4389 (1979), p. 135.

The introduction to petroleum geology and oil exploration is based on entries on geophysical exploration (or prospecting) in *Encyclopedia Americana*, int'l ed., Vol. 17 (1974), pp. 504-08; *Encyclopedia Britannica*, Vol. 10 (1973), pp. 197-202; and articles on

(a) Marine Geology

To the layman, geologists like to compare the earth to a soft-boiled egg—the yolk being the earth's liquid core, the white its mantle, and the shell its crust. The major features of the earth's surface, continents and oceans, overlie the continental crust and the oceanic crust, respectively. Generally speaking, the oceanic crust, more mafic in composition, is thin (5 km) and dense (2.9 gram/cubic centimeter) and has a high seismic velocity (6.7 km/second). In contrast, the continental crust contains rocks of a more sialic composition with a lower density (2.6-2.7 gram/cubic centimeter) and a lower seismic velocity (6.0 km/second), but with a much greater thickness (35 km).

The oceanic crust, all covered by the oceans, constitutes about 60 percent of the earth's surface. Approximately a quarter of the continental crust (i.e., the remaining 40 percent of the earth's surface) is submerged below sea level but still fundamentally is a part of the continent standing above the general level of the oceanic crust. This submerged part of the continental crust, mostly overlain by sediments of various depths deposited from continental origin, is known as the continental margin (See figure). The term "continental margin" suffers from a variety of usage but usually includes:

(1) the continental shelf, which gently slopes from the shore (gradient: 1:600);
(2) the continental slope, which begins from the edge of continental shelf where a marked increase of declivity occurs (gradient: 1:14) and continues into great depths; and
(3) the continental rise, which extends from the base or foot of the continental slope (gradient: 1:40 to 1:1,000)

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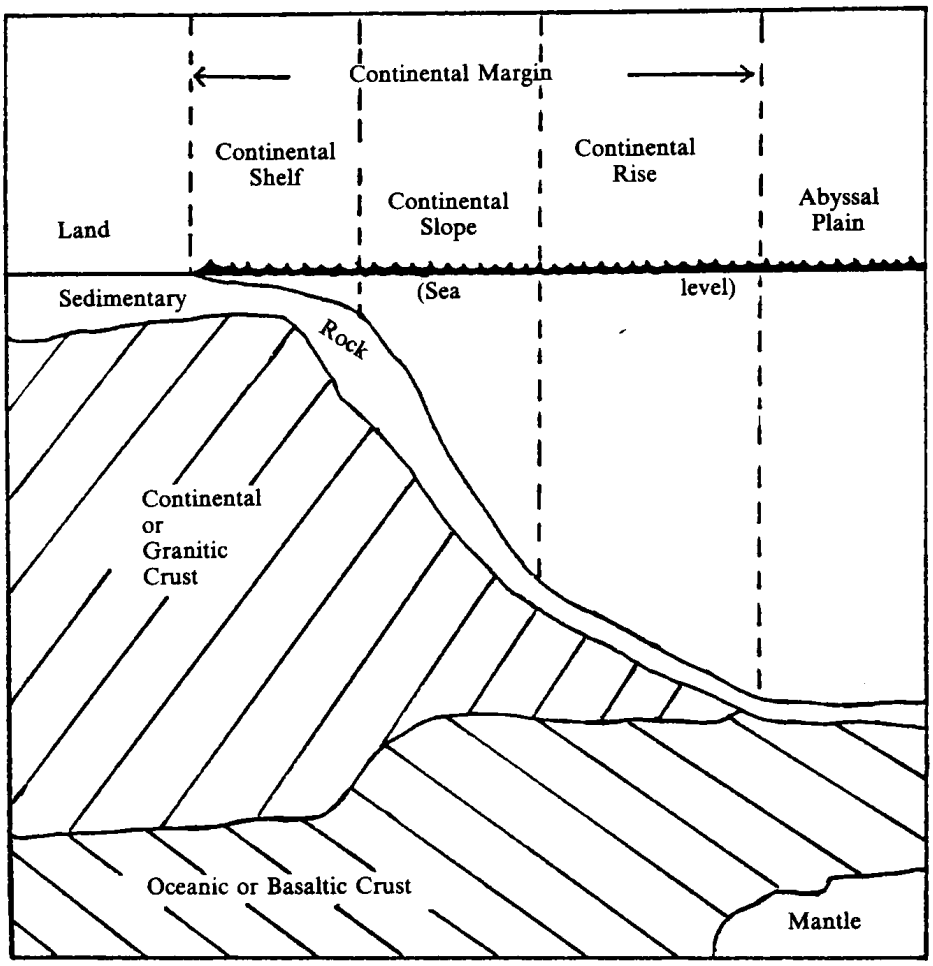
petroleum in *Encyclopedia Americana*, int'l ed., Vol. 21 (1974), pp. 677-78, 681-82; *Encyclopedia Britannica*, Vol. 17 (1973), pp. 758-62.

Information about offshore operation is based on the following sources: Commission on Marine Science, Engineering and Resources: *Report of the Panel on Marine Engineering and Technology* VI-1, VI-164-169 (1969), *reprinted in* H. Gary Knight, *The Law of the Sea: Cases, Documents and Readings*, 1980 ed., Baton Rouge, Louisiana: Claitor's Law Books and Publishing Division, 1980, pp. 9-12 to 9-16; "Panel Discusses Trends in Offshore Drilling," *Ocean Industry*, January 1979, p. 35; P.W.J. Wood, "New Slant on Potential World Petroleum Resources," *ibid.*, April 1979, p. 59; Darryl R. Smith, "Techniques Involved in Drilling in Deepest Water," *ibid.*, June 1979, p. 37 and Roger Lowenstein, "Oil Fims to Drill Deep off Atlantic Coast," *Asian Wall Street Journal*, February 24, 1983, p. 9.

and merges imperceptibly with the abyssal plain on the ocean floor.

Geology of Continental Margin



The base of the continental slope, one of the most extensive and distinctive geomorphological features of the earth, is generally regarded as the approximate boundary between continental and oceanic crusts. The boundary, however, may not be a clearly marked line, but a zone covering parts of the slope as well as the rise. In some localities, the crustal structure shows intermediary character in thickness, density, and seismic velocity.

The continental shelf ranges in width from one to 650 miles,

averaging about 37 miles, and in depth from 50 to 550 meters, averaging about 133 meters. The conventional assumption that that outer limit of the geological continental shelf coincides with an arbitrary isobath variously phrased as 200 meters or 100 fathoms (183 meters or 600 feet) is plainly at variance with geological reality. The continental slope has an average width of 9 to 18 miles and an average depth of 1,830 meters within the range of 1,000 to 5,000 meters. The continental rise has a width of up to 540 miles, a depth of up to 5,000 meters and a thickness of up to 10 km. Since many continental margins of the world's continents, including those of East Asia, have not been thoroughly studied, current knowledge about their geology is rather limited.

(b) Petroleum Geology

Most petroleum is found in porous sedimentary rocks several thousand feet under the surface where organic material deposited millions of years ago is transformed into oil through long, slow, and complex chemical changes. The high porosity of sedimentary rocks (such as sandstone) allows the oil and gas thus formed to migrate freely until they collect in natural traps sealed by impervious rocks (such as igneous rock) as a result of crustal movement. Petroleum traps are of three main types: anticline, fault, and stratigraphic traps. An oil field is the accumulation of many such traps. The thicker the sedimentary rock, the greater the potential yield of oil. The most favorable habitat of petroleum offshore, as onshore, is sedimentary basins where layers of sediments acquire a thickness of over one km. Such basins are concentrated along the continental margin, namely, the shelf, the slope, and the rise.

Past drilling data show that rocks of certain geologic ages are far more oil-bearing than those of other ages. More than half of the oil in the world, in fact, is found in rocks of the Cenozoic Era (70 million years ago to the present time), the youngest age in the earth's history, and especially in rocks of the Tertiary Period (65 to 2 million years ago). In the Tertiary Period, rocks of the Neogene Epoch (25 to 2 million years ago) account for a large proportion of the world petroleum production. In general, sedimentary basins of the Tertiary Period are one of the most promising geological environments for oil.

(c) Offshore Oil Operation

Petroleum lies hidden under the earth. Except for natural seepage, it cannot be detected from the surface by its physical or chemi-

cal property. Three scientific methods are currently employed to prospect for oil from the surface: geological, geophysical, and geochemical methods. The geophysical techniques, such as gravity, magnetic, and seismic surveys, are the most popular ones. Among them, the seismic survey, the most expensive and laborious method, produces the most precise information about the petroleum geology of the area prospected. Whether oil deposits actually exist, however, can only be learned by drilling. Offshore oil exploration and production are far more arduous, costly, and risky than those onshore, the result of the more hostile environment and the ocean engineering work required. Offshore drilling rigs are supported and/or carried by fixed or mobile platforms, depending on the water depth at the drilling site. Drillships, jack-ups, submersibles and semi-submersibles are the commonly used rigs operating throughout the world today. Current drilling capability may reach more than 6,000 feet (2,100 meters) of water, and production capability 980 feet (300 meters). The bulk of offshore drilling and production in the next decade, however, will still take place in waters less than 600 feet deep (180 meters), the U.S. offshore industry sources predict, unless the price of crude oil gets to $60 a barrel.

2. State of Research on East Asia's Seabed

Unlike those of the Persian Gulf and North Sea, the seabed of the East China Sea was largely neglected in the 1950s and 1960s. Lack of geological knowledge and regional political stability account for the inattention. The earliest study was published in 1949 by American geologists Shepard, Emery, and Gould.[11] Their work was less useful because it was largely a compilation of data derived from bottom-sediment notations on navigational charts.[12] A 1958 study by Klenova, a Soviet marine geologist who had access to geological information on the north China seabed prior to the Sino-Soviet rift, again contained only general discussions.[13] Not until 1961 did a

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11. F.P. Shepard, K.O. Emery, and H.R. Gould, "Distribution of Sediments on East Asiatic Continental Shelf," *Occasional Paper*, No. 9, Allan Hancock Fundation, 1949 *cited in* Hiroshi Niino and K.O. Emery, "Sediments of Shallow Portions of East China and South China Sea," *American Geological Society Bulletin* (1961), pp. 731-32, 742-43.

12. This criticism appeared in Yang-chih Huang *et al.*, "Tiao-yu-t'ai Ch'ien-wan Tiou-pu-teh," (Tens of Thousands of "Noes" to Forsaking the Tiao-yu-t'ais), *Ming-pao Yueh-k'an* (Ming-pao Monthly), Vol. 16 (May 1971), pp. 17, 18 [hereinafter cited as Huang *et al.* (1971)]. Mr. Huang got his Ph.D. in geography from Columbia University in the mid-1970s. *Ming-pao Yueh-k'an* is a Hong Kong-based, Chinese-language monthly periodical associated with *Ming Pao*.

13. M.B. Klenova, "Hai-yang Ti-chih-t'u," (Ocean Bottom Character Chart), *Hai-*

more elaborate study come out. This was done by Emery and geologist Niino of Japan.[14] It focused largely on distribution of sediments of the East China Sea instead of its geological structure and prospects for oil. Only six years later did another effort by them begin to touch upon petroleum geology.[15] In 1968, the newly formed Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP [the official acronym]) sponsored, under the auspices of the U.N. Economic Commission for Asia and the Far East (ECAFE), a shipborne research program. It was a six-week geophysical survey in the East China Sea and the Yellow Sea on board the U.S. R/V *R.F. Hunt* provided by the U.S. Naval Oceanographic Office. Its report, written by Emery and scientists from CCOP member countries, was published in 1969 (hereinafter referred to as the Emery Report). It contained the most comprehensive data at the time about the East China Sea's geology. Given the limited time used, the Report has nevertheless to be confirmed by further seismic surveys and drillings.[16] Its optimistic prediction of oil deposits in the region[17] has, however, triggered off what one commentator termed the "oil war" in East Asia.[18] Since the Report, published geological information on the East China Sea has been scarce.

3. Regional Geology

A series of parallel northeast-southwest-trending ridges and sediment-filled depressions outline the East China Sea's regional geology[19] (Map 3). Functionally, the ridges serve as tectonic dams to

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yang Yu Hu-chao (Oceanologia et Limnologia Sinica), Vol. 1 (1958), pp. 243-51 (S. Fan & C. Hsu trans. from Russian).

14. *See* note 11 *supra*.

15. K.O. Emery and Hiroshi Niino, "Stratigraphy and Petroleum Prospects of Korea Strait and the East China Sea," UNECAFE/CCOP *Technical Bulletin*, Vol. 1 (1968), p. 13.

16. K.O. Emery *et al., supra* note 7, p. 41.

17. For details, see note 38 *infra* and accompanying text.

18. Choon-ho Park, *Continental Shelf Issues in the Yellow-Sea and East China Sea*, Occasional Paper, No. 15, Kingston, Rhode Island: Law of the Sea Institute, University of Rhode Island, 1972, pp. 3-4, 51 note 1 [hereinafter cited as Park (1972)]. Dr. Park has written extensively on problems of East Asian ocean resources, including the seabed controversy under study. The author benefits substantially from his pioneer research in this area. Part of his analysis remains valid and will be referred to in its place. Part of his analysis, however, suffers from several drawbacks to be discussed in Chapter 4 *infra*. In any event, drastic changes in events and the law of the sea require an updated treatment of the seabed issues in the East China Sea.

19. K.O. Emery *et al., supra* note 7, p. 40 (Fig. 17), *reproduced as* Map 3.

trap sediments[20] derived mostly from China, drained by the Yellow, Yangtze, and other rivers.[21] In the region, the northwesternmost ridge is the Fukien-Reinan Massif, a folded zone uplifted during the Middle to Late Mesozoic Eras (160 to 70 million years ago).[22] It lies south to the Yellow sea, trapping, in the Yellow Sea Basin, at least 200,000 cubic km. of sediments[23] of Neogene origin. Further down southeast, the Taiwan-Sinzi Folded Zone coincides with the outer edge of the vast continental shelf between Taiwan and Japan.[24] The Zone was formed during the later part of the Tertiary Period[25] (60 to 10 million years ago). By damming sediments from the Chinese mainland the Zone has helped build the present continental shelf known among geologists as the "Taiwan Basin." Sediments landward of the Zone are estimated at one million cubic km., mostly Neogene in age.[26] Beyond the Taiwan-Sinzi Folded Zone lies the Ryukyu Folded Zone with outcropping volcanic islands such as the Ryukyus. This Zone, believed to have been formed during the Neogene age,[27] has also dammed a continuous belt of sediments in the Okinawa Trough,[28] the structural depression between the Taiwan-Sinzi Folded Zone and the Ryukyu Zone. Seaward of the Ryukyu Folded Zone the seabed slopes downward to a terrace, with thick sediment, and on to the floor of the Ryukyu Trench, averaging more than 6,000 meters below sea level.[29] Since the Emery Report made no mention of the crustal origin of the Okinawa Trough, however, it is still unclear whether the Trough is a continental or oceanic structure.

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20. For a discussion on how a tectonic dam works, see K.O. Emery, "The Continental Shelves," *Scientific American*, September 1969, pp. 106, 109-11.

21. The volume of sediments annually discharged from the Yellow and Yangtze rivers is 2,080 and 550 million tons respectively. The two rivers are the first and the fourth largest contributors of sediments to the ocean in the entire world. See J.N. Holeman, "The Sediment Yield of Major Rivers of the World," *Water Resources Research*, Vol. 4 (1968), pp. 737-47, *cited in* K.O. Emery *et al., supra* note 7, p. 31.

22. K.O. Emery *et al., supra* note 7, p. 39. All the geologic times referred to in parenthesis based on *Encyclopedia Britannica*, Vol. 10 (1973), pp. 161-76; *Encyclopedia Americana*, int'l ed., Vol. 12 (1974), pp. 462-63; *Webster's New World Dictionary of the English Language Unabridged*, 1976, p. 949.

23. K.O. Emery *et al., supra* note 7, p. 31.

24. *Ibid.*, p. 33.

25. *Ibid.*

26. *Ibid.*

27. *Ibid.* p. 38.

28. *Ibid.* p. 35.

29. *Ibid.* p. 38.

4. Distribution of Sediments

Mud, sand, and their mixture constitute the majority of surface sediments of the East China Sea.[30] Mud bottom lies close to shore, followed by sand or mud-and-sand bottoms. Beneath this blanket of sediment lie the oil-bearing Tertiary strata of the Neogene age.[31] The surface strata are again underlain by Mesozoic and Paleozoic sedimentary rocks[32] (70 to 620 million years ago). These low-porosity strata often serve as the floor of oil traps.[33]

The Neogene strata thicken southwesterly from Tsushima Strait (between Japan and Korea) to Taiwan. Being less than 200 meters in thickness in the Strait, the strata's thickness exceeds 2 km. in an area several times the size of Taiwan (13,948 sq. mi.) located northeast of that island.[34] According to the Emery Report, potential oil-bearing features such as anticlines, faults, and unconformities were found in the Neogene strata.[35] Since sediments landwards of the Taiwan-Sinzi Folded Zone have filled up the Taiwan Basin and then surmounted the dam along most of its length, the western slope of the Okinawa Trough adjacent to the Zone is also rich in sediments of hydrocarbon potential. The sediments in the Trough exceed 1.2 km. in thickness.[36]

D. Potential for Hydrocarbons

In their 1967 study Emery and Niino concluded that "considered most favorable is the cross-hatch area between Kyushu and Taiwan, having one reported seep, probably folds."[37] In the 1969 Emery Report, they and the others became more specific in the assessment of oil prospects:

> The most favorable part of the region for oil and gas is the 200,000 sq. km. area mostly northeast of Taiwan. Sediment thickness exceeds 2 km., and on Taiwan they reach 9 km., including 5 km. of Neogene sediment. Most of the sediment fill beneath the continental shelf is believed to be

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30. Hiroshi Niino and K.O. Emery, *supra* note 11, pp. 744 (Fig. 11), 746 (Fig. 12).
31. K.O. Emery *et al., supra* note 7, p. 33.
32. K.O. Emery and Hiroshi Niino, *supra* note 15, p. 19.
33. Petroleum traps such as anticline usually have rocks of low porosity as their "floor" as well as "ceiling" between which oil, gas, and water collect. *See* note 10 *supra* and the accompanying text.
34. K.O. Emery *et al., supra* note 7, pp. 33, 35.
35. *Ibid.*, p. 41.
36. *Ibid.*, p. 35.
37. K.O. Emery and Hiroshi Niino, *supra* note 15, p. 25.

> Neogene in age, . . . Nearly all of the oil and gas that is produced on land in Japan, Korea, and Taiwan comes from Neogene Strata. *A high probability exists that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world*. It is also one of the few large continental shelves of the world that has remained untested by the drill, owing to military and political factors. . . .[38] (emphasis added)

The optimism was shared by some geologists, but challenged by others.[39] The general consensus seems to support the Emery Report's appraisal, however. In any event, the Emery Report is, by its own admission,[40] but the first step toward understanding the oil prospects. No drilling, which would have yielded the most direct information about the undersea petroleum geology, was done in the survey. Despite this weakness, the Emery Report has generated much euphoria in capitals of the coastal states. Since then, a number of Western companies associated with the ROC and the ROK, as well as the PRC itself, have conducted limited drillings in the Taiwan Strait, southern and northern parts of the East China Sea, and the eastern section of the Yellow Sea.[41] The results have been carefully guarded by the companies or governments involved. The locations of these drillings suggest, however, that the bulk of the East China Sea shelf has remained untapped[42] due to political factors.

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38. Emery *et al., supra* note 7, pp. 39, 41. Writing in 1979, Emery still stood by what he said a decade earlier:

> The best prospect for large new petroleum discoveries are [sic] believed to be the mature and youthful continental margins off eastern Asia and off northern Asia.

K.O. Emery, "Continental Margins—Classification and Petroleum Prospects," *AAPG Bulletin*, Vol. 64 (1980) pp. 297, 309.

39. For a discussion of geologists' reactions to the Emery Report, *see* Selig S. Harrison, *China, Oil and Asia: Conflict Ahead?* New York: Columbia University Press, 1977, pp. 48-52 [hereinafter cited as Harrison].

40. K.O. Emery *et al., supra* note 7, p. 51.

41. *See* Chapter 2 *infra*.

42. The drilling sites off Taiwan coasts rarely went more than 50 miles offshore. On the other hand, the PRC's Geology Ministry drilled two exploratory wells in the middle of the northern part of the East China Sea in February 1981 (Longjing-I), and April 1982 (Longjing-II). The PRC's China National Offshore Oil Company drilled the third exploration well, Dongtai-I, in 1982 in the same area (Map 10). These were the first wells the PRC has ever drilled in the East China Sea. Longjing-I was reported to have tested 2,628 barrels of petroleum per day (BOPD) of high-quality crude. There has been no confirmation of this, however. Statement of David S. Holland, senior vice president of Pennzoil, to the Senate Foreign Relations Committee on February 24, 1982. *United States-China Economic Relations: A Reappraisal*, Washington, D.C.: Government Print-

The limited understanding of the region's petroleum geology has not deterred geologists, businessmen, journalists, and even politicians from making estimates of the offshore oil potential of China's marginal seas. Some figures can be several times larger than others. For instance, a Japanese Government survey estimated that the oil deposits in an unidentified area surrounding the Tiao-yu-t'ai Islands may be as high as 15 billion tons (109.5 billion barrels)[43] which alone exceeds estimates for China's total potential given by others. Here are some samples of this numbers game:

Estimator (year)	Estimates of China's Recoverable Offshore Reserves (billion barrels)	Estimator's Own Remarks
Soviet geologist F. Salmanov (1974)[44]	7.5-11.2	
U.S. Major oil companies (1975-76)[45]	10.0-45	
Prof. A.A. Meyerhoff & Dr. J.O. Willums (1975, 1979, 1983)[46]	30-32	"pure speculation"
Central Intelligence Agency (CIA) (1977)[47]	39	"a subject of conjecture"
Former U.S. Secretary of Energy Schlesinger (1978)[48]	50	
PRC Government (1981, 1982)[49]	73.7-157.4	

ing Office, April 1982, p. 92; Selig S. Harrison, "Oil Rush in East Asian Waters, Part II: Claims in Conflict," *Asia*, July-August, 1982, pp. 8-11; G.L. Fletcher, "Oil and Gas Developments in Far East in 1982: The People's Republic of China," *AAPG Bulletin*, Vol. 67 (1983), pp. 1896-97.

43. Jan-Olaf Willums, *Prospects for Offshore Oil and Gas Development in the People's Republic of China*, Paper No. 2186, Offshore Technology Conference, Houston, May 1974, 542, *cited in* Harrison, *supra* note 39, p. 43.

44. *Oil & Gas Journal*, October 7, 1974, p. 53.

45. This information was based on interviews conducted by Selig S. Harrison and a

Here[48],[49]

These are the total quantities of China's offshore reserves without, except for the Meyerhoff/Willums estimate, a geographical breakdown. None of them provided the methodology of their estimations, except again the Meyerhoff/Willums estimate. Both the CIA and Schlesinger estimates were in fact onshore figures adapted for offshore estimation.

According to Meyerhoff and Willums, the total volume of "economic sediments," i.e., "deposits in which petroleum accumulations are geologically possible,"[50] can be estimated from the information gathered by companies shooting seismic lines in the East China Sea. They then compared these data, using a computer simulation model developed at the Massachusetts Institute of Technology, to those from similar sedimentary basins elsewhere where drilling and oil production were taking place. The range of hydrocarbon potential thus could be assessed "within the limits of probability theory."[51] Some of their estimates were as follows.[52]

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study by Randall W. Hardy (*China's Oil Potential*). Harrison, *supra* note 39, pp. 265, 275 n.6.

46. Jan-Olaf Willums, "China's Offshore Petroleum," *China Business Review*, July-August 1977, pp. 6-14; A.A. Meyerhoff and Jan-Olaf Willums, "China's Potential Still A Guessing Game," *Offshore*, January 1979, pp. 54, 55-56; A.A. Meyerhoff, "Petroleum in China's Offshore," *Asian Profile*, Vol. 11, No. 1, February, 1983, p. 1.

47. Central Intelligency Agency, *China: Oil Production Prospects*, ER 77-1003 OU, Arlington, Virginia: Central Intelligence Agency, 1977, p. 1.

48. Leonard LeBlanc, "Chinese Officials Ponder Next Move" *Offshore*, January 1979, pp. 53, 56.

49. Clarence Rivers, "China's 10-billion-tonne Offshore Oil Bananza," *Far Eastern Economic Review*, October 2, 1981, p. 57; *China Daily*, April 10, 1982, p. 1. (*China Daily* is the official English-language newspaper in the PRC); Richard Pascoe, "Foreign Oil Firms Expecting Long Delays on Bids to China," *International Herald Tribune*, November 23, 1983, p. 10.

50. Williams, *supra* note 46, p. 7.

51. *Ibid.*

52. *Ibid.*, p. 12 (Table 3).

Area	Total Recoverable Hydrocarbon Potential (billions of barrels)			Total In Place Hydrocarbon Potential (billions of barrels)		
	Pess.	Middle	Opt.	Pess.	Middle	Opt.
East China Sea shallow section	0.1	2.1	60.0	0.4	8.5	240.0
East China Sea deep section	3.7	10.4	175.0	14.8	41.6	700.0
Formosa [Taiwan] Strait and Taiwan Area	0.8	3.4	7.6	3.2	13.5	30.4
TOTAL	4.6	15.9	242.6	18.4	63.6	970.4
China's total	8.7	29.0	283.6	34.8	115.9	1134.9

(emphasis added)

The hydrocarbon potentials of the East China Sea, the Taiwan Strait and the Taiwan area combined account for slightly more than half of China's total potential, if the middle figures are used. By far the most specific assessment of China's oil potential, the Meyerhoff/Willums estimate may have been refuted by information from the PRC's massive geophysical surveys that have taken place since late 1978.[53] But, since drillings in the East China Sea are relatively few, these figures at least give one a preliminary picture, however sketchy, of hydrocarbon potentials of the East China Sea.[54]

53. Information gathered from these surveys are carefully guarded by the PRC and the participating Western oil firms. But since the East China Sea is not included in these massive surveys, the Meyerhoff/Willums estimate will continue to be relevant for the near future. For a brief discussion of these surveys, see Chapter 2 *infra*.

54. There have been French, Japanese, and American reports that in view of the geology of the East China Sea shelf, natural gas is more likely to be found than oil. Harrison, *supra* note 39, pp. 53-54.

CHAPTER 2 CLAIMS AND MOVES OF THE COASTAL STATES

The continental shelf as a geological concept was first used in 1887.[1] Only recently did modern technology permit the exploitation of seabed petroleum and lawyers begin to pay attention to this vast submerged land. Prior to 1945, a few states had made continental shelf claims based on jurisdiction over living resources[2] (free swimming or sedentary) or the contiguity principle associated with the territorial acquisition of islands.[3] None had ever staked out a *general* claim to the shelf itself and its living and non-living resources. One monumental development in the evolution of the continental shelf as a legal concept was President Truman's 1945 proclamation on the continental shelf[4] whereby the U.S. asserted "jurisdiction and control" over the natural resources in its adjacent continental shelf without specifying the seaward extent of such a claim. The proclamation inspired widespread unilateral claims by states over maritime

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1. Martinus W. Mouton, *The Continental Shelf*, The Hague: Martinus Nijhoff, 1952, p. 6. *But cf.* Abu Dhabi Arbitral Award (Petroleum Development Ltd. v. Sheikh Dhabi), *International & Comparative Law Quarterly*, Vol. 1 (1952), pp. 247, 253 (Lord Asquith of Bishopstone, the umpire, stated that the term was first used by a geographer in 1898).

2. In 1910 Portugal issued a decree regulating deep trawling of free-swimming species within the limits of the continental shelf by steam vessels. UNLS/1, p.19. Ceylon (now Sri Lanka) promulgated an ordinance in 1925 regulating pearl fisheries (sedentary) in its adjacent continental shelf, *ibid.*, p. 59. For a discussion, see Edwin J. Cosford, "The Continental Shelf, 1910-1945," *McGill Law Journal*, Vol. 4 (1958), pp. 245, 246-53.

3. *E.g.*, Imperial Russia made such a claim in 1916 to islands situated on the "Siberian Continental Upland". The text of the claim appears in W. Lakhtine, *Rights over the Arctic* (Moscow, 1928), *referred to in* W. Lakhtine, "Rights Over the Arctic," *American Journal of International Law*, Vol. 24 (1930), pp. 703, 708. For a discussion, see Cosford, *supra* note 2, p. 249. In 1942, Great Britain and Venezuela divided and annexed the submarine areas of the Gulf of Paria by a treaty. *See* UNLS/1, p. 44. The treaty simply divided the seabed in the Gulf beyond the parties' territorial seas with no general claim to these areas or the natural resources contained therein.

4. Presidential Proclamation No. 2667, September 28, 1945, *Federal Register*, Vol. 10, p. 12302; *Code of Federal Regulations*, Vol. 3 (1943-48), p. 67; *United States Department of State Bulletin*, Vol. 13 (1945), p. 485. Due to its novelty, the Truman Proclamation was not considered to have been based on any recognized or established rules of international law; neither was it counter to any such rules. Rather, as its preamble showed, it was prompted simply by practical economic considerations. See F.A. Vallat, "Continental Shelf," *British Yearbook of International Law*, Vol. 23 (1946), pp. 333, 334; Edwin Borchard, "Resources of the Continental Shelf," *American Journal of International Law*, Vol. 40 (1946), pp. 53, 59, 60; Joseph W. Bingham, "The Continental Shelf and the Marginal Belt," *ibid.*, Vol. 42, pp. 173, 174, 177.

areas of various depths, distances from shore, and legal characters.[5]

The United Nations International Law Commission (ILC) in 1949 began to consider the question of the continental shelf.[6] Two years later, it adopted, in its third session, a draft on the regime of the continental shelf with a commentary which was then circulated to member states for comment.[7] Upon the ILC's recommendation, the U.N. General Assembly convened the first United Nations Conference on the Law of the Sea (UNCLOS I) at Geneva in 1958, with 86 states represented.[8] The Conference adopted four conventions,[9] including the Convention on the Continental Shelf (hereinafter the Shelf Convention) based on the ILC's draft. Among the coastal states in the East China Sea, the ROC, Japan, and the ROK attended the Conference, but only the ROC signed the Shelf Convention.[10] No shelf claim was made by any of the coastal states, except

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5. For national claims made prior to 1951, see UNLS/1, pp. 3-38.

6. *Yearbook of International Law Commission*, 1949, pp. 235-237 [hereinafter cited as YBILC].

7. For the draft articles on the continental shelf, see ILC Report to the General Assembly, UNGAOR, Vol. 6, Supplement No. 9, UN Doc. A/1858 (1951), p. 17, *reprinted in* YBILC (1951), Vol. 2, p. 141. UN Doc. A/CN 4/SER. A/1951/Add. 1. For the comments of governments, see ILC Report to the General Assembly, UNGAOR, Vol. 8, Supplement No. 9, UN Doc. A/2456 (1953), p. 42, *reprinted in* YBILC (1953), Vol. 2, p. 241, UN Doc. A/CN. 4/SER. A/1953/Add. 1.

8. For the General Assembly resolution concerning the Conference, see UNCLOS I, *Official Records*, Vol. 2, p. xi, UN Doc. A/CONF. 13/38 (1958). The list of delegations appears in *ibid.*, p. xiii.

9. The four conventions are: the Convention on the Territorial Sea and the Contiguous Zone, UST, Vol. 15, p. 1606; TIAS, No. 5639; UNTS, Vol. 516, p. 205, the Convention on the High Seas, UST, Vol. 13, p. 2312; TIAS, No. 5200; UNTS, Vol. 450, p. 82, the Convention on the Fishing and Conservation of the Living Resources of the High Seas, UST, Vol. 17, p. 138; TIAS, No. 5960; UNTS, Vol. 559, p. 285, and the Convention on the Continental Shelf, UST, Vol. 15, p. 471; TIAS, No. 5578; UNTS, Vol. 449, p. 311.

10. *Supra* note 8, pp. xv, xix. The ROC ratified the Shelf Convention 12 years later. *See* text accompanying notes 89-91 *infra*. On October 25, 1971, the PRC took over the ROC's seat at the U.N. under General Assembly Resolution 2758 (XXVI). In a communication to the U.N. Secretary-General who performs depository functions for multilateral treaties including the Shelf Convention, the PRC denounced as illegal and null and void all the ROC's signatures and ratifications of and accessions to these multilateral treaties. The PRC further stated that it would study these treaties before deciding whether to accede to them. United Nations Secretariat, *Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions, List of Signatures, Ratifications, Accessions, etc. As at December 31, 1978*, pp. iii, iv, UN Doc. ST/LEG/SER.D/12 (1979) [hereinafter cited as UN Multilateral Treaties]. Since none of the other coastal states are parties to the Shelf Convention, the question whether the ROC may invoke its provisions as against Japan or the ROK, despite the PRC's denunciation, is moot.

the ROK,[11] until 1969, when the Emery Report came out.

None of the coastal states in the East China Sea, except the PRC, produces enough oil to meet its energy demands. But Japan, the ROK, and the ROC all fuel their booming economies with oil, more than 98 percent of which has to be imported from abroad for each of them.[12] Against this background, the wave of conflicting claims and actions by them following the publication of the Emery Report came as no surprise. The soaring oil prices since the early 1970s helped intensify the competition.

In a strict legal sense, all coastal states but Japan have made formal continental shelf claims.[13] They have also granted concessions[14] to domestic or foreign oil companies for surveys, exploration,

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11. On January 18, 1952, the ROK asserted, in a presidential proclamation, its sovereignty over the "shelf adjacent to the peninsular and insular coasts of the national territory, no matter how deep it may be," and the natural resources contained therein. The proclamation also delineated, subject to future changes, a zone of "control and protection" of natural resources under the ROK's sovereignty. The zone included the seabed off North Korean coasts in the Yellow Sea and the Sea of Japan. The ROK obviously acted as if it had sovereignty over *all* Korea in making this claim. In the East China Sea (Map 5), the zone (area within the broken line) is much smaller than the zone delineated 18 years later. Text of the proclamation appears in UNLS/6, p. 30, *reprinted in* UNLS/8, p. 14.

The claim has not been formally repealed. Neither was it alluded to in later legislation dealing with the same subject, however. *Infra*, text accompanying notes 17-19. While Dr. Park made no mention of it in his 1972 article, *supra* Chapter 1, note 18, Oda, a Japanese writer and now judge of the International Court of Justice, was unsure of its validity. Shigeru Oda, "The Delimitation of the Continental Shelf in Southeast Asia and the Far East," *Ocean Management*, Vol. 1 (1973), pp. 327, 346 [hereinafter cited as Oda (1973)].

12. Producing no oil at all, the ROK depends 100 percent on imports. G.L. Fletcher, "Petroleum Developments in Far East in 1979: South Korea," *AAPG Bulletin*, Vol. 64 (1980), pp. 1893, 1896 (Table 1).

In 1979, Japan produced 9,836 barrels of petroleum per day (BOPD), roughly 0.2 percent of its oil demands. *Ibid.*, p. 1896. The ROC's oil production (3,980 BOPD) is about 1.2 percent of its needs. *Ibid.*; *Lien-ho Pao*, August 21, 1979, p.1.

13. Coastal states in disputed areas are often reluctant to spell out their claims in detail. The South China Sea and the Aegean Sea are good examples. For the former, see Hungdah Chiu and Choon-ho Park," Legal Status of the Paracel and Spratly Islands," *Ocean Development and International Law Journal*, Vol. 3 (1974), p. 3, and Hungdah Chiu, "South China Sea Islands: Implications for Delimiting the Seabed and Future Shipping Routes," *China Quarterly*, No. 72 (December 1978), p. 742.

For the latter, see Ying-jeou Ma *et al., Greek-Turkish Conflict over the Continental Shelf of the Aegean Sea: An Analysis of the Problem and a Proposed Solution* (May 1978) (unpublished paper written under the supervision of the late Prof. R.R. Baxter of the Harvard Law School). The ROK's present concessions are not necessarily its maximum claim. Harrison, *supra* chapter 1, note 39, p. 46 (Fig. 7).

14. The distinction between a *claim* and a *concession* is worth noting. As used here, a

and exploitation. For the purpose of this study, the Japanese concession areas are regarded as the extent of its continental shelf claim. Presented below is an examination of these unilateral claims and actions. The Democratic People's Republic of Korea (DPRK), better known as North Korea, has no coastal front in the East China Sea and only will be referred to when necessary.

A. The Republic of Korea

1. Claims and Concession Areas

The ROK was quick in translating euphoria into action. Five months after the CCOP survey ended, but before the Emery Report came out, Gulf oil obtained two offshore concessions[15] (Map 4). Shell, Socal/Texaco (Caltex), and Wendell Phillips followed in line within 17 months.[16] Of the seven concessions, Blocks K-4, K-5, and K-7 are in the East China Sea and of primary interest. The ROK concluded the oil contracts with foreign oil firms in such haste that its governing laws came out only after the contracts had been signed. The Submarine Mineral Resources Development Law took effect in January 1970 in which a general claim was made to the continental shelf "adjacent to the coasts of the Korean Peninsula and its ancil-

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claim denotes a state's assertion of exclusive sovereign rights over the natural resources in its adjacent continental shelf. A concession means a grant, made by a government to a concessionaire, typically a private or state-owned company, to explore a portion of the continental shelf and/or exploit its natural resources. The legal mechanism for exploration and production of oil takes various contractual forms ranging from traditional concessions, joint ventures and production sharing contracts, to service contracts. The seabed under a concession is referred to as a "concession area (block or zone)" A state may not grant an area larger than its claimed continental shelf to concessionaires whereas a concession granted implies that a claim exists at least to the extent of the concession. A claim may be implicit and has to be ascertained by concessions actually granted. As used here, the terms "seabed", "shelf", and "continental shelf" are interchangeable.

15. The concession areas of Gulf and others in 1970 were as follows:

Operator	Block(s)	Area (km^2/$mi.^2$)	Date Granted
Gulf	K-2,K-4	70,000/27,000	4-15-69
Shell	K-3,K-6	70,000/27,000	1-28-70
Caltex	K-1,K-5	80,000/30,000	2-27-70
Wendell Phillips	K-7	59,000/23,000	9-24-70

J.J. Tanner and W.E. Kennett, "Petroleum Development in Far East in 1971: South Korea," *AAPG Bulletin*, Vol. 56 (1972), pp. 1823, 1845 (Table II). Slight changes have been made from the original table. For the status of these concession blocks as of December 31, 1982, see Map 5 and Table in the Appendix.

16. *Ibid.*

lary islands."[17] A Presidential Decree delineating the seven blocks was promulgated in May 1970.[18] Finally, an enforcement regulation came into effect a year later.[19]

2. *Principles of International Law Employed*

Just a few months before the ROK acted, the International Court of Justice (ICJ) at the Hague handed down the decision of the *North Sea Continental Shelf Cases*,[20] the first of the only three judicial decisions to date on seabed delimitation. The equidistance principle, a cornerstone of Article 6 of the Shelf Convention,[21] was not regarded as a mandatory rule of customary international law in continental shelf delimitation, particularly between adjacent states.[22] The Court considered the principle inequitable because of the distorting effect it might give to individual geographical features.[23] Rather, the Court stressed that a

> delimitation is to be effected by agreement in accordance with equitable principles and taking account of all the relevant circumstances in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a *natural prolongation of its land territory into and under the sea* without encroachment on the natural prolongation of the land territory of the other . . . (emphasis added)[24]

The significance of this new principle of "natural prolongation of land territory" was certainly not lost in the ROK. The geomorphology of the East China Sea was such that application of this principle would be advantageous to the ROK vis-à-vis Japan.[25] The

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17. Korean Petroleum Industry Development Center, *The Law for Development of Submarine Mineral Resources*, Seoul, 1971, p. 55 (Korean-English bilingual pamphlet in the author's possession).

18. *Ibid.*, p. 70. The geographical coordinates of the area delineated in the Presidential Decree were quoted *in toto* in Oda (1973), *supra* note 11, p. 327.

19. Korean Petroleum Industry Development Center, *supra* note 17, p. 80.

20. I.C.J. Reports 1969, p. 3.

21. Article 6 of the Shelf Convention is quoted in Chapter 4 *infra*.

22. I.C.J. Reports 1969, pp. 41, 45, 46.

23. *Ibid.*, p. 17.

24. *Ibid.*, p. 53.

25. The ICJ noted, without pronouncing the status of the Norwegian Trough, that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, *nor to be its natural prolongation*. (emphasis added)
Ibid., p. 32.

ROK can justifiably argue that Japan's continental shelf jurisdiction ends at the Okinawa Trough so that Japan may not "jump" over the Trough to claim the vast shelf on the other side. The ROK has, in fact, officially advocated this legal position at UNCLOS III.[26] On the other hand, the flat and uninterrupted bottom of the Yellow Sea (Map 1) neutralized the thrust of this principle because the seabed may be regarded as the natural prolongation of China's as well as Korea's territories. An equidistance (median-line) boundary seems justified by the predominantly opposite-coast situation.[27]

Against this background lies the legal rationale of the ROK's claim and concessions. For Blocks K-1 to K-4 (Map 4) facing China, the equidistance principle must have been the governing rule. Cheju and other islands along the coast apparently have been used as basepoints. This presumably is justified in view of their proximity to shore and the ROK's straight baseline system declared in 1978.[28] While Block K-5 needs no international delimitation (Map 4), Block K-6 seems also to have entailed the equidistance principle.

Block K-7 is far more complex in delineation. Geographically, it stretches far south into the East China Sea; its southern tip lies 330 miles from Cheju, the nearest ROK basepoint. In the north, a 12-mile zone is allowed for Japan's Danjo Gunto and Tori Shima.[29] Geomorphologically, the block goes beyond the 200-meter isobath (dotted line in Map 5), which bisects the block, all the way to the middle of the Okinawa Trough where the water averages 900 meters

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26. Statement of Mr. Song (ROK). UNCLOS III, *Official Records*, Vol. 1 (1975), p. 90.

27. The ICJ said in dictum that:

> The continental shelf area off, and dividing opposite states, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and *can* therefore *only be delimited by means of a median line* . . (emphasis added)

I.C.J. Reports 1969, p. 36.

28. The ROK declared a 12-mile territorial sea in April 1978 and promulgated a system of straight baselines in September that year. "Straight Baselines: Republic of Korea," *Limits in the Seas*, No. 82 (January 23, 1979), p. 3. Cheju Island is 48 miles off the nearest Korean mainland shore but less than 20 miles from the nearest point (Point 13) on the straight baselines (Map 5). The whole Cheju Strait, the water body between Cheju Island and the Korean mainland, thus has come under the ROK's territorial jurisdiction. Treating Cheju Island as part of the Korean Peninsula in determining the ROK's continental shelf seems to present a strong case. For an earlier study on the ROK's islands, see Donald R. Allen and Patrick H. Mitchell, "The Legal Status of the Continental Shelf of East China Sea," *Oregon Law Review*, Vol. 51 (1972), pp. 789, 801-02 [hereinafter cited as Allen & Mitchell (1972)].

29. At the time Japan only claimed a 3-mile territorial sea. "National Claims to Maritime Jurisdictions," *Limits in the Seas*, No. 36 (December 23, 1975), p. 109.

in depth (Map 1). The block thus sits on two distinct geomorphological provinces: the shelf and the Trough. Apparently, the equidistance principle fails to explain the block's location. To go beyond the geological shelf into an area on the Japanese side of a hypothetical median line drawn regardless of the Okinawa Trough, the Natural prolongation principle must have been employed. Two questions arise. First, as the block's eastern side largely follows the mid-channel line of the Okinawa Trough, did the ROK apply the *thalweg* principle[30] by analogy? There seems to be no obvious answer. Second, the block enters an area where the maritime boundaries of China, Japan, and Korea would converge. The area lies *off* rather than *between* the coasts of China and Korea, to paraphrase the words of the United Kingdom's counsel in the 1977 *Anglo-French Continental Shelf Arbitration*[31] (Map 14) where an analogous situation existed.[32] Are the coasts *opposite* or *adjacent* to each other? Or neither? The ROK seemed to have treated it, as the Anglo-French Court of Arbitration has done, as an "opposite" situation and applied the equidistance principle accordingly in delineating Block K-7 and, perhaps, part of Block K-4 as well.

In sum, given disparate geophysical environments, the ROK has relied on the natural prolongation principle vis-à-vis Japan and the equidistance principle in relation to China. Coastal islands have been used as basepoints whereas uninhabited mid-ocean islets were only accorded a 12-mile zone.

3. Offshore Exploration

Wendell Phillips, a large independent oil firm,[33] "farmed out,"[34]

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30. Under the principle the mid-channel line of a navigable boundary river is the international boundary between two riparian states. *See generally* L. Oppenheim, *International Law*, 8th ed., H. Lauterpacht ed., London: Longmans, Green and Co., 1955, p. 484.

31. The United Kingdom of Great Britain and Northern Ireland and the French Republic *Delimitation of the Continental Shelf* Arbitration of 10 July 1975; Decision of 30 June 1977 and Decision of 14 March 1978 (Interpretation of the 1977 Decision), Cmd. 7439, March 1979, *reprinted in International Legal Materials*, Vol. 18 (1979), p. 494 [Judge Waldock's separate opinion and Judge Briggs' dissenting opinion on the second decision excluded in the reprint] [hereinafter cited as the Anglo-French Award].

32. The analogous area referred to is the "Atlantic region" Anglo-French Award, para. 89-98. For details, see Chapter 5 *infra*.

33. In world oil business, the seven giant oil companies, or the "Seven Sisters" are usually referred to as "majors" whereas smaller companies are known as "independents". The "Seven Sisters" are: Exxon (U.S.), Royal Dutch/Shell (U.K. and the Netherlands), Mobil (U.S.), BP (U.K.), Texaco (U.S.), and Gulf (U.S.). For a historical

at an early stage, 90 percent of its interest to Korean American Oil (Koam), a Korean-U.S. joint venture newly established to explore Block K-7. That block was wholly included in the Japan-ROK Joint Development Zone (JDZ) to be discussed *infra*. Caltex (Block K-1 and K-5) conducted seismic surveys in both blocks but was prevented by the State Department from drilling in the politically sensitive Block K-1.[35] Hostility which Gulf and others actually encountered in the same region served as a further deterrent.[36] Caltex drilled a dry hole in Block K-5 before relinquishing to the ROK all but part of Block K-5 of its concessions in 1976.[37] Gulf's two blocks (K-2 and K-4), said to be promising in the Emery Report, were all in the sensitive area opposite the PRC. Gulf has experienced extensive sabotage by Peking's "fishing" vessels, in addition to repeated warnings. The company drilled three dry holes during 1972-73 before relinquishing its concessions in 1975; part of Block K-4 was later granted in August 1981 to Zapata Oil which did some drillings in 1983.[38]

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account, see Anthony Sampson, *The Seven Sisters: The Great Oil Companies and the World They Shaped*, New York: Viking Press, 1975, pp. 5-17, 32-42.

34. To "farm out", in American oil business jargon, means to assign the whole or a part of a lease (here the concession) by the lessee (here the concessionaire) not interested in drilling at the time to another operator or operators who are. R.D. Langenkemp, *Handbook of Oil Industry Terms and Phrases*, Tulsa, Okla.: The Petroleum Publishing Company, 1974, p. 47.

35. Harrison writes,

> [T]he State Department was instructed to inform oil company representatives in Washington and U.S. embassies throughout Asia that the American posture in disputes relating to oil survey operations would thereafter not only be one of scrupulous noninvolvement but of active discouragement. If American companies nonetheless conducted survey operations in disputed areas they would do so at their own risk. They were not to use U.S.-flag survey vessels or drilling rigs; not to employ U.S. citizens in the crews of such vessels; not to use classified U.S. technical equipment that might fall into the hands of other military forces; and not to expect cooperation in using U.S. satellites for navigation purposes.

Harrison, *supra* chapter 1, note 39, pp. 5-6. This policy was made public in a formal State Department announcement. Murray Marder, "U.S. Cautions Oil Seekers near China," *Washington Post*, April 10, 1971, p. 1.

36. Since 1971, floating tracer cables used in surveys in the Yellow Sea have been systematically cut by armed PRC fishing vessels. Gulf in March encountered PRC missile gunboats which remained nearby for three days. Harrison, *supra* chapter 1, note 39, p. 130.

37. William R. Scheidecker, "Petroleum Developments in Far East in 1976: South Korea," *AAPG Bulletin*, Vol. 61 (1977), p. 1837. The part of Block K-5 that was not relinquished is in part covered by the JDZ.

38. William R. Scheidecker, "Petroleum Developments in Far East in 1975: Republic of Korea," *AAPG Bulletin*, Vol. 60 (1976), p. 1912; G.L. Fletcher, "Oil and Gas Developments in Far East in 1981: South Korea," *AAPG Bulletin*, Vol. 67 (1983), pp. 1897-98.

4. Joint Development with Japan

Frustrated by its experience with the U.S. oil companies that were vulnerable to political pressure, the ROK became enthusiastic about joint development with Japan in the area claimed by both countries. Negotiation with Japan began in late 1972 and was consummated, despite protests from China (the PRC and the ROC)[39] and North Korea,[40] in January 1974, with the signing of two agreements. The first dealt with delimitation of the continental shelf boundary in the Korea Strait.[41] The other was the Japan-ROK Joint Development Agreement under which the JDZ was established and the seabed dispute was shelved.[42] While the ROK parliament quickly approved the treaty in December 1974, it took the Japanese Diet more than three years to do the same, mainly due to domestic political infighting.[43] The PRC protested again,[44] accusing Japan and the ROK of infringing upon China's sovereignty. Seoul and Tokyo exchanged instruments of ratification in June 1978.[45] Despite its expected third protest,[46] the PRC took no retaliatory action against Japan nor linked the issue with the pending friendship treaty.[47]

The JDZ, located entirely on the Japanese side of the Japan-ROK hypothetical median line (Map 1), was divided further, under

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39. *Peking Review*, February 8, 1974, p. 3. The ROC also made it clear on February 14, 1974 that it reserved all its rights in the continental shelf of the East China Sea. "Continental Shelf Rights Reserved," Free China Weekly, February 17, 1984, p. 1. For a discussion, *see infra* Chapter 3.

40. *Korean Central News Agency* (Pyongyang), February 3, 1974.

41. Agreement between Japan and the Republic of Korea Concerning the Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries, February 5, 1974, NDLOS, Vol. 4 (1975), p. 113; "Continental Shelf Boundary and Joint Development Zone: Japan-Republic of Korea," *Limits in the Seas*, No. 75, September 2, 1977, pp. 1-3.

42. Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, February 5, 1974, NDLOS Vol. 4 (1975), pp. 117-33; *Limits in the Seas*, No. 75, September 2, 1977, pp. 12-33.

43. For the pros and cons in Japan, see Susumu Awanohara, "Oil Pact Delay Upsets Seoul," *Far Eastern Economic Review*, May 13, 1977, p. 25; Sam-O Kim, "The Resentful Land of the (Not So) Morning Calm," *ibid.*, June 4, 1977, pp. 55-56.

44. The PRC first warned, on May 27, 1977, the Japanese not to ratify the agreement, *Peking Review*, June 3, 1977, p. 7, and then lodged a "serious protest" with Tokyo after the agreement was ratified, declaring the agreement "entirely illegal and null and void", *ibid.*, June 17, 1977, pp. 16-17.

45. Junnosuke Ofusa, "Japan-South Korea Oil Treaty Ratified," *New York Times*, June 15, 1978, p. D11.

46. *Peking Review*, June 30, 1978, p. 25.

47. Junnosuke Ofusa, *supra* note 45.

the agreement, into nine subzones along the boundaries of existing Korean and Japanese concession blocks (Map 6).[48] Subzones 5, 6, 7, 8, and 9 overlap with areas claimed by the ROC and the PRC. The Western oil firms which left reluctantly in 1976 or earlier came back, applying anew for mining rights in the JDZ.[49] So did Japanese firms which had concessions there.[50] Thus far, the *exploration* right to Subzone 7, the largest, has been awarded to Koam on behalf of the ROK whereas *exploitation* rights, upon commercial discovery, will be exercised by Nippon Oil, representing Japan.[51] The Japan-ROK Joint Commission, an overseeing body set up under the agreement, has worked out similar arrangements in Subzones 2, 3, 4, 5 and 6 (Map 6).[52] These opposite combinations of oil companies representing the interests of the ROK and Japan are intended to balance conflicting national interests in an intergovernmental joint venture. Regardless of these arrangements, all natural resources extracted and all costs incurred are to be equally divided.[53] Full-scale exploration was begun in September 1979.[54] By mid-1983, two exploratory wells had been spudded in Subzone 7, again over the PRC's protest.[55]

B. Japan

Japan was the first in East Asia to appreciate the potential of seabed oil.[56] The Ryukyu Islands' return to Japan by the U.S. in 1972 was reportedly accelerated under Japanese pressure due in part to the islands' strategic location.[57] The hitherto little known Tiao-

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48. *See* Article III and the Appendix of the Agreement, *supra* note 42.

49. Junnosuke Ofusa, *supra* note 45. The Western majors in fact pushed the conclusion of the agreement so that they could go ahead with drilling.

50. *Ibid.*

51. Ron Richardson, "South Korea Poised to Drill," *Far Eastern Economic Review*, September 14, 1979, p. 63.

52. Art. XXIV of the Agreement.

53. Art. IX.

54. Ron Richardson, *supra* note 51.

55. *Petroleum Economist*, August 1980, p. 357; G.L. Fletcher, *supra* note 38, p. 2373; G.L. Fletcher, "Oil and Gas Developments in Far East in 1982: South Korea," *AAPG Bulletin*, Vol. 67 (1983), pp. 1897-98. The PRC's protest appeared in *Beijing Review*, May 19, 1980, pp. 6-7.

56. The Japanese conducted preliminary drilling near the Tiao-yu-t'ais and almost found gas during World War II. Harrison, *supra* Chapter 1, note 39, p. 174.

57. *See* Tao Cheng, "The Sino-Japanese Dispute over the Tiao-yu-t'ai (Senkaku) Islands and the Law of Territorial Acquisition," *Virginia Journal of International Law*, Vol. 14 (1974), pp. 221, 242 note 67 [hereinafter cited as Cheng (1974)]. Japan was vested with so-called "residual sovereignty" over the Ryukyu Islands. For details of the back-

yu-t'ais, sitting atop the oil-rich shelf, became the focus of a bitter territorial dispute between Japan and China (the ROC and the PRC). Japan also found itself unable to accept the ROK's extensive offshore claims. The year 1972 witnessed certain significant changes. Japan and the ROK began negotiating a joint development program in the disputed area. Meanwhile, Tokyo's establishment of diplomatic ties with Peking in September 1972 not only shelved the explosive territorial issue but also paved the way for oil imports from the PRC.[58] It was thereafter politically undesirable and economically unnecessary for Japan to continue an ambitious oil hunt in the troubled East China Sea.

1. Claims and Concession Areas

Japan thus far has made no official seabed claim to the East China Sea. The Japanese Government, however, has asserted or defended its *de facto* claims and concessions in a variety of ways. For instance, in a diplomatic note to the ROC on July 18, 1970,[59] ten days before Gulf signed the oil exploration contract with CPC,[60] Japan stated that the ROC's concession zones located between Japan (including the Tiao-yu-t'ais, according to the Japanese) and Taiwan were unilateral and invalid under international law. The position was made public in August of that year by Japanese Foreign Minister Aichi in the Diet.[61] In October, talks were held between the ROC's acting Foreign Minister and the Japanese Ambassador.[62] The latter reportedly defended Japanese concessions in the disputed area[63] and proposed a transitional arrangement pending formal ne-

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ground, see generally Senate Committee on Foreign Relations, *Okinawa Reversion Treaty: Hearing on Exec. J 92-1 (The Agreement between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Island)*, 92nd Cong., 1st Session, 1971.

58. Japan began importing crude oil from the PRC in May 1973. A long-term trade agreement concluded in 1978 called for importation of 47.1 million tons (344 million barrels) of oil during 1978-85, *New York Times*, February 17, 1978, p. 8. The agreement was later extended to 1990.

59. *See* Hungdah Chiu, "Tiao-yu-t'ai Lieh-yu Wen-t'i Yen-chiu" [A Study of the Tiao-yu-t'ai Islands Problem], *Cheng-ta Fa-hsueh P'ing-lun*, (Chengchi Law Review), Vol. 6 (1972), pp. 1, 3 [hereinafter cited as Chiu (1972)]. This article was the definitive work on the Tiao-yu-t'ais dispute at the time. The source of this particular information was identified as "reliable sources", *ibid.*, p. 3, n.18.

60. *Infra* text accompanying notes 112.

61. *Chung-yang Jih-pao*, August 11, 1970, p. 1.

62. Chiu (1972), *supra* note 59, pp. 4, 21-22.

63. *See* Park (1972), *supra* Chapter 1, note 18, p. 13.

gotiation.[64] Japan reiterated this flexible stand later in December 1971.[65] As if to show that flexibility did not mean weakness, Japan was firm in preventing Gulf's planned survey near the Tiao-yu-t'ais in mid-1972.[66] Japan's reactions to the ROK's claims ran along similar lines,[67] except for the added complication of a territorial dispute with the ROC and the PRC. By concluding the Joint Development Agreement, Japan and the ROK did not fail to stress that their respective sovereign rights in the JDZ remained unaffected.[68]

West Japan Oil, a Shell/Mitsubishi joint venture, filed the first concession application in 1967 (J-4 in Maps 4, 7, and 8).[69] The block was only marginally relevant here (Map 4). West Japan obtained more concessions in the Okinawa Trough (J-3c in Maps 7 and 8) and beyond, the bulk of which were assigned in 1977 to New West Japan oil (Map 8), a joint venture of Mitsubishi, Shell, and the government-owned Japan Petroleum Development Corporation (JPDC, renamed Japan National Oil Corporation (JNOC) in June 1978).[70] Part of the West Japan blocks (J-4 and J-3c) was later included in the JDZ (Subzones 1 and 9 in Map 6). The second concession application was made by Nippon Oil in 1968 for a block (J-3 in Maps 4, 7, and 8) of 50,312 sq. km. immediately south of the West Japan block.[71] The bulk of the Nippon block later became Subzones 4, 5, and 7 of the JDZ (Map 6).

In 1969, Teikoku Oil applied for a concession block (J-2 in Maps 4, 7, and 8) south of the Nippon zone (Map 7).[72] Subsequently, Teikoku, joined by Gulf, applied for vast areas along the

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64. Chiu (1972), *supra* note 59, pp. 25-26.

65. *Ibid.*

66. Harrison, *supra* Chapter 1, note 39, pp. 178-79.

67. Park (1972), *supra* Chapter 1, note 18, p. 20.

68. Japan-ROK Joint Development Agreement, *supra* note 42, Art. XXVIII.

69. Howard W. Dalton, "Petroleum Developments in Far East in 1967: Japan," *AAPG Bulletin*, Vol. 52 (1968), pp. 1585, 1587.

70. New West Japan Petroleum Development Company was formed to accommodate financing by the Japanese Government through JPDC. Japan Petroleum Consultants, Ltd., *Japan Petroleum and Energy Yearbook 1978*, (Tokyo, 1978), pp. T-111, T-112 [hereinafter cited as *Japan Petroleum Yearbook* (1978)]. For the renaming of JPDC to JNOC, see the Japanese National Committee of the World Petroleum Congress, *The Petroleum Industry in Japan 1978*, (Tokyo, 1979), p. 2.

71. Howard D. Dalton, "Petroleum Development in the Far East in 1968: Japan," *AAPG Bulletin*, Vol. 53 (1969), p. 1801. But Nippon Oil claimed that it first applied for a permit as early as 1958. *Japan Petroleum Yearbook, supra* note 70, p. T-107. The acreage figures in these sources (and within the same source) are also slightly different. Here the figure in the September 1972 issue of *AAPG Bulletin* is adopted.

72. Wilson Humphrey, "Petroleum Development in Far East [in 1969]: Japan,"

Okinawa Trough and around the Ryukyus. Teikoku's block J-3 was later covered by the JDZ. Among Japanese firms, Teikoku has the largest concession area in the East China Sea. Also in 1969, JPDC approached the Ryukyu authorities, then under U.S. administration, for leasing 25,000 sq. km. of seabed (J-1 in Map 4) 180 miles west of the Ryukyus and 108 miles from Taiwan (Map 4).[73] The JPDC zone was later enlarged and divided among Uruma (J-1a), Japan Petroleum Exploration Company (Japex, J-1b), and Alaska (J-1c) (Maps 7 and 8).

The status of some of these concession blocks remains unclear.[74] For the purpose of this study, they are treated as representing the *de facto* Japanese claim to the East China Sea.

2. Principles of International Law Employed

Despite the absence of an official seabed claim to the East China Sea, Japan nevertheless made public its positions on continental shelf issues in general. In 1973, Japan submitted to the U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction (hereinafter the Seabed Committee) a preliminary proposal on "Principles on the Delimitation of the Coastal Seabed Area."[75] Revised Draft Articles on the same subject were proposed during the second session of UNCLOS III at Caracas. The Draft Articles, in which Japan's adherence to the equidistance principle was obvious, provided, *inter alia*:

> 2. The outer limit of the continental shelf (the coastal seabed area) shall not exceed a *maximum distance of 200 nautical miles* from the baseline for measuring the breadth of the territorial sea as set out in . . .
> 3. (a) Where the coasts of two or more States are adja-

AAPG Bulletin, Vol. 54 (1970), p. 1561; Wilson Humphrey, "Petroleum Development in Far East in 1970: Japan," *AAPG Bulletin*, Vol. 55 (1971), pp. 1647, 1648.

73. Wilson Humphrey, "Petroleum Developments in Far East [in 1969]: Japan," *supra* note 72, p. 1561.

74. Before 1972, all the concessions had been regarded as "under application" Park (1972), *supra* Chapter 1, note 18, p. 13; J.J. Tanner and W.E. Kennett, "Petroleum Developments in Far East in 1971: Japan," *AAPG Bulletin*, Vol. 56 (1972), pp. 1828, 1843 (Table 5). But as late as 1977, the Japex sector, for instance, was referred to as "provisional" whereas the Teikoku and Uruma blocks were marked "letter of intent area" in Map 8. This author's inquiries to JNOC (Washington office) and the Japanese embassy in Washington in late 1979 got nowhere. The information black-out was obviously prompted by the sensitivity of the matter.

75. Japan: Principles on the delimitation of the coastal sea-bed area, UN Doc. A/AC.138/SC.II/L.56 (1973), Seabed Committee Report, Vol. 3 (1973), p. 111.

> cent or opposite to each other, the delimitation of the boundary of the continental shelf (the coastal seabed area) appertaining to such States shall be determined by agreement between them, *taking into account the principle of equidistance*.
>
> (b) Failing such agreement, *no State is entitled to extend its sovereign rights over the continental shelf* (the coastal seabed area) *beyond the median line*, every point of which is equidistant from the nearest points of the baselines, *continental or insular*, from which the breadth of the territorial sea of each State is measured. (emphasis added).[76]

Another important element in seabed delimitation is the selection of basepoints. It is not uncommon for two opposite states adhering to the same equidistance principle to disagree considerably on the basepoints from which the equidistance line is to be drawn.[77] Tiny islands situated midway or on the "wrong" side of the hypothetical median line are one of the best examples. The regime of islands (i.e., definition and status) was debated at length in the Caracas session of UNCLOS III, where Japan declared that it favored, in principle, an equal treatment of islands, islets, and continents regarding their entitlement to seabed rights.[78] Article 3(b) of the Draft Articles quoted above indicated the same position of Japan.

Delimitation of the West Japan blocks in the Korea Strait (J-4) and Okinawa Trough (J-3c) clearly relied, in relation to Korea and China, on the equidistance principle. All the islands (Tsushima, Osumi, Tokara, Amami, etc) were used as basepoints. The Nippon block (J-3a) seems to have followed the same principle vis-à-vis Korea and China, using as basepoints not only the Japanese continental territory (Kyushu), and nearby islands (Goto Retto), but also tiny

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76. Japan: Revised draft articles on the continental shelf, UN Doc. A/CONF.62/C.2/L.3/Rev.1 (1974), UNCLOS III, *Official Records*, Vol. 3 (1975), p. 211.

77. For instance, judging from their claims and concessions, both Greece and Turkey seemed to adhere to the equidistance principle. Yet the Greeks would use the Greek Aegean Islands as basepoints for measuring the median line, including those only a few miles from the Turkish coast. This would leave the Turks with nothing but a narrow belt of continental shelf not much different from its territorial sea. On the contrary, the Turks would disregard the Greek islands in drawing the median line between the mainland coasts of the two countries so that Turkey would get a substantial share of the Aegean continental shelf. The Aegean Sea shelf dispute underscores the significance of basepoint selection. *See* Ying-jeou Ma *et al., supra* note 13. This is also true in the *Anglo-French* arbitration, *supra* note 31.

78. Statement of Mr. Ogiso (Japan), UNCLOS III, *Official Records*, Vol. 2 (1975), p. 148.

islets (Tokara Gunto) and barren rocks (Tori Shima and Danjo Gunto). Delineation of the Teikoku blocks also entailed the equidistance principle. As two of the blocks (J-2 and J-3b) stretch over 200 miles, the basepoints employed vary. Kyushu, Tokara Gunto, and Amami Gunto may all have been used as basepoints for Block J-3b and the eastern part of Block J-2 whereas the southern part of Block J-2 must have engaged the disputed Tiao-yu-t'ais as basepoints. Questions concerning tiny, uninhabited islets would arise. Moreover, all basepoints selected (except the Tiao-yu-t'ais) are in areas geomorphologically unrelated to the continental shelf on which the concession blocks sit, due to the presence of the intervening Okinawa Trough. Much the same can be said of the concession blocks of Japex, Uruma, and Alaska which used the Tiao-yu-t'ais as the sole basepoints. Analyses of the legal status of tiny islands and undersea trough in relation to continental shelf delimitation are reserved for Chapters 4 and 5.

To summarize, despite the unclear status of some concession blocks, Japan has consistently followed the equidistance principle in delimiting its continental shelf, with islands being accorded the same seabed rights as is continental territory, regardless of their size and economic value.

3. Offshore Exploration

As noted earlier, Japanese geologist Niino coauthored, with Emery, two important geological studies in 1961 and 1967 on the East China Sea and participated in the 1968 CCOP survey. Niino was so fascinated by the oil potential that he personally organized, with substantial support from the Japanese Government and universities, three geophysical surveys in 1968, 1969, and 1970 in areas around the Tiao-yu-t'ais.[79] The first two produced inconclusive findings;[80] the result of the third, said to be more encouraging, led to

79. For an account of these surveys, see Daisuke Takaoka, "Senkaku Retto Shuhen Kaiiki no Gakujyutsu Chosa ni Sanka Shite" (I participated in the Academic Surveys in Offshore Areas Surrounding the Senkaku Islands), *Okinawa* (in Japanese), No. 56 (March, 1971), pp. 42-65, *cited in* Yang-chih Huang *et al.*, "Jih-jen Wei Mou-tuo wuo Tiao-yu-t'ai Cho-lê-hsieh Shê-mo Shou-chiao?" [What Tricks Have the Japanese Played in Attempting to Plunder Our Tiao-yu-t'ais?], *Ming-pao Yueh-k'an*, Vol. 7 (October 1972), pp. 6, 7, 20 note 16 [hereinafter cited as Huang *et al.* (1972)]; Harrison, *supra* Chapter 1, note 39, p. 175. For the result of the second survey, see UNECAFE/CCOP Technical Advisory Group, "Marine Geologic Investigations of the Offshore Area around the Senkaku Islands, Southern Ryukyu Islands," Report of the Seventh Session of CCOP (Agenda Item 4(b)), UN Doc. E/CN.11/L.278 (1970), pp. 99, 111.

80. Harrison, *supra* chapter 1, note 39, p. 175.

Japan's planning of a "five-year crash program" to search for oil in that area.[81] Troubled by the boundary dispute, however, Japanese companies except West Japan did minimal exploration before September 1972.[82] Since then, the Japanese Government has undertaken cautiously a few surveys in the East China Sea where private companies were not permitted to do so. All these surveys and one drilling (by Gulf) took place in the Okinawa Trough or east of the Ryukyus, outside the disputed area.[83]

4. Joint Development with the ROK

The background of the Japan-ROK joint development program has been noted earlier. Japanese concession blocks included in the JDZ are those of Nippon (J-3a), Teikoku (J-3b), and West Japan (J-3c & J-4) (Map 6).

C. The Republic of China

In terms of population and territory under effective control, the ROC is the smallest coastal state in the East China Sea.[84] Otherwise resource-poor, the island of Taiwan has had a century-long history

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81. *Ibid. But see* Huang *et al.* (1972), *supra* note 79, p. 9.

82. In 1969, both West Japan and Nippon conducted magnetometer and seismic surveys in their respective concession areas. Wilson Humphrey, *supra* note 73, p. 1562. No survey was ever conducted by either Teikoku or Japex in 1970. Wilson Humphrey, "Petroleum Developments in Far East in 1970: Japan," *supra* note 72, pp. 1647-49.

83. See W.E. Kennett, "Petroleum Developments in Far East in 1972: Japan," *AAPG Bulletin*, Vol. 57 (1973), pp. 2090, 2091 (Table 2); Harrison, *supra* Chapter 1, note 39, pp. 172-73; William R. Scheidecker, "Petroleum Developments in Far East in 1976: Japan," *AAPG Bulletin*, Vol. 61 (1977), pp. 1837, 1843 (Table 3), 1870 (Fig. 9); G.L. Fletcher, "Petroleum Developments in Far East in 1977: Japan," *ibid.*, Vol. 62, (1978), pp. 1985, 2005 (Table 5); G.L. Fletcher, "Petroleum Developments in Far East in 1978: Japan," *ibid.*, Vol. 63 (1979), pp. 1822-23, 1864 (Fig. 13), 1865 (Fig. 14); G.L. Fletcher, "Petroleum Developments in Far East, 1979: Japan," *ibid.*, Vol. 64 (1980), pp. 1888, 1940 (Fig. 15), 1941 (Fig. 16); G.L. Fletcher, "World Energy Developments, 1980-Foreign Oil and Gas Developments, Far East: Japan," *ibid.*, Vol. 65 (1981), pp. 2168, 2193 (Fig. 19), 2194 (Fig. 20); and G.L. Fletcher, "Oil and Gas Developments in Far East in 1981: Japan," *ibid.*, Vol. 66 (1982), pp. 2367, 2394 (Fig. 19), 2395 (Fig. 20). G.L. Fletcher, "Oil and Gas Developments in Far East in 1982: Japan," *AAPG Bulletin*, Vol. 67 (1983), pp. 1893-94. In late May 1979, Tokyo sent two research vessels to the Tiao-yu-t'ai waters for a ten-day multipurpose survey. A day earlier, a heliport was completed on the main island of the group. *Hua-chiao Jih-pao*, May 28, 1979, p. 1. For details, see Introduction, note 15 and accompanying text.

84. Population and land area as of December 31, 1982 are as follows:

of onshore oil and gas development dating back to 1877.[85] Offshore oil operation did not begin, however, until the late 1960s. Like the ROK, the ROC was quick to capitalize on the Emery Report; unlike the ROK, the ROC has, since 1946, had a relatively sophisticated state oil enterprise—the China Petroleum Corporation (CPC). CPC has engaged not only in such "downstream" operations as transportation, refining, marketing, and petrochemicals, but also in such "upstream" operations as geological survey and oil prospecting.[86] During 1969-1970, the ROC systematically made seabed claims, enacted relevant legislation, delineated offshore zones, and engaged six U.S. oil companies for offshore oil development. All this occurred amid the simmering political atmosphere among coastal states in the East China Sea, the offshore claims of which hopelessly overlapped with one and other. To becloud matters further, the U.S. quietly reversed its China policy in 1970, culminating in President Nixon's visit to the PRC in February 1972. To the oil companies associated with CPC, Washington's *volte-face* eroded their confidence in the ROC's future. Moreover, State Department interventions against operations by U.S.-flag vessels in sensitive waters made offshore operations even more difficult. Eventually, two firms gave up; the other four decided to wait and see.

1. Claims and Concession Areas

"Continental shelf" as a legal concept was alien to the ROC prior to the 1958 UNCLOS I, except to a few U.N.-related legal experts. After the ROC signed the Shelf Convention, neither the ROC Government nor the academic community paid much attention to the new regime or the Convention's ratification by the ROC until the Emery Report brought the issue into the limelight.[87] The ROC Gov-

	Japan	ROK	China PRC	China ROC
Population (millions)	118	40 (est.)	1,004 (est.)	18
Land area ('000 km²)	378	99	9,561	36

The World Almanac and Book of Facts 1983, New York: Newspaper Enterprise Association, 1983, pp. 509, 511, 535, 537.

85. Chinese Petroleum Corporation, *A Petroleum History of China*, Vol. 2, Taipei: Chinese Petroleum Corporation, 1976, pp. 905-09 [hereinafter cited as *Petroleum History of China*].

86. *Ibid.*, Vol. 2, p. 1521 *et seq.* *See also Chinese Petroleum Corporation*, [A Brief Introduction], Taipei, 1979.

87. Kang Huang, "Chung-hua-min-kuo Yu Ta-lu-chiao-ch'en Chih-tu [The Repub-

ernment, urged by its Economic Affairs Ministry (CPC's parent ministry), declared on July 17, 1969:

> The Republic of China is a State signatory to the Convention on the Continental Shelf which was adopted by the U.N. Conference on the Law of the Sea in 1958. For the purposes of exploring and exploiting natural resources and in accordance with the principles embodied in the said Convention, the Government of the Republic of China declares that it may exercise its sovereign rights over all the natural resources of the seabed and subsoil adjacent to its coast outside its territorial sea.[88]

To strengthen the declaration's legal basis, the ROC ratified the Shelf Convention on August 21, 1970[89] with two reservations made to Article 6 of the Convention:

> (1) that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the *principle of the natural prolongation of their land territories*; and
>
> (2) that in determining the boundary of the continental shelf of the Republic of China, *exposed rocks and islets shall*

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lic of China and the Regime of the Continental Shelf]," *Jen Yu Shê-hui* [Man and Society], Vol. 1, No. 3, (August 1, 1973), p. 50.

88. *Chung-yang Jih-pao*, July 18, 1969, p. 1; *Free China Weekly*, July 20, 1969, p. 4. This declaration was simply a restatement of Article 2, Paragraph 1 and part of Article 1 of the Shelf Convention. Can the ROC, merely a signatory but not a party to the Convention, nevertheless invoke its provisions to claim shelf rights? International law requires a state "to refrain from acts which would defeat the object and purpose of a treaty" when that state has signed the treaty subject to ratification unless and until that state "shall have made its intention clear not to become a party to the treaty." Article 18, Vienna Convention on the Law of Treaties. United Nations Conferences on the Law of Treaties, *Official Records*, 1970, p. 289, UN Doc. A/CONF.39/11/Add. 2; *American Journal of International Law*, Vol. 63 (1969), p. 875. The ROC's exercise of rights under Article 2 certainly would not defeat the object and purpose of the Convention since neither Japan nor the ROK was a party to the Convention. Further, a coastal state's shelf rights have been so established by state practice since 1945 that it has become customary international law. The Convention is no longer needed to justify such a claim. Thirdly, the fact that the Convention had already entered into force for five years when the ROC made the declaration also militates against possible illegality, if any, of the ROC's action.

89. *Li-fa-yuan Kung-pao* [Gazette of the Legislative Yuan], No. 64, (August 22, 1970), pp. 2, 14.

not be taken into account.[90] *(emphasis added)*

The ROC thus became the forty-third party to the Shelf Convention when the instrument of ratification was deposited with the U.N. Secretariat on October 14, 1970.[91]

The next step was to get offshore operation going. Though competent onshore, CPC needed the technology to "go offshore." From mid-1970 to mid-1972, CPC entered into joint ventures with seven North American oil companies (later reduced to six)[92] to develop a total of 194,000 sq. km. of seabed in the Taiwan Strait and the East China Sea. To regulate offshore activities, a Statute for Exploration and Exploitation of Petroleum in Offshore Areas was belatedly promulgated in September 1970[93] *after* three of CPC's joint venture contracts had been signed.[94] The Enforcement Rules issued in July 1974 further spelled out details of implementation.[95] To give substance to the 1969 continental shelf declaration, the ROC announced on October 15, 1970 the delineation of five "Reserved Offshore Petroleum Zones"[96] (hereinafter the Offshore Zones) stretching from the Taiwan Strait (22°N latitude) to the East China Sea (30°N latitude) (Map 9). The zones are separated from one another by latitudinal lines, using the mainland Chinese coasts invariably as their western limits and the west coast of Taiwan (for Zone I), the mid-

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90. *Ibid.*, p. 14; For the English translation, see *International Legal Materials*, Vol. 10 (1971), p. 452.

91. *International Legal Materials*, Vol. 10 (1971), p. 452. Nine years later, by extending the breadth of its territorial sea from 3 miles to 12 miles and by declaring a 200-mile exclusive economic zone (EEZ) on September 6, 1979, the ROC did not forget to stress in the declaration that

> [t]he 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.

See *supra* Introduction, note 20.

92. They were: Amoco (Standard Oil of Indiana), Gulf, Oceanic, Clinton, Conoco, Texfel, and Viking. Viking's relationship with CPC was too brief to deserve attention here. See *A Petroleum History of China*, Vol. 2, *supra* note 85, pp. 1177-83 and Table 7 in the Appendix of this study.

93. English text of the statute appears in *Investment Laws of the World*, Vol. 8 (1974), p. 201.

94. The haste with which the new law was acted upon belied its alleged three-year preparation and one-year drafting. *Petroleum History of China*, Vol. 2, *supra* note 85, p. 1172.

95. Chinese and English texts of the Statute and the Enforcement Rules also appear in a pamphlet published by CPC in July 1976.

96. *Chung-yang Jih-pao*, October 16, 1970, p. 1.

channel line of the Okinawa Trough (for Zone II, III and IV), and the outer edge of East China Sea continental shelf (for Zone V) as their eastern limits.[97] The ROC did not fail to stress the preliminary nature of these offshore zones, envisaging that more zones would be announced in the future.

Steps taken by the ROC were the most specific and systematic among those of the coastal states in the East China Sea. However extravagant and, perhaps, unrealistic in words, the ROC has been prudent and realistic in deeds. Concessions granted to CPC to be shared with the U.S. oil companies occupy only one half of the five Offshore Zones (Map 9). All the concession areas lie in the eastern half of the Offshore Zones, leaving unallocated the western half adjacent to the Chinese mainland coast. Moreover, the eastern limit of concession areas actually granted follows the 200-meter isobath instead of the mid-channel line of the Okinawa Trough as stated in the ROC's official announcement (Map 7). The former is farther than the latter from the Japanese coast.

2. Principles of International Law Employed

Unlike the ROK and Japan, the ROC has declared the principles of international law on which it based its seabed claims. Zone I in the Taiwan Strait requires no *international* delimitation since the ROC and the PRC are not foreign states *inter se*. There is presumably no room for applying international law. Despite the ROC's nominal claim, the western limit of its concession blocks in Zone I largely centers around a *de facto* median line,[98] zigzag in shape, leaving open the area west of that line. Were international law to govern, the result would probably be the same, given the flat and continuous shelf shared by the mainland and Taiwan.

Zones II, III, and IV extend from the Chinese mainland coast all the way to the middle of the Okinawa Trough. The ROC's claim, as the 1970 announcement indicated, does not stop at the 200-meter isobath—the conventional limit of the continental shelf; rather, it continues through the slope and the rise until it reaches the deep bottom of the Okinawa Trough. This sweeping claim, using the coasts of the Chinese mainland and Taiwan as basepoints, could not have been based on anything other than the natural prolongation

97. *Ibid.*

98. All the blocks allegedly lie within the ROC's naval patrol lines which largely coincide with or parallel to the median line in the Taiwan Strait. Interview with a CPC official in Taipei (July 29, 1978). This official preferred to remain anonymous.

principle. The explicit designation of the median line of the Okinawa Trough as these zones' eastern limit also suggests that the *thalweg* principle might have had some role to play. As in the case of the ROK's Block K-7, there exists a number of legal questions to be analyzed in Chapter 5. Zone V, the northernmost zone, is 290 to 415 miles from Taiwan (See Table 7). Under the 1970 announcement, the zone's eastern limit coincides with the edge of the continental shelf, namely, the 200-meter isobath. Applying the same analysis for Zones II to IV, one finds that the natural prolongation principle has been employed again. It is unclear, however, why Zones II, III and IV have the mid-trough line as the outer limit whereas Zone V has the shelf edge as its limit. In effect, the depression, which the 400-fathom (724-meter) isobath encircles near Kyushu, is still part of the Okinawa Trough. This means that the ROC could have designated the mid-trough line as the outer limit of Zone V as well.

Another significant feature is the selection of basepoints. Except for Zone I and part of Zone III, the ROC must have used the mainland Chinese coast as basepoints to claim such far-off shelves in the East China Sea hundreds of miles from Taiwan. The ROC's designation of the mainland Chinese coast as the outer limit of its five Offshore Zones attests to this observation. By so doing, the ROC has apparently intended to speak for all China, including the mainland.[99] Realistic or not, this position further complicates the East China Sea oil controversy.

3. Offshore Exploration

CPC's first offshore seismic survey took place in 1965 in the Taiwan Strait off the onshore producing wells in northern Taiwan.[100] The year 1968 saw three airborne geomagnetic surveys in the Taiwan Strait and the East China Sea: one by CCOP, the other two by a U.S. firm associated with Amoco.[101] The results indicated seaward

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99. This position has been upheld by the ROC Government since its retreat from the mainland to Taiwan. Taipei has made no change of its position regarding the offshore zones as delineated in the October 15, 1970 announcement. CPC officials vigorously demanded correction by editors of *Offshore* magazine in 1975 when a map in its October 1974 issue showed overlapping claims made by Japan, the ROK and the ROC in the East China Sea. *Offshore*, March 1975, p. 19. In September 1979 when the ROC proclaimed a 12-mile territorial sea and a 200-mile exclusive economic zone, it did not fail to emphasize that its previous continental shelf claims were not thereby affected. *Chung-yang Jih-pao*, September 7, 1979, p. 1.

100. *Petroleum History of China*, Vol. 2, *supra* note 85, pp. 1037-61.

101. *Ibid.*, p. 1169.

extension of an onshore anti-clinal structure into the Taiwan Strait and the thick sedimentary strata of the Neogene Age.[102] The shipborne CCOP survey that produced the optimistic Emery Report also took place later in that year. Short of needed offshore technology, CPC engaged six U.S. oil companies whose explorations in Zone I to Zone V are related below.

(a) Amoco[103]

Amoco (Standard Oil of Indiana) approached CPC in 1967 and conducted an aeromagnetic survey for CPC in 1968. A firm joint venture contract was finally signed in July 1970 and approved in September by the ROC Government. Amoco's 8,200-sq. km. concession lies in the northern part of Zone I in the Taiwan Strait (Map 9). From 1970 to 1973, Amoco shot 1,500 miles of seismic lines and drilled one dry hole. Having done nothing in its blocks since 1974, Amoco withdrew temporarily in early 1977. When the contract expired in September 1978, Amoco relinquished all its concession blocks to CPC which struck oil there only a year later.[104]

(b) Conoco[105]

Continental Oil Company (Conoco), a large "independent" based in Stamford, Connecticut, obtained a joint venture contract with CPC in July 1971. Conoco had four blocks in Zone I totaling 20,000 sq. km. (Map 9). In May 1973 Conoco farmed out 50 percent interest to Amoco to fully utilize Amoco's establishment in Taiwan. Conoco carried out, from 1972 to 1975, 4,500 miles of seismic surveys. One of the drillings done by Amoco as operator for the partnership struck natural gas in June 1974, 60 miles off southern

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102. *Ibid.*

103. Information about Amoco is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 2, *supra* note 85, pp. 1179, 1188; Wilson Humphrey, "Petroleum Developments in Far East [in 1970]: China (Taiwan)," *AAPG Bulletin*, Vol. 55 (1971), pp. 1635, 1641; Standard Oil Company (Indiana), *Annual Report* (1971), p. 121; *ibid.*, (1972), p. 8; *ibid.*, (1974), p. 10; *Shih-Yu T'ung-hsun* [CPC Monthly], No. 307 (March 1, 1977), p. 40. *Shih-Yu T'ung-hsun* is a monthly newsletter published by CPC.

104. "Hai-yu Tan-yu Chih Shu-kuang (The Dawn of [Taiwan's] Offshore Oil Exploration)," *Shih-yu T'ung-hsun*, No. 339 (November 1, 1979), p. 5.

105. Information about Conoco is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 2, *supra* note 85, pp. 1188-89, 1197; Continental Oil Company, *Annual Report*, (1974) p. 24.

Taiwan.[106] The estimated probable reserve was large enough (300,000 million cubic feet per day (MMCFD)[107] to sustain Taiwan's then natural gas supply for more than four years.[108] But both companies consider this find still too small to justify further investment in view of price regulation of natural gas in Taiwan and the ROC's uncertain future.[109] Conoco's confidence was further eroded when the U.S. Government reportedly refused to insure its investment in Taiwan and strenuously intervened to thwart its planned drilling in early 1976 by a U.S.-flag rig.[110] Like Amoco, Conoco completely disengaged in September 1978.[111]

(c) Gulf[112]

Though the smallest among the "Seven Sisters", Gulf is CPC's largest foreign partner. It has had a quarter-century relationship of crude sale, financing, and investment with CPC. Its joint venture contract with CPC entered into force in September 1970. Gulf's 11 concession blocks in Zone II (Map 9) also had the largest acreage—55,000 sq. km. Gulf shot 7,500 miles of seismic lines and drilled four unsuccessful wells, one of which was less than 40 miles from the disputed Tiao-yu-t'ais. Gulf relinquished 73 percent of its original acreage before 1976. This was intended in part to minimize conflict with Japan where Gulf had a larger stake, including a joint venture with Teikoku whose block slightly overlapped with Gulf's (Map 7).

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106. Continental Oil Company, *Annual Report* (1974), p. 24; *Oil & Gas Journal*, September 2, 1974, p. 28.

107. Harrison, *supra* Chapter 1, note 39, p. 98. Amoco and Conoco stated a daily flow of 25 MMCFD of gas and 250 barrels of condensate. Standard Oil Company (Indiana) *Annual Report* (1974), p. 10; Continental Oil Company, *Annual Report* (1974), p. 24; *Oil & Gas Journal*, September 2, 1974, p. 28. *AAPG Bulletin* reported 24 MMCFD of gas. R.D. Caldwell, "Petroleum Developments in Far East in 1974: Taiwan," *AAPG Bulletin*, Vol. 59 (1975), pp. 1983, 1984.

108. Taiwan's daily production of natural gas was put at 201,210 MMCFD by Liu Ke-shu, Chairman of CPC. *Shih-yu T'ung-hsun*, No. 286 (June 1, 1975), p. 14.

109. Harrison, *supra* chapter 1, note 39, p. 98.

110. *Ibid.*, p. 99; Jeffrey Segal, "Taiwan: Reality Intrudes into Oil Plans," *Petroleum Economist*, May 1979, p. 185.

111. Actions of Amoco and Conoco were concerted since each held 37.5 percent interest in their joint venture with CPC.

112. Information about Gulf is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 1, *supra* note 85, p. 394; *ibid.*, Vol. 2, pp. 1181, 1190, 1198, 1264, 1356-57; Harrison, *supra* Chapter 1, note 39, pp. 95-97; Gulf Oil Corporation, *Annual Report*, (1970), p. 22; *ibid.*, (1972), p. 5; *ibid.*, (1973), p. 6; *ibid.*, (1974), p. 12; *ibid.*, (1975), p. 9; G.L. Fletcher, "Petroleum Developments in Far East in 1982: Taiwan," *AAPG Bulletin*, Vol. 67 (1983), p. 1898.

Earlier, Gulf extended the exploration period under the contract with CPC to March 1980 but has suspended operation since the mid-1970s under the *force majeure* clause of the contract; it was said to have dropped all its holdings in 1982.[113]

(d) Oceanic[114]

Oceanic Exploration Company was a small but active independent based in Denver, Colorado. It came to Taiwan in 1968 and concluded a joint venture contract with CPC in September 1970. Oceanic lost Zone II to Gulf but won Zone III over Clinton. Its concession area, 110 miles from Taiwan at the closest point (Map 9; Table 7), had 40,000 sq. km. in eight blocks. From 1970 to 1974, Oceanic shot 5,500 miles of seismic lines and found five promising structures before relinquishing to CPC 62.5 percent of its original acreage. Despite CPC's constant prodding and extension of drilling deadline, Oceanic failed to drill, due primarily to State Department intervention[115] and the departure of its drilling partner. Oceanic

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113. There were intensive debates in 1975 among ROC officials on whether to let the foreign concessionaires extend the exploration deadline by invoking the *force majeure* clause. Opponents alleged that invoking that clause would delay the companies' operations indefinitely while CPC could not take the block back because the foreign companies would remain the operator under the contract. This would vitiate the policy reason for inviting foreign operators, namely, to accelerate the offshore oil hunt. Proponents argued, on the other hand, that the only alternative for CPC to invoking the *force majeure* clause would be to terminate the joint venture contract on the ground of nonperformance. But CPC may be unable to find a substitute operator to do the exploration. Should CPC be momentarily unable to take over the exploration itself, Peking might take advantage of this vacuum. Moreover, the contract would remain intact with the *force majeure* clause being invoked. Interview with an official in the ROC's Ministry of Economic Affairs in Taipei (November 21, 1978). The official preferred to remain anonymous.

What actually came out of the debates seemed to be a combination of the two views: extension of the exploration deadline was first granted; when performance still could not be secured, then came the *force majeure* clause. *Ibid. See also* Jeffrey Segal, *supra* note 110, p. 185.

114. Information about Oceanic is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 2, pp. 1179-80, 1191, 1194, 1198; Harrison, *supra* Chapter 1, note 39, p. 110; Jeffrey Segal, *supra* note 110; Oceanic Exploration Company, *Annual Report* (1973), p. 11; *ibid.*, (1974), pp. 7, 8; Interim Report (1974); *Annual Report* (1975), p. 5; *ibid.*, (1976), p. 9; *ibid.*, (1979), p. 7.

115. Harrison, *supra* chapter 1, note 39, p. 113. The State Department's warning was allegedly prompted in part by the Mayaguez incident earlier that year where a U.S. container ship was seized by Khmer Rouge forces for violating Khmer territorial waters. Interview (November 21, 1978) *supra* note 113.

since then has invoked the *force majeure* clause to excuse its non-performance of contractual obligations owed CPC.

(e) Clinton[116]

Clinton International Corporation, the overseas arm of Energy Reserve Group, a Wichita, Kansas company, concluded a joint venture contract with CPC in September 1970. The Clinton sector, 250 miles from Taiwan, had seven blocks with a total area of 35,000 sq. km. (Map 9; Table 7). Clinton shot only 1,700 miles of seismic lines and relinquished four blocks in March 1972. Promising prospects shown in the surveys helped induce Superior Oil of Houston to join Clinton in 1974 as a drilling operator. The State Department vigorously blocked Superior's planned drilling in early 1975 (Map 9), however. Superior subsequently pulled out of the partnership with Clinton which in turn suspended all operations under the *force majeure* clause in the contract with CPC. In July 1979, Clinton acquired a 10 percent interest from CPC in an ex-Gulf block, with CPC as operator.[117] Though the well drilled was dry, the move demonstrated Clinton's desire to operate in safer areas closer to Taiwan.

(f) Texfel[118]

Texfel Pacific Corporation is the exploration outfit of Texfel Petroleum Company, a small independent based in Los Angeles. Signing a joint venture contract with CPC in June 1972, Texfel was only able to obtain a 28,000-sq. km. triangular-shaped block in Zone V, the farthest from Taiwan (more than 300 miles) (Map 9; Table 7). Texfel has done nothing whatsoever in its concession zone because of the zone's conspicuously sensitive location. Like Clinton, Texfel has been looking for safer blocks closer to the island.[119] No new agreement with CPC has materialized so far.

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116. Information about Clinton is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 2, *supra* note 85, pp. 1181, 1198; Harrison, *supra* Chapter 1, note 39, pp. 105-09; *Oil & Gas Journal*, May 13, 1974, p. 34. Annual reports of Clinton in the 1970's had no information in this respect.

117. *Lien-ho Pao*, July 27, 1979, p. 1.

118. Information about Texfel is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 2, *supra* note 85, p. 1198; Harrison, *supra* Chapter 1, note 39, pp. 115-17.

119. Perhaps to show their goodwill, two senior executives of Texfel came to Taipei four days after President Carter announced in December 1978 his sudden decision to recognize Peking. *Shih-Yu T'ung-hsun*, No. 330 (February 1, 1979), p. 34.

(g) CPC[120]

CPC's explorations had concentrated in close-in areas offshore Taiwan (Map 10). In Zone I, CPC had shot, as of December 1975, 7,860 miles of seismic lines, more than those of its foreign partners combined. In Zone II (ex-Gulf blocks), CPC's seismic work (6,500 miles) was about half of what Gulf, Oceanic, and Clinton combined did before 1976. The seven wells spudded by CPC in Zone I before 1976 were all unsuccessful. In view of the U.S. companies vulnerability to political pressure from Washington, CPC decided in 1975 to carry out, on its own, explorations in all the unallocated and relinquished areas (Map 10). A seven-year intensive program, with a capital outlay of $1.8 billion, was begun in July 1976. More than a hundred wells were projected for that period. From 1976 to 1984, 60 wells had been drilled, in contrast to 16 wells (seven by CPC alone) before 1976. CPC made a modest discovery in October 1979, 11 miles off northern Taiwan in an ex-Amoco block.[121] The four wells yielded altogether, during testing, 3,300 barrels of petroleum per day (BOPD) and 1,519 MMCFD of natural gas, with a 20,000 BOPD potential estimated by CPC.[122] The oil strike did more to boost CPC's morale than to reduce the ROC's dependence on foreign oil since the estimated output amounted to only six percent of the ROC's daily oil imports. Only when a second commercial gas discovery was made in September 1984 in the same area did CPC decide to develop this so-called CBK structure.[123]

D. The People's Republic of China

The PRC has been active since the 1960s in such dispute-free waters as the Pohai Bay, the Pearl River estuary near Hong Kong, and close-in areas in the South China Sea. However, in the Yellow Sea, the East China Sea, and the Taiwan Strait, the PRC had, since the Emery Report, only made strong but vague claims and done vir-

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120. Information about CPC is based, unless otherwise indicated, on the following sources: *Petroleum History of China*, Vol. 2, *supra* note 85, pp. 1191-97; Chinese Petroleum Corporation, *Annual Report* (1976), p. 4; *ibid.*, (1977), p. 4; *ibid.*, (1978), p. 4; *ibid.*, (1979), p. 4; *ibid.*, (1980), p. 4; *ibid.*, (1981), p. 4; *ibid.*, (1982), p. 4; *ibid.*, (1983), p. 4. *Asia Letter*, December 16, 1975, pp. 3-41; *Asia Research Bulletin*, January 31, 1976, pp. 156-66 *cited in* Harrison, *supra* chapter 1, note 39, pp. 118, 290 n.41; *Lien-ho Pao*, November 11, 1980, p. 1; September 15, 1984, p. 1.

121. *Lien-ho Pao*, October 27, 1979, p. 1.

122. Jung-hua Hsu, "Chung-yu Tzuan-t'an Ch'i-nien Hai-yu T'an-yu Ch'en Kung (After Seven Years of Offshore Drilling and Exploration, CPC Strikes Oil)," *ibid.*

123. *Lien-ho Pao*, September 30, 1984.

tually no exploration before 1979. In the wake of Peking's "grand opening" to the West beginning in 1978, it has forsaken its hitherto sacred "self-reliance" doctrine in the petroleum industry, which was formerly a national "self-reliance" model.[124] Foreign, especially American, offshore technology was vigorously sought since Sino-foreign joint ventures began. From late 1978 to July, 1979, the PRC engaged as operators large American, British, French, Italian, and Japanese oil companies to conduct geophysical surveys to be completed in one year in the Pohai Bay, the Yellow Sea, and the South China Sea (Map 11).[125] The surveys covered 448,000 sq. km. of seabed and eventually 46 international oil firms from 13 nations, including all the Seven Sisters except Gulf, participated in the bidding during 1982.[126] As of this writing in August 1984, among the 33 companies which have completed bidding for 43 blocks that cover 150,000 sq. km. of seabed, twenty-three joint venture contracts have been signed with Peking's China National Offshore Oil Corporation (CNOOC) to explore the Pearl River estuary and the Yellow Sea.[127]

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124. "In Industry, Learn from Taching" has been a national campaign slogan for many years until 1980. Taching oil field in northeastern China has been the PRC's number one oil field since the early 1960s. Stephanie Green, "Taching/Pohai Journal," *China Business Review*, November-December 1978, p. 10. The "self-reliance" rigidity slackened during 1977-78 when Hong Kong businessman made joint venture deals with PRC enterprises in Canton. *China Business Review*, March-April, 1979, pp. 15, 16. The new trend culminated on July 8, 1979 when the PRC made public its Sino-Foreign Joint Venture Law. *New York Times*, July 9, 1979, p. A1. The new law's official English translation appears in *China Business Review*, July-August, 1979, pp. 46-47.

125. *New York Times*, August 24, 1979, p. 1; *China Business Review*, July-August 1979, p. 62 (with map); *United States-China Economic Relations: A Reappraisal, supra* Chapter 1, note 42, p. 87 (Geophysical Surveys Map) and p. 92 (Offshore China Exploration Activity Map). Both maps are reproduced as Map 11 in the Appendix of this book.

126. The first round of bidding is in two stages. Stage one, covering an area of 150,000 sq. km. in the north Yellow Sea and Pearl River basin in the South China Sea, began February 16, 1982. The second stage, which covers 42,700 sq. km. in the south Yellow Sea and the Tokin Gulf, started March 15, 1982. *Hong Kong Standard*, February 18, 1982, p. 1; *Asian Wall Street Journal*, March 18, 1982, p. 3.

127. *See, e.g.*, Amanda Bennett, "BP Signs Accord for Oil Rights Offshore China," *Asian Wall Street Journal*, May 11, 1983, p. 1; "U.S. Company Gets Rights to Search for Oil Off China," *New York Times*, August 7, 1983, p. 1; Dinah Lee, "Exxon, China Expected to Reach Oil Accord," *International Herald Tribune*, August 17, 1983, p. 9; Teresa Ma, "Foreigners Too Would Like Some Offshoot Business," *Far Eastern Economic Review*, August 25, 1983, pp. 61-63; Amanda Bennett, "China Awards Two More Contracts for Drilling in the South China Sea," *Asian Wall Street Journal*, September 6, 1983, p. 1; "Foreign Oil Companies Sign China Contracts," *ibid.*, November 16, 1983, p. 7; Vigor Keung Fung, "China Limits Foreign Role in Oil Support," *ibid.*, November 23, 1983, p. 1; Jing Wei, "Oil Exploitation in the South China Sea," (1)-(3), *Beijing Review*, April 9, 1984, p. 19; April 16, 1984, p. 25; April 23, 1984, p. 22; Nancy Langston, "Wells of Uncer-

Conspicuously missing from the long chain of survey sectors are those in the East China Sea and the Taiwan Strait where the ROC has laid extensive claims.

1. Claims and Concession Areas

Neither the PRC's official statement nor academic literature has ever mentioned "continental shelf" as a legal concept prior to the 1970s.[128] The Emery Report and its aftermath certainly did not escape the attention of the PRC, however.[129] The PRC's first reaction was to denounce the establishment in November 1970 of a non-governmental ROC-ROK-Japan Liaison Committee by businessmen from the three countries for research and development of resources of the East China Sea. The Committee proposed that the three governments involved freeze the seabed disputes and let their private enterprises proceed with oil exploration.[130] The PRC's denunciation appeared in the official *People's Daily* in an article by a "commentator" (a pen name reserved for high officials) instead of a formal governmental statement. The article attacked the committee proposal as representing the real intentions of the respective governments, but stopped short of stating the PRC's own claim. The term "continental shelf" was absent, however.

The Liaison Committee decided in late December 1970 to take more concrete actions. Infuriated, Peking attacked again on December 29 through the *People's Daily*'s commentator.[131] The article containing Peking's first continental shelf claim is worth quoting at length:

Taiwan Province and the islands appertaining thereto in-

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tainty: The Hunt for China's Offshore Oil is not all plain sailing," *Far Eastern Economic Review*, June 28, 1984, p. 50.

128. Hungdah Chiu, *Chinese Attitude Toward Continental Shelf and Its Implication on Delimiting Seabed in Southeast Asia*, No. 1, Baltimore, University of Maryland Law School: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1977, p. 16 [hereinafter cited as Chiu (1977)).

129. Mention was made of exploration and other developments in East Asia in Peking's December 4, 1970 statement. *Peking Review*, December 11, 1970, pp. 15-16; *Washington Post*, December 5, 1970, p. A1.

130. Park (1972), *supra* Chapter 1, note 18, p. 21. *But see Chung-yang Jih-pao*, March 6, 1971, p. 1; *Ibid.*, April 9, 1971, p. 1. The ROC's chief delegate to the conference, Mr. C.K. Ku, flatly denied any attempt by the conference to even touch the issue of sovereignty over seabed resources. Minutes of the two sessions of the conference appeared in *ibid.*

131. *Jen-min Jih-pao*, December 29, 1970, p. 1; English translation in *Peking Review*, January 1, 1971, p. 22.

> cluding the Tiaoyu, Huangwei, Chihwei, Nanhsiao, Peihsiao and other islands, are China's sacred territories. The resources of the sea-bed and subsoil of *the seas around these islands and of the shallow seas adjacent to other parts of China* all belong to China, their owner, and we will never permit others to lay their hands on them. The People's Republic of China has the right to explore and exploit the resources of the sea-bed and subsoil of these areas . . . *All agreements and contracts* concerning the exploration and exploitation of China's sea-bed and subsoil resources [which] the Chiang Kai-shek gang concluded with any country, any international organization or any foreign public or private enterprise under the signboard of 'joint development' or anything else are *illegal and null and void* (emphasis added).[132]

The PRC's position was reaffirmed in a communiqué issued on March 1, 1970 by the annual, unofficial PRC-Japan Memorandum Trade Talks:

> The newly established Japan-Chiang-Park 'liaison committee' has gone so far as to decide on the 'joint exploration' of the resources of the shallow seas adjacent to China's coasts. *This is a flagrant encroachment of China's sovereignty*. The Chinese people will not tolerate this.[133] (emphasis added)

This was the first time that the PRC asserted its "sovereignty" over the "shallow seas adjacent to China's coasts." This formulation was employed repeatedly later in 1974 and 1977 in the PRC's protests against the Japan-ROK Joint Development Agreement and in 1980 against their exploratory drilling in the JDZ.[134]

In February 1981 and April 1982, respectively, Peking's Minis-

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132. *Ibid.* The PRC learned about the ROC's offshore gas strike in late 1974. (Gas was found in June but news was not broken until October.) Peking made a critical comment through a People's Liberation Army radio in Fukien facing Taiwan across the Taiwan Strait. It accused the CPC of being "an unfilial son who stole the family fortune by colluding with outsiders," referring to CPC's joint ventures, and of "selling out the natural resources of the motherland in the name of China." The broadcast, relying allegedly on a UPI dispatch, erroneously reported that the CPC was a "joint organization of six U.S. petroleum companies." The accusation was based on this information. Yang Ping, "Such is the Chinese Petroleum Corporation," *Foreign Broadcast Information Service Daily Report*, November 4, 1974, p.C1.

133. Communiqué on Talks between Representatives of China-Japan Memorandum Trade Office of China and Japan-China Memorandum Trade Office Of Japan, *Peking Review*, March 12, 1971, pp. 24, 25.

134. *See* notes 39, 44, 46, 55 and accompanying text *supra*.

try of Geology drilled two exploratory wells, Longjing-I and Longjing-II (*Longjing* means "dragon well"), and China National Offshore Oil Corporation drilled the third, Dongtai-I, all in the northern East China Sea right in the ROC's Zone V and very close to the Japan-ROK JDZ.[135] As the southwestern edge of the JDZ coincides with the southwestern edge of the ROK's Block K-7 (Maps 5 and 6) which in turn is the extension of the hypothetical median line suggested by Seoul between the ROK and the PRC in the Yellow Sea, the two wells are located on the west (Chinese) side of the hypothetical median line. This by no means indicates Peking's tacit acceptance of that line, however. Quite to the contrary, these symbolic moves obviously serve as a reminder to other claimants of Peking's claim to the East China Sea, regardless of the allegedly favorable but unconfirmed test results of the drillings. Meanwhile, Peking promulgated, in February 1982, the Regulation of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises,[136]laying down for the first time rules for international joint ventures and offshore operations. This new law presumably covers the East China Sea, should any concession be granted in that area. As of this writing (August 1984), though, no concession has been granted either in the East China Sea or in the Taiwan Strait.

2. Principles of International Law Employed

Since the PRC has neither specified its seabed claims nor granted exploration or development concessions in the East China Sea, it is difficult to infer any international legal principle from the vague statements made thus far. Peking did, however, make known its positions on law of the sea issues in general. In July 1973, the PRC submitted a working paper to Subcommittee II of the Seabed Committee.[137] On the seaward extent of a coastal state's continental shelf jurisdiction, it provided:

> (1) By virtue of the principle that the continental shelf is the *natural prolongation of the continental territory*, a coastal State may reasonably define, according to its *specific geo-*

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135. *Supra* Chapter 1, note 42.

136. Jen-min Jih-pao, February 11, 1982, p. 4. English text appears in *Beijing Review*, February 22, 1982, p. 14.

137. Working paper submitted by the Chinese Delegation: Sea area within the limits of national jurisdiction, UN Doc. A/AC.138/SC.II/L.34 (1973), Seabed Committee Report, Vol. 3 (1973), *supra* note 75, p. 71, *reprinted in International Legal Materials*, Vol. 12 (1973), p. 1231.

> *graphical conditions*, the limits of the continental shelf under its exclusive jurisdiction beyond its territorial sea or *economic zone*. The maximum limits of such continental shelf may be *determined among states through consultations*.[138] (emphasis added)

On the method of boundary delimitation, it continued:

> (5) States adjacent or opposite to each other, the continental shelf of which connects together, shall *jointly determine* the delimitation of the limits of jurisdiction of the continental shelf *through consultation* on an equal footing.[139] (emphasis added)

The working paper did not directly address the question of islands' seabed rights. But the language seemed to imply that only *continental* territory was entitled to a legal continental shelf.[140] It is also worth noting that on the seaward delimitation of the EEZ, the working paper specified four considerations, one of which was the *geological* conditions of the coastal state.[141] As an EEZ embraces the water surface and column as well as the seabed and the subsoil,[142] geological conditions which no other state has mentioned in connection with EEZ delimitation, are relevant nevertheless. The PRC's inclusion of the geological factor in EEZ delimitation could be intended for the Okinawa Trough. Implications of this provision are discussed in Chapter 5.

In substantive sessions of UNCLOS III since 1974, Peking indicated in only a few occasions its position on the delimitation of the continental shelf and the EEZ. At the Resumed Ninth Session (July 28-August 29, 1980), the PRC took the position that delimitation questions should be determined through negotiations between the parties concerned on the basis of equity, taking into account all fac-

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138. *Seabed Committee Report*, Vol. 3 (1973), *supra* note 75, p. 74; *International Legal Materials*, Vol. 12 (1973), p. 1233.

139. Seabed Committee Report, Vol. 3 (1973), *supra* note 75, p. 74; *International Legal Materials*, Vol. 12 (1973), p. 1233.

140. According to the PRC Working Paper, islands are entitled to a territorial sea regardless of their sizes. Seabed Committee Report, Vol. 3 (1973), *supra* note 75, p. 72; *International Legal Materials*, Vol. 12 (1973), p. 1232. The key term "continental territory" was later replaced by "land territory", thereby eliminating previous discrimination against islands. *See, e.g.*, the PRC's protest against exploratory drilling in the Japan-ROK JDZ, *supra* note 55.

141. Seabed Committee Report, Vol. 3 (1973), *supra* note 75, p. 73; *International Legal Materials*, Vol. 12 (1973), p. 1232.

142. Convention on the Law of the Sea, art. 56, para. 1(a).

tors concerned; the median line approach is acceptable only when in accordance with equitable principles.[143] In late 1981, Peking again submitted its opposition, together with a group of developing and East European states, to the Conference president's giving special consideration to the employment of the equidistance line in continental shelf or exclusive economic zone (EEZ) delimitations through negotiations under equitable principles.[144]

To summarize, the PRC, like the ROC, adheres to the natural prolongation principle in seaward delimitation of the continental shelf. Islands are accorded a territorial sea. Beyond that, it is less clear. While implicitly limiting continental shelf jurisdiction to a coastal state's continental territory, the PRC has claimed the "shallow seas" around disputed, mid-ocean islets in the East China Sea and the South China Sea. On seabed boundary delimitation, the PRC prefers multistate consultation to third-party process. In the East China Sea, the political reality has prevented any multistate consultation from taking place.[145]

3. Offshore Exploration

Before the recent mass engagement of foreign oil companies, the PRC had done little prospecting in the East China Sea other than rudimentary bottom sedimentation studies, according to published sources.[146] Since September 1980, a West German team has been

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143. Statement of PRC delegate Shen Wei-liang at the plenary meeting held on August 25, 1980, UN Press Release (Geneva) SEA/128 (1980), p. 4.

144. UN Press Release SEA/425 (1981), p. 24.

145. When the oil controversy first arose, seven governments were involved: Japan, the ROK, the DPRK, the PRC, the ROC, the Ryukyus, and the U.S. (as administrative authority of the Ryukyus). Since the return of the Ryukyus to Japan in 1972, the number of contenders has been reduced to four: Japan, the ROK, the ROC, and the PRC. (The DPRK is excluded here since it has no coastal front in the East China Sea.) The number of governments involved poses less of a problem than do the relationships of these governments *inter se*. Both China and Korea are divided; while the PRC and the DPRK are "socialist brother states", the ROC and the ROK are no less friendly. Mutual non-recognition between rival regimes within the same state naturally extends to the ally of its rival. Any official contact by one government with the ally of its rival regime could be interpreted as *de facto* recognition thereof and would seriously offend the ally. This is why Peking remained cool towards the ROK's overtures made in March 1973 to negotiate a settlement with the PRC on the seabed issue, even at the expense of Seoul-Taipei ties. Peking understood well that any positive reaction would alienate Pyongyang and only benefit Moscow which had been seeking to expand its influence in the Korean Peninsula. For the ROK's overtures, see Harrison, *supra*, Chapter 1, note 39, pp. 130, 137.

146. *E.g.*, M.B. Klenova, *supra* Chapter 1, note 13; Shih-ching Fang and Yun-shan Ch'in, "Chung-kuo Tung-hai Ho Huang-hai Nan-pu Ti-chih Ti Ch'u-pu Yen-chiu (A

conducting geochemical and geophysical surveys in the western part of the Wenchou basin off the coast of Chekiang Province, using a Communist Chinese vessel.[147] No drilling had been done until the sinking of Longjing-I and Longjing II in February 1981 and April 1982, respectively and Tongtai-I in 1982 (Map 10). Given the sensitivity of the East China Sea, large-scale exploration probably will not commence until production begins in other dispute-free areas of the China seas, which will be in the late 1980s.[148]

Preliminary Study of Submarine Geology of China's East China Sea and Southern Yellow Sea)." *Hai-yang Yu Hu-chao* [Oceanologia et Limnologia Sinica], Vol. 2 (1959), p. 82; Yun-shan Ch'in, "Tung-hai Ta-lu-chia Ti Ch'i-fu Ho Ti-chih Ch'en-Chi-wu Ti Ch'u-pu Yen-chiu (An Initial Study of the Relief and Botton Sediment of the Continental Shelf of the East China Sea)," *ibid.*, Vol. 5 (1963), p. 35.

147. Jeffrey Segal, "Need for More Oil Exploration," *Petroleum Economist*, November, 1981, p. 498.

148. Kevin Fountain, "The Development of China's Offshore Oil: Prospects for the 80s," *China Business Review*, January-February 1980, p. 23.

CHAPTER 3 CONFLICTS OF CLAIMS AND CONCESSION AREAS

This chapter examines conflicts resulting from the coastal states' unilateral claims and overlapping concession areas and defines the issues to be pursued further in Part II. Table 1[1] illustrates the magnitude of these conflicts. Apart from political considerations, application by the East China Sea's coastal states of seminal and unclear rules of international law then prevailing to the complex geophysical environment also accounts for the conflicts. Legal implications of these geophysical features vary depending on the interpreting coastal states. Based on discussions in Chapter 2, Table 2 summarizes the respective positions of the coastal governments on relevant law of the sea issues.

In the East China Sea, claims of all the coastal states (but not necessarily their concession areas) conflict with one another. While their claims may be extravagant, they are more prudent in granting concessions. In fact, certain concession blocks were granted clear of overlaps.[2] This is because claims exclusively involve governments but concessions concern oil companies as well. Unrealistic claims may be good for domestic consumption or as a bargaining position for future negotiations. Unreasonably high political/jurisdictional risks[3] associated with legally untenable concessions, however, only scare away potential concessionaires. Analyzed below are conflicts between pairs of disputants.

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1. In the Chart, to preserve the numbering system for Japanese concessions used in Map 4, the former "J-1" is broken down to "J-la", "J-1b", and "J-1c", representing three smaller blocks shared by Japex (Block J-1's original holder), Uruma, and Alaska. By the same token, the former "J-3" is re-numbered "J-3a", "J-3b", and "J-3c" In fact, blocks like J-2 and J-3b are merely a part of the vast Teikoku concession area. The division is, of course, artificial. In both the J-1 and J-3 cases, the newly-numbered blocks put together have a larger area than the original J-1 or J-3 blocks. The numbering system is unofficial and used simply for the convenience of discussion.

2. For instance, Texfel Pacific's block in the ROC's Zone V, text accompanying note 12 *infra*.

3. This author has defined "jurisdiction risk" as the risk or probability of occurrence of adverse political and/or legal events arising from a potential jurisdictional dispute that will affect the profit prospect or operation of a given foreign direct investment. For an elaborate discussion of jurisdictional risk and foreign oil investment in the East Asian context, see Ying-jeou Ma, "Foreign Investment in the Troubled Waters of the East China Sea," *Chinese Yearbook of International Law and Affairs*, Vol. 1 (1981), pp. 35-73.

A. The ROK and Japan

As Table 1 shows, all of the eight concession blocks of Japan and the ROK that overlapped each other before 1974 are now either re-delineated through boundary delimitation (Blocks J-4 and K-6 in the Korea Strait) or included in the Japan-ROK JDZ (the rest of the blocks in the East China Sea).[4] The Joint Development Agreement left unsettled the seabed dispute,[5] yet it has defused the controversy by shelving the sovereignty question indefinitely and replacing confrontation with cooperation. Advocated by commentators[6] and the ICJ,[7] the idea of joint development of offshore oil in disputed waters between claimants has found only modest support in state practice.[8]

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4. *Supra* Chapter 2, text accompanying notes 41, 42.

5. Article XXVIII of the Agreement provides:

> Nothing in this Agreement shall be regarded as determining the question of sovereign rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective Parties with respect to the delimitation of the continental shelf.

For a competent and comprehensive analysis of the legal issues of the ROK-Japan seabed dispute, see Park (1972), *supra* Chapter 1, note 18, pp. 29-36.

6. *E.g.*, Note, "The 'Distance plus Joint Development Zone,' Formula: A Proposal for the Speedy and Practical Resolution of the East China and Yellow Seas Continental Shelf Oil Controversy," *Cornell International Law Journal*, Vol. 7 (1973), pp. 49, 63-70 [hereinafter cited as Cornell Note (1973)].

7. The North Sea Continental Shelf Case, I.C.J. Reports 1969, p. 52.

8. Supplementary Agreement to the Ems-Dollart Treaty, the Netherlands-Federal Republic of Germany, April 8, 1960 UNTS, Vol. 509, p. 140; Agreement Relating to the Partition of the Neutral Zone, Kuwait-Saudi Arabia, July 7, 1965, UNLS/15, p. 760; *International Legal Materials*, Vol. 4 (1965), p. 1134; *American Journal of International Law*, Vol. 40 (1966), p. 744; Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands Between Qatar and Abu Dhabi, March 20, 1969, UNLS/16, p. 403; *Limits in the Seas*, No. 18, May 29, 1970; and Agreement Between Sudan and Saudi Arabia Relating to the Joint Exploration of the Natural Resources of the Seabed and Subsoil of the Red Sea in the Common Zone, May 16, 1974, UNLS/18, p. 452.

Joint development of oil in disputed seabeds is not to be confused with joint exploitation of common oil or gas deposits between states across their borders (sometimes referred to as "unitization" arrangements). The former has several distinctive features: First, a boundary dispute must exist; second, the hydrocarbon deposit has *not* been previously discovered; and third, the sovereignty issue is either unresolved but shelved or the sovereignty itself is equally shared by the parties. On the other hand, a unitization arrangement is usually dictated by the geological conditions of a previously discovered oil or gas field. Normally no dispute exists over the boundary across which the deposit lies. Hence no sovereignty issue. The only feature shared by both is the existence of a consultation or joint management body. In state practice, unitization arrangements are quite common whereas joint development mechanisms are rare. In fact, a number of seabed boundary agreements contain unitization clauses. For a good discussion, see Rainer Lagoni, "Oil and Gas Deposits Across National Frontiers," *American Journal of International Law*, Vol. 73 (1979), p. 215 [hereinafter cited as Lagoni (1979)].

Issues of joint management and distribution of petroleum produced, just to name a few, are no easier than seabed boundary delimitation. Although these problems are well handled by the Japan-ROK Joint Development Agreement, it remains to be seen how effectively this pioneer arrangement will work,[9] since exploration has just gotten under way. Furthermore, other claimants to the same seabed have not stayed idle. The agreement was signed, ratified, and implemented over vigorous protests from the PRC and the DPRK. The sinking by Peking of three exploratory wells (Longjing I and II and Dongtai-I) in the East China Sea only a few miles from the JDZ (Map 10) highlights the intensity of the conflict. Further complications could emerge upon commercial discovery of petroleum.

B. The ROK and China (the ROC and the PRC)

The ROC and the PRC assert identical claims to the East China Sea's shelf but have been exploring in different parts of China's marginal seas. Their relationships with the ROK vary accordingly.

1. The ROK and the ROC

The ROC granted no concession block in the Yellow Sea where the ROK's four blocks are located, but the ROC's Zone V overlaps with the ROK's Blocks K-4, K-5, and K-7. The ROK had in fact asserted claims to what is now the ROC's Zone V ten months before the ROC did; yet the ROK has made no protest, at least in public, to the ROC when the ROC announced its five Offshore Zones in October 1970. When the ROK and Japan signed the Joint Development Agreement in early 1974, however, the ROC issued a statement to reserve its rights:

> In connection with certain statements recently made by some States concerning the development of submarine resources in the East China Sea and the illegal claims made by the Chinese Communist regime, the Government of the Republic of China reserves all her rights over the continental shelf extending from her coast including the right to ex-

9. The Japan-ROK Joint Development Agreement is unprecedented in terms of the size of the JDZ, the national economic interests at stake, and the often abrasive relations between Tokyo and Seoul. In fact, the ROK officials took pride in the agreement for being a pioneer work. Conversation with Mr. Sang-Myon Rhee, S.J.D. candidate at Harvard Law School, Cambridge, Massachusetts (December 27, 1979). Mr. Rhee worked for the ROK Foreign Ministry at the time the agreement was negotiated and signed. Mr. Rhee got his S.J.D. and returned to Korea to teach law.

> plore the continental shelf and to exploit its natural resources.
> The continental shelf in question is adjacent to, and is a natural prolongation of, the territory of the Republic of China . . .
> . . . The activities for the exploration and exploitation in *these areas* have begun for several years and are going on extensively.[10] (emphasis added)

The tone was mild; Japan and the ROK were not even mentioned by name. The allegation of extensive exploration seems to refer to the ROC's concession areas other than Zone V, since no reported exploration has been conducted there by either Texfel,[11] the concessionaire, or CPC. In fact, the eastern half of Zone V that overlaps extensively with the ROK's blocks was left unallocated when Texfel obtained the western half[12] (Compare Maps 7 and 9). All in all, the ROC-ROK conflict in claims in the East China Sea seems minor at best. On the other hand, no overlap exists in concession blocks actually granted. This means that there is no mining rights conflict between companies working for the ROC and those exploring in the JDZ. This is likely to continue given cordial ties between Taipei and Seoul.

2. The ROK and the PRC

Seabeds in the East China Sea covered by the PRC's vague claims overlap with those of the ROK, as evidenced by the PRC's protests and hostility since 1970 against the ROK (and Japan).[13] But the extent of the conflict has never been clear. By 1979, five out of seven of the ROK's concession blocks had been relinquished and open for bidding again (Map 5). Only part of Block K-4 was regranted to Zapata Oil Company in 1981. The sensitive location coupled with their former operator's experiences seem unattractive to potential operators. Block K-6 in the Korea Strait does not really enter the picture here (Map 5). Nor does the part of Block K-5 still held by Caltex since it entails no international delimitation (Map 5). In terms of real conflict between the PRC's *claim* and the ROK's *concession blocks*, therefore, the only relevant area is the JDZ.

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10. *Free China Weekly*, February 17, 1974, p. 1.
11. *Supra* Chapter 2, text accompanying notes 118-19.
12. It is, of course, not unlikely that certain tacit understanding was reached between Taipei and Seoul to avoid overlapping of concession blocks.
13. *Supra* Chapter 2, text accompanying notes 36, 39, 40, 44, and 46.

The PRC's protests over the JDZ from 1974 to 1980 seemed to have been addressed more to the *mode* by which it was established rather than to the alleged infringement of the PRC's sovereignty, despite the PRC's phrasing to the contrary.[14] The drilling of the Longjing and Dongtai wells seems to have engendered similar protests. In other words, Japan's failure to consult the PRC in advance was what really mattered. But Japan could not possibly have done so without first consulting the ROK, the other party to the agreement, which the PRC simply refuses to deal with in the first place.[15] On the other hand, the PRC's response, in a *People's Daily* article, to the Japanese argument that the JDZ lay entirely within the Japanese side of the hypothetical Sino-Japanese median line was substantiated by the following arguments:

> It is well known that "mid-line" is not a recognized principle under international law for demarcating the waters between the littoral states. On the contrary, international law requires that such demarcation, including temporary measures prior to reaching a formal agreement, must be made through consultation and agreement between the countries concerned. Moreover, the "mid-line" referred to by the Japanese side is defined unilaterally and not based on any law whatsoever. The argument used by the Japanese Government cannot cover up the essence of its infringement on China's sovereignty.[16]

The response, understandably not addressed to the ROK, affected

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14. The recurring theme in the PRC's 1974, 1977, and 1978 official protests was that:

> [A]ccording to the principle that the continental shelf is the natural extension of the continent, the People's Republic of China has inviolable sovereignty over the continental shelf in the East China Sea, and that *the division of those parts of this continental shelf which involve other countries ought to be decided on through consultations by China and the countries concerned.* The *unilateral marking off* of a so-called Japan-ROK "joint development zone" on the continental shelf in the East China Sea by the Japanese Government and the south Korean authorities through signing behind China's back the "Japan-ROK Agreement on Joint Development of the Continental Shelf" is an *infringement on China's sovereignty* to which China will never agree. (emphasis added)

Peking Review, June 30, 1978, p. 25.

Peking's May 7, 1980 protest largely repeated the above except that the first half of the first sentence was rephrased "according to the principle that the continental shelf is the natural *prolongation* of the *land* territory . . " (emphasis added). The two words "extention" and "continent" were replaced by "prolongation" and "land" respectively. *Beijing Review*, May 19, 1980, p. 6.

15. *See supra* Chapter 2, note 143.

16. *Jen-min Jih-pao*, June 14, 1977, p. 1 [commentator's article]; *English translation* in *Peking Review*, June 17, 1977, p. 17.

the ROK as well. Both Tokyo and Seoul have reserved their previous positions vis-à-vis each other in establishing the JDZ. The ROK's positions regarding Block K-7, which later became the main body of the JDZ, are the natural prolongation principle vis-à-vis Japan and the equidistance principle in relation to the PRC.[17] Japan, on the other hand, relied on the equidistance principle alone vis-à-vis China and the ROK in granting concessions to Nippon, Teikoku, and West Japan (later New West Japan), part of whose concession areas later came within the JDZ[18] (Map 6). This was why reservation of previous positions was necessary for Japan and the ROK in the Joint Development Agreement. Now, with regard to boundary delimitation with the PRC, the only part of the JDZ to be involved is its southwestern edge, formerly the edge of the ROK's Block K-7. The ROK's equidistance position vis-à-vis the PRC naturally becomes the common position of Japan and the ROK in relation to the PRC. The PRC's outright rejection of the equidistance solution obviously was not addressed to Japan alone.

The present conflict between the PRC and the ROK has become and will remain a tripartite legal controversy as a result of the advent of the JDZ. In purely legal terms, a boundary delimitation between the PRC on the one hand and the JDZ on the other is manageable (to be shown in Chapter 5 *infra*).[19] The real obstacle arises from politics, not law, however.

C. Japan and China (the ROC and the PRC)

As in the Japan-ROK case, Japan and China (at least the ROC) hold diametrically opposite views on almost every key issue (Table 2). As a result, their claims and concession areas overlap substantially (Table 1). Unlike the Japan-ROK case, attempts by the ROC, Japan, and the ROK to work out a regional development program were nipped in the bud by the PRC.[20] Meanwhile, the Tiao-yu-t'ai territorial dispute made any separate, bilateral cooperation between Taipei and Tokyo politically impossible.[21] When Tokyo switched

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17. *Supra* Chapter 2, text accompanying notes 26-30.

18. *Supra* Chapter 2, text accompanying notes 75-78.

19. Such a delimitation involves neither mid-ocean islets nor deep trough, unlike the Sino-Japanese situation. However, the "lying off" situation in the East China Sea between the PRC and the JDZ poses the same difficulty as it does to Sino-Korean delimitation, *supra* Chapter 2, notes 31, 32, and accompanying text.

20. *Supra* Chapter 2, text accompanying notes 29-35.

21. The ROC then was under strong pressure from Chinese communities all over the world not to discuss with Japan any joint development program before the territorial

recognition from Taipei to Peking in 1972, the ROC lost its status as China's spokesman in all future dealings with Japan. Issues the PRC inherited from the ROC against Japan were nonetheless the same; yet Peking made a political decision to shelve them all. Claiming to represent China, the PRC and the ROC hold identical views on some of the sea law issues (Table 2). Yet they differ in granting survey licenses and exploration concessions: the ROC in the East China Sea and the PRC in the Pohai Bay, the Yellow Sea, and the South China Sea. Their respective overlaps with Japan vary accordingly.

1. Japan and the ROC

The unilateral claims and counterclaims of Japan and the ROC were noted in Chapter 2 *supra*. Here the focus is on concession blocks. Table 1 shows that five Japanese blocks and four ROC blocks produce nine overlaps. The conflict is indeed substantial.

One dimension of the conflict is the selection of basepoints. The ROC used the coasts of mainland China and Taiwan exclusively as basepoints for delineating its Offshore Zones.[22] Neither of them relied on the Tiao-yu-t'ais' mid-ocean location.[23] Quite to the contrary, Japan relied heavily on these islets as basepoints for delineating the concession areas of Teikoku (J-2), Uruma (J-1a), Alaska (J-1b), and Japex (J-1c).[24] This demonstrates how the territorial dispute became entangled hopelessly with the seabed issue and has prompted writers to recognize the inseparable nexus between them.[25] Under the then prevailing rules of international law, islands, regardless of their "merits" (size, population, and economic value),

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issue was satisfactorily resolved. The "Defending Tiao-yu-t'ai" Movement, first begun by Chinese students in the U.S. in late 1970, spread rapidly to Taiwan, Hong Kong, Japan, Europe, and Australia. The movement has had profound impact on Chinese intelligentsia at the time. *See generally* Hearings on Okinawa Reversion Treaty, *supra* Chapter 2, note 57, at 152-53; March, May, June, and August 1971 issues of *Ming-Pao Yue-K'an*; and The Fourth Department of the Kuomintang Central Committee, *Tiao-Yu-T'ai Lieh-Yu Wen-T'i Tzu-Liao Hui-Pien* [A Collection of Materials on the Tiao-yu-t'ais Question] (Taipei, 1972) [hereinafter cited as *Collection of Tiao-yu-t'ais Materials*].

22. *Supra* Chapter 2, text accompanying notes 97-99.

23. Relying on the natural prolongation principle, the ROC did not need these islets for claiming the continental shelf of the East China Sea. Besides, the ROC was estopped to use them as basepoints in continental shelf delimitation by its reservations to Article 6 of the Shelf Convention.

24. *Supra* Chapter 2.

25. *See infra* Chapter 4, note 4.

generated as much seabed rights as continental territories did.[26] The Tokara-Amami-Ryukyu islands chain also benefitted from this rule in giving Japan a large chunk of the East China Sea's shelf. The disparate views of Taipei and Tokyo on insular seabed rights dictate the emergence of the conflict.

As in the ROK-Japan case, another source of conflict is the Okinawa Trough. The ROC has made a strong case under the natural prolongation principle against Japan in treating the Trough as a natural boundary of Chinese and Japanese seabed jurisdictions. Japan's insistence on the equidistance principle for seabed delimitation, which ignores the Trough, however, receives some support from the recent trend of expanded maritime jurisdictions. Since the Chinese mainland (and Taiwan) and the Ryukyus are less than 400 miles apart, if the Trough did not exist, a median line seems to be an equitable solution when each side has a minimum 200-mile shelf jurisdiction. The legal status of the Okinawa Trough, which in turn depends on its geological structure (oceanic or continental), and the legal regime of islands, are key issues to be dealt with in Chapters 4 and 5 *infra*.

2. Japan and the PRC

From reading the PRC's vague statements since 1970, one concludes that the PRC does lay claims to the continental shelf of the East China Sea under the natural prolongation principle and to sovereignty over the Tiao-yu-t'ais on historical grounds. Other than these vague claims and drillings of the Longjing and Dongtai wells, the PRC has not specifically challenged Japanese concession areas in the East China Sea. Nor has it granted any of its own in the same area. Therefore, while the question of overlapping concessions does not arise, there is a serious conflict of claims between the PRC and Japan, whose claim is implicit as well. But the gravity of the conflict has been deliberately played down by both sides. The provocative fishing-boat incident in 1978 only momentarily revived the territorial issue, not the seabed dispute.[27] However, the PRC has decided to redouble its efforts to go offshore because its onshore prime reserve could run out in two decades.[28] It could not afford to leave unallo-

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26. This is what Article 1, Paragraph b of the Shelf Convention literally means. The article, along with Articles 2 and 3, was declared by the ICJ as a part of customary international law. I.C.J. Reports 1969, p. 39.

27. *See supra* Introduction.

28. Central Intelligence Agency, *China: Oil Production Prospects, supra* Chapter 1, note 47, p. 22. The CIA predicted that if the PRC crude oil output expanded at 10% to

cated forever the East China Sea—the most promising among China's four marginal seas.[29] Overtures on joint development with Japan are just one indication;[30] the sinking of the Longjing and Dongtai wells is another. In the long run, as energy demands intensify, the seabed and territorial issues are likely to surface again. The Law of the Sea Convention, which both the PRC and Japan have signed, will certainly influence the ultimate solution.

D. The ROC and the PRC

As seabed rights derive ultimately from a state's sovereignty over its land territory, the conflict of seabed claims (as opposed to concession conflicts) between the ROC and the PRC expresses itself more as an extension of the existing rivalry in speaking for China than as a legal clash between two separate states. Both of their seabed claims, identical in substance, reach all the marginal seas of China, the only difference being that the ROC's appear more specific than the PRC's. The real issue, therefore, is not who claims how much seabed, but who represents the state of China, which, under international law, is entitled to exercise sovereign rights over its adjacent continental shelf. Though not a purely legal question, this issue nevertheless has legal consequences that bear upon the oil dispute in the East China Sea, particularly when third states are involved. This dimension is treated at length in Chapter 6 *infra*.

A more pertinent question seems to be the potential overlaps of concession areas of the ROC and the PRC.[31] As if to avoid just such a possibility, the PRC did not engage any foreign oil company to survey areas where the ROC's concessionaires have been operating for years. However, a closer look at the PRC's survey areas (Map 11) reveals that such a possibility still exists. The most likely overlap

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20% annually, then the prime reserves in the north and northeastern regions of China from which 80% of the PRC's output has come, would be exhausted in ten to fifteen years.

29. *See supra* Chapter 1.

30. *Supra* Introduction, text accompanying notes 16-17.

31. As of this writing in August 1984, the PRC has granted no exploration or production concessions in the East China Sea. But it has since 1978 engaged dozens of Western and Japanese oil firms to conduct geophysical surveys in the rest of China's marginal seas; some of these firms have already obtained exploration concessions in the past two years, as related in Chapter 2 *supra*. Although none of these concessions granted by the PRC overlaps with the ROC's offshore concessions blocks in the East China Sea, the assumption here is that the PRC would sooner or later grant some of these survey sectors that are potentially overlapping with the ROC's concession blocks to foreign oil companies.

exists in the Taiwan Strait where the ROC's Zone I is located, and possibly the area offshore Shanghai where the ROC's Zone V lies (Map 10). If the ROC's official claims, namely, the five Offshore Zones (Map 10), are taken seriously, then the sectors of Phillips, Chevron/Texaco, and even Exxon (Esso) (Map 11) fall, in part, within the ROC's Zone I, the southern edge of which extends from Taiwan all the way to Macao. The overlap would be substantial indeed. However, as stated earlier, the western half of these overlapping zones has remained unallocated. A more relevant inquiry, therefore, should focus on concession areas actually or potentially granted instead of nominal claims. The Phillips sector (Map 11), reportedly only 80 miles from Taiwan at its closest point[32] where the ROC's Zone I (Map 10) (now held by CPC) protrudes 120 miles into the Taiwan Strait, is then the most likely candidate. If Map 11 is any guide, the overlapped area could range from a few hundred square miles to a few thousand, depending on the exact location of the present Phillips sector near the border between the South China Sea and Taiwan Strait.

A second possible area is offshore Shanghai near the Yangtze River estuary. The ROC's *nominal* Zone V (Map 10) might overlap with the British Petroleum (BP) sector (Map 11). But the triangular-shaped block *actually granted* to CPC and Texfel, 150 miles off the mainland shore, is unlikely to overlap with the BP sector (Map 10 and 11). Chances of one lying adjacent to the other are good, however.

On the other hand, the drilling by Peking of the Longjing and Dongtai wells right in the ROC's Zone V suggests that the PRC might, instead of granting that area to foreign interests, explore and develop the area itself. If the ROC reacts strongly, the resulting direct confrontation between them would be serious indeed. It is submitted, however, that any such move would not come about unless the two sides are ready for a larger political/military showdown. Given the prevailing situation in East Asia and the PRC's recent conciliatory attitude toward the ROC, this scenario seems unlikely.

In view of the above, the first overlap seems more important than the second. Texfel has not explored its concession area in Zone V and probably will not do so in the foreseeable future. The regional geology, heretofore little known, will remain so until a few years after the PRC's exploration in other areas is completed. On

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32. *New York Times*, August 4, 1979, p. 1; *Far Eastern Economic Review*, September 28, 1979, p. 19.

the other hand, the ROC's Zone I (Map 9), particularly its southern part, has been well explored by Conoco and Amoco (with a gas strike in 1974) and by CPC. The potential overlap lies in a sedimentary basin known as the Leichou Basin,[33] extending from southwestern Taiwan to Hong Kong, Macao, and on to the Gulf of Tonkin (called Beibuwan by Peking). The shallow-water, thick-sediment character bespeaks its hydrocarbon potential and economic feasibility.[34] Unlike those far-off areas north of Taiwan, this may be one of the priority areas CPC will concentrate its efforts on in the next decade. Clashes with Phillips or whomever is granted the sector in this area are not unlikely.

Concession overlappings give rise to a host of legal questions: Who infringes on whose sovereign rights or mining rights? Who has title to the oil produced from the overlaps? If oil is exported to a third state by the PRC's operator (or CPC), can Taipei (or Peking) claim it? If that state has switched recognition from Taipei to Peking, could the ROC claim the oil at all? Does international law in this regard, if any, apply to the ROC and the PRC? These questions are discussed at length in Chapter 6.

E. Summary

A decade and a half after the present oil controversy first arose, one development has brought about profound changes. The conclusion of the Japan-ROK Joint Development Agreement has defused the Japan-ROK seabed dispute which, though not formally settled, probably will lie dormant for fifty years, if the Agreement's term is any guide. Meanwhile, the Agreement literally reduced the size of the multilateral controversy as a whole. For instance, the number of overlapping concession blocks decreased from seventeen to nine (Table 1). It was pointed out in 1972[35] that the present controversy, though involving five governments, was effectively one between Japan on the one hand, and China (the PRC and the ROC) and Korea on the other, because geophysical similarities in the latter states' coastal areas dictated their similar legal positions vis-à-vis Japan. Now that the ROK has concluded a "separate peace" with Japan in the oil war, the controversy becomes, essentially, a Sino-Japanese dispute. This by no means suggests that the Sino-Korean dispute is

33. K.O. Emery and Zvi ben-Aviaham, "Structure and Stratigraphy of the China Basin," UNECAFE/CCOP *Technical Bulletin*, Vol. 6, (1972) p. 136, *cited in* Harrison, *supra* Chapter 1, note 39, p. 287 n.16.

34. Harrison, *supra* Chapter 1, note 39, pp. 54, 99.

35. Park (1972), *supra* Chapter 1, note 18, p. 20.

readily solvable. While legally it may be so, the dispute has been so politicized that what really matters is which of the two Chinese governments one is dealing with. The net results are, of course, diametrically opposite. The ROK's claims and concession blocks overlap with areas under the ROC's nominal claims, but not the ROC's concession zones actually granted. In real terms, the conflict is marginal at most. On the other hand, the ROK-PRC conflict is deprived of a settlement exclusively for political reasons, although the legal issues involved are manageable.

The Sino-Japanese seabed and territorial disputes seem to be the only real conflict left in the East China Sea. Whereas the PRC has refrained from pressing its claim against Japan for political reasons, the ROC's concession blocks have overlapped substantially with Japanese ones, half of which have used the disputed Tiao-yu-t'ai Islands as basepoints. Economic reality is changing this picture. The PRC's stagnant domestic oil production no longer can afford the strategy of playing patience to its neighbors' impatience. Sooner or later the parties involved will be serious about seeking a settlement of these disputes to clear the way for oil development. The Law of the Sea Convention would obviously to play a role. Apart from the international dimension, the two Chinese governments also have overlapping concession areas. Obviously, the ultimate settlement must await political forces at work; but the legal aspects or consequences in particular contexts are nevertheless worth probing.

What was summarized above defines the scope of inquiry in Part II: first, the Sino-Japanese seabed disputes; second, the legal aspect of the Peking-Taipei rivalry in the undersea oil context. A preliminary analysis of the relevance of the Tiao-yu-t'ai territorial dispute to the seabed issue will clarify their interrelationship. References are made occasionally to the rest of the disputing states, but the focus will remain on China (the ROC and the PRC) and Japan.

PART II THE MARITIME JURISDICTIONAL DISPUTE: WHO MAY OWN THE UNDERSEA OIL?

CHAPTER 4 RELEVANCE OF THE TIAO-YU-T'AI (SENKAKU) ISLANDS TERRITORIAL DISPUTE

This Chapter does not purport to deal with the territorial dispute over the Taio-yu-t'ai Islands as such, but instead analyzes the *relevance* of this dispute to the larger East Asian seabed jurisdictional issue. In the past decade, an extensive body of literature on the sovereignty question has been published in Chinese, Japanese, and English.[1] Unless new historical evidence of significance is uncovered or the international law of territorial acquisition is clarified, it is unlikely that either China (the ROC and the PRC) or Japan can

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1. For the Chinese sources, *see Collection of Tiao-yu-t'ai Materials*, *supra* Chapter 3, note 21. This is the most comprehensive collection of news reports, editorials, and scholarly commentaries of ROC origin. *See also* Yang Chung-Kwei, *Chung-kuo, Liu-ch'iu, Tiao-yu-t'ai* (China, Ryukyu, and Tiao-yu-t'ai) Hong Kong: Union Research Institute, 1972 (hereinafter cited as Yang (1972)); Chiu (1972), *supra* Chapter 2, note 59.

For the Japanese sources, *see Okinawa* (A Japanese quarterly devoted to the problem of Okinawa and Bonin Islands), No. 56 (Senkaku Islands Special Issue), March 1971. *See also* Toshio Okuhara, "Senkaku Rettō no ryōyūken kizoku montai" (The Problem of the Right of Sovereignty over the Senkaku Islands), *Asahi Asian Review*, Vol. 3, No. 2 (1972), pp. 18-25, cited in Cheng (1974), *supra* Chapter 2, note 57, p. 221, p. 244, note 77 (hereinafter cited as Cheng (1974)); Kiyoshi Inoue, "Tiao-yu Shoto ("Senkaku Rettō" nado) no rekishi to sono ryōyūken (sairon)" (The History and Sovereignty of the T'iao-yu-t'ai Islands — A Re-assessment), *Chukoku Kenkyu Geppo* (Chinese Studies Monthly), No. 292 (June 1972), p. 36, cited in Cheng (1974), *supra* p. 248, note 88 (Professor Kiyoshi Inoue, a Japanese historian, supported the Chinese position); Kiyoshi Inoue, *Tiao-yu-t'ai Lieh-yu: Li-shih Yu Ling-t'u Chu-ch'uan Te Pou-hsi* (An Analysis of the History and Territorial Sovereignty of the Tiao-yu-t'ai Islets) translated by Chi-nan Chen, Taipei: Mei-chuan Hsiao Chiu, 1973.

For the English sources, *see* Toshio Okuhara, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf," *Japanese Annual of International Law*, Vol. 15 (1971), p. 97; Park (1972), *supra* Chapter 1, note 18, pp. 37-48; Choon-ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy," *Harvard International Law Journal*, Vol. 4 (1973), p. 212 (hereinafter cited as Park (1973)) (this is a slightly revised version of his 1972 paper); Note, "International Law and the Sino-Japanese Controversy over Territorial Sovereignty of the Senkaku Islands," *Boston University Law Review*, Vol. 52 (1972), p. 763; Note, "The East China Sea: The Role of International Law in the Settlement of Dispute," *Duke Law Journal* (1973), p. 823, pp. 846-54; Cheng (1974), *supra*; Jerome A. Cohen and Hungdah Chiu, *People's China and International Law*, Princeton, N.J.: Princeton University Press, 1974, pp. 346-53; Victor H. Li, "China and Offshore Oil: The Tiao-yu-t'ai Dispute," *Stanford Journal of International Studies*, Vol. 10 (1975), p. 143.

advance any new argument determinative of the sovereignty issue.[2] Moreover, even if questions of fact and law are settled, there is no guarantee that the contestants would have the dispute adjudicated by a third party pursuant to international law principles. The more likely scenario is, like other territorial disputes, a settlement through diplomatic negotiations. Chinese and Japanese attitudes toward the dispute have, since its emergence, attested to this observation. The PRC's decision to shelve the issue in 1972 and revive it in 1978 simply to serve a particular political purpose vividly illustrates the extent to which the dispute has been politicized. The same can probably be said of Japan. A reexamination of a territorial issue which both contestants[3] have deliberately kept dormant makes little sense, particularly when prospects for breaking new ground are poor.

On the other hand, the seabed issue has received much less attention. International law in this regard was embryonic and confusing. Accordingly, most writers as well as the disputing states considered the settlement of the territorial issue as a *conditio sine qua non* to the seabed dispute.[4] The 1958 Shelf Convention, the only

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2. For a comprehensive and balanced discussion, *see* Cheng (1974), *supra* Chapter 2, note 57. On the basis of the arguments and evidences presented by Japan and China (the PRC and the ROC), Professor Cheng concluded that China had a stronger claim. *Ibid.*, pp. 239-41, 266. The unclear aspect of the international law of territorial acquisition is the doctrine of intertemporal law as interpreted by Judge Huber in the *Island of Palmas Case* (United States v. The Netherlands). *United Nations Report of International Arbitral Awards*, Vol. 2 (1949), p. 829; *American Journal of International Law*, Vol. 22 (1928), p. 867. For a famous critique of that case, *see* Philip Jessup, "The Palmas Island Arbitration," *American Journal of International Law*, Vol. 22 (1928), pp. 735, 740. *See also* Robert Yewdall Jennings, *The Acquisition of Territory in International Law*, Manchester: Manchester University Press, 1963, pp. 28-31.

3. Japan derecognized the ROC and established diplomatic relations with the PRC in 1972. Accordingly, the relations between Taipei and Tokyo since then have been unofficial. Even if the ROC wished to reopen the territorial issue, Japan could not possibly negotiate with a government which it officially has derecognized as representing China.

4. For writers who explicitly or implicitly took this view, *see* Park (1972), *supra* Chapter 1, note 18, p. 49; Note [*Duke Law Journal*], *supra* note 1, p. 846; Cheng (1974), *supra* note 1, p. 264; Li, *supra* note 1, p. 146; Barry Buzan, *A Sea of Troubles? Sources of Dispute in the New Ocean Regime*, Adelphi Papers No. 143, London: The International Institute for Strategic Studies, 1978, p. 38; Derek W. Bowett, *The Legal Regime of Islands in International Law*, Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1979, p. 307 [hereinafter cited as Bowett (1979)]; Jeanette Greenfield, *China and the Law of the Sea, Air, and Environment*, Alphan aan den Rijn, The Netherlands: Sijithoff & Noordhoff, 1979, p. 129; Choon-ho Park, "Les Jurisdictions Maritimes dans la Mer de Chine: Les Pratiques étatiques actuelles," *Revue Gènérale De Droit International Public*, Vol. 84 (1980), pp. 328, 338; Choon-ho Park, "Offshore Oil Development in the China Seas: Some Legal

positive law as of this writing, also unequivocally recognizes, in Article 1(b), the seabed rights of islands regardless of their "merits." The International Court of Justice in 1969 declared in the *North Sea Cases* that Articles 1 to 3 of the Shelf Convention had acquired the status of customary international law applicable to parties and non-parties to the Shelf Convention.[5] This in turn stiffened the respective positions of China (the ROC and the PRC) and Japan and intensified the territorial dispute, since the whole seabed issue hinged upon its outcome.

The following decade witnessed a revolution in the regime of the oceans, especially in the areas of expanded national jurisdictions and the legal status of islands regarding seabed rights. The new international consensus is that small islands may, in some cases, be denied continental shelf rights. If the Tiao-yu-t'ais are to have no continental shelf of their own beyond the territorial sea, the seabed issue can then be detached entirely from the territorial dispute. The key question, of course, is whether the Tiao-yu-t'ais should be so treated. The analysis below responds to this question.

A. The Tiao-yu-t'ai Islets: Geographical Context[6]

The Tiao-yu-t'ais consist of five uninhabited islets and three barren rocks (Map 12). The whole group is 102 miles from Keelung in northern Taiwan and 230 miles from Naha, the capital of Japan's Okinawa Prefecture (Map 1). However, the distance between the group and the nearest Chinese and Japanese *territories*, including small offshore islets, is approximately 90 miles respectively. Scattered between 25°40'N and 26°N latitude and 123°E and 124°34'E longitude in the East China Sea, the Tiao-yu-t'ais have three separate clusters. Tiao-yu, the largest in the group (4.5 sq. km.), along

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and Territorial Issues" in *Ocean Yearbook 2* ed. by Elisabeth Mann Borgese and Norton Ginsburg, Chicago and London: The University of Chicago Press, 1980, p. 315.

5. *See* text accompanying note 21 *infra*.

6. This section is based primarily on the following sources: Sha Hsueh-chun, "Tiao-yu-t'ai Shu Chung-kuo Pu-shu Liu-ch'iu Chih Shih-ti Ken-chü" [The Historical-Geographical Evidence of the Chinese and Not the Ryukyuan Sovereignty Over the Tiao-yu-t'ai Islands], *Hsueh Ts'ui* [Sinological Studies], Vol. 14, No. 2 (February 1972), p. 4, reprinted in Sha Hsueh-chun, *Ti-li-hsüeh Lun-wen-chi* [Collected Geographical Papers] p. 483, 1972; Yang (1972), *supra* note 1, pp. 131-35; and *Tiao-yu-t'ai Lieh-yu Ti-tu* [A Map of the Tiao-yu-t'ai Islands], made by Professor H. Sha (scale 1:10,000; size: 37″ × 51″; color: five colors) (Taipei 1972). Professor Sha was the president of the Chinese Geographic Society and Professor of Geography Emeritus at the National Taiwan Normal University. The map is allegedly the only large-scale map of the Tiao-yu-t'ais in the world. It is partially reproduced as Map 12.

with Nan-hsiao (the third largest), Pei-hsiao (the fourth), and three barren rocks (Ch'ung-pei-yen, Ch'ung-nan-yen, and Fei-lai) form the eastern cluster. Huang-wei, the second largest in the group (1.08 sq. km.), is 14 miles northeast of Tiao-yu. Ch'ih-wei (also known as Raleigh Rock to Westerners), the fifth largest (0.154 sq. km.), lies 48 miles west of Huang-wei.

Geologically, the Tiao-yu-t'ais are volcanic formations of the Neocene age. Like islets off the northern Taiwan shore (Hua-p'ing Mien-hua, and P'eng-chia Islets) (Map 1), they are rocky outcroppings of undersea extensions of coastal mountains in northern Taiwan. Small but disproportionately high peaks (383 meters on Tiao-yu) and steep cliffs are common to all islets. They have served as excellent navigational aids in past centuries. All the islets sit atop the edge of the East China Sea continental shelf, separated from the Ryukyus by the deepest part of the Okinawa Trough (over 2,000 meters).

B. The Regime of Islands in International Law Regarding Seabed Rights

All states on earth, if not landlocked, have insular territories. When the territorial sea concept first emerged in the late 1500s among European maritime powers, islands were treated in the same way as other mainland territories since many of the states' metropolitan and colonial territories were insular.[7] The security-oriented rationale underlying the territorial sea regime called for no differentiation. As regards entitlements of tiny islets and rocks to far more extensive jurisdictions such as continental shelf and 200-mile zones developed during the last three decades, questions of inequity arose. One problem concerns the seaward delimitation of these zones for islands, namely, whether *all* islands were capable of generating a continental shelf or an EEZ. The apparent inequity lay in the extreme case where an uninhibited mid-ocean reef of one square mile commanded a 200-mile zone of more than 140,000 square miles.[8] The other problem resulting from expanded national juris-

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7. *See generally* H.S.K. Kent, "The Historical Origins of the Three-mile Limit." *American Journal of International Law*, Vol. 48 (1954), p. 537.

8. The reef is assumed to be circular in shape with approximately a one-mile diameter. However, in order for an island to have a land area comparable to that of its 200-nautical mile zone around it, such an island must have a diameter of 965 nautical miles if it is circular in shape. In that case, the area of the island's landmass and the 200-mile zone would be 967,850 sq. mi. each. It would be larger than Greenland (840,000 sq. mi., the largest island in the world) and simply does not exist on earth.

dictions related to the effect of islands' presence on shelf and EEZ boundaries between neighboring states: that is, whether islands should be taken into account in boundary delimitations. These two problems are separate but interrelated. Certain categories of islands that were not allowed to generate their own shelf or EEZ, were irrelevant to shelf or EEZ boundary delimitations. However, it was conceivable that in certain cases an island may generate its own maritime zone but may not equitably be granted full effect (or any effect) in drawing a boundary. The inequity seemed acute when islands, situated closer to the state other than their home state, were used as basepoints in drawing an equidistant boundary.[9] The following survey of various sources of international law on this subject focuses on the continental shelf alone.

1. International Legislation

An island's seaward delimitation is determined by the legal definition of continental shelf, an erstwhile purely geological term. It was first dealt with by the United Nations International Law Commission (ILC) in the early 1950s.[10] The ILC's first draft articles on the continental shelf, completed in 1951, made it clear that the term "continental shelf" "may apply also to islands to which such submarine areas are contiguous."[11] On the other hand, neither the text (Article 7) nor the commentary referred to the effect of islands' presence on boundary delimitation. Indiscriminate treatment of islands and mainlands seemed to have been assumed without challenge in previous and subsequent ILC discussions. The ILC's second draft articles made no change in the islands' seabed entitlement.[12] In this draft the ILC also considered the effect of islands on seabed boundary delimitation between opposite and adjacent states. In the comments on Article 7, "presence of islands" was cited as one of the "special circumstances" justifying a departure from the equidistance line drawn from the mainland coasts of the neighboring states.[13] The ILC adopted the same formulation in its third draft, couched in

9. A good example would be the Channel Islands in the English Channel (Map 14).

10. YBILC (1949), pp. 235, 237.

11. ILC Report to the General Assembly, UNGAOR, Vol. 6, Supplement (no. 9), UN Doc. A/1858 (1951) p. 17, reprinted in YBILC (1951), Vol. 2, p. 141, UN Doc. A/CN.4/SER.A/1951/Add.1.

12. ILC Report to the General Assembly, UNGAOR, Vol. 8, Supplement (no. 9), UN Doc. A/2456 (1953), p. 12, reprinted in YBILC (1953), Vol. 2, pp. 200, 212-14, UN Doc. A/CN.4/SER.A/1953/Add.1.

13. *Ibid.*, p. 216.

Articles 67 to 73 of the draft convention on the law of the sea.[14] This draft became the basis of negotiation at Geneva in the first United Nations Conference on the Law of the Sea (UNCLOS I) in 1958.

During the Conference, a Filipino proposal[15] added to draft Article 67, which omitted islands in the text, a second paragraph explicitly providing islands with whatever rights a continent may have. The Conference adopted draft Article 67 as amended by the proposal.[16] Meanwhile, intensive debate took place in the Fourth Committee (dealing with continental shelf) on the effect of islands on shelf boundaries (draft Article 72).[17] Two proposals by Italy and Iran, which would have had the effect of ignoring all islands as basepoints if they were situated in a continental shelf continuous from the mainland coast, were rejected.[18] Draft Articles 67 and 72 later became Articles 1 and 6, respectively, of the Shelf Convention, the relevant parts of which are as follows:

Article 1

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent water admits of the exploitation of the natural resources of the said areas; (b) to the *seabed and subsoil of similar submarine areas adjacent to the coasts of islands*.

Article 6

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite

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14. ILC Report to the General Assembly, UNGAOR, Vol. 11, Supplement (no. 9), pp. 11-12, 40-45, UN Doc. A/3159 (1956), reprinted in YBILC, (1956), Vol. 2, pp. 253, 264, 296-301, UN Doc. A/CN.4/SER.A/1956/Add.1.

15. Philippines: Proposal (Article 67), UN Doc. A/CONF.13/C.4/U.26, UNCLOS I, *Official Records*, Vol. 6, 4th Committee (Continental Shelf), UN Doc.A/CONF.13/42, 1958, p. 133.

The Convention on the Territorial Sea and Contiguous Zone, UNTS, Vol. 516, p. 207, also adopted by the 1958 UNCLOS I at Geneva, defines an island in Article 10, Paragraph 1:

> An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

The second paragraph recognizes that an island may have a territorial sea of its own.

16. UNCLOS I, *Official Records*, Vol. 6, *supra* note 15, p. 47.

17. *Ibid*., pp. 91-98.

18. Italy: Proposal, UN Doc. A/CONF.13/C.4/L.25/Rev.1, *ibid*., p. 133; Iran: Proposal, UN Doc. A/CONF.13/C.4/L.60, *ibid*., p. 142. The voting rejecting both proposals appears in *ibid*., p. 98.

> each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary *is* the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary *shall be determined by application of the principle of equidistance* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. . . .[19] (emphasis added)

The Shelf Convention went into effect in 1964 with ratifications by 22 states; by the time the ICJ decided the *North Sea Cases*, 39 states had become parties.[20] The ICJ declared, in dictum, that Articles 1 to 3 of the Convention "were then regarded [by UNCLOS I] as reflecting, or as crystalizing, received or at least emerging rules of customary international law relative to the continental shelf."[21] The Court did not address islands which were not at issue in that case. Nor did it intend to alter the effect of the presence of islands, as (or not as) a special circumstance under Article 6, on seabed boundary delimitation. The legislative history of Article 6 clearly shows that, absent an agreement between opposite or adjacent states, the general rule is the equidistance principle, whereas a departure from that principle justified by the presence of islands is an exception.[22] In other words, despite Article 1(b) of the Convention, an island's presence should be ignored as a general rule unless it is so exceptional as to justify a deviation. The Shelf Convention appears to retract partially in Article 6 what it generously grants to islands in Article 1(b). The ICJ, recognizing Article 1 to 3 as reflecting customary international law but denying Article 6 the same status, nevertheless did not

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19. UNTS, Vol. 450, p. 311.

20. United Nations Secretariat, *Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions, List of Signatures, Ratifications, Accessions, etc. as at 31 December 1978*, UN Doc. ST/LEG/SER.D/12 (1978), p. 566.

21. I.C.J. Reports 1969, p. 39.

22. *Supra* note 12, p. 216.

approve the notion that presence of islands may be invoked as a "special circumstance" in all cases. Rather, their presence may be merely one of the "relevant circumstances" to be taken into account by the delimiting states under the rubric of "equitable principles."[23]

The troublesome character of islands' shelf entitlement began to gain wider recognition in the international community as offshore technology made more and more seabed accessible to human beings and more and more mid-ocean insular states declared independence. Difficult questions of classifying islands according to varying criteria were discussed in the early 1970s in the Seabed Committee,[24] which was established by the United Nations General Assembly in 1968, and were debated intensively in the Caracas session of UNCLOS III in 1974.[25] A compromise was reached in the third session at Geneva

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23. I.C.J. Reports 1969, pp. 53, 54.

24. There were a number of proposals submitted to Sub-Committee II on the regime of islands in general and islands' effect on shelf and other maritime boundaries in particular. *See e.g.*, Greece: Draft article under item 19, Regime of Islands, UN Doc. A/AC.138/SC.II/L.29 and Corr. 1, Seabed Committee Report, Vol. 3 (1973), p. 70; Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia, and United Republic of Tanzania: Draft articles on exclusive economic zone, UN Doc. A/AC.138/SC.II/L.40 and Corr. 1-3 (Article XII), *ibid.*, p. 87 and p. 89; Cameroon, Kenya, Madagascar, Tunisia and Turkey: Draft article under article 19, Regime of Islands, UN Doc. A/AC.138/SC.II/L.43, *ibid.*, p. 98 (same as Art. XII above); Turkey: Proposal for a study on islands, UN Doc. A/AC.138/SC.II/L.49, *ibid.*, p. 105; Romania: Working paper on certain specific aspects of the regime of islands in the context of delimitation of marine spaces between neighboring states, UN Doc. A/AC.138/SC.II/L.53, *ibid.*, p. 106.

By and large, Greece advocated equal treatment of islands and mainland territories of a state whereas the rest of the proposals favored a differentiated treatment.

25. The regime of islands, as agenda item 19, was debated in the 38th, 39th, and 40th meetings of the Caracas session. UNCLOS III, *Official Records*, Vol. 2 (1974), pp. 278-89. There were nine draft articles relating to islands submitted to the Second Committee (dealing with traditional law of the sea issues); Romania: Draft articles on delimitation of marine and ocean space between adjacent and opposite neighboring States and various aspects involved (Article 2), UN Doc. A/CONF.62/C.2/L. 18, UNCLOS III, *Official Records*, Vol. 3 (1974), p. 195; Fiji, New Zealand, Tonga and Western Samoa: Draft articles on islands and on territories under foreign domination or control, UN Doc. A/CONF.62/C.2/L.30, *ibid.*, p. 210; Ireland: Draft article on delimitation of areas of continental shelf between neighboring states, UN Doc. A/CONF.62/C.2/L.43, *ibid.*, p. 220; Greece: Draft articles on the regime of islands and other related matters, UN Doc. A/CONF.62/C.2/L.50, *ibid.*, p. 227; Romania: Draft articles on definition of and regime applicable to islets and islands similar to islets, UN Doc. A/CONF.62/C.2/L.53, *ibid.*, p. 228; Turkey: Draft articles on the regime of islands, UN Doc. A/CONF.62./C.2/L.55, *ibid.*, p. 230; Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Libyan Arab Republic, Mexico, Morocco, Nicaragua, Panama, Paraguay, Peru and Uruguay: Draft article on islands and other territories under colonial domination or foreign occupation, UN Doc. A/

in 1975, as reflected in Article 132 of the Informal Single Negotiating Text[26] (hereinafter ISNT) which provided:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territory.
> 3. *Rocks which cannot sustain human habitation or economic life of their own* shall have *no* exclusive economic zone or continental shelf.[27] (emphasis added)

This formulation combines the definition of island under Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone and Article 1(b) of the Shelf Convention. Paragraph 3, however, imposes an important but elusive restriction on an island's entitlement to the continental shelf and the EEZ. Compared to the Shelf Convention, the new regime on islands made a significant change—not all islands may have shelf rights, even in an isolated location where no boundary delimitation is involved. The merits of an island thus became crucial considerations for its seabed rights. But it is still unclear from the language of paragraph 3 just how the dividing line is to be drawn between a qualified and an unqualified rock. On the other hand, islands' effects on shelf boundaries become, under Article 70[28] of ISNT, one of the "relevant circumstances" to be considered in effecting an equitable delimitation employing, where

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CONF.62/C.2/L.58, *ibid.*, p. 232; Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madgascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia: Draft articles on the regime of islands, UN Doc. A/CONF.62/C.2/L.62/Rev. 1, *ibid.*, p. 232; Uruguay: Draft article on the regime of islands, UN Doc. A/CONF.62/C.2/L.75, *ibid.*, p. 238.

Except for the draft article of Argentina *et al.*, (L.58) *supra* which did not address the question of islands' maritime rights, the draft articles of Fiji *et al.* (L.3), Greece (L.50) and Uruguay (L.75), *supra* supported an equal treatment of islands and mainland territories whereas those of Ireland (L.43), Romania (L.53), Turkey (L.55), and Algeria *et al.* (L.62/Rev.1), *supra*, advocated a differentiated treatment. A French draft article referred to islands but did not specify its position on islands' entitlement to shelf. France: Draft article on the delimitation of the continental shelf or of the economic zone, UN Doc. A/CONF.62/C.2/L.74, *ibid.*, p. 237.

26. UN Doc. A/CONF.62/WP.8, UNCLOS III, *Official Records*, Vol. 4 (1975), p. 137.

27. *Ibid.*, pp. 170-171.

28. *Ibid.*, p. 163.

appropriate, the equidistance principle. The change from Article 6 of the Shelf Convention is, at least in form,[29] obvious, as is the heavy influence of the *North Sea* Cases.

The formulation of ISNT's Article 132 survived all the subsequent sessions of UNCLOS III that produced the Revised Single Negotiating Text (RSNT) (Article 128) in 1976, the Informal Composite Negotiating Text (ICNT) (Article 121) in 1977 and its three subsequent revisions[30] in 1979 and 1980 (ICNT/Rev. I, ICNT/Rev. 2, and Draft Convention on the Law of the Sea (Informal Text), Article 121 respectively), the Draft Convention on the Law of the Sea[31] (Article 121) in 1981, and finally, the LOS Convention (Article 121) in 1982.[32]

2. Other Sources of International Law

Questions of islands' shelf entitlement did not arise until the international community's general acceptance of 200-mile maritime zones. On the other hand, islands' effects on shelf boundaries have long been a subject of controversy among states since 1958. To date, a solid body of state practice has accumulated and international tribunals have adjudicated three continental shelf boundary disputes. A brief account of these developments is presented below.

(a) State Practice

Following the lead of the United States in making unilateral claims to adjacent continental shelf, a great number of states, continental or insular, have asserted seabed rights of islands.[33] The uniformity and frequency of these claims and the absence of protests

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29. The Court in the *Anglo-French Arbitration* stated that in substance Article 6 and corresponding provisions under discussion at UNCLOS III (including, of course, the ISNT Article 70) made little difference as applied to the case before the Court. The Anglo-French Award, Chapter 2, note 31 *supra*, para. 96.

30. The three revisions of ICNT were: the Informal Composite Negotiating Text/Revision 1, UN Doc. A/CONF.62/WP.10/Rev.1, 28 April 1979, the Informal Composite Negotiating Text/Revision 2, UN Doc. A/CONF.62/WP.10/Rev.2, 11 April 1980, and the Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/Rev.3, 27 August 1980. All three documents have not been reprinted in official records of UNCLOS III.

31. UN Doc. A/CONF.62/L.78, 28 August 1981.

32. UN Doc. A/CONF.62/122, 7 October 1982.

33. *E.g.*, Chile (1947), UNLS/1, p. 6, Costa Rica (1948), *ibid.*, p. 9; Philippines (1949), *ibid.*, p. 19; Iran (1955), UNLS/15, p. 366; India (1959), *ibid.*, p. 364; Denmark (1963), *ibid.*, p. 344; New Zealand (1964), *ibid.*, p. 389; Iceland (1969), *ibid.*, p. 354; Malaysia (1969), UNLS/16, p. 154; Fiji (1970), *ibid.*, p. 141.

from other states combined to vindicate the existence of an international custom to that effect. Codification of this custom by Article 1(b) of the Shelf Convention and subsequent endorsement by the ICJ in the *North Sea Cases* as such further strengthen its status.

On the other hand, state practice in boundary delimitation consists primarily of boundary agreements. As a rule, not all states disclose the legal principles underlying their agreement on a particular boundary.[34] Shelf boundary maps provide useful clues, but they sometimes admit of more than one interpretation.[35] Nevertheless, there is substantial agreement among commentators[36] who have surveyed scores of these boundary agreements and summarized their treatments of islands. A number of these conduct patterns emerge from these agreements.

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34. *E.g.*, the Norway-U.K. shelf boundary agreement stated that the boundary was an equidistance line. Agreement Relating to the Delimitation of the Continental Shelf, Norway-U.K., March 10, 1965, UNTS, Vol. 551, p. 214; UNLS/15, p. 775; "Continental Shelf Boundary: North Sea," *Limits in the Seas*, No. 10 (revised), June 14, 1974, p. 2. But the Netherlands-U.K. agreement only specifies the geographical coordinates without stating the delimitation principle. Agreement Relating to the Delimitation of the Continental Shelf Under the North Sea, Netherlands-U.K., October 6, 1965, UNTS, Vol. 595, p. 113; UNLS/15, p. 779; "Continental Shelf Boundary: North Sea," *Limits in the Seas*, No. 10, *supra*, p. 11.

35. *E.g.*, Agreement Concerning the Delimitation of Continental Shelf, Sweden-Norway, July 24, 1968, UNLS/16, p. 413; "Continental Shelf Boundary: Norway-Sweden," *Limits in the Seas*, No. 2, January 22, 1970.

Northcutt Ely, a Washington lawyer, pointed out that "[s]ome small Swedish islets or exposed rocks were *ignored*, i.e., were not used as basepoints" (emphasis added). Northcutt Ely, "Seabed Boundaries between Coastal States: The Effect to be Given Islets as Special Circumstances." *International Lawyer*, Vol. 6 (1972), p. 227 [hereinafter cited as Ely (1972)]. However, Robert D. Hodgson, the late geographer of the State Department, considered that "Norway and Sweden have granted *full effect* to their respective islands . . ." (emphasis added). Robert D. Hodgson, *Islands: Normal and Special Circumstances*, Research Study RGE-3, Washington, D.C.: Bureau of Intelligence and Research, Department of State, 1973, p. 55 [hereinafter cited as Hodgson (1973)]. The difference of interpretation comes not as a surprise since both states have identical or similar insular geography. Granting their respective islands full effect or no effect produces nearly the same result since the effects are equalized anyway.

36. *See e.g.*, Ely (1972), *supra* note 35; L.F.E. Goldie, "The International Court of Justice's Natural Prolongation and the Continental Shelf Problems of Islands." *Netherlands Yearbook of International Law*, Vol. 4 (1973), p. 237 [hereinafter cited as Goldie (1973)]. Hodgson (1973), *supra* note 35; Donald E. Karl, "Islands and the Delimitation of Continental Shelf: A Framework for Analysis." *American Journal of International Law*, Vo. 71 (1977), pp. 642, 651-65 [hereinafter cited as Karl (1977)]; Bowett (1979), *supra* note 4, pp. 156-83; Clive R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff Publishers, 1979, pp. 189-204 [hereinafter cited as Symmons (1979)].

As between opposite states, which is the concern here, islands in general are accorded full effect, partial effect, or no effect in shelf boundary delimitations, depending on their location, size, status of title, and macrogeography. In terms of *location* (in the order of ascending distance from the island's home state coast): (1) Islands located within the territorial sea of the mainland of their home state are usually granted full effect in generating their own shelves;[37] (2) islands located close to but outside the territorial sea of their home state's mainland coast are accorded partial effect;[38] (3) islands located on or near the median line (constructed in disregard of their very presence) between their home state and the opposite state, are given full effect,[39] partial effect,[40] or no effect,[41] depending on other considerations; and, (4) islands located close to the mainland coast of the opposite state are accorded partial effect or no effect.[42]

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37. *E.g.*, Agreement on the Delimitation of the Continental Shelf, Denmark-Norway, December 8, 1965, UNTS, Vol. 634, p. 71; UNLS/15, p. 780; "Continental Shelf Boundary: North Sea," *Limits in the Seas*, No. 10 (revised), June 14, 1974, p. 6; "Continental Shelf Boundary: Italy-Yugoslavia," *ibid.*, No. 9, February 20, 1970; *International Legal Materials*, Vol. 7 (1968), p. 547. Agreement Relating to the Delimitation of the Continental Shelf between Greenland and Canada, Canada-Denmark, December 17, 1973, UNLS/18, p. 447; *International Legal Materials*, Vol. 13 (1974), p. 506. In the above delimitations, coastal islands within the outer limits of the territorial sea were used as basepoints.

38. *E.g.*, Agreement Concerning the Islands Al-'Arabiyah and Farsi and the Delimitation of Submarine Areas, Saudi Arabia-Iran, October 24, 1968, UNTS, Vol. 696, p. 189; UNLS/18, p. 433; "Continental Shelf Boundary: Iran-Saudi Arabia," *Limits in the Seas*, No. 24 (n.d.); "Continental Shelf Boundary: Italy-Yugoslavia," *supra* note 37.

In the former agreement, the Iranian island of Kharg, 17 miles offshore (Iran claims a 12-mile territorial sea), was given half effect in delimiting the median line between Iranian and Saudi mainland coasts. In the latter agreement, the Yugoslav islands of Jabuka and Andrija were granted partial effects in influencing the median line drawn between the mainland coasts of the two states.

39. *See e.g.*, the Norway-U.K. agreement, *supra* note 34; "Continental Shelf Boundary and Joint Development Zone: Japan-Republic of Korea," *Limits in the Seas*, No. 75, September 2, 1977, pp. 1-3. For an elaborate discussion, see text accompanying notes 111-12 *infra*.

40. *See e.g.*, the Italy-Yugoslavia agreement, *supra* note 37; "Continental Shelf Boundary: Italy-Tunisia," *Limits in the Seas*, No. 89, January 7, 1980. The two boundaries are discussed in text accompanying notes 113-20 *infra*.

41. *See e.g.*, Bahrain-Saudi Arabia Boundary Agreement, February 22, 1958, UNLS/16, p. 409; "Continental Shelf Boundary: Bahrain-Saudi Arabia," *Limits in the Seas*, No. 12, March 10, 1970; Iran-Saudi Arabia agreement, *supra* note 38. These two boundary delimitations are also discussed in text accompanying notes 121-27 *infra*.

42. *See e.g.*, the Italy-Tunisia agreement, *supra* note 40. *But compare* "Continental Shelf Boundary: India-Indonesia," *Limits in the Seas*, No. 62, August 25, 1975 (the Indian islands of Nicobar (740 sq. mi; population: 14,563), which are 900 miles from the

In terms of *size*, small islets or rocks are usually ignored or given limited effect in continental shelf delimitation.[43] Since these tiny land masses are too small to support a permanent population living on them, they are often uninhabited (except by caretakers) and have little or no economic value. In terms of *status of title*, an island the sovereignty of which is in dispute is often accorded no effect in shelf delimitation.[44] This pattern is largely independent of other factors. In terms of *macrogeography*, islands of various locations and sizes belonging to two states are granted identical treatment, be it full effect, partial effect, or no effect, if the insular geography of the delimiting states warrants reciprocal concessions on each side.[45] The application of this pattern is not limited to islands *inter se*; it is applicable to islands vis-à-vis other geographical features.[46]

These patterns of state practice are, of course, somewhat overgeneralized. In practice, the actual delimitation is affected by a combination of these factors and possibly even more. The relative weight of each factor is a function of the particular context and is difficult, if not impossible, to generalize about.

(b) International Adjudication

Since the 1945 Truman Proclamation, there have been only three adjudicated cases relating to international seabed delimitation:[47] the 1969 *North Sea Cases*, the 1977 *Anglo-French Arbitration*

Indian mainland, were granted full effect in drawing the median line between the islands and Indonesia's Sumatra Island).

43. *See e.g.*, the Norway-Sweden agreement, *supra* note 35; the Italy-Tunisia agreement (treatment of the island of Lampione), *supra* note 40; Bahrain-Saudi Arabia agreement, *supra* note 41. *See* text accompanying notes 119, 121 *infra*.

44. *See e.g.*, "Continental Shelf Boundary: Iran-United Arab Emirates (Dubai)," *Limits in the Seas*, No. 63, September 30, 1975 (the island of Abu Musa was in dispute and thus ignored); "Historical Water Boundary: India-Sri Lanka," *ibid.*, No. 66, December 12, 1975 (the disputed Kachchativu Islet was denied even a territorial sea of 12 miles). *See* text accompanying notes 123-27 *infra*.

45. *See e.g.*, the Norway-Sweden agreement, *supra* note 35 (islands were given reciprocal treatment, be it full or no effect); the Iran-Saudi Arabia agreement, *supra* note 38 (the reciprocal treatment of the islands of Al-'Arabiyah and Farsi); the Iran-U.A.E. agreement, *supra* note 44 (two islets each of which belonged to one state were used in drawing a boundary line); Japan-ROK agreement, *supra* note 31 (all islands were given full effect).

46. *See e.g.*, the Norway-U.K. agreement, *supra* note 34 (the ignorance of the Norwegian Trough as a limiting factor and the full effect granted to the Shetland Islands may have been part of a bargain).

47. There have been a number of international and municipal adjudications relating

and *the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* of 1982 (hereinafter the *Tunisian-Libyan* Case).[48] The first case dealt with an adjacent-state situation involving no islands, the second case specifically focused on islands' entitlement to continental shelf, and the third case discussed a half-adjacent, half-opposite coast with some coastal islands. The way islands were treated is outlined below.

The *North Sea Cases* are relevant to the regime of islands only marginally. The ICJ stated in dictum, as noted earlier, that for opposite states to effect an equitable delimitation of their common geological shelf the "presence of islets, rocks . . ." should be ignored to eliminate their "disproportionately distorting effect" in constructing a median line between the two mainland coasts.

The *Anglo-French* case, on the other hand, largely hinged on the effect given to islands between opposite states. The seabed of the English Channel was, the Court of Arbitration pointed out, a common prolongation of the territories of the U.K. *and* France, despite a

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to the maritime boundaries of islands prior to and after the 1945 Truman Proclamation. For instance, *The Anna*, 5 C. Rob. 373; 165 Eng. Rep. 815 (1805) (an uninhibated American island was held to have a territorial sea of three miles), *The Anglo-Norwegian Fisheries Case*, I.C.J. Reports, 1951, p. 115 (the Norwegian skjaergaard, or rock rampart, was recognized by the Court as legitimate basepoints for measuring the breadth of territorial sea), and the *Anglo-Icelandic Fisheries Jurisdiction Case*, I.C.J. Reports, 1974, p. 3 (the 50-mile fishing zone of Iceland, an insular state, was held not opposable to the United Kingdom). None of these cases, however, deal with the *seabed rights* of islands.

On the other hand, there have been a number of unresolved cases relating to the continental shelf: the territorial dispute, which has seabed implications, between Chile and Argentina over the Beagle Channel (an arbitral tribunal granted an award in 1977 in favor of Chile, which has remained unimplemented due to Argentina's rejection of it). *See* F. V., "The Beagle Channel Affair," *American Journal of International Law*, Vol. 71 (1977), p. 733; the *Aegean Sea Continental Shelf Case* concerning the Greece-Turkey seabed boundary (the dispute was submitted to ICJ which found itself lacking jurisdiction to decide the merits), I.C.J. Reports 1978, p. 3; and the U.S.-Canadian maritime dispute regarding the delimitation of the Gulf of Maine (now being submitted to the International Court of Justice), Delimitation of Maritime Boundary in the Gulf of Maine, I.C.J. Reports 1982, p. 3 (Constitution of Chambre Order of January 20, 1982). For a study of the parties' arguments and a proposed solution, *see* Sang-Myon Rhee, "Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine," *American Journal of International Law*, Vol. 75 (1981), p. 590. A decision is expected in August 1984. See John Vinocur, "U.S.-Canada Case is Given to Judges," *New York Times*, May 13, 1984, p. 11.

48. I.C.J. Reports 1982, p. 18. For discussions, *see* Mark B. Feldman, "The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?" *American Journal of International Law*, Vol. 77 (1983), p. 219 and E.D. Brown, "The Tunisia-Libya Continental Shelf Case: A Missed Opportunity," *Marine Policy*, Vol. 7 (1983), p. 142.

minor geological depression.[49] (Map 14) Both states agreed in principle that the boundary should be a median line, but they differed significantly as to how the line should be drawn.[50] France argued, *inter alia*, that the proximity (6 to 16 miles) of the Channel Islands[51] (belonging to the U.K. but maintaining automony) to the French coast and their presence in a concave bay surrounded by French coast dictated, under equitable principles, a median line drawn between the two states' mainland coasts, thus denying the Channel Islands their own shelf.[52] The U.K. replied that since the Channel Islands had substantial land area (195 sq. km.) and population (130,000) and were of economic and political importance, they should generate their own continental shelf.[53]

After considering the geographical location, political status, and economic importance of the Channel Islands, the existing regimes in the region[54] (the 12-mile territorial sea and fishing zones of France and the U.K., respectively), and the parties' navigation and defense interests in the area,[55] the Court concluded:

> The presence of these British Islands close to the French coast, if they are given full effect in delimiting the continental shelf, will manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to the French Republic. The fact by itself appears to the Court to be, *prima facie*, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity.[56]

Short of accepting the French position, the Court decided that a primary boundary should be a mid-Channel equidistance line drawn between mainland coasts of France and the U.K. (Map 14).[57] A second boundary in effect was a line 12 miles from the Channel Islands in their north and west, leaving France a belt of continental shelf, between the mid-Channel line and the Channel Islands, continuous with the rest of the French shelves elsewhere (Map 14).[58] Thus, an

49. Anglo-French Arbitration, *supra* note 29, para. 107.
50. *Ibid.*, para. 146.
51. *Ibid.*, para. 6.
52. *Ibid.*, paras. 156-67.
53. *Ibid.*, paras. 168-79.
54. *Ibid.*, para. 187.
55. *Ibid.*, para. 188.
56. *Ibid.*, para. 196.
57. *Ibid.*, para. 201.
58. *Ibid.*, para. 202.

enclave was created for the Channel Islands surrounded by French shelves.

A second dispute related to the Atlantic area west of the English Channel, where some British islands (the Scillies) extended roughly twice as far from the British mainland coast (21 miles) as the French islands (Ushant) did from the French mainland coast (10 miles).[59] France favored a delimitation on the basis of a bisector of an angle drawn between lines constructed along the general direction of the Channel coasts of the U.K. and France whereas the U.K. proposed a normal median line between the two coasts.[60]

The Court first identified the geographical character of the area as constituting a "special circumstance" under Article 6 of the Shelf Convention,[61] thus rejecting the U.K. position. The Court also found itself unable to accept the French approach since it would have detached the delimitation from the coast and thus run afoul of the fundamental principle of continental shelf—natural prolongation of land territories.[62] In view of the Scillies' distorting effect, the Court finally decided to accord them half effect in drawing the median line between French and British mainland coasts in the Atlantic area (Map 14).[63]

The results of the *Anglo-French* case fit nicely into the patterns of state practice noted above. The enclave treatment of the Channel Islands is compatible with pattern four, namely, no effect or partial effect accorded to islands located close to the mainland coast of the opposite state, whereas granting partial effect to the Scillies finds support from pattern two, namely, partial effect accorded to islands located close to but outside the territorial sea of their home state. More importantly, these results were reached by the Court in the belief that Article 6 of the Shelf Convention, customary rules of international law, state practice, and even the consensus reached at UNCLOS III were simply different expressions of a single concept—equitable principles.[64] The Court's emphasis on taking into account all the relevant circumstances[65] supports not only the *North Sea* ruling but also the boundary delimitation provisions of the RSNT (Articles 62 and 71) (Articles 74 and 83 in all the subsequent versions of

59. *Ibid.*, paras. 4, 10, 235, 251.
60. *Ibid.*, paras. 208, 212.
61. *Ibid.*, para. 245.
62. *Ibid.*, para. 246.
63. *Ibid.*, para. 251.
64. *Ibid.*, para. 96.
65. *Ibid.*, para. 97.

the negotiating text and the LOS Convention). The inherent and unanswered question, of course, is what circumstances are relevant and who should decide whether relevance exists. Disagreement between disputing states could lie precisely there.

The *Tunisian-Libyan Case* involves, unlike the *North Sea Cases* and *the Anglo-French Arbitration*, coasts that are both adjacent to and opposite each other. The area in dispute lies in the Pelagian Sea, a marginal sea of the Mediterranean Sea (Map 15). The coastlines of Tunisia and Libya facing the Pelagian Sea are such that they are adjacent in the area near the common land boundary but become opposite in the area farther out to sea.[66] In both areas there are islands on the Tunisia side, namely, Jerba and the Kerkennahs, but not on the Libyan side. The seabed of the Pelagian Sea, known as the Pelagian Block to geologists, is the common continental shelf shared by both Tunisia and Libya; there is no distinct geological feature that may serve as a natural boundary.[67]

Both parties have made unilateral continental shelf claims that were rejected by the ICJ[68] (Map 16). They themselves also rejected the applicability of the equidistance method as the boundary delimitation principle.[69] The Court, having appreciated the hybrid nature of the parties' coastline, decided to divide the disputed area into two sectors applying different delimitation principles.[70] In the area near the common land boundary (the first sector), the seabed boundary largely follows the extension of the land boundary which bears an angle of 26° to the meridian, roughly perpendicular to the coastline at Ras Ajdir, the land boundary's terminal point[71] (Map 17). The Court has chosen this line because it had been followed by the parties as a *de facto* boundary in granting concessions for offshore oil-exploration during the period 1964-76.[72] In this sector the island of Jerba was disregarded by the Court in assessing the direction of the coastline, for it was "at more than a comparatively short distance from" Ras Ajdir.[73]

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66. This hybrid relationship is not unusual in cases where two neighboring states share a common bay or bight, such as those between Norway and Sweden in the Skagerrak, Italy and Yugoslavia in the Adriatic Sea, France and Spain in the Bay of Biscay, and China and Korea (North) in the Yellow Sea.

67. I.C.J. Reports 1982, para. 67, p. 58.

68. *Ibid.*, para. 113, p. 80.

69. *Ibid.*, para. 110, p. 79.

70. *Ibid.*, para. 114, p. 82.

71. *Ibid.*, para. 121, p. 85.

72. *Ibid.*, para. 21, p. 35 and paras. 117-18, pp. 83-84.

73. *Ibid.*, para. 120, p. 85.

In the second sector where the parties' coasts were considered opposite each other, the Kerkennah Islands were given half effect in drawing the boundary based on the equidistance principle (Map 17).[74] The ICJ reasoned that to take account of these islands' seaward coastline as baseline for delimiting the boundary would, "in the circumstance of the case, amount to giving excessive weight to the Kerkennahs."[75]

The ICJ's disregard of the island of Jerba should not be disturbing since its presence is, after all, much less relevant, as the equidistance method is not employed here.[76] But the Court's treatment of the Kerkennah Islands deserves attention. Large (about 65 square miles) and populous (more than 15,000), these islands lie only 11 miles offshore at their closest point and 22 miles at their farthest.[77] (Tunisia has claimed a 12-mile territorial sea since 1973).[78] In state practice outlined earlier, islands of this size and location are normally granted full effect or partial effect. Here the Court, which saw equitable principles basically as a result-oriented concept,[79] apparently considered that granting no effect or full effect to the Kerkennah Islands would result in inequities; hence the adoption of a middle ground. Despite the apparent impression of arbitrariness, the result of the *Tunisian-Libyan Continental Shelf Case* does not depart appreciably from state practice in treatment of islands in seabed boundary delimitations.

C. The Tiao-t'ais Dispute: Is It Relevant to the East Asian Seabed Controversy?

The Tiao-yu-t'ai dispute was triggered in part[80] by the Sino-

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74. *Ibid*., para. 128, p. 88.

75. *Ibid*.

76. Employment of the equidistance principle in lateral boundary delimitation between two adjacent states has a greater chance of creating inequity in cases where islands or other prominent geographical features are present by magnifying the protruding effect of these features.

77. *Columbia Lippincott Gazetteer of the World* (1962), p. 931 [hereinafter cited as *Columbia Gazeteer*].

78. Law 73-49, August 2, 1973, "National Claims to Maritime Jurisdictions," *Limits in the Seas*, No. 36, 4th revision, May 1, 1981, p. 157.

79. I.C.J. Reports 1982, para. 70, p. 59.

80. It is, however, important to note that this territorial dispute had existed, without much attention being paid by the Chinese and Japanese governments, long before the publication of the Emery Report in 1969. Although neither state had openly contested the other's claim prior to 1968, each had assumed that the islets were part of its territory. Visits to and uses of them for various purposes by their respective nationals, text accompanying note 102 *infra*, have been taken for granted and never challenged by the other

Japanese seabed dispute. In the past decade, that dispute has effectively delayed seabed delimitation and consequently oil development in that area. As the legal regime of islands is about to turn a new page, it is high time to examine whether the Tiao-yu-t'ais are eligible at all, under emerging customary and conventional international law, for seabed rights. If so, how much? If they are denied any effect, then the seabed issue could be dealt with separately before the territorial dispute is finally resolved. If they are only denied full effect, then it is necessary to ascertain how much effect they should exert on the shelf boundary. Once that is determined, the territorial issue can still be detached from the seabed issue. In both cases, the Tiao-yu-t'ai territorial dispute would be irrelevant.

1. Under Existing and Emerging Conventional International Law

(a) Existing Conventional Law

No existing conventional international law applies to the present dispute because Japan, the ROK, and the PRC are not parties to the Shelf Convention, although the ROC is a party, and no bilateral shelf boundary agreement exists between Japan and the two Chinese governments.

(b) Emerging Conventional Law

On the other hand, the new Law of the Sea Convention, which was signed by 117 states at Jamaica in December, 1982 but has not come into effect,[81] will be the governing conventional law for Japan and the PRC, but not necessarily for the ROC. The ROC has been precluded from all United Nations activities, including UNCLOS III, since October 1971 when the PRC took over the ROC's seat at the U.N. Security Council and the General Assembly under General Assembly Resolution 2758 (XXVI).[82] Should the ROC, as a non-

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side. (Presumably Chinese and Japanese visitors rarely came across each other.) After all, the magnitude and economic value of this tiny landmass would hardly have warranted any government's attention before the prospects for undersea oil were publicized. It is thus fair to say that the coastal states' oil hunt merely *activated* an erstwhile dormant territorial dispute but did not *create* it. For the history of the dispute, see the references cited in note 1 *supra*.

81. "Sea Law Signed by 117 Nations; U.S. Opposes It; 46 Other Countries Also Refuse to Back Treaty," *New York Times*, December 11, 1982, p. 1. As of January 1984, 133 countries have signed the convention and nine have ratified. *U.N. Chronicle*, Vol. 21, No. 2 (February 1984), p. 96.

82. UN Doc. A/RES/2758 (XXIV) (A/L.630 and Corr. 1), *UN Monthly Chronicle*,

party, be bound by the LOS Convention even though it will never be able to accede thereto?

(1) Should the ROC be Bound by the LOS Convention?

To respond, one has first to determine whether the LOS Convention, nearly a universal treaty, declares or creates customary international law. The preamble of the LOS Convention explicitly illustrates its norm-declaring *and* norm-creating character:

> Believing that the *codification* and *progressive development* of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations. . . .[83] (emphasis added)

The next question is to ascertain to which category a particular provision of the LOS Convention relevant to the present study belongs. Article 77, dealing with rights of the coastal state over the continental shelf, seems to be a *prima facie* norm-declaring case. This was illustrated by its adoption by the ICJ in the *North Sea* judgment which, as a source of customary law,[84] was subsequently endorsed by the *Anglo-French* Court of Arbitration.[85] To use the late Judge Baxter's words, "the decision maker, legal advisor, or scholar must give to the treaty the same weight that would be accorded to [117][86] simultaneous, contemporary and identical declarations by those [117] states of their understanding of customary law."[87]

However, one is less sure about Article 121 (dealing with the regime of islands), particularly paragraph 3, which denies shelf and EEZ entitlements to certain rocks. That paragraph presumably is intended to replace the customary law as contained in Article 1(b) of

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Vol. 8, No. 10 (November 1971), p. 61. *Department of State Bulletin*, Vol. 65 (1971), p. 556. The PRC delegate at the U.N. specifically proposed that the ROC not be invited to UNCLOS III. "Recommendation for Holding U.N. Conference on Law of the Sea," Hsinhua Weekly [New China Weekly], November 5, 1973, p. 22. Hsinhua Weekly is one of the PRC's official weekly publications.

83. LOS Convention, Preamble, UN Doc. A/CONF.62/122, 7 October 1982, p. 1.

84. I.C.J. Reports 1969, p. 46.

85. *See* note 64 *supra* and accompanying text.

86. This is the assumed number of states that will become parties to the Law of the Sea Convention.

87. Richard R. Baxter, "Treaty and Custom," *Hague Academy, Recueil Des Cours*, Vol. 129, Sec. I (1970), p. 25 and p. 55.

the Shelf Convention. Therefore, whereas Article 77 may apply to the ROC, a non-party to the LOS Convention, *qua* customary law, Article 121(3) may not apply until sometime in the future when it is declared "through juridical decision or other authoritative pronouncement that the treaty provision has passed into customary law."[88]

As a practical matter, the ROC probably will not oppose Article 121(3) to the extent it coincides with its reservation to Article 6 of the Shelf Convention that "exposed rocks and islets shall not be taken into account" in continental shelf boundary delimitation.[89] Since the ROC made this reservation with the Tiao-yu-t'ais in mind,[90] it seems reasonable to assume that the ROC will accept Article 121(3) as applied to the Tiao-yu-t'ais.[91]

(2) Article 121 of the LOS Convention: An Analysis

In this context, Article 121, which has been adopted by successive negotiating texts without change, demands attention. Paragraph 3, requoted below, is particularly relevant to the Tiao-yu-t'ais:

> Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Nowhere in the LOS Convention is "rock" defined. The fact that mathematical criteria suggested by commentators[92] and partici-

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88. *Ibid.*, pp. 73-74.

89. *Supra* Chapter 2, text accompanying note 90.

90. *Li-fa-yuan Kung-pao*, *supra* Chapter 2, note 89, p. 3; Ch'ang Shen-chun, "Chiao-ch'en Kung-yueh Yu 'Pao-liu T'iao-k'uan' [The Shelf Convention and the "Reservations"] *Chung-kuo Shih-pao* [China Times], August 16, 1970, reprinted in *Collection of Tiao-yu-t'ai Materials*, *supra* Chapter 3, note 21, p. 50; Chiu (1972), *supra* Chapter 2, note 59, p. 10 (The *China Times* is an independent Chinese-language daily based in Taipei).

91. As a developing and, insofar as territory under effective control is concerned, an insular state, the ROC is not expected to find any obvious disadvantage in abiding by the rules of the LOS Convention. In effect, by declaring a 200-mile EEZ on September 6, 1979, the ROC seemed to show its receptiveness to developments at UNCLOS III. For the declaration, *see* Introduction, note 20 *supra*.

92. *See e.g.*, Hodgson (1973), *supra* note 35, pp. 17-18; Hodgson classified islands into four categories: (1) rocks (less than 0.001 sq. mi. in area); (2) islets (0.001-1 sq. mi.); (3) isles (1-1,000 sq. mi.); and (4) islands (over 1,000 sq. mi. in area). This proposal was repeated in Hodgson and Smith, "The Informal Single Negotiation Text (Committee II): A Geographical Perspective," *Ocean Development and International Law Journal*, Vol. 3 (1976), p. 225, pp. 230-31 [hereinafter cited as Hodgson and Smith (1976)].

pating states[93] were not adopted by drafters at UNCLOS III bespeaks the difficulties in reaching agreement. Without a precise, objective definition, one is forced to place more emphasis on the qualitative criteria of a rock's ability to "sustain human habitation or econmic life of [its] own."[94]

A logical interpretation of this provision is that rocks that fail *either* test would be disqualified from having a continental shelf whereas, to qualify itself, the rock in question must conform to *both* criteria simultaneously.[95] A number of questions arise. Does the first test mean "uninhabitability" or "uninhabitedness"? Interpreted by the ordinary meaning of the words,[96] "uninhabitability" seems to have been intended.[97] The drafters thus envisage a rare but possible situation where an inhabitable rock able to sustain its own economic life is nevertheless left uninhabited for other reasons. But it is still unclear how long the rock in question should sustain human habitation in order to qualify itself?[98] Weeks? Months? Years?

The answer seems to depend on how much resources the rock has. This inquiry leads to the second test: the rock's ability to sustain its own economic life. In determining that ability, one has first to ask: should the rock's economic life originate from resources of

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93. Romania, in its draft articles on islands (L.53), *supra* note 25, differentiated between an islet (less than 1 sq. km.) and an island similar to an islet (larger than 1 sq. km. but smaller than x sq. km.) on the one hand, and islands (over x sq. km.) on the other. The draft articles of Algeria *et al.* (L.62/Rev.1), *ibid.*, classified into islands, islets, rocks, and low-tide elevations without using any mathematical criterion. Nor did the Irish (L.43) and Turkish (L.55) draft articles, *ibid.*

94. This shift of emphasis should not give "rock" an excessively broad definition so as to include fairly substantial islands. In fact, islands that fail the qualitative criteria are rarely substantial in size.

95. *But compare*: Hodgson and Smith (1976), *supra* note 92, p. 231 (it was stated that "[l]ogically, to qualify, the rock must meet *one of the two* implicit criteria") (emphasis added).

96. *See* Article 31 (general rule of interpretation) of the Vienna Convention on the Law of Treaties, which provides, *inter alia*,

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose* . . . .

United Nations Conference on the Law of Treaties, *Official Records, Documents of the Conference*, UN Doc. A/CONF.39/11/Add.2, 1970, p. 289; *American Journal of International Law*, Vol. 63 (1969), p. 875.

97. Another indication is that the Romanian draft articles (L.53), *supra* note 25, suggested both meanings but the ISNT only adopted the former.

98. Both the draft articles of Romania (L.53) and Algeria *et al.* (L.62/Rev.1) favored a requirement of permanent habitation or settlement, *supra* note 25. This requirement was not adopted by ISNT, subsequent negotiating texts and the LOS Convention.

the rock proper (the landmass) alone, or those in nearby waters as well? Inclusion of nearby resources as part of a rock's "own economic life" seems to beg the question since what needs to be determined is precisely whether the marine resources in the continental shelf and the EEZ of that rock should belong to it. On the other hand, whether to include the resources within the rock's 12-mile territorial sea, which it is undeniably entitled to, poses a harder question. A rich fishing ground within the rock's territorial sea could sustain a viable economic life, thereby enabling it to claim the petroleum lying beneath its continental shelf further seaward. The issue, then, is whether the resources in the territorial sea may be used as a "stepping stone" to bypass the second test.

Technically, given sufficient investment, virtually any rock in the world could be made economically viable, with or without the resources in its territorial sea. A not-too-remote possibility would be building an offshore casino on a rock. The "human habitation" and "own economic life" tests would be met effortlessly. This again leads to the third question: should "economic life of their own" exclude a situation in which massive outside resources pour in to turn an erstwhile barren rock into a valuable piece of real estate? If potential resources in the rock's continental shelf or EEZ are rich enough, its home state would lack no incentive to do so. In this case, the equity of granting extensive maritime jurisdiction to a semi-artificial island is in serious doubt.[99]

The fourth question is whether an inhabitable rock can claim an economic life of its own if it has limited indigenous resources in the landmass but they are economically unfeasible to develop? What standards should be used in determining economic feasibility?

Neither the LOS Convention nor its *travaux préparatoires* provides obvious answers to the last three questions. But the apparent object or purpose of Article 121(3) sheds some light on a proper interpretation.[100] Since paragraph 3 of that article serves as an exception to paragraph 2 and clearly is intended to exclude certain types of rocks from shelf and EEZ entitlements,[101] a more strict construc-

99. It has been settled that an artificial island or any offshore structure shall have no maritime zone other than a 500-meter safety zone around them. LOS Convention, arts. 60, 80.

100. Vienna Convention on the Law of Treaties, art. 31(1), *supra* note 96.

101. At UNCLOS III, the number of states that supports the restrictions on the continental shelf and EEZ entitlements of certain islands far exceeds that of the other side. This can be seen from the draft articles proposed and the debates on the regime of islands held at the Caracas session, *supra* note 25.

tion should then be given to it to keep the exception from becoming meaningless. Under this assumption, to qualify itself, a rock not only has to be inhabitable for an extended period of time, but its own economic life should be supported by the resources on the rock proper alone, not including those in its territorial sea or brought from outside. Moreover, the development of the rock's indigenous resources must be economically feasible according to local standards at the time the question arises.

(3) Applying Article 121 to the Tiao-yu-t'ais

A few more words about the Tiao-yu-t'ais are needed before applying the above criteria to them.[102] In Table 3, the islets and rocks are listed in the order of their sizes. Tiao-yu (No. 1), Nan-hsiao (No. 3), Pei-hsiao (No. 4), Ch'ung-pei-yen (No. 6), Ch'ung-nan-yen (No. 7) and Fei-lai (No. 8) should be, as noted earlier, considered together because of their proximity (4 miles apart) which would make their shelf entitlements, if any, largely identical. Since Huang-wei (No. 2) is not far (10 miles) from Ch'ung-pei-yen (No. 6), it is discussed together with the Tiao-yu cluster. We shall begin with Ch'ih-wei (No. 5), to be followed by the rest.

Ch'ih-wei is a volcanic rock without vegetation. The rocky surface and steep cliffs make it virtually useless except as a navigational aid in ancient times and for target practice in modern times. From all available evidence, Ch'ih-wei has not and prabably cannot sustain human habitation and economic life of its own.

Tiao-yu and Huang-wei, about 30 and 7 times, respectively, the size of Ch'ih-wei, are also of volcanic origin. They and Nan-hsiao are the only ones that have vegetation on them. In addition to palm trees and tropical bushes, Tiao-yu and Huang-wei are abundant in *Hai-fu-jung* or *Shih-ts'ung-jung* (*Statice arbuscula*), a precious Chinese medicinal herb good for curing high blood pressure and rheumatism. Whereas Huang-wei has no potable water, Tiao-yu is said

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102. In addition to the literature cited in *supra* note 6, this section is based, unless otherwise indicated, on the following sources: Ch'i Tung-hsin, "T'iao-yu-t'ai Ch'un-tao Chien-chieh" [A Brief Note on the T'iao-yu-t'ai Islands], *Chung-yang Jih-pao*, August 18, 1970, reprinted in *Collection of T'iao-Yu-T'ai Materials*, *supra* Chapter 3, note 21, p. 51; Yao Chuo-jan, *Ch'ing-t'ing Yu-min-men Te Hu-sheng: "Tiao-yu-t'ai Shih Wo-men-te!"* [Please listen to the Fishermen: "The Tiao-yu-t'ais are Ours!"], *Chung-kuo Shih-pao*, August 28, 1970, reprinted in *Collection of Tiao-Yu-Tai Materials*, *supra* Chapter 3, note 21, p. 73; Liu Pen-yen, "Tiao-yu-t'ai Chiu-ching Shih-She-mo Yang-tzu?" [What Are the Tiao-yu-t'ais like after all?], *Chung-yang Jih-pao*, August 24, 1970, reprinted in *Collection of Tiao-yu-t'ai Materials*, *supra* Chapter 3, note 21, p. 59; Okuhara (1971), *supra* note 1.

to have a spring big enough to accomodate 200 people. Nearby waters are rich in bonito. A strait between Tiao-yu and Fei-lai provides a good gale shelter for fishing vessels in the region.

In the past six centuries, Chinese imperial envoys of Ming and Ch'ing Dynasties first used the Tiao-yu-t'ais as navigational aids on their way to the Ryukyu Kingdom, then a tributary of China, to officiate at investiture ceremonies.[103] In the nineteenth century came the Chinese fishermen and pharmacists. Around the turn of this century, an enterprising Japanese named Koga brought in scores of seasonal workers, food, and supplies each year to develop Tiao-yu, Huang-wei, and Nan-hsiao. Houses, reservoirs, docks, warehouses and sewers were built and experimental planting was conducted. Koga was engaged in the business of collecting guano and albatross feathers, bonito canning, and bird stuffing. His business was discontinued in 1915 because of high cost. After his death in 1918, his son continued his fish canning and bird stuffing businesses until the early 1940s, when all operations were terminated and enterprises abandoned. After the war, the Tiao-yu-t'ais were placed, along with the Ryukyus, under U.S. administration.[104] No other use was made of them except for naval target practice on Huang-wei and Ch'ih-wei. In the 1950s and 1960s a Taiwan-based salvage company used Huang-wei as a work site, having built a 200-meter railroad and an iron pier which were later destroyed by naval bombing. Coming from Taiwan, Chinese fishermen still regularly, and pharmacists occasionally, visited the islets or nearby waters until the Sino-Japanese territorial dispute erupted and Japanese patrol boats began to chase them away. Currently the Tiao-yu-t'ais are under Japanese physical control. Ever since Koga and company left, the islets have been uninhabited for four decades. How will these islets fare, in light of the above descriptions, under Article 121(3) of the LOS Convention?

As to the "inhabitability" test, one could argue that at least the

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103. Cheng (1974), *supra* Chapter 2, note 57, pp. 254-56, especially p. 256 note 108. *See generally* Ta-tuan Ch'en, "Investiture of Liu-ch'iu Kings in the Ch'ing Period," in *The Chinese World Order*, edited by John K. Fairbank, Cambridge: Harvard University Press, 1968, p. 135.

104. The Ryukyus were under the physical control of the U.S. forces when Japan surrendered in 1945. The 1951 peace treaty with Japan, UST, Vol. 3, p. 3169; TIAS, No. 2490; UNTS, Vol. 130, p. 45, placed the Ryukyus under U.S. administration, to be included in the U.N. trusteeship system (which never happened). In 1953, the U.S. Civil Administration of the Ryukyus issued Proclamation No. 27 which embraced the Tiao-yu-t'ais within the scope of the U.S. civil administration, *Hearing on Okinawa Reversion Treaty*, *supra* Chapter 2, note 57, p. 149. For a denial of the alleged legal effect of the above proclamation on China with respect to the Tiao-yu-t'ais, *see ibid.*, p. 152.

Tiao-yu Island can sustain human habitation, given its potable water and tillable soil. After all, it has been done in the past for a fairly long period of time. On the other hand, opponents can point out that to sustain human habitation Koga and company had not only to bring in food and supplies but also constantly replace the seasonal inhabitants. Additionally, they can argue that the attempt to settle on the islets was unsuccessful. It is true that the Kogas' experience admits of conflicting interpretations. But if "inhabitability" is not intended to mean "permanent settlement,"[105] then Tiao-yu and Huang-wei seem qualified to be inhabitable under that test.

Next is the "own economic life" test. Proponents can argue that the collection of guano, feathers and herb and production of stuffed birds and canned fish enable the islets to sustain an economic life of their own. However, arguments can also be advanced to the effect that the absence of the collecting of guano, which is exhaustible, in the post-war decades attests to its unfeasibility; that the drastic reduction of birds, according to a Japanese study,[106] also makes feather collecting or bird stuffing difficult, if not impossible; and that the herb, according to a Chinese pharmacist in Taiwan who has occasionally extracted herbs on the Tiao-yu-t'ais, can sustain large-scale exploitation for only five years.[107] Opponents may conclude that the ultimate failure of Koga's family business and the absence of its restoration thereafter bespeaks the unfeasibility of establishing an indigenous economic life on the islets. As for fish canning, it has been assumed that the living resources in nearby waters of a rock are excluded from its "own economic life". So is the use of these islets as temporary work sites.

Unlike the "inhabitability" notion susceptible of more objective criteria, the "own economic life" test has various interpretations. "Economic life" itself is vague enough to literally include everthing of economic value. But with the word "own" strictly construed to denote only indigenous resources from the rock proper, the case disqualifying Tiao-yu and Huang-wei seems to be stronger than the case qualifying them.

The above analysis relies on a few assumptions intended to give Article 121(3) a strict reading according to the purpose and object of

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105. *Supra* note 98.

106. The study said that there were around 850,000 birds in the area in 1963. By 1970, the number went down to about 110,000. This study, done by the Japanese in 1970, was cited in Yang (1972), *supra* note 1, p. 134.

107. This was estimated by Mr. Shen Ch'eng-nan, a Chinese herbal pharmacist who was familiar with the Tiao-yu-t'ais. *See* Liu, *supra* note 102, p. 61.

the article as a whole. Applying that paragraph under these assumptions, Tiao-yu and Huang-wei can sustain human habitation but it is doubtful that these islets can sustain an economic life of their own without bringing in substantial resources from outside.

2. *Under Customary International Law*

(a) State Practice

The state practice in this regard discussed above may not have become so general as to evidence an international custom or constitute an *opinio juris*, as required by the Statute of the International Court of Justice[108] (Article 38) and the *North Sea Cases*.[109] But a few patterns summarized earlier may be in the process of becoming one, if more states whose interests are specially affected follow those patterns. In the following analysis, factors that influence islands' effect on shelf boundaries such as location, size, status of title, and macrogeography are considered together with location as the connecting factor.

In addition to their small size and disputed status, the Tiao-yu-t'ais have another characteristic. They (except Ch'ih-wei) are located exactly on or very close to the hypothetical median line drawn from the coasts of China (including Taiwan) and Japan (including the Ryukyus) in disregard of the presence of the Tiao-yu-t'ais (Map 1). Islands in the following shelf boundary agreements selected from state practice have at least one of the three characteristics. The midway location is used as the connecting factor.

(1) Full Effect to Midway Islands

There have been two relevant full-effect cases:[110] the Shetland

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108. Article 38 provides, *inter alia*:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, . . . ;
b. international custom, as evidence of a general practice accepted as law;
. . . .

109. I.C.J. Reports 1969, p. 44. This requirement was criticized as too rigid by dissenting Judges Tanaka and Lachs, *ibid.*, p. 175, and p. 231.

110. Another two cases of interest are the treatment of the Indonesian islands of Natuna (815 sq. mi.) and Anambas (260 sq. mi.) in the South China Sea and the treatment of the Venezuelan Aves Isle in the Carribbean Sea. In the first case, the two groups of islands, situated approximately midway from Borneo and the Malay Peninsula, were granted full effect in the Indonesian-Malaysian shelf boundary delimitation. However, apart from the islands' substantial size which would have justified full-effect treatment anyway, they were in fact included within Indonesia's straight baseline system. There-

Islands in the North Sea between the United Kingdom and Norway and the Tsushima Island in the Korea Strait between the ROK and Japan. In the former case, a 1965 shelf boundary agreement between London and Oslo[111] gave full effect to the Shetland Islands in drawing a median-line boundary (Map 13). (The Shetlands lie outside the British straight baseline system and are 96 and 173 miles from the nearest British and Norwegian mainland coasts respectively. The distance between the two coasts in that part of the North Sea is about 270 miles.) In the latter case, points on the coast of Tsushima Island, situated 37 and 53 miles respectively from Korean and Japanese coasts in the 95-mile-wide Korea Strait, were used as basepoints in drawing an equidistance shelf boundary under the 1974 Japan-ROK agreement (Map 1).[112]

A closer look at the geographies of the two cases reveals that their full shelf entitlements may have little to do with their midway or near-midway location. First, in both cases the islands involved are fairly large (Shetlands: 552 sq. mi.; Tsushima: 271 sq. mi.), populous (Shetlands: 17,298; Tsushima: 58,672) and important. There is little reason to deny them a continental shelf. Second, considerations of reciprocal concessions may have heavily influenced the boundaries. For instance, in the Norway-U.K. case, the Norwegian Trough lying only a few miles off Norway could have caused Nor-

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fore their use as basepoints had nothing to do with their midway location. *See* Agreement on the Delimitation of the Continental Shelves, Malaysia-Indonesia, October 12, 1969, UNLS/16, p. 417; "Continental Shelf Boundary: Indonesia-Malaysia," *Limits in the Seas*, No. 1, January 21, 1970. *But see* Hodgson (1973), *supra* note 35, p. 63 (the effects these islands received were said to range from half to 86 percent rather than full effect).

In the second case, Venezuela's tiny Aves Isle (0.02 sq. mi.) was also granted full effect. The Islet is located in the east Caribbean Sea 300 miles from Venezuelan mainland coast and 191 miles from Puerto Rico, a self-governing commonwealth of the U.S. The islet, which is actually a sand bar covered by purslane and inhabited by birds and turtles, is occasionally used as garrison by the Venezuelan military authorities. Under the Maritime Boundary Treaty between the United States of America and the Republic of Venezuela concluded on March 18, 1978, TIAS No. 9890, the U.S. agreed to grant it full effect primarily because of political considerations. For the boundary and the Aves Isle, see "Maritime Boundary: United States-Venezuela," *Limits in the Seas*, No. 91, December 16, 1980. For the Venezuelan perspective, see Kaldone G. Nweihed, "EZ (Uneasy) Delimitation in the Semi-Enclosed Caribbean Sea: Recent Agreements between Venezuela and Her Neighbors," *Ocean Development and International Law Journal*, Vol. 8 (1980), pp. 5 (map), 20-21. For the U.S. perspective, see Mark B. Feldman and David Colson, "The Maritime Boundaries of the United States," *American Journal of International Law*, Vol. 75 (1981), p. 747.

111. *Supra* note 39.

112. *Supra* note 39.

way difficulties in claiming the shelf west of the Trough had the United Kingdom stressed the discontinuity of the Norwegian shelf. However, the median-line boundary was drawn in total disregard of the Trough's presence as a potential limiting factor. To what extent this concession of the United Kingdom was linked to granting full effect to the Shetlands is a matter of conjecture. But such a possibility obviously exists. In the Japan-ROK case, a similar situation appears. The ROK's Cheju Island in the mouth of the Korea Strait is 48 miles offshore. Like Tsushima, it was used as a basepoint in constructing the southern portion of the Japan-ROK median line in the Korea Strait. If Tsushima had been granted no effect (other than the territorial sea), there would have been little reason to treat Cheju differently. Using these islands in question in both cases as basepoints admittedly displaced the median lines to varying degrees (more so in the wider North Sea than in the narrower Korea Strait), but the resulting distorting effects were reduced or eliminated by reciprocal concessions from macrogeographical perspectives. The two cases shed little light on the Tiao-yu-t'ais' shelf entitlement, however, because of the disparity in size and importance between them.

(2) Partial Effect to Midway Islands

The two most noted partial-effect cases involve Italy. In a 1968 agreement between Italy and Yugoslavia,[113] Pelagrus and Kajola, two tiny Yugoslav islets[114] midway in the Adriatic Sea, were only accorded a 12-mile zone which created a bulge in the otherwise smooth median line between the Italian and Yugoslav mainland coasts. Since Yugoslavia did not claim a 12-mile territorial sea until 1978,[115] the two-mile continental shelf beyond its then 10-mile territorial sea reflected recognition of the partial effect of these islands at the time. After Yugoslavia's extension of territorial sea to 12 miles, these islands' effects on the median-line boundary were eliminated entirely.

Another instance was the 1971 shelf boundary agreement between Italy and Tunisia[116] that went into effect in 1978. One island (Pentelleria, 32 sq. mi.),[117] two islets[118] (Lampedusa and Linosa, 3

113. *Supra* note 37.

114. Information about the size and economic life of these two islets is not available.

115. "National Claims to Maritime Jurisdictions," *supra* note 78, p. 175.

116. *Supra* note 40.

117. *See Webster's New Geographical Dictionary* (1972), p. 920. Pantelleria's 1961 population was 9,267. *See also Hodgson* (1973), *supra* note 35, p. 62, note 43.

118. *The Columbia Gazetteer*, *supra* note 77, p. 1015 and p. 1060. Lampedusa's 1971

sq. mi and 2 sq. mi respectively) and one uninhabited rock[119] (Lampione, less than 1 sq. mi.) are situated either on the median line drawn without regard to their presence or on the Tunisian side of that line (Map 15). Under the agreement four semicircles of different radius were drawn around these islands as their entitlements to continental shelf. Except for Lampione, which was accorded a 12-mile zone, the rest got a 13-mile zone. All the semicircles intersect with the median line or with each other so that no enclave was created. Since Italy claimed a 6-mile territorial sea in 1971 and extended it to 12 miles in 1974,[120] all the islands' effects on shelf boundary may be categorized as "partial" before 1974. Thereafter, the effect of Lampione became nil. In fact, Italy might have deliberately used a 12-mile limit in anticipation of its prevalence in the future as the width of territorial sea.

These two cases have important implications for the Tiao-yu-t'ais in view of their great resemblance in size, location, and macrogeography. None of these islets was granted full effect; the partial effects they received were limited or even symbolic. Particularly noteworthy is that an island of the magnitude of Pantelleria (population over 9,000) was accorded only slight effect in shelf delimitation.

(3) No Effect to Midway Islands

Where islands are granted no effect, the result may be the mere existence of a territorial sea (including, of course, the seabed) or even a reduced territorial sea if the area to be delimited is very small. In addition to the Lampione instance discussed above, there have been a number of cases where small, midway, and/or disputed islets are ignored in shelf boundary delimitation.

In 1958, Bahrain and Saudi Arabia delimited a shelf boundary[121] where small islands between their coasts were either ignored or used as turning points on the equidistance line (which is another way of denying maritime zones, including territorial sea, to midway

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population was 4,387. John Paxton, *The Statesman's Yearbook World Gazetteer*, London and Basingstoke: Macmillan Press Ltd., 1979, p. 299. Linosa's population in the 1950s was 336. It is noteworthy that Linosa's small size and precisely midway location are extremely similar to those of Tiao-yu Islet in the Tiao-yu-t'ai Islands.

119. Information about Lampione is limited; it has no entry (or separate entry) in the above-cited geographical references. Its land area is estimated at less than 0.2 sq. mi., approximately the size of Nan-hsiao Islet of the Tiao-yu-t'ais.

120. "National Claims to Maritime Jurisdictions," *supra* note 78, p. 90.

121. *Supra* note 41.

islands). In the Iran-Saudi Arabia shelf boundary agreement of 1968[122] there were two tiny islets, Farsi (Iran) and Al-'Arabiyah (Saudi Arabia), sitting very close to the median line (but on the Saudi side) drawn between the mainland coasts of the two states. These islets were allowed to have only a 12-mile territorial sea, thus having no effect on the shelf boundary. A "local" median line delimited the territorial sea boundary between them.

In 1974, India and Sri Lanka signed an agreement[123] to delimit their "historical waters" in the island-riddled, 45-mile-wide Palk Strait. It is of interest to note that Kachchativu,[124] a tiny landmass located 1.2 miles from the median line drawn without regard to its presence, was denied even a 12-mile territorial sea, which Sri Lanka claims. The islet's sovereignty was previously in dispute between India and Sri Lanka. The agreement allocated the islet to the latter but guaranteed the citizens of the former free access to it for fishing and religious purposes.[125] Also in 1974, Iran and the United Arab Emirates (U.A.E.) signed an agreement[126] delimiting their shelf boundary in the Persian Gulf near the Strait of Hormuz. The mid-gulf island of Abu Musa,[127] claimed by both Iran and Sharjah Emirate (a part of the U.A.E.), was ignored in drawing the boundary, which was not a median line.

(4) Observations

The cases of Shetland and Tsushima Islands apparently exemplify that midway location alone may not determine shelf entitlement. Size does matter; so do macrogeographical considerations. If the midway islands are small, as the Italian-Yugoslav and Italian-Tunisian shelf boundaries show, they are given partial effects ranging from two to seven miles beyond the territorial sea of the state to which the islands belong. In yet another series of shelf or other maritime boundaries in the Persian Gulf and the Palk Bay, small islets situated near the median lines drawn in disregard to their presence were either completely ignored or were permitted to maintain a terri-

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122. *Supra* note 38.

123. *Supra* note 44.

124. The land area is estimated by the author at about 0.1 sq. mi., roughly the size of Pei-hsiao in the Tiao-yu-t'ai.

125. *See* India-Sri Lanka Historical Waters Boundary Agreement, Article 5, *supra* note 44.

126. *Supra* note 44.

127. The land area is estimated at about 4 sq. mi. The treatment of this island was also referred to in Ely (1972), *supra* note 35, p. 230.

torial sea only. If the particular islet's sovereignty is in dispute, ignoring its presence in boundary delimitation seems to be the rule, as the treatments of Kachchativu (Sri Lanka) and Abu Musa (U.A.E.) demonstrate.[128] The above observations are in general accord with proposals on treatment of islands by commentators.[129]

(b) The *North Sea Cases,* the *Anglo-French Arbitration, and* the *Tunisian-Libyan Case*

(1) The *North Sea Cases*

The *North Sea Cases* are relevant here only in general terms because the ICJ did not address, except in passing, the question of islands not at issue in that case.[130] The Court nevertheless expressly favored disregard of the presence of "islets, rocks and minor coastal

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128. That a disputed island should be given no effect in the delimitation of continental shelf or EEZ is a convenient proposition. But it must be subject to the caveat that it may be abused by a state by creating a dispute over an erstwhile undisputed island near its coast but belonging to another state. Hodgson (1973), *supra* note 35, pp. 57-58. This is not the case with respect to the Tiao-yu-t'ai territorial dispute. For details, *see supra* note 80.

129. *See e.g.*, S. Whittemore Boggs, "Delimitation of Seaward Areas under National Jurisdiction," *American Journal of International Law*, Vol. 45 (1951), pp. 240, 258-59 [hereinafter cited as Boggs (1951)]; David J. Padwa, "Submarine Boundaries," *International and Comparative Law Quarterly*, Vol. 9 (1960), pp. 628, 647-50 [hereinfter cited as Padwa (1960)]; Louis Henkin, *Law for the Sea's Mineral Resources*, New York: Columbia University Press, 1968; Shigeru Oda, "Boundary of the Continental Shelf," *Japanese Annual of International Law*, Vol. 12 (1968), pp. 264, 281-83; Juraj Andrassy, *International Law and the Resources of the Sea*, New York: Columbia University Press, 1970, pp. 103-05; Edward D. Brown, *The Legal Regime of Hydrospace*, London: Stevens and Sons, 1971, p. 64 [hereinafter cited as Brown (1971)]; Hodgson (1973), *supra* note 35, pp. 55-59 and pp. 62-63; Goldie (1973), *supra* note 36, pp. 258-59; Karl (1977), *supra* note 36, pp. 655-59; Symmons (1979), *supra* note 36, p. 206; Kiyofumi Nakauchi, "Problems of Delimitation in the East China Sea and the Sea of Japan," *Ocean Development and International Law Journal*, Vol. 6 (1979), pp. 312-16; Jon M. Van Dyke and Robert A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Ocean's Resources," *Ocean Development and International Law Journal*, Vol. 12 (1983), p. 288.

130. There are fringes of islands along the North Sea coasts of the Netherlands, Germany, and Denmark: notably the West, East, and North Frisian Islands (Map 13). All closely related to the coasts geographically, these islands should be regarded as part of the coast for purposes of continental shelf delimitation. The only island that stands out is Helgoland, 27 miles off the German coast. Previously heavily fortified and famous but now deserted, Helgoland is located on or near the line that bisects the approximate right angle formed by the concave coastlines of Germany. More seaward than any other islands in the area, Helgoland is, however, still too landward to significantly influence the courses of boundaries between the three states *inter se* even if geometrically median lines are drawn from the respective coasts. This probably explains why Helgoland did not

projections" in a delimitation between opposite states.[131] Given the generality of the opinion, the Court seemed to regard the presence of these minor geographical features as inherently distortive in opposite-coast delimitations.

(2) The *Anglo-French Arbitration*

The *Anglo-French* case, particularly the part relating to the Channel Islands, has some bearing here. In macrogeography, the two cases share a few similarities. Both involve an insular state (U.K., Japan) and a continental state (France, China), and both have opposite-coast situations (which seem inevitable between insular and continental states). The two cases, however, have more geophysical differences. The seabed of the English Channel is, as the Court of Arbitration and the parties all agreed, a continental shelf continuous from the United Kingdom to France. Such geological integrity of continental shelf is presumably lacking in the East China Sea, given the presence of the deep Okinawa Trough. Second, whereas the Channel Islands are large (195 sq. km.) and densely populated (667 persons per sq. km.), the Tiao-yu-t'ais are tiny (total area: 6.5 sq. km.) and uninhabited. Third, the Channel Islands are situated much closer to the French coast than to the English coast, whereas the Tiao-yu-t'ais are just about equidistant to the nearest territories of China and Japan. Finally, having agreed that their coasts were opposite and the shelf in between was continuous from their coasts, the United Kingdom and France agreed to apply the equidistance principle. The only difference between them was how the median line was to be drawn. Here, China (the PRC and the ROC) and Japan differ profoundly on the delimitation principle: the former advocates the natural prolongation principle while the latter insists on the equidistance principle.

Despite the dissimilarities, the *Anglo-French* award contains principles of general application relating to islands. The Court of Arbitration's determination on an island's effect in shelf delimitation depends on whether full effect, if granted, would create inequity, given the broad equality of the coastlines of the two opposite states. Thus, like the *North Sea Cases*, the *Anglo-French* decision is also predicated on the *a priori* equality of the macrogeography of a particular case to determine whether a balance is disturbed by the pres-

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become an issue either in the *North Sea Cases* or the subsequent bilateral negotiations by the three states in accordance with the *North Sea* judgment.

131. I.C.J. Reports 1969, p. 36.

ence of islands. In the East China Sea, one doubts that the macrogeography of Japan and China — island chains (the Ryukyus *et al.*) separated by a deep trough and a vast shelf from a continent (China) — can be characterized as "broadly equal", since the geophysical setting here is two-dimensional as opposed to the one-dimensional seabed of the English Channel. If one takes into account the regional geology, then the natural prolongation principle, which the *Anglo-French* Court also endorsed,[132] would boost the Chinese claim all the way to the middle of the Okinawa Trough. In that case, the question of islands' effect (or inequity-creating potential) becomes moot because the shelf entitlements of the Chinese mainland and the Tiao-yu-t'ais would merge. On the other hand, if the geological factor is ignored and the coastline of the Ryukyus *et al.* is considered as broadly equal to that of China's mainland and Taiwan, then a median line would supposedly effect an equitable delimitation. The Tiao-yu-t'ais, if granted full effect, would certainly command an enormous piece of seabed around them owing to their isolated location (Map 1) and thus "manifestly result in a substantial diminution of the area of continental shelf which would otherwise accrue to" the country eventually not owning them. Thus ignoring their presence seems to be required under the *Anglo-French* rule.

In sum, the *Anglo-French* case applies here only to the extent geophysical similarities permit. But it at least establishes that islands of the Channel Islands' magnitude can be discounted in the name of equity. Other things being equal, the tiny Tiao-yu-t'ais ought to be disregarded in the Sino-Japanese seabed delimitation *a fortiori.*

(3) The *Tunisian-Libyan Case*

The role of islands in the *Tunisian-Libyan* case in determining the final seabed boundary was, as discussed earlier, limited. The Kerkennah Islands, the only islands involved in that case that have affected delimitation, bear virtually no similarity to the Tiao-yu-t'ai Islands here. (Maps 12 and 15)

Geologically, the Kerkennahs are sitting on the natural prolongation of Tunisia's land territory, which, according to the ICJ, is also the natural prolongation of Libya's land territory. Such continuity of continental shelf simply does not exist in the situation of the Tiao-yu-t'ais in the East China Sea where they are geologically separated from Japan's Ryukyu Islands by the deep Okinawa Trough. The macrogeographies of these two island groups also differ greatly. The

132. Anglo-French Award, *supra* note 29, para. 246.

Kerkennahs, comparatively large (65 sq. mi.) and populous (more than 15,000), are situated very close to shore (11 miles) whereas the Tiao-yu-t'ais are tiny (2.5 sq. mi.), uninhabited, and located halfway (90 miles) between Taiwan and the Ryukyus. In addition, while the Tunisian-Libyan coasts are both adjacent and opposite, the China (Taiwan)-Japan (Ryukyu) coasts are only opposite each other. Finally, the Kerkennahs are undisputably Tunisian territory whereas the territorial sovereignty of the Tiao-yu-t'ais are still contested between China (the ROC and the PRC) and Japan.

Given the above-stated dissimilarities, the *Tunisia-Libyan Case* is of little specific applicability to the Tiao-yu-t'ais situation. However, like the *Anglo-French Arbitration*, the *Tunisian-Libyan* judgement also contains principles of general application relating to islands. The judgment (particularly the part relating to the second sector) was also predicated, as in the *Anglo-French Arbitration*, on the *a priori* equality of the macrogeography of a given case to determine whether the balance is disturbed by the presence of islands. This was why the Kerkennahs were given neither full effect nor no effect, but rather were given half effect. Leaving aside the question of regional geology which also differs fundamentally in the two cases under discussion, the conclusion one gets from analyzing the *Tunisian-Libyan Case* is that if islands of the Kerkennahs' magnitude may be denied full effect in the name of equity, it is all the more logical to ignore the presence of the tiny Tiao-yu-t'ais in continental shelf delimitation in the East China Sea between China (the ROC and the PRC) and Japan.

D. Concluding Remarks

Under the new LOS Convention, which reflects current international consensus, the Tiao-yu-t'ais seem to lie in the gray area. Yet denying their shelf entitlement seems to be a stronger case than granting one. The state practice in shelf delimitation between opposite states seems to favor a no-effect treatment for the Tiao-yu-t'ais as well, or alternatively, some effect such as a few miles beyond the islets' territorial sea. But the Tiao-yu-t'ais' disputed status, an independent factor, dictates the denial of effect. The *North Sea Cases* endorses, in general, the disregard of the presence of islets in opposite-coast situations. The *Anglo-French Arbitration* and the *Tunisian-Libyan Case*, though not squarely applicable here, at least establish the likelihood of denying the shelf entitlement to islands much larger and more important than the Tiao-yu-t'ais in an opposite-state delimitation.

The combined effect of the above summary suggested a rather strong case for denying the Tiao-yu-t'ais any continental shelf beyond its territorial sea of 12 miles. The territorial dispute can then be wholly detached from the continental shelf issue. However the territorial issue is eventually resolved and whoever ultimately acquires the sovereignty of the Tiao-yu-t'ais, the disputing states would be unable to take advantage of the islets' strategic location in claiming any portion of the seabed of the East China Sea beyond their territorial sea.

At first glance, the conclusion reached here seems to differ insignificantly from the "enclave" solution proposed by some writers[133] in the early 1970s. A closer look reveals two important distinctions, however. First, the *approach* leads to the conclusion. Previous writers relied primarily on a few scattered shelf boundary agreements[134] alone which at the time hardly provided any evidence of a general practice of states capable of creating an international custom. The approach here, on the other hand, derives its authority from a variety of emerging conventional and customary sources of international law, including not only more extensive, and thus more conclusive, state practice, but also adjudicated cases and crystallized international consensus on the subject to date. It seems obvious that the

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133. *See e.g.*, Park (1972), *supra* Chapter 1, note 18, p. 31 (although the reference there was made to Danjo Gunto and Tori Shima and not directly to the Tiao-yu-t'ais); Donald R. Allen and Patrick H. Mitchell, "The Legal Status of the Continental Shelf of East China Sea," *Oregon Law Review*, Vol. 51 (1972), pp. 801-10; Note, "The Distance Plus Joint Development Zone Formula: A Proposal for the Speedy and Practical Resolution of the East China and Yellow Seas Continental Shelf Oil Controversy," *Cornell International Law Journal*, Vol. 7 (1973), pp. 59-60.

134. *See e.g.*, The Bahrain-Saudi Arabia agreement, *supra* note 41; the Iran-Saudi Arabia agreement, *supra* note 38; the Italy-Yugoslavia agreement, *supra* note 37; Agreement Concerning the Boundary Line Dividing the Continental Shelf, Iran-Qatar, September 20, 1969, UNTS, Vol. 787, p. 165; UNLS/16, p. 416, *Limits in the Seas*, No. 25, July 9, 1970. (This agreement was not discussed in the text above because its indiscriminate disregard of all islands in the Persian Gulf, presumably out of practical convenience, makes it largely irrelevant here. However, two writers did discuss it and interpreted its significance differently. Karl (1977), *supra* note 36, p. 657; Bowett (1979), *supra* note 4, pp. 172-73); and the Abu Dhabi-Qatar agreement, "Continental Shelf Boundary: Abu Dhabi-Qatar," *Limits in the Seas*, No. 18, May 29, 1970. (A small Abu Dhabi (now the United Arab Emirates) island, Dayyinah, situated near the equidistance line but on Qatar's side was given a 3-mile seaward zone coextensive with the breadth of Abu Khabi's territorial sea. The island, whose ownership was also determined by the agreement, thus creates a bulge on the equidistance line in favor of Abu Dhabi. Despite similarities between this island and the Tiao-yu-t'ais in terms of size and location, the agreement was not discussed in the text above because Abu Dhabi and Qatar are adjacent states and thus do not fit into the discussion exclusively on opposite-state situations.)

conclusion reached here has a solid legal foundation rather than merely an arbitrary sense of equity.

The second distinction lies in the *inference* drawn from the conclusion reached. A few writers, though proposing the "enclave" solution, still considered settlement of the Tiao-yu-t'ai territorial dispute precedent to that of the East Asian seabed issue.[135] Hence the complication of the whole East China Sea oil controversy. The inference drawn here, which seems logically imperative, is that the Tiao-yu-t'ai territorial dispute, given its irrelevance to the East Asian seabed issue, can be, and should be, taken completely out of the picture.

135. *See e.g.*, Park (1972), *supra* Chapter 1, note 18, p. 49.

CHAPTER 5 THE SINO-JAPANESE SEABED DISPUTE: A FRESH LOOK

A. Introduction: A Framework for Analysis

It has been suggested that the continental shelf dispute in the East China Sea is, for all practical purposes, a Sino-Japanese dispute. Like the shelf delimitation problems involving the Channel Islands (France versus Britain) and the Aegean Sea Islands (Greece versus Turkey), the East China Sea problem is among the cases generally recognized as intractable. Unlike the above two cases which are physically one-dimensional (geography), the Sino-Japanese dispute involves two dimensions, geography and geology, which result from the presence of the Ryukyu Islands chain and the Okinawa Trough. The detachment of the Tiao-yu-t'ai dispute from the seabed controversy, as analyzed in the preceding chapter, at least makes the geographical dimension of the present dispute more manageable, if not any easier. This chapter will deal with the rest of the legal issues arising from the two dimensions and other relevant circumstances.

Given the complexity of the issues involved, a legal framework for identifying and analyzing them is clearly needed. In establishing such a framework, the first issue encountered is the applicable law governing the present dispute.

The LOS Convention, adopted by UNCLOS III in 1982, will enter into force 12 months after it has been ratified or acceded to by 60 states. Article 83 of the Convention, which deals with shelf delimitation, provides:

> *Article 83*
> *Delimitation of the continental shelf between States with opposite or adjacent coasts*
>
> 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
>
> 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional

> arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.[1]

Among the disputants to the present controversy, Article 83 will become the positive law for the PRC and Japan, both of which have signed[2] and will probably ratify the Convention, to settle their differences regarding the East China Sea continental shelf. On the other hand, the ROC, unable to participate in UNCLOS III in the past and unlikely to accede to the Convention in the future because of the PRC's vigorous obstruction,[3] has shown considerable receptiveness toward developments at UNCLOS III by, for instance, extending its territorial sea to 12 miles and declaring a 200-mile EEZ in 1979.[4] With regard to EEZ delimitation, the 1979 declaration states:

> (2) Where the exclusive economic zone of the Republic of China extends over any part of the exclusive economic zone as proclaimed by other states, the boundaries shall be *determined by agreement* between the states concerned or *in accordance with generally accepted principles of international law on delimitation*.[5] (emphasis added)

This position of the ROC is in essential accord with Article 74 of the LOS Convention, which is identical to Article 83 except that the term "continental shelf" is replaced by "exclusive economic zone." Therefore, barring any unexpected turn of events in the future, one can probably assume that Article 83, particularly paragraph 1, will be the applicable law governing the shelf delimitation between China (the PRC and the ROC) and Japan.

Other than requiring that the solution be equitable, Article 83 offers little guidance in terms of specific criteria for shelf boundary delimitation in order to achieve such an equitable solution. The UNCLOS III's acceptance of this masterpiece of ambiguity, proposed by Conference President Tommy T.B. Koh of Singapore at

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1. UN Doc. A/CONF.62/122, 7 October 1982, p. 36.
2. *See supra* Introduction, note 21.
3. *See supra* Chapter 4, note 82 and accompanying text.
4. *See supra* Introduction note 20.
5. *Ibid.*

the Resumed Tenth Session in August 1981 at Geneva, was intended to resolve a hopeless, prolonged deadlock in negotiations between two groups of states belonging respectively to the "equidistance" and "equitable principles" schools regarding shelf delimitation.[6] The reference to Article 38 of the Statute of the ICJ, which includes treaties, custom, general principles of law, and judicial decisions and authoritative scholarly teachings as sources of international law, has in effect passed the law-making burden from the Conference to the evolution of customary international law. A brief analysis of customary law on shelf delimitation thus is necessary.

A general trend, if not already a general rule, of customary international law regarding the delimitation of continental shelf, as reflected by the 1958 Shelf Convention, the 1969 *North Sea Continental Shelf Cases*, the 1977 *Anglo-French Continental Shelf Arbitration*, the 1982 *Tunisian-Libyan Continental Shelf Case* and the deliberations at the UNCLOS III, which have crystallized pre-existing or emerging rules of customary law, seems to have taken shape. Simply put, it is that a shelf boundary should be effected by agreement between the delimiting states in accordance with equitable principles, taking into account all the relevant circumstances, and that, failing to reach an agreement, the parties should have the dispute adjudicated by a third-party process entailing a binding decision. This formulation serves as a convenient point of departure for the analysis in this chapter. It consists of three obligations on the part of the delimiting states: the obligation to conduct "meaningful" negotiations (or good-faith bargaining[7]); the obligation to consider all the relevant circumstances in applying equitable principles to reach agreement on an equitable delimitation; and, the obligation to resort to international adjudication in the absence of an agreement. The first and the last obligations are procedural in character. The second obligation addresses the substance of shelf delimitation and thus deserves attention and elaboration.

While the notion of equity may be vague and abstract, a few

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6. UN Press Release, SEA/445 (1981), p. 1. For a criticism on the hasty manner in which the new text was adopted and the extent to which it deviates from the jurisprudence on the subject, see Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)," *American Journal of International Law*, Vol. 76 (1982), pp. 14-15.

7. The term is borrowed from American labor law. For a discussion, see L.F.E. Goldie, "The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?" *New York Law Forum*, Vol. 16 (1970), pp. 325, 359-66; L.F.E. Goldie, "The North Sea Continental Shelf Cases: A Postscript," *New York Law Forum*, Vol. 18 (1972), pp. 411, 414-15.

substantive "equitable principles" of continental shelf delimitation, such as the principles of natural prolongation[8] and equidistance,[9] which have grown out of state practice and international adjudications and have in effect become legal principles, are fairly concrete and comprehensible. Even more concrete are the "circumstances" in which these principles are to operate. An ideal delimitation process, usually via negotiations by the delimiting states, would involve a close interplay of these three elements. The equity of a substantive equitable principle still depends very much upon the relevant circumstances to which that principle is to apply. Thus, the equidistance principle—the most frequently employed principle in state practice—may not be applicable or may have to undergo substantial modification in a particular geographical setting simply because its strict application would produce inequitable results. The *North Sea Cases* is an instructive example. The Court in that case held that application of the equidistance principle, as urged by Denmark and the Netherlands, in delimiting the lateral boundaries between the two states on the one hand and Germany on the other in the North Sea would have a disproportionately distorting (and thus inequitable) effect on the shelf boundaries because of the concave coastline of Germany.[10] On the other hand, in determining the relevance of and, particularly, the weight to be assigned to a given circumstance, be it geographical, geological or otherwise, one may have, at times, to turn to the notion of equity. Thus, in the *Anglo-French Arbitration* the Court acknowledged the relevance of the presence of the Channel Islands but denied them any weight in effecting the mid-Channel shelf boundary between France and the United Kingdom in order to "correct" the disproportionate influence they would otherwise have

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8. The ICJ considered the natural prolongation principle as the most fundamental principle of the continental shelf doctrine in seaward delimitation and an equitable principle in inter-state delimitation. I.C.J. Reports 1969, pp. 3, 22, 47. This position was somewhat toned down in the *Tunisian-Libyan* Case, I.C.J. Reports 1982, p. 46.

9. Whittemore Boggs in 1951 suggested that the median line method "would provide the 'equitable principles' for accord between the United States and a neighbor state which are referred to in" the 1945 Truman Proclamation. Boggs (1951), *supra* Chapter 4, note 116, p. 262, note 34. Since the adoption by the Shelf Convention, the equidistance principle has been used extensively in state practice of shelf delimitation. *See* Table 4 in the Appendix. Despite the *North Sea Cases* the *Anglo-French* Court of Arbitration did consider that principle as an equitable principle and part of customary international law. Anglo-French Award, *supra* Chapter 2, note 31, paras. 70, 75. For an excellent discussion, see M.D. Blecher, "Equitable Delimitation of Continental Shelf," *American Journal of International Law*, Vol. 73 (1979), pp. 60, 68-73 [hereinafter cited as Blecher (1979)].

10. I.C.J. Reports 1969, p. 49.

were they granted full effect.[11] The same can be said of the *Tunisian-Libyan Case*, where the ICJ granted only half effect to Tunisia's Kerkennah Islands, despite their large size and proximity to shore, because, according to the ICJ, giving them full effect would be "excessive."[12] The complexity of a given situation may call for the application of more than one principle to satisfactorily solve a delimitation problem, since both the means and ends of a shelf delimitation must be equitable with the means being subordinate to the ends.[13] Questions as to whether one principle should override the other(s) will naturally arise; the answer probably has to be sought again in the notion of equity in light of the relevant circumstances.

That the prevailing trend of shelf delimitation derives its ultimate authority from equity should not, in theory, obscure the fact that in neither the *North Sea Cases*, the *Anglo-French Arbitration* nor the *Tunisian-Libyan Case* were the courts deciding the disputes *ex aequo et bono*.[14] Both courts insisted that they applied exclusively legal principles in adjudicating the disputes before them.[15] As a matter of procedure, they could not have decided the cases *ex aequo et bono* without the consent of the parties.[16] Despite the courts' disclaimer, however, the results of the three cases, which are generally regarded as reasonable, could well have been reached the same way even if the courts were in fact instructed to make the decisions *ex aequo et bono*. The ICJ singled out, on the one hand, the concavity of the German coastline as a natural feature creative of inequity and needing to be redressed. The Court refused, on the other hand, to "completely refashion" nature by redressing *all* inequities created by nature. Such reasoning leaves one largely in the dark as to just how far one should go in correcting natural "inequities", even if they are at all readily identifiable under well-defined criteria. The same can be said of the *Anglo-French* court, particularly regarding its giving half effect to the British Scilly Islands but granting full effect to the French island of Ushant in the Atlantic region west of the English Channel. The ICJ's treatment of the Kerkennah Islands in the *Tunisian-Libyan Case*, as noted earlier, is another example. The Courts'

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11. Anglo-French Award, para. 196.

12. I.C.J. Reports 1982, p. 89.

13. I.C.J. Reports 1969, p. 50; I.C.J. Reports 1982, p. 59.

14. I.C.J. Reports 1969, p. 48; Anglo-French Award, para. 245; I.C.J. Reports 1982, p. 60.

15. *Ibid.*

16. Statute of the International Court of Justice, art. 38, para. 2. In the case of arbitration, the arbitral tribunal's competence is derived from the parties' consent as well.

intuition of equity or proportionality appears very evident. It is therefore not unreasonable to characterize the two courts, as the late Professor Friedmann did with respect to the ICJ in the *North Sea Cases*, as "[applying] a kind of distributive justice while denying that [they were] doing so" and "in effect, giving [decisions] *ex aequo et bono* under the guise of interpretation."[17] Apparently, the judges' subjective sense of equity and justice has played a significant part in deciding these cases, whether the reasoning process or guiding principle is labeled *ex aequo et bono*, absolute equity, equity *praeter legem*, or equity *secundum legem*.[18]

What has been discussed above is in actuality a recurring phenomenon in the operation of law in human society, municipal or international. Legal principles grow out of notions of equity, justice, and fairness, which themselves are a part of the law. These legal principles may become, over time, too rigid to produce just results under certain circumstances, which then call for correction in accordance with equity. As a matter of approach, the following analysis on the seabed issue of the East China Sea will begin by identifying all the "relevant circumstances" of that area as such. Recourse is had, in the process, to various sources of international law for guidance. This approach has in fact been employed in the preceding chapter to establish the irrelevance of the Tiao-yu-t'ai territorial dispute. Once the relevance question, which is a comparatively easier one, is settled, the next question is to determine, according to equitable principles, the relative weight of relevant circumstances in influencing the ultimate shelf boundary. Finally, the focus will be shifted to the selection of substantive equitable principles of shelf delimitation, with all the weighed circumstances considered. The result may be one principle or a combination of several principles.

Admittedly, the exercise cannot but have a measure of subjectivity since there are few hard and fast rules to draw upon. Therefore, a few alternatives based on different but comparable weights assigned to each relevant circumstance are suggested. These suggestions are intended to indicate the range of equitable solutions. They could also serve as a basis for the parties, reportedly already engaged intermittently in negotiations for joint development of the resources

17. Wolfgang Friedman, "The North Sea Continental Shelf Cases: A Critique," *American Journal of International Law*, Vol. 64 (1970), pp. 229, 236. Similar criticism was voiced in E.D. Brown, "The Tunisia-Libya Continental Shelf Case," *Marine Policy*, Vol. 7 (1983), p. 149.

18. Bin Cheng, "Justice and Equity in International Law," *Current Legal Problems*, Vol. 8 (1955), pp. 185, 202-11.

near the Tiao-yu-t'ais,[19] to tackle the larger issue of shelf delimitation elsewhere in the East China Sea.

B. The "Relevant Circumstances" and International Law of Seabed Delimitation

In view of the open-ended character of the requirement that all the relevant circumstances be taken into consideration in reaching agreement on shelf boundaries, a review of the existing conventional and customary rules of international law may offer some guidelines for identifying the relevant circumstances in the East China Sea.

1. The 1958 Shelf Convention

Article 6 of the Shelf Convention provides, with similar language in paragraphs 1 and 2, that a shelf boundary between opposite and adjacent states shall be determined by agreement; and failing that, "and unless another boundary line is justified by special circumstances," the boundary shall be the equidistance line. The concept of "special circumstances" which is functionally parallel to, but far less extensive as, that of the "relevant circumstances," is not defined in the Convention itself. But a glance at its *travaux préparatoires*, including deliberations of the International Law Commission of the United Nations during 1950-1956 and of the Geneva Conference in 1958, reveals in part what was in the drafters' minds with respect to that concept. The references may be grouped into two categories: unusual geographical features and legitimate uses of the sea.

(a) Unusual Geographical Features

In the ILC's Comments on draft article 7 (similar to Article 6 of the Shelf Convention) of its 1953 Report to the General Assembly, it was stated that:

> [M]oreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modifications in cases in which another boundary line is justified by special circumstances. As in the case of boundaries of coastal waters, provision must be made for departures necessitated by any *exceptional configurations of the coast*, as well as the *presence of islands* or of *navigable channels*. To that extent the rule adopted partakes of some elas-

19. *See supra* Introduction, text accompanying notes 15-17.

ticity.[20] (emphasis added)

Nearly identical words appeared in the ILC's 1956 draft article 72[21] which later was adopted by the Geneva Conference as Article 6 of the Shelf Convention. During the Conference, a number of delegates also made references to these unusual features as constituting special circumstances justifying a boundary other than the equidistant line.[22] Given the great variety of complex geographical situations, the Conference could not have, and did not, set any criteria for this purpose.

(b) Other Legitimate Uses of the Sea

Considerations in this regard include navigation, fishing, and exploitation of the seabed. References were made to "navigable channels" in both the ILC's 1953 and 1956 draft articles quoted above and during the Geneva Conference. Since the legal continental shelf does not include the superjacent water column, which is still part of the high seas, these concerns were satisfactorily addressed by Articles 3 and 5 of the Shelf Convention.[23] The same can be said of fishing of the free-swimming species which is carried out also in the water column above the continental shelf. Article 5 of the Shelf Convention offers at least *de jure* protection to the fishing rights as against unjustifiable interference resulting from exploitation of the continental shelf. Finally, the question of existing exploitation rights, though referred to in the Conference as a special circumstance,[24] received little attention.

It is evident that the relatively narrow concept of "special circumstances," as the drafters of the Shelf Convention saw it, is basically geographically oriented. It is of special interest to note that

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20. YBILC (1953), Vol. 2, *supra* Chapter 4, note 13, p. 216.

21. YBILC (1956), Vol. 2, *supra* Chapter 4, note 15, p. 300.

22. *E.g.*, Statements of the Venezuelan delegate, UNCLOS I, *Official Record*, Vol. 2 *supra* Chapter 4, note 16, p. 92, and of the United States delegate, *ibid.* p. 95.

23. Article 3 provides:

> The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as the high seas, or that of the air space above those waters.

Article 5, Paragraph 1 provides:

> The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

24. The reference was made by Commander Kennedy, representing the United Kingdom. UNCLOS I, *Official Records*, Vol. 6, *supra* Chapter 4 note 16, p. 93.

geological consideration did not figure prominently in the *travaux préparatoires* of the Shelf Convention despite the geological origin of the continental shelf doctrine.

2. State Practice

It was noted earlier that state practice in continental shelf delimitation is found in boundary agreements, excluding, of course, unilateral delimitations protested by neighboring states. Delimitation principles employed are sometimes provided for in the agreements, but provisions for consideration of certain special circumstances are rarely seen. As the analysis in the preceding chapter of state practice on islands shows, one may be able to infer from boundary maps that certain geographical or geomorphological features (such as the presence of islands or troughs) were taken into account or ignored, but very little can one learn about the influence of other factors such as the regional geology or the ratio of the length of coastlines to shelf entitlements. Information about these factors either does not show on a map or has to be gathered through precise mathematical calculations.

Despite the difficulties, some general observations nevertheless can be made. Conceivably, geographical considerations play the most important part in shelf delimitation between neighboring states, particularly where the equidistance principle is employed. Examples can readily be found in shelf boundaries in the North Sea, the Mediterranean Sea, and the Persian Gulf (Table 4). As most of the areas covered by boundary agreements concluded so far lie in relatively shallow and smooth parts of the geological shelf, geological and geomorphological considerations at most remain in the background. In a few localities where distinctive geological or geomorphological features exist, such as the Georges Bank (Canada-United States),[25] the Rockall Bank (Ireland-United Kingdom),[26] and

25. The Georges Bank, located in the Gulf of Maine off the U.S. and Canada, is rich in lobsters and oil. The decade-old dispute over the maritime jurisdiction over the area became explosive when both the U.S. and Canada declared a 200-mile fishing zone. After lengthy negotiations filled with turns and twists, they finally agreed to submit the dispute to the ICJ. For the history of the dispute and the parties' contentions, see Sang-Myon Rhee, "Equitable Solutions to the Maritime Boundary Dispute between the United States and Canada in the Gulf of Maine", *American Journal of International Law*, Vol. 75 (1981), p. 590. The ICJ has constituted a special chamber of the Court to adjudicate the dispute. Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Canada), I.C.J. Reports 1982, p. 3 (Constitution of Chamber Order of January 20). At this writing of August 20, 1984, the Court has not yet rendered the decision on the merits.

the East China Sea (China-Japan-Korea), disputes rather than agreements become the rule, with the notable exceptions of the Norwegian Trough (Norway-United Kingdom, Denmark-Norway) and the Timor Trough (Australia-Indonesia) to be discussed *infra*.[27] Considerations of unity of deposits (of minerals),[28] the presence of offshore structures,[29] and existing navigation channels[30] have, in a few isolated occasions, influenced parts of the course of the shelf boundaries, but the main courses are still dominated by geographical factors. Existing legal regimes of the sea, such as straight baselines[31] and territorial sea boundaries,[32] have also played limited roles in measuring the shelf boundaries.

The brief survey above of state practice regarding the influence of "special" or "relevant" circumstances seems to confirm the prevailing view that they have been and should be taken into account in shelf boundary delimitation. However, given the great variety of physical circumstances, state practice so far has not produced any specific pattern of conduct regarding the treatment of special or relevant circumstances uniform enough to evidence an international custom.

3. The North Sea Cases

After rejecting the principle of equidistance as a mandatory rule

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26. The most comprehensive study thus far on the Rockall problem is contained in a lengthy, two-part article by Professor E.D. Brown of the University of Wales, England. E.D. Brown, "Rockall and the Limits of National Jurisdiction of the UK," *Marine Policy*, Vol. 2 (1978), pp. 181 (Part 1), 275 (Part 2) [hereinafter cited as Brown (1978)].

27. *See infra* text accompanying notes 186-204.

28. *E.g.*, The Iran-Saudi Arabia shelf boundary, *supra* Chapter 4, note 38. The northern sector of the boundary, zigzag in shape, was said to have been delimited in consideration of the undersea oil deposits. For an analysis, see Richard Young, "Equitable Solutions for Offshore Boundaries: the 1968 Saudi Arabia-Iran Agreement," *American Journal of International Law*, Vol. 64 (1970), pp. 152, 154, 156.

29. *E.g.*, the Iran-United Arab Emirates shelf boundary, which is not a median line, was drawn to avoid an offshore anchorage platform near the second turning point. For a brief reference, *see* Bowett (1979), *supra* Chapter 4, note 4, p. 174.

30. *E.g.*, The Argentina-Uruguay boundary. "Continental Shelf Boundary: Argentina-Uruguay," *Limits in the Seas*, No. 64 October 24, 1975. The boundary (between two adjacent coasts) follows the navigation channel instead of the equidistant line. *Ibid.* p. 14.

31. *E.g.*, the Indonesia-Malaysia shelf boundary, *supra* Chapter 4, note 110. *See also infra* text accompanying note 144.

32. *E.g.*, The Norway-Sweden shelf boundary, *supra* Chapter 4, note 35. The shelf boundary begins where the territorial sea boundary, which was delimited according to previous treaties and the award of the famous Grisbadarna Arbitration, ends.

of international law regarding continental shelf delimitation among Denmark, the Netherlands and Germany, the ICJ went on to elaborate the elements of equity, itself a rule of law, in reference to the legal regime of the continental shelf. These elements include, *inter alia*, the obligation on the part of the parties to take into account all the relevant circumstances in applying equitable principles. Conceding that "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures,"[33] the Court nevertheless listed three "factors to be taken into account:"

> (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
> (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about 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, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.[34]

Intended to be illustrative but not exhaustive, these "relevant circumstances" are far more extensive than the "special circumstances" as conceived by the drafters of the Shelf Convention. Given the format of a general rule, they seem to be intended for general application elsewhere as well. The ICJ thus in fact granted *carte blanche* to the delimiting states insofar as factors affecting a shelf boundary delimitation are concerned.

4. The Anglo-French Arbitration

The geography of the British and French territories in the English Channel (Map 14) and the treaty relations between the two states gave the *Anglo-French* Court of Arbitration a unique opportunity to interpret and apply both conventional and customary international law relating to "special" and "relevant" circumstances in shelf

33. I.C.J. Reports 1969, p. 50.

34. *Ibid.*, p. 54. Since the Court was not asked to actually delimit the boundary between the parties' coasts, it did not relate these factors to the geography or geology of the North Sea.

delimitation. Both the United Kingdom and France are parties to the Shelf Convention. But since France had made reservations,[35] to which the United Kingdom later objected,[36] to Article 6 to exclude a number of areas characterized as special circumstances from the application of the equidistance principle, the Court declared that Article 6 was inapplicable to the parties to the extent of the French reservations.[37] That is to say, delimitation in the Bay of Granville (Channel Islands area), one of the areas being excluded, was not governed by Article 6 but by customary international law, namely, the rules stated in the *North Sea Cases*.[38] But the Court added that the two sets of rules made no difference in substance as far as the case at bar was concerned.[39] On the other hand, Article 6 still applied to the Atlantic region which was not referred to in the French reservations.

In actually delimiting, instead of merely expounding the legal principles governing, the Anglo-French boundary in the Channel Islands area,[40] the Court took into account the following factors:

—regional geology (particularly some geomorphological depressions, that is, the Hurd Deep, in the middle of the English Channel);[41]
—macrogeography (the broad equality existing between the British and French coasts in the English Channel[42] and the notion of proportionality);[43]
—size of the Channel Islands (195 sq. miles), population (130,000), economy (agriculture and commerce), and political and legal status (direct dependency of the British Crown maintaining substantial autonomy except in the area of defense and foreign affairs);[44]
—existing maritime regimes in the area[45] (France's 12-mile territorial sea and the United Kingdom's 12-mile fishing zone); and
—navigational, defense, and security interests of the parties

35. *UN Multilateral Treaties, supra* Chapter 2, note 10, p. 568.
36. *Ibid.*, p. 570.
37. The Anglo-French Award, para. 61.
38. *Ibid.*, para. 62.
39. *Ibid.*, para. 65.
40. Art. 2 of the Anglo-French Arbitration Agreement. *Ibid.*, p. 4.
41. *Ibid.*, paras. 9, 12, 104-108.
42. *Ibid.*, paras. 181-83. *See also infra* text accompanying notes 179-84.
43. Anglo-French Award, paras. 98-101.
44. *Ibid.*, para. 184.
45. *Ibid.*, para. 179.

in the disputed area.[46]

These factors were all considered as relevant to, but were assigned quite different weights in, determining the primary (mid-channel) and the second (around the Channel Islands) shelf boundaries in the Channel Islands area. The regional geology in general, namely, continuity of the continental shelf in the English Channel, constitutes one of the foundations of the Court's decision.[47] But the significance of the Hurd Deep was dismissed summarily.[48] The macrogeography of the area (broad equality between French and English coasts) is the other cornerstone underlying the Court's choice of the median line as the primary shelf boundary.[49] Considerations of size, population, economy, and political and legal status prevented the Channel Islands from being totally ignored; and the existing juridical regimes provided some guidance to the effect to be accorded them. The relevance of these factors seems to be largely confined to the second shelf boundary, however.[50] The influence of the navigational, defense, and security interests of the parties was expressly regarded by the Court as not "decisive" and their weight "diminished," despite their being said to support the French position.[51]

In the Atlantic region, the Court seems to consider only the macrogeographical factor: the fact that the Scilly Islands extend roughly twice as far from the United Kingdom mainland as does Ushant Island from the French mainland.[52] By invoking this geographical fact as a special circumstance within the meaning of Article 6 of the Shelf Convention, the Court justified the departure from the equidistance boundary which would have otherwise obtained in that area.[53] The geological factor again remained in the background.

5. The Tunisian-Libyan Case

The Tunisian-Libyan dispute was submitted on December 1, 1978 to the ICJ by Special Agreement between the parties with the following question put to the Court:

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46. *Ibid.*, para. 188.
47. *Ibid.*, paras. 9, 12, 104-09. *See also infra* text accompanying notes 285-90.
48. *Ibid.*
49. *See infra* text accompanying notes 179-84.
50. *Ibid.*, para. 202.
51. *Ibid.*, para. 188.
52. *Ibid.*, paras. 249-51.
53. *Ibid.*, para. 250.

> What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the Socialist People's Republic of Libyan Arab Jamahiriya and to the area of the continental shelf appertaining to the Republic of Tunisia, and the Court shall take its decision according to equitable principles, and the *relevant circumstances which characterize the area*, as well as the new accepted trends in the Third Conference on the Law of the Sea.[54] (emphasis added)

Reasoning that "[i]t is clear that what is reasonable and equitable in any given case must depend on its particular circumstances,"[55] the Court went on to identify the following relevant circumstances:

> —geography (the area to be delimited, configuration of the parties' coasts, and the presence of islands and low-tide elevations)[56] (Map 15);
> —geomorphology (particularly the Tripolitanian Furrow);[57]
> —existence and interests of other states in the area;[58]
> —the Tunisian-Libyan land boundary (particularly its terminus, Ras Ajdir, at which the land boundary intersects with the coastline)[59] (Map 15);
> —the parties' alleged maritime limits (i.e., (1) Tunisia's ZV (Zenith Vertical) 45° line, (2) Libya's 1955 petroleum exploration line, (3) the perpendicular *modus vivendi* line, and (4) the 26° northeast line)[60] (Map 16);
> —Tunisia's historical rights (straight baselines and sedentary fishery);[61] and
> —economic considerations (Tunisia's relative poverty and lack of natural resources; presence of oil wells in the delimitation area).[62]

All these circumstances were considered and weighed in determining the ultimate shelf boundary. The geographical circum-

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54. Special Agreement between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, *signed* June 10, 1977, *quoted in* I.C.J. Reports 1982, p. 21.
55. *Ibid.*, p. 60.
56. *Ibid.*, pp. 61-64.
57. *Ibid.*, p. 64.
58. *Ibid.*
59. *Ibid.*, pp. 64-65.
60. *Ibid.*, pp. 66-71, 83-85.
61. *Ibid.*, pp. 71-77.
62. *Ibid.*, pp. 77-78.

stances exerted substantial influence on the course of the boundary in the second, more seaward sector north of the 34°10'30" north latitude. While the turning point from which the boundary in the second sector (Map 17) begins was determined by reference to the westernmost point of the Gulf of Gabes where the abrupt change of the general direction of the Gulf coast occurs, the angle of the boundary to the meridian in the second sector was calculated by giving the Kerkennah Islands half effect.[63] The island of Jerba was ignored because of its close proximity to shore.[64]

The geomorphological circumstances were generally discounted since the Court considered the seabed in the delimitation area as the common, continuous shelf of both Tunisia and Libya. It thus is not surprising that although the Tripolitanian Furrow, a submarine valley running roughly parallel to the Libyan coast, received some consideration, it was subsequently dismissed.[65]

The existence and interests of other states in the areas, namely, those of Italy and Malta, were not, according to the Court, prejudiced by the present delimitation.[66] Italy delimited a modified equidistance boundary with Tunisia in 1971 which entered force in 1978[67] (Map 15). Malta has not delimited its seabed boundary with either Tunisia or Libya; it has sought but failed to intervene in the present case.[68] Because of this uncertain boundary situation in the northeastern part of the delimitation area, the end of the boundary in the second sector was left open (the arrow in Map 17). On the other hand, in calculating the areal ratios of the parties' shelves under the proportionality principle, shelf areas potentially belonging to Malta were included for comparison purposes.[69]

The terminus of the Tunisian-Libyan land boundary, Ras Ajdir, is relevant here primarily for constructing the 26° line as the boundary in the first sector (Map 17). As to the alleged maritime limits, the

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63. *Ibid.*, pp. 87-89.

64. *Ibid.*, p. 85.

65. *Ibid.*, p. 64.

66. *Ibid.*, p. 91.

67. "Continental Shelf Boundary: Italy-Tunisia", *Limits in the Seas*, No. 89, January 7, 1980.

68. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981, p. 3, *referred to in* I.C.J. Reports 1982, p. 24. A special agreement between Malta and Libya to submit the question of shelf boundary delimitation to the ICJ was notified to the Court on July 26, 1982. The Court has set April 26, 1983 as the time limit for the filing of memorials. *International Legal Materials*, Vol. 21 (1982), p. 971.

69. I.C.J. Reports 1982, p. 91.

first two were disregarded summarily as unilateral claims not opposable to the other party.[70] The third line, the tacit *modus vivendi* line perpendicular to the coastline at Ras Ajdir, was held not precise enough and discounted.[71] But it was actually very close to the fourth line—the 26° northeast line which was ultimately used as the first sector boundary.[72]

Tunisia's historical rights of sedentary fishery were considered irrelevant to the delimitation.[73] The seabed of its territorial sea and areas landward of its straight baselines also were held to be included in calculating the degree of proportionality between area of the shelf and length of the coastline, despite the fact that these areas are not continental shelf in the legal sense.[74] On the other hand, the economic considerations advanced by Tunisia were all rejected as irrelevant.[75] But the Court also stated that oil wells located in the delimitation area may be taken into account in achieving an equitable result.[76]

6. The LOS Convention

During the nine years before the present LOS Convention was finally adopted by UNCLOS III in December 1982, it had had five versions of negotiating texts and two versions of draft conventions. They are (with shelf delimitation articles):

—Informal Single Negotiating Text (ISNT) (1975),[77] Article 70;

—Revised Single Negotiating Text (RSNT) (1976),[78] Article 71;

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70. *Ibid.*, p. 68.

71. *Ibid.*, p. 69.

72. *Ibid.*, pp. 70-71, 83-85.

73. *Ibid.*, pp. 71-77.

74. Article 1 of the Shelf Convention, which has become part of customary international law, provides that the continental shelf is "outside the territorial sea". UNTS, Vol. 449, p. 311. But the Court argued that calculations of the ratio of proportionality are based on the lengths of *coasts*, not the *straight baselines* around the coasts. I.C.J. Reprts 1982, p. 76.

75. I.C.J. Reports 1982, p. 77.

76. *Ibid.*, p. 78.

77. Informal Single Negotiating Text, UN Doc. A/CONF.62/WP.8, 7 May 1975, UNCLOS III, *Official Records*, Vol. 4 (1975), p. 137.

78. Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Rev. 1, 6 May 1976, UNCLOS III, *Official Records*, Vol. 5 (1976), p. 125.

—Informal Composite Negotiating Text (ICNT) (1977),[79] Article 83;
—Informal Composite Negotiating Text/Revision 1 (ICNT/Rev.1) (1979),[80] Article 83;
—Informal Composite Negotiating Text/Revision 2 (ICNT/Rev. 2) (1980),[81] Article 83;
—Draft Convention on the Law of the Sea (Informal Text) (1980),[82] Article 83; and
—Draft Convention on the Law of the Sea (1981),[83] Article 83.

The substantive delimitation principles contained in these documents have undergone several changes, but up to the Draft Convention (Informal Text) of 1980, the basic formula had remained largely the same. That is, regardless of whether the delimiting states' coasts are opposite or adjacent to each other, the delimitation is to be effected by agreement in accordance with equitable principles (and/or in conformity with international law), employing, where appropriate, the median or equidistance line, and taking into account all the relevant circumstances (or all the relevant circumstances prevailing in the area concerned). However, in order to break the impasse of negotiation created by the irreconcilable confrontation between the "equidistance" and the "equitable principles" schools, the Conference finally decided to remove all the references to equitable principles, equidistance median or line, and relevant circumstances, as noted earlier.[84] The compromise solution as contained in Article 83 of the 1981 Draft Convention later became Article 83 of the present LOS Convention.

The changes notwithstanding, customary international law in this regard remains the same, as analyzed in the beginning of this chapter. However, neither customary international law nor the 1980 Draft Convention (Informal Text) and previous negotiating texts defines "relevant circumstances." As far as the latter are concerned,

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79. Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10, 15 July 1977, UNCLOS III, *Official Records*, Vol. 8 (1977), p. 1.

80. Informal Composite Negotiating Text/Revision 1, UN Doc. A/CONF.62/WP.10/Rev.1, 28 April 1979.

81. Informal Composite Negotiating Text/Revision 2, UN Doc. A/CONF.62/WP.10/Rev.2, 11 April 1980.

82. Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/Rev.3, 27 August 1980.

83. Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78, 28 August 1981.

84. *See supra* note 6 and accompanying text.

recourse has to be had to the LOS Convention's *travaux preparatoires*: the proceedings of the UNCLOS III since 1974 and those of the Seabed Committee prior to that. Since Article 83 and Article 74 (dealing with EEZ delimitation), are nearly identical, and since within 200 miles from the shore of a coastal state its continental shelf is part of its EEZ, references will be made to the EEZ as well. However, because of the fundamental differences between these two concepts on the one hand and that of the territorial sea on the other, factors which states considered relevant to the delimitation of the latter will not be discussed.

Negotiations at the UNCLOS III show that states which favored the adoption of equitable principles as the rule of delimitation of the continental shelf and EEZ outnumbered those adhering to the equidistance/special circumstance rule under Article 6 of the Shelf Convention.[85] However, not all of the states in the former group have spelled out what specific "relevant circumstances" they had in mind. Presented below are specific illustrations which some of these states have given in the draft articles and debates.

Apparently having the Greek Aegean Islands in mind, Turkey was the only state in the Seabed Committee that specified the term "special circumstances" which includes:

> *[I]nter alia*, . . . the *general configuration of the respective coasts, the existence of islands or islets* of another state and the physical and *geological structure* of the marine area involved including the seabed and subsoil thereof.[86] (emphasis added)

During the 1974 Caracas session of the UNCLOS III where major debates and proposals were made, Romania proposed that delimitation of marine spaces be effected by agreements between neighboring states in accordance with equitable principles, "taking into account all the circumstances affecting the marine or ocean area concerned and all relevant *geographical, geological* or other factors."[87] (emphasis added)

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85. The former group had 29 states while the latter 22. Reports the Committees and Negotiating Groups on Negotiations at the Seventh Session [and the Resumed Seventh Session] Contained in A Single Document both for the Purposes of Records and for the Convenience of Delegations. UN Docs. A/CONF.62/RCNG/1 and 2. UNCLOS III, *Official Records*, Vol. 10 (1978), pp. 13, 124, 126, 170. But since UNCLOS II adopts the consensus method to conduct negotiations, no vote has ever been taken on this hotly contested issue.

86. Seabed Committee Report, Vol. 3 (1973), pp. 22-23.

87. Romania: Draft articles on delimitation of marine and ocean space between ad-

Turkey again proposed:

> In the course of negotiations, the States shall take into account all the relevant factors, including, *inter alia*, the *geomorphological* and *geological structure* of the shelf up to the outer limits of the continental margin, and special circumstances such as the *general configuration of the respective coasts*, the *existence of islands, islets or rocks* of one State on the continental shelf of the other.[88] (emphasis added)

A similar list of factors relating to delimitation of the EEZ was also proposed by Turkey later.[89]

Meanwhile, the delegate of the Libya Arab Republic, Mr. Unis, stated in the 16th meeting of the Second Committee:

> In order to delineate the limits of area allocated to each of the adjacent or opposite States, any one of a combination of delimitation methods appropriate for arriving at an equitable subdivision of the economic zone might be applied, taking into consideration the *historical* and *geographical* conditions and special circumstances.[90] (emphasis added)

The Draft Article on the Delimitation of the Continental Shelf or the Exclusive Economic Zone, submitted by Kenya and Tunisia to the Second Committee, provided, *inter alia*:

> For [the purpose of delimitation], special account should be taken of *geological and geomorphological* criteria, as well as all the special circumstances, including the *existence of islands or islets* in the area to be delimited.[91] (emphasis added)

In their draft articles on the delimitation of the continental shelf and the economic zone, Ireland[92] and France[93] proposed slightly dif-

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jacent and opposite neighboring States and various aspects involved, art. 1, UN Doc. A/CONF.62/C.2/L.18, UNCLOS III, *Official Records*, Vol. 3 (1975), p. 195.

88. Turkey: Draft articles on delimitation between States: Varous aspects involved, art. 2, UN Doc. A/CONF.62/C.2/L.23, *ibid*., p. 201.

89. Turkey: Draft articles on delineation between adjacent and opposite States, UN Doc. A/CONF.62/C.2/L.34, *ibid*., p. 213.

90. UNCLOS III, *Official Records*, Vol. 2 (1975), p. 145 (16th mtg, 2nd Comm.).

91. Kenya and Tunisia: Draft article on the delimitation of the continental shelf or the exclusive economic zone, art. 2, UN Doc. A/CONF.62/C.2/L.28, UNCLOS III, *Official Records*, Vol. 3 (1975), p. 195.

92. Ireland: Draft articles on delimitation of areas of continental shelf between neighboring States, UN Doc. A/CONF.62/C.2/L.43, *ibid*., p. 220.

93. France: Draft article on the delimitation of the continental shelf or of the economic zone, UN Doc. A/CONF.62/C.2/L.74, *ibid*., p. 237.

ferent rules. Yet both states specifically singled out the presence of islands and islets as a special circumstances deserving *ad hoc* consideration. It is apparent that Ireland had the British Rockall Rock in mind whereas France was worried about the Channel Islands.

Last, in the draft articles on the EEZ submitted by eighteen African states, it was proposed that, *inter alia*:

> For this purpose [of delimitation of the exclusive economic zone], special account shall be taken of *geological* and *geomorphological* factors as well as other special circumstances which prevail.[94] (emphasis added)

To sum up, the common denominator of circumstances regarded as "relevant" by the participating states of the Seabed Committee and the UNCLOS III who have addressed the question seems to include the following:

—regional geography, such as the general configuration of the coast and presence of islands; and
—regional geology and geomorphology.

None of these factors was unknown previously. They seem to reflect the influence of the *North Sea Cases* in this area.

A question arises as to whether these proposals or statements constitute a source of international law. The ICJ correctly pointed out, in the 1974 *Fisheries Jurisdiction Case*[95] between Iceland and the United Kingdom, that they are merely "manifestations of the views and opinions of individual States as vehicles of their aspirations rather than as expressing principles of existing law."[96] But when the Convention enters into force, these proposals will be firsthand sources of *travaux préparatoires* for interpreting the new convention because of the direct contribution of their adoption, rejection, or revision to the final text of the convention. Hence, the significance of these proposals and debates.

C. Identifying the "Relevant Circumstances" in the East China Sea Other Than Its Geography, Geology, and Geomorphology

The above review provides certain guidelines as to where to

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94. Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania and Zaire: Draft articles on the exclusive economic zone, UN Doc. A/CONF.62/C.2/L.82, *ibid.*, p. 240.

95. I.C.J. Reports 1974, p. 3.

96. *Ibid.*, p. 23.

look for the "relevant circumstances" in the East China Sea for the purpose of Sino-Japanese seabed delimitation. The circumstances worth considering are grouped into four categories: irrelevant, partially relevant, potentially relevant, and relevant circumstances. What follows is a discussion of the relevance of the former three types of circumstances chosen according to the above guidelines. The fourth type, *i.e.*, the geographical, geological, and geomorphological circumstances are reserved for the next two sections.

1. Irrelevant Circumstances

(a) Defense and Security Interests

A state's sovereignty over its adjacent continental shelf is, at least theoretically, resources-oriented and does not reach the superjacent water where surface and submarine navigation takes place. The defense and security interests, if any, of a coastal state with respect to the continental shelf largely consist of the freedom of maneuver of its submarines. In the *Anglo-French Arbitration* France did stress the need for its navy to control activities on the continental shelf around the Channel Islands.[97] If the French continental shelf was cut into two separate parts in consequence of granting full effect to the Channel Islands, France argued, "serous inconveniences and risks for French submarines stationed at Cherbourg"[98] would result (Map 14). These considerations, held to be relevant but not decisive in that case,[99] seem to be absent in the East China Sea. Despite its semi-enclosed configuration, the East China Sea is much larger and far more open than the English Channel. Moreover, neither of the boundaries based on the claims of China (the ROC and the PRC) or Japan (Map 1) would result in the severance of either state's continental shelf into two separate zones. The freedom of maneuver of either state's submarines would hardly be affected. Hence the irrelevance of defense and security considerations.

(b) Navigation

This is a concern that existed only in the early stages of the evolution of the continental shelf doctrine when the juridical status of that novel notion was unclear and the high seas freedoms were feared threatened. Since 1958, the rule that the legal status of the waters superjacent to the continental shelf remains as high seas has

97. Anglo-French Award, para. 161.
98. *Ibid.*
99. *Ibid.*, para. 188.

become part of customary international law. Consideration of navigation thus becomes irrelevant.

(c) Historical Title

The historical title to a maritime area is a legitimate consideration for delimitation of territorial sea between neighboring states, given the proximity of that jurisdiction to shore and the long history of human activities in coastal waters. Both customary international law and the 1958 Convention on the Territorial Sea and Contiguous Zone recognize historical bays and other historical titles to coastal waters.[100] It is doubtful, however, whether such rights exist in connection with the seabed and subsoil outside the territorial sea. There are nevertheless a few possibilities: existing rights to sedentary fisheries[101] and exploitation of seabed resources. The East China Sea is not noted for sedentary species of living organisms. Even if it were, that consideration would still be irrelevant since the possible site of the Sino-Japanese shelf boundary, based on either the Japanese or the Chinese claim, would lie in waters ranging from 100 to 2,000 meters in depth where sedentary fishery is unlikely.

Historical title based on exploitation of undersea oil is also questionable, insofar as the East China Sea is concerned. Aside from the lack of a solid legal foundation of such a title,[102] as conceded by Judge Jessup in his separate opinion of the *North Sea Cases*,[103] there have not been much exploitation activities by the PRC, the ROC, or Japan in the disputed area. As noted in Chapter 2, all the wells drilled by CPC and its foreign partners lie on the Chinese side of the hypothetical median line; so do the three wells, Longjing I and II and Dongtai-I, drilled by the PRC (Map 10). Japanese drillings have also been confined to areas *east* of the Okinawa Trough even farther from the potential boundary line. Even if large-scale exploitation had been conducted by either state in the *disputed* area on the continental shelf, the vigorous protests by the other state,

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100. Art. 7(6), 12.

101. The "natural resources" as defined by Article 2 of the Shelf Convention include only one kind of living resources, i.e., sedentary species.

102. Under Article 2 of the Shelf Convention, a coastal state's right to the continental shelf is inherent and exclusive, not depending on occupation, effective or notional. Other states may not obtain such rights without the express consent of the coastal state. There is, accordingly, little basis to claim historical title based on occupation, prior use, or prescription. This point was discussed by the ICJ in the *Tunisian-Libyan* Case in connection with Tunisia's historical rights in the disputed area. I.C.J. Reports 1982, p. 74.

103. I.C.J. Reports 1969, p. 80. *But see infra* text accompanying note 276.

which would have been made before any drilling took place, would have prevented the creation of any title based on prescription or other legal doctrines.

(d) Unity of Deposits

The ICJ prescribed, in the *North Sea Cases*, the unity of deposits of natural resources, "so far as known or readily ascertainable,"[104] as a relevant circumstance. It has been suggested in Chapters 1 and 2 that despite the bright prospects for hydrocarbons in the East China Sea, very little is known about the bulk of its seabed simply because jurisdictional disputes effectively have delayed oil exploration. Since knowledge about a deposit will not be obtained before the boundary disputes are settled and large-scale exploration begins, the "unity of deposits" question logically will be irrelevant to boundary delimitations in the East China Sea.

(e) Fishing and the EEZ

As in the case of navigation, fishing of free-swimming species, one of the high seas freedoms,[105] was thought to be threatened upon the advent of the continental shelf doctrine. Article 5 of the 1958 Shelf Convention, which prohibits "any unjustifiable interference with fishing or the conservation of the living resources" by exploration and exploitation of the continental shelf, eliminates such fear only on an *ipso jure* basis. In fact, competition between the fishing and ocean mining industries becomes increasingly acute in areas where rich fishing grounds and mineral deposits lie side by side. The North Sea,[106] the Atlantic Ocean off New England coast (Georges Bank),[107] and the East China Sea off the coast of Kyushu,[108] just to name a few, are illustrative examples.

Another dimension of the relationship between fishing and the continental shelf relates to their jurisdictional limits. Despite their juridically distinguishable character, the seaward limit of one may, for administrative purposes, coincide with that of the other. In fact,

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104. I.C.J. Reports 1969, p. 54.

105. Convention on the High Seas, art. 2, UST, Vol. 13, p. 2312; TIAS, No. 5200; UNTS, Vol. 450, p. 82. That article is generally recognized as having codified customary international law.

106. *See generally* John P. Grant, "The Conflict between the Fishing and the Oil Industries in the North Sea: A Case Study," *Ocean Management*, Vol. 4 (1978), p. 137.

107. "Oil Drilling Foes Drop Court Suit," *Boston Globe*, December 22, 1980, p. 1.

108. Ron Richardson, "South Korea Posed to Drill," *Far Eastern Economic Review*, September 14, 1979, p. 63.

the evolution of the concept of the exclusive economic zone, which comprises the water column, the seabed, and the subsoil, can be conceived as a step further toward the marriage of the concepts of the continental shelf and the exclusive fishery zone. Moreover, in the *Anglo-French Arbitration*, the 12-mile fishery zone of the Channel Islands was taken into account by the Court in determining the extent of their continental shelf.[109] The boundary finally delimited was in fact a 12-mile zone to the north and west of the Channel Islands (Map 13).

In the East China Sea, a fishing ground from time immemorial, fishing has been regulated in the past three decades by treaties and non-governmental arrangements among the three coastal states.[110] As between Japan and the PRC, lack of diplomatic ties during the pre-1972 period necessitated a series of unofficial arrangements which were later superseded by formal treaties.[111] The latest was one signed in 1975 and renewed in 1977.[112] Fishing zones established thereunder are located closer to the Chinese mainland than to Japan. They consist of an irregular belt of the sea with an average width of 100 miles beyond the PRC's straight baselines. The most seaward part of their outer limit extends 140 miles into the East China Sea. Within these zones, fishing vessels from both states are subject to various restrictions for conservation purposes.

The outer limits of the fishing zones seem to provide little guidance as to how the continental shelf boundary between China and Japan should be delimited.[113] The fishing boundary is much closer to the Chinese mainland coast than the median line proposed by Japan. Since the PRC, like the ROC, adheres to the natural prolongation principle and has raised objections to a median line solution, it would *a fortiori* reject the fishing limits as a shelf boundary which is

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109. *See text* accompanying note 50 *supra*.

110. *See generally* Choon-ho Park, "Fishing Under Troubled Waters: The Northeast Asia Fishery Controversy," *Ocean Development and International Law Journal*, Vol. 2 (1974), p. 96.

111. *See generally* Tao Cheng, "Communist China and the Law of the Sea," *American Journal of International Law*, Vol. 63 (1969), p. 47; Song Yook Hong, *The Sino-Japanese Fisheries Agreement of 1975: A Comparision with Other North Pacific Fisheries Agreements*, No. 6, Hungdah Chiu ed., University of Maryland Law School: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1977, and the references cited therein.

112. For the text of the 1975 agreement and the chart showing the fishing zones, see "Fisheries Agreement China-Japan," *Limits in the Seas*, No. 70, April 6, 1976. The agreement was renewed in 1977.

113. In accord is Bowett (1979), *supra* Chapter 4, note 4, p. 305.

even more unfavorable to it. Besides, there seems to be little legal or practical justification whatsoever in taking into account the fishing zone in seabed delimitation in the East China Sea. Finally, these fishing zones are by no means permanent and may be overtaken shortly by a new boundary based on the 200-mile EEZ. As of 1984, at least Japan and the ROC have asserted a 200-mile fishing zone or an EEZ.

At this juncture, a question arises regarding the interrelationship between boundaries of the EEZ and the continental shelf. Without going into detailed discussion of the EEZ as a legal regime, one should ask: should the shelf and the EEZ boundaries necessarily coincide if the PRC and Japan also proclaim their respective EEZs?

Conceptually, the EEZ, as defined in the LOS Convention's Articles 56 and 57,[114] incorporates the continental shelf up to a maximum distance of 200 miles from shore. Functionally, the major resource-related concern, or the only concern in the foreseeable future in the EEZ, is fishing, since other exotic uses of the water column[115] will not be technically or economically feasible soon. In contrast, the interest in the continental shelf almost exclusively consists in the underlying petroleum. With respect to the question of interstate boundary, the distance- (or geographically) oriented regime of the EEZ clearly is more amenable to such a distance-oriented delimitation principle as the equidistance principle than to the geologically-oriented regime of the continental shelf, which cannot escape considerations of geology and geomorphology. Therefore, separate EEZ and continental shelf boundaries, though difficult to administer, are not incompatible with the fundamental rationale underlying these two regimes.[116] The following discussion therefore is

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114. Article 56 provides:

> 1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and subsoil and of the seabed and its subsoil . .

Article 57 provides:

> The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

115. *E.g.* Ocean thermal energy conversion (OTEC). *See generally* Michael Mulcahy, "OTEC—from $85,000 to $35 Million in Six Years," *Sea Technology*, Vol. 18 (August, 1977), p. 16.

116. For a discussion in support of this view, see Bowett (1979), *supra* Chapter 4, note 4, pp. 188-89. *But see* J.C. Phillips, "The Exclusive Economic Zone as a Concept in International Law," *International and Comparative Law Quarterly*, Vol. 26 (1977), pp. 585, 613-15.

based on this premise.

2. Partially Relevant Circumstances

It was noted earlier that in deciding whether the Channel Islands would be allowed to generate their own continental shelf, the *Anglo-French* Court of Arbitration took account of the size, population, economy, and political and legal status of the Channel Islands. These considerations eventually proved to have only marginal effects on the primary (mid-channel) boundary between France and the United Kingdom but were important to the secondary boundary to the north and west of the Channel Islands. Hence the characterization "partially relevant" circumstances. In the East China Sea, both China (PRC and ROC) and Japan have substantial insular territories that may be relevant to seabed delimitation, such as the coastal islands of mainland China, Taiwan (including offshore islands), Kyushu (including offshore islands), and the Ryukyu Islands. A brief review of their "merits" seems warranted. The coastal islands of mainland China, which mostly are included in the PRC's straight baseline system, will be the subject of a later discussion. Meanwhile, since Kyushu (16,215 sq. miles) and Taiwan (13,885 sq. miles) have substantial landmass (the 31st and 36th largest islands on earth, respectively)[117] and constitute the major portion of the territory of Japan and the ROC, they will be treated as mainlands. The review below therefore is confined to the Ryukyu Islands only.

The Ryukyu Islands[118] comprise three major island groups (*gunto* in Japanese): The Amami Gunto (north), the Okinawa Gunto (central), and the Sakishima Gunto (south) (Map 1). The Ryukyu Islands from a northeast-southwest trending arc extending 650 miles from the southern tip of Kyushu all the way down to the vicinity of Taiwan. The islands are fairly large (total area: 1,338 sq. miles) and populous (around one million). Fishing and agriculture are the major economic activities with a less significant light industrial sector. The Amami Gunto was "returned" to Japan by the United States in 1953 and the rest of the Ryukyu Islands in 1972. Administratively, the Amami Gunto belongs to the Kogashima Prefecture with its seat in Kyushu, whereas the Okinawa Prefecture includes the Okinawa Gunto and the Sakishima Gunto.

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117. Hodgson (1973), *supra* Chapter 4, note 35, p. 4.

118. The physical and political geographies of the Ryukyu Islands are based on *Columbia Gazetteer, supra* Chapter 4, note 77, p. 1618; *Encyclopedia Americana*, Vol. 24 (1974), p. 62; Statistics Bureau, The Prime Minister's Office, *Japan Statistical Yearbook*, Vol. 1 (1979).

The above review seems to suggest that the Ryukyu Islands are capable of generating their own continental shelf under any criteria. Given their location in a semi-enclosed sea (at least on one side of these islands) less than 400 miles in width, however, there is no guarantee that they actually would obtain full entitlement in a shelf boundary delimitation. In other words, the circumstances of size, population, etc., merely provide the *necessary* conditions enabling the Ryukyu Islands to receive full consideration in the process of balancing the equities. They are not *sufficient* conditions, however.

3. Potentially Relevant Circumstances

A few legal and physical circumstances in the East China Sea appear to be *prima facie* potentially relevant to the seabed delimitation. But the extent of their relevance depends not so much on their own merits as on certain extrinsic variables. These circumstances include two existing legal regimes, namely, the Japan-ROK Joint Development Zone (JDZ) and the PRC's straight baselines, and the presence of coastal islands off Kyushu and Taiwan.

However, these potentially relevant circumstances are not to be confused with the partially relevant circumstances discussed above. While relevance of the former is uncertain, depending on future events, the latter's relevance *is* definite, but the weight assigned it may be only marginal.

(a) The Japan-ROK Joint Development Zone

It was noted in Chapters 2 and 3 that the JDZ, not being a *de jure* shelf boundary as such, will nevertheless commit Japan and the ROK for at least 50 years, unless the resources in the JDZ become economically unexploitable sooner.[119] But since the legal continental shelf is precisely a resource-oriented concept, if the joint efforts of Japan and the ROK eventually deplete the undersea hydrocarbons in the JDZ, there simply would exist no reason for the other claimants to assert sovereignty over the then sterile seabed of the JDZ.[120] In this sense, the JDZ functions as a *de facto* shelf boundary zone, despite the parties' disclaimer to the contrary.

The potential relevance of the JDZ as a *de facto* shelf boundary expresses itself in two ways. First of all, part of the JDZ's western

119. The Japan-ROK Joint Development Agreement, arts. XXVIII, XXXI, *supra* Chapter 2, note 42.

120. *See* Choon-ho Park, "China and Maritime Jurisdiction: Some Boundary Issues", *German Yearbook of International Law*, Vol. 22 (1979), p. 119.

edge coincides with the Sino-Korean and Sino-Japanese hypothetical median lines (Map 1). This overlapping segment naturally includes the trijunction point of the Sino-ROK and Japan-ROK hypothetical median lines. Should the application of the equidistance principle in this region be considered equitable by the parties, then this segment as a reference line would be potentially significant.

Second, it was pointed out in Chapter 2 that the JDZ lies entirely on the Japanese side of the Japan-ROK hypothetical median line. Japan thus is thought to be willing to tolerate the ROK's shelf claim based on the natural prolongation principle at the expense of its own claim based on the equidistance principle. Although the JDZ is not a shelf boundary as such, Japan's apparent concession could adversely affect its legal position vis-à-vis China (PRC and ROC) in the southern part of the East China Sea where the geophysical situations are similar to those of the north but the petroleum geology may be much more favorable.

To conclude, since Japan and the ROK can always defend, *ipso jure*, that the JDZ is not a shelf boundary, it is considered here only as a potentially relevant circumstance.

(b) The PRC's Straight Baselines (Map 1)

One of the important dimensions of continental shelf delimitation is the determination of baselines (or basepoints) from which the territorial sea is measured. The whole question of islands' entitlement to continental shelf in substance can be conceived of as a question of whether islands may be used as basepoints in seaward or lateral delimitations. Two methods for determining baselines are most widely used in state practice and recognized in international treaties. The first method, known as the low-water baseline or normal baseline, calls for a line following the low-water marks of a coastal state's seashore.[121] The other method, known as the straight baseline, consists of a series of straight lines connecting salient points of a coastline irrespective of the low-water marks.[122] While most states employ the normal baseline method, states with irregular coasts have applied the straight baseline method to the whole or a part of their coasts for practical, economic, security, and other reasons. In the 1951 *Fisheries Case* between Norway and the United Kingdom, Norway's time-honored employment of the straight base-

121. Convention on the Territorial Sea and Contiguous Zone, art. 3, UST, Vol. 15, p. 1606; TIAS No. 5639; UNTS, Vol. 516, p. 205.

122. *Ibid.*, article 4.

line method to its exceptionally indented coasts was sanctioned by the ICJ as "not contrary to international law."[123] Since then, through state practice, codification efforts of the U.N. International Law Commission,[124] and the adoption by the Geneva Conference, the straight baseline method has acquired the status of customary international law. As of today (1984), out of the world's 140 or so coastal states, more than sixty have passed domestic legislation permitting the use of straight baseline or have actually drawn it along their coasts.[125]

(1) The 1958 Declaration

The PRC was one of the fifteen harbinger states that had declared a straight baseline system prior to 1960.[126] In its "Declaration on China's Territorial Sea" on September 4, 1958, the PRC stated:

> 1. The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as *Taiwan and its surrounding islands, the Penghu* [Pescadore] *Islands*,. . .
> 2. China's territorial sea along the mainland and its coastal islands takes as its baseline *the line composed of the straight lines* connecting basepoints on the mainland coast and *on the outermost of the coastal islands*;. . . The water areas inside the baseline, including Pohai Bay and the Chiungchow Strait, are Chinese inland waters.
> . . . .
> 4. The principles provided in paragraphs 2 and 3 likewise apply to Taiwan and its surrounding islands, the Penghu Islands. . . and all other islands belonging to China.[127] (emphasis added)

The PRC has never made public how its straight baseline system would be drawn on the Chinese coast of 11,900 km. (6,432 miles). (The system does not, of course, cover Taiwan and the Pes-

123. I.C.J. Reports 1951, pp. 115, 143.

124. YBILC (1956), Vol. 2, *supra* Chapter 4, note 15, p. 257.

125. The figures are derived from the author's calculations based on "National Claims to Maritime Jurisdictions," *Limits in the Seas*, No. 36, 4th rev., May 1, 1981.

126. The others were Albania, Cuba, Egypt, Ethiopia, Finland, Guatemala, Iceland, Iran, Norway, Panama, Saudi Arabia, Soviet Union, Sri Lanka, Sweden, and Yugoslavia.

127. *Peking Review*, September 9, 1958, p. 21.

cadores which are under the ROC's control.) This move would have been required if the PRC joined the 1958 Convention on the Territorial Sea and Contiguous Zone.[128] The Geographer of the United States Department of State in 1972 drew hypothetical straight baselines to the Chinese coasts on a naval chart.[129] In the accompanying comments, he concluded:

> Basically, Peking appears to have taken a realistic and non-expansive attitude in drafting its straight baselines. . . .
>
> . . .With the exception of the Spratly Islands, the straight baselines shown on the attached charts would probably be quite consistent with international state practices. . . .[130]

(2) Challenges and Protests

Shortly thereafter, two American commentators[131] challenged the legality of the PRC's straight baselines in the East China Sea on the grounds that some of the outlying islands supposedly used as basepoints are excessively distant from the mainland coast (the greatest distance being 69 miles) and that the straight lines connecting these islands do not follow the general direction of the Chinese coastline,[132] as required by customary international law reflected in the ruling of the *Fisheries Case*.

In practice, however, other than the United States[133] and the

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128. *Supra* note 122.

129. *See* "Straight Baselines: People's Republic of China," *Limits in the Seas*, No. 43, July 1, 1972.

130. *Ibid.*, pp. 3, 6.

131. Allen & Mitchell (1972), *supra* Chapter 2, note 28.

132. *Ibid.*, pp. 796-800. Art. 4, paras. 1 and 2 of the Convention on the Territorial Sea and Contiguous Zone provide:

> 1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> 2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the line must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

UNTS, Vol. 516, p. 208.

133. Department of State, "The Legal Considerations Affecting the Status of Taiwan and the Offshore Islands," *American Foreign Policy: Current Documents*, 1958, pp. 1189, 1198.

United Kingdom,[134] no state has ever raised any objections. Since the United Kingdom itself adopted the straight baseline method in 1964,[135] its objection seems to be weakened, if still valid. Meanwhile, the ROK promulgated a system of straight baselines on September 20, 1978.[136] Inasmuch as the East China Sea is concerned, the PRC's straight baselines have met with no objection from Japan. The ROC also has been silent so far.[137]

(3) Opposability to Japan

If Japan presumably has acquiesced since 1958 to the PRC's straight baselines for measuring China's territorial sea, is it thereby estopped from objecting to such method when the same baselines are used for measuring China's continental shelf? The interests of Japan in the seabed of the East China Sea were not aroused until the late 1960s. But it took part in the negotiations at the 1958 Geneva Conference. Although Japan did not sign nor later accede to the Shelf Convention, it ought to be aware that the continental shelf of a coastal state begins outside the territorial sea but is measured from the same baseline from which the breadth of the territorial sea is measured.[138] It thus is arguably, at least, that the PRC's straight baseline system is opposable to Japan on the same ground on which the ICJ decided the *Fisheries Case* in favor of Norway:

> The notoriety of the fact, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[139]

It seems necessary at this juncture to discuss the ICJ's treatment of Tunisia's straight baselines in relation to shelf delimitation in the

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134. U.S. Consulate General in Hong Kong, *Survey of China Mainland Press* [SCMP], No. 1871 (October 9, 1958), p. 89.

135. Territorial Waters Order in Council of 25 September 1964, article 3, UNLS/15, pp. 129, 130. For an analysis with charts, see "Straight Baselines: United Kingdom," *Limits in the Seas*, No. 23, June 26, 1970.

136. "Straight Baselines: Republic of Korea," *Limits in the Seas*, No. 82, January 22, 1979, p. 1; UNLS/19, p. 98.

137. The ROC was said to have seriously considered the use of the straight baseline in the past. Hungdah Chiu, "China and the Question of Territorial Sea," *International Trade Law Journal*, Vol. 1 (1975), pp. 29, 49-50.

138. Although Article 1 of the Shelf Convention (definition of the continental shelf) does not so prescribe, Article 6 (delimitation between states) should make this point quite clear.

139. I.C.J. Reports 1951, p. 139.

Tunisian-Libyan Case.[140] The question there was whether Tunisia's internal waters and territorial sea should be included in calculating the degree of proportionality between the shelf areas appertaining to each of the parties and the lengths of their respective coasts. Tunisia argued that by definition the legal continental shelf begins where the territorial sea ends; the seabed of its territorial sea and internal waters landward of the straight baselines therefore should be excluded from shelf delimitation. On the other hand, Libya contended that the whole seabed of the delimitation area must be taken into account in making these calculations. The Court, disclaiming passing any judgment on the legality of or opposability to Libya of the Tunisian straight baselines, stated that it was not convinced by Tunisia's contention. It concluded:

> It should be reaffirmed that the continental shelf, in the legal sense, does not include the sea-bed areas below territorial and internal waters; *but the question is not one of definition, but of proportionality as a function of equity*. The fact that a given area is territorial sea or internal waters does not mean that the coastal State does not enjoy "sovereign rights for the purpose of exploring it and exploiting its natural resources". . . . Furthermore, *the element of proportionality is related to lengths of the coasts of the States concerned, not to striaght baselines drawn round those coasts*. . . . [S]ince it is a question of proportionality, the only absolute requirement of equity is that *one should compare like with like*.[141] (emphasis added)

The real rationale, however, underlying the ICJ's deviation from the fundamental legal concept of the continental shelf in the name of equity is, it seems, that the inclusion or exclusion of the Tunisian internal and territorial waters would make "a very marked difference in the ratios resulting from any foreseeable delimitation line."[142] As is clearly shown in Map 16, the areas landward of Tunisia's territorial sea limits amount to nearly one third of the whole delimitation area lying off the coasts of Tunisia up to Ras Kaboudia and of Libya up to Ras Tajoura. If these areas had been excluded, Tunisia would have gained an enormous advantage vis-a-vis Libya in dividing the remaining two-thirds of the delimitation area. Furthermore, Tunisia's straight baselines were declared in 1973, five

140. I.C.J. Reports 1982, pp. 71-76.
141. *Ibid*., p. 76.
142. *Ibid*., p. 71.

years *after* the critical date when the present dispute arose.[143] The 1973 law has substantially changed the pre-existing Tunisian law which did not constitute the waters in question as internal or territorial. Therefore, the above considerations must have combined to convince the Court that equity requires the inclusion of Tunisian territorial and internal waters in applying the proportionality test.

Despite the smokescreen of the Court's disclaimer on the legality of Tunisia's system of straight baselines, it seemed to disapprove of the way they were drawn to include so large an area in Tunisia's exclusive domain. But to admit such disapproval on the record would, of course, have unnecessarily complicated the already sticky question at issue.

Now the question is: should the *Tunisian-Libyan* rule apply here in the Sino-Japanese shelf delimitation in the context of the East China Sea? It seems that the Sino-Japanese case is distinguishable from the *Tunisian-Libyan Case* in two respects. First, the delimitation area here is the whole of the East China Sea (Map 1), which is much larger both in absolute terms than the delimitation area in the *Tunisian-Libyan Case* (Map 15) and in relation to the PRC's internal and territorial waters measured from its straight baselines. Inclusion or exclusion of these areas therefore would not make a marked difference in calculating the proportionality ratios as in the *Tunisian-Libyan Case*. Second, the PRC's straight baselines were declared in 1958, as noted above, long *before* any shelf dispute in the East China Sea arose. In fact, the declaration was the PRC's first legislation on the subject, not amending any pre-existing law. Therefore, even if Japan cites the *Tunisian-Libyan* rule in support of its own claim in future shelf delimitations with China (PRC and ROC), the rule's applicability to a wholly dissimilar East China Sea is only open to question.

Another aspect of the opposability of the PRC's straight baselines to Japan concerns their relationship to boundary delimitation principles. The straight baseline, by nature, extends more seward than does the normal baseline and consequently would affect any shelf boundary based on distance-oriented criteria, such as the equidistance principle, in favor of the state that adopts the straight baseline. The Indonesia-Malaysia continental shelf boundary is a case in point. Precisely to counteract such an effect resulting from Indone-

143. Continental Shelf, Separate Opinion of Jimenez de Arechaga, I.C.J. Reports 1982, p. 139.

sia's extensive straight baselines, Malaysia declared its own[144] shortly before the two states agreed upon their shelf boundaries in 1969. By the same token, should the equidistance principle apply to either the Yellow Sea or the East China Sea, Japan may, instead of objecting to the PRC's system, simply declare its own. However, if other principles based on depth of water or the natural prolongation of the coast apply, the effect of the straight baseline on the shelf boundary becomes nil since the boundary is drawn independent of the coastal configuration as well as the distance from the coast.

(4) Conclusion

In conclusion, the relevance of the PRC's straight baselines to the continental shelf delimitation in the East China Sea depends on the delimitation principle and the proportionality test to be employed. The delimitation principle should, in turn, be determined by the larger context of geography, geology, and geomorphology of the East China Sea as a whole.

(c) The Coastal Islands of Kyushu and Taiwan

(1) The Coastal Islands of Kyushu[145]

There are two groups of islands off the northwestern shore of Kyushu, namely, Goto Retto and, further south, Danjo Gunto and Tori Shima (Map 1). (The Osumi Gunto southeast of Kyushu are largely irrelevant due to their far-east location.) The Goto Retto, comprising seven main islands, are relatively large (240 sq. miles) and populous (150,000). They are situated about 25 miles west of Kyushu, separated therefrom by waters dotted with islets and rocks. Two islands in the Goto Retto were used six times as basepoints in constructing the southern portion of the Japanese-ROK shelf boundary in the Korea Strait.[146] Given their proximity to Kyushu, the Goto Retto perhaps might be enclosed in a straight baseline system as part of Kyushu should Japan decide to adopt one. However, the

144. Emergency (Essential Powers) Ordinance, No. 7, 1969, as amended in 1969, art. 3, UNLS/16, pp. 14, 15.

145. Unless otherwise indicated, descriptions of the physical geography of Goto Retto, Danjo Gunto, and Tori Shima are based on *Columbia Gazetteer, supra* Chapter 4, note 77, pp. 649, 701, Allen & Mitchell (1972), *supra* Chapter 2, note 28, pp. 803-04, and Park (1972), *supra* Chapter 1, note 18, pp. 30-32.

146. They were Sagono Shima and Shiro-Se, each of which was used three times. "Continental Shelf Boundary and Joint Development Zone: Japan-Republic of Korea," *Limits in the Seas*, No. 75, September 2, 1977, (Table 1).

Goto Retto are so located that they are relevant only to delimitation between Japan and Korea and not between Japan and China.

More troublesome to the Sino-Japanese delimitation are the Danjo Gunto and Tori Shima. The former consists of several small islets with a total area of less than four square miles. They lie 34 miles south of Fukue Shima, the largest and the southernmost island of the Gotto Retto. Tori Shima comprises two small islets lying 32 miles southwest of Goto Retto and 18 miles northwest of Danjo Gunto. With no intervening islands between them and Goto Retto, Danjo Gunto and Tori Shima cannot be connected with Gotto Retto by their territorial seas. Other than the existence of caretakers of a light house and a radio signal tower in Danjo Gunto, the two groups are also uninhabited. To complicate matters further, Danjo Gunto and Tori Shima are sitting on the geological continental shelf continuous from Korea but separated from Gotto Retto by the northernmost end of the Okinawa Trough. The ROK maintained, at least prior to 1974, that these islets were too small to generate their own continental shelf and that in any case, under the natural prolongation principle, Japan's continental shelf would terminate on the eastern rim of the Okinawa Trough near Goto Retto.[147]

When the 1974 Japan-ROK shelf boundary in the Korea Strait was delimited, the ROK seemed to have retreated from its previous position by allowing Japan to use Tori Shima as a basepoint[148] in determining the southernmost terminal point of that boundary. Danjo Gunto, unlike Goto Retto, are also likely to be used as basepoints by Japan in future Sino-Japanese delimitation because they are among the few Japanese territories north of 26°N latitude that are close to the Chinese mainland coast (Map 1).

(2) The Coastal Islands of Taiwan[149]

Three volcanic outcroppings, P'eng-chia, Mien-hua, and Hua-

147. *See supra* Chapter 2.

148. According to *Limits in the Seas, supra* note 143, the name of the islet was Torino Shima and not Tori Shima. However, on the naval chart attached to the book, only the latter appears. Moreover, Tori Shima's distance from the terminal point, actually measured by this author, is almost identical to the distance between the terminal point and the nearest Korean territory, Cheju. This finding is in accord with the distance figures in Table 1 of the same book. Therefore, the name "Torino Shima" is taken either as a typographical error or as another name of the same islet.

149. Unless otherwise indicated, descriptions of the physical geography of the P'eng-chia, Mien-hua, and Hua-p'ing Islets are based on Jui-nan Chou, "P'eng-chia Yu: Taiwan Ch'ih Tsui-pei-tien" [P'eng-Chia Islet: Taiwan's Northernmost Point], *Shih-yu t'ung-hsun, supra* Chapter 2, note 103, No. 281, p. 33 (Jan. 1, 1975). Chou identified his

p'ing Islets, lie 30, 23, and 17 miles, respectively, from the northern coast of Taiwan in the East China Sea (Map 1). All of them sit on the geological shelf continuous from Taiwan but separated from the Sakishima Gunto of the Ryukyu Islands by the Okinawa Trough. The total area of the group is less than one square mile. Otherwise uninhabited, there is a light house on P'eng-chia staffed with a few caretakers and weathermen.

The ROC's newly declared 12-mile territorial sea, applicable under international law even to the most tiny little landmass insofar as it is naturally formed and above high tide at all times,[150] connects the three islets with Taiwan by a continuous belt of territorial sea. However, the ROC's renunciation in its reservations to the Shelf Convention of the use of "exposed rocks and islets" as basepoints on shelf delimitation[151] could deprive them of any shelf entitlements. The PRC's straight baseline system, which was intended to apply to "Taiwan and its surrounding islands" as well, probably would give rise to protests from other states if it is applied to these islets. The straight lines connecting these islets and Taiwan obviously will depart appreciably from the general direction of the northern coast of Taiwan, even if the islets could be characterized as situated in the "immediate vicinity" of the Taiwan coast.[152]

(3) Relevance of the Coastal Islands of Kyuhsu and Taiwan

The geographic locations and physical dimension of these two groups of islets are largely comparable to those of the Tiao-yu-t'ai Islands. Some of the arguments that support the disregard of the Taio-yu-t'ais' presence in the Sino-Japanese seabed delimitation apparently are applicable here. Even if, however, the Tiao-yu-t'ais are differentiated by reference to their disputed status, the relevance of Danjo Gunto *et al.* still depends on two variables: first, whether the treatment accorded them is reciprocal; and second, whether the equidistance principle is used.

Despite the ROC's expressed disregard of "exposed rocks and islets" in shelf delimitation in its reservations to the Shelf Convention, this disclaimer does not seem to be unconditional. The ROC would be unlikely to adhere to that reservation unilaterally if the

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source as Keelung City Government, *Statistical Yearbook of the City of Keelung*. No publication date was indicated. *Ibid.*, p. 34.

150. Convention on the Territorial Sea and Contiguous Zone, art. 10(1).

151. *See supra* Chapter 2, text accompanying note 90.

152. *See supra* note 94.

other side refused to go along. In other words, reciprocity in treatment, which appears evident in the language of the reservations, would be crucial. Furthermore, the PRC has never disclaimed the use of islets as basepoints.

Assuming that all these islets would be used as basepoints, their relevance still would depend on what delimitation principle is to govern. As in the case of the PRC's straight baselines, the islets' use or non-use makes a difference only if a distance-oriented delimitation principle, *e.g.*, equidistance, applies. Thus, once again the conclusion is that the ultimate answer to the relevance question depends on the larger physical context of the East China Sea.

D. Geography as a Relevant Circumstance

Each independent sovereign state occupies a defined piece of the globe's dry surface as its territory. Boundaries between states on land, in rivers and lakes, or in the seas unavoidably involve the geography of that region. Distinctive geographical features, such as rivers and mountain ridges are often directly used, for practical purposes, as boundaries. Ever since the advent of the legal concept of the continental shelf, geographical considerations also have played a prominent role in shelf boundary delimitation, as evidenced by treaties, international judicial decisions, and state practice.

Geographical circumstances usually relate to *surface* features only, whereas *submarine* features fall into the ambit of regional geomorphology and geology. Specifically, two geographical features have generated the greatest influence in shelf delimitation: the overall coastal configuration and, to a lesser extent, the presence of islands. The former may be referred to as the "macrogeography," whereas the latter may be termed the "microgeography". In Chapter 4 the legal significance of small, isolated islands was examined. Here we shall deal with the macrogeography of the East China Sea. Since the choice of the equidistance principle in state practice to date (Table 4) is largely dictated by the coastal configuration of the delimiting states, it is adequate to treat the applicability of that principle together with the discussion of geography.

1. The Macrogeography of the East China Sea

The detailed physical geography of the East China Sea was noted in Chapter 1. Here we will only pinpoint a few legally significant features as a frame of reference. First, there exists no common land boundary between China and Japan, between Japan and the

ROK, or between China and the ROK.[153] The geographical relationships of the three states *inter se*, are, accordingly, opposite-coast situations (Map 1). Second, for the Japan-ROK and China-ROK pairs, the juxtaposition of the two "opposite" relationships exists only in the northern part of the East China Sea, roughly north of the 30°N parallel.[154] South of that latitude the opposite relationship finds itself only between Japan and China (ROC and PRC). For the purpose of this study, the former area is referred to as the North Region while the latter area is referred to as the South Region. Third, and more specifically, the Chinese coasts in the North Region include the Yangtze River estuary and the island-spattered Hangchou Bay. The Japanese coasts comprise those of Kyushu and its offshore islands. In the South Region, the Chinese coasts begin with the southern headland of the Hanchou Bay to the Hai-t'an Island in Fukien Province and include that of Taiwan whereas the Japanese coasts consist only of those of the Ryukyu Islands. In the North Region, which is a trijunction area, the future Sino-Japanese shelf boundary likely would be influenced by the future Sino-ROK and Japan-ROK boundaries and possibly by the Japan-ROK JDZ. As suggested earlier, politics rather than law would be more determinative of the outcome. We therefore shall focus more on the South Region, which is exclusively a Sino-Japanese sphere.

Between states having opposite coasts facing each other, the inevitable question relating to seabed delimitation is: should the equidistance principle apply? Japan's response is positive while the responses of China (and the ROK) are in the negative. It is therefore necessary to examine the applicability of that principle to the East China Sea in light of its macrogeography and precedents in international practice.

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153. The PRC and the DPRK (North Korea) do share a common land boundary, i.e., the Yalu River which is not, however, near the East China Sea.

154. The choice of the 30°N latitude as the demarcation line between two macrogeographically distinct regions is an intermediary position. The geographical trijunction point of the three median lines drawn between the coasts of Japan and Korea, Korea and China, and China and Japan has geographical coordinates of 30°46.2 N Latitude and 125° 55.5 E Longitude. That point, of course, is north of the 30°N parallel. On the other hand, the ROK's concession block K-7 extends to 28°36′N Latitude, which is south of the 30°N parallel, indicating the ROK's perception of the southern limit of the Sino-Korean, and Japanese-Korean opposite relationships. Controversial as the location of that demarcation line is, a sensible choice must be a convenient, intermediary one. Since the 30°N parallel roughly coincides with the geographical boundary between Kyushu (including the Osumi Gunto) and the Ryukyu Islands (including the Tokara Gunto) (Map 1) and the northern limit of the 1,000 meter isobath of the Okinawa Trough (Map 1a), it is accordingly chosen.

2. The Equidistance Principle: Should It Apply?

The equidistance principle is the rule, the application of which calls for the drawing of a line every point of which is equidistant from the nearest points of the baseline from which the breadth of the territorial sea is measured.[155] An equidistant line so drawn between opposite coasts is referred to as a "median" line, whereas the line between two adjacent coasts is a "lateral" line. This principle, sometimes with variations, has been used extensively in the state practice of maritime boundary delimitation for over one hundred years.[156] It also has been adopted by a number of bilateral and multilateral treaties. Its evolution as an important rule of international boundary delimitation and its legal and technical applications have been treated elaborately by the U.N. International Law Commission,[157] the ICJ,[158] and many commentators.[159]

Before we proceed to address the East China Sea problem, one important assumption has to be made. The presence of the Okinawa Trough, which makes the seabed issue two-dimensional, fundamentally disturbs the geological continuity on which the appliability of the equidistance principle in many cases is premised. Therefore, for the purpose of the following analysis, the Okinawa Trough is re-

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155. The technique of drawing a strict median line was said to be developed by a Colonel Lawrence Martin in connection with the Michigan-Wisconsin boundary in the Great Lakes. It was later used by the U.S. Supreme Court in Wisconsin v. Michigan, 297 U.S. 547 (1963), and theorized by S. Whittemore Boggs, a geographer advising the State Department, in his article entitled "Problems of Water Boundary Definition," *Geographical Review*, Vol. 27 (1937), p. 445. *See* Boggs (1951), *supra* Chapter 4, note 129, p. 258 note 30. But the use of median or equidistant line as water boundary began much earlier. *See* Padwa (1960), *supra* Chapter 4, note 129, p. 631. For the technical construction of an equidistant line, see Aaron L. Shalowitz, *Shore and Sea Boundaries*, Vol. 1, Washington, D.C.: U.S. Department of Commerce, Coast and Goedetic Survey, 1962, pp. 232-35.

156. Sang-Myon Rhee, "Sea Boundary Delimitation between States before World War II," *American Journal of International Law*, Vol. 76 (1982), p. 555. Some water boundaries, which in fact coincided with the equidistant line in whole or in larger part, did not refer to that principle as such but only enumerated geographical coordinates. This practice still prevails today. *See* the treaties listed in Table 4.

157. For a terse summary of the ILC's deliberations, see Etienne Grisel, "The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases," *American Journal of International Law*, Vol. 64 (1970), pp. 562, 570-73 [hereinafter cited as Grisel (1970)].

158. The North Sea Continental Shelf Cases, I.C.J. Reports 1969, p. 3, particularly the dissenting opinions.

159. *E.g.*, Padwa (1960), *supra* Chapter 4, note 129, pp. 631-47; Grisel (1970), *supra* note 157, pp. 570-79; Brown (1971), *supra* Chapter 4, note 129, pp. 57-62; Collins & Rogoff (1982), *supra* Introduction, note 23, p. 14 and pp. 24-29.

garded as non-existent and the geological shelf is assumed to extend from the Chinese mainland coast all the way to the Ryukyu Islands. We now begin the survey of state practice to see under what circumstances the equidistance principle is applied or rejected.

(a) State Practice

One of the direct consequences of expanded national maritime zones in the last two decades is the increasing overlapping jurisdictions and hence the urgent need to delimit boundaries between neighboring states. According to Dr. R. Hodgson,[160] the late geographer of the Department of State and a recognized authority on the geographical aspects of the law of the sea, as of mid-1976,

> [t]here are approximately 300 potential territorial sea or continental shelf boundaries at the present state of time and geography. Of these, 156 boundaries divide opposite states while 144 divide adjacent states. The figures are, surprisingly, nearly equal. Of the 156 "opposite" boundaries five are limited to the territorial sea, while eight of the adjacent boundaries fall in that category. Thus, there are 151 "opposite" territorial sea or continental shelf boundaries and 136 "adjacent" limits.[161]

Hodgson also indicated that only 21 per cent or (63) of the 300 potential boundaries have been negotiated by them, but he did not give separate numbers for each of the group of "adjacent" and "opposite" boundaries. By 1981, out of a total of 331 maritime boundaries, approximately 100 had been negotiated.[162]

A survey by this author, on the basis of a variety of sources to date concerning "opposite" shelf boundaries published under the auspices of the United Nations,[163] the United States Department of State,[164] and private publicists,[165] indicated 45 delimitations of "op-

160. Robert D. Hodgson and Robert W. Smith, "Boundaries of the Economic Zone," in Edward L. Miles and John King Gamble, ed., *Law of the Sea: Conference Outcomes and Problems of Implementation*, Proceedings of the Law of the Sea Institute, Tenth Annual Conference, June 22-25, 1976, Cambridge, Mass: Ballinger Publishing Company, 1977, p. 183 [hereinafter cited as Hodgson & Smith (1977)].

161. *Ibid.*, pp. 189-190.

162. See Robert D. Hodgson and Robert W. Smith, "Boundary Issues Created by Extended National Marine Jurisdictional", *The Geographical Review*, Vol. 69 (1979), p. 426 and Robert W. Smith, "The Maritime Boundaries of the United States", *ibid.*, Vol. 71 (1981), p. 397.

163. *I.e.*, UNLS/15, UNLS/16, UNLS/18, and UNLS/19.

164. *I.e.*, the *Limits in the Seas* series (97 issues as of August 1984).

posite" shelf boundaries (including the Anglo-French boundary), as shown in Table 4. (The Tunisian-Libyan shelf has not been delimited since the ICJ judgment.) The geographical distribution of these boundaries is as follows: Europe (14), Asia (16), the Americas (12), and the Oceans (3). With two exceptions, all the boundaries were delimited on or after 1965. This survey plainly shows the high frequency of the use of the equidistance principle. The list may well be incomplete, given the possibility of unpublished treaties. It nevertheless includes the vast majority of "opposite" shelf boundaries delimited to date and provides a reasonable basis for analysis.

Table 4 is intended to examine the correlations between the choice of the equidistance principle and the macrogeography of the opposite coasts. The concept of a "broad equality of coasts," as used by the *Anglo-French* Court of Arbitration to describe the macrogeography of the English Channel,[166] is employed here as a measuring rod. The coasts compared here involve only those that are *relevant* to the particular boundary delimitation, and thus do not include the same delimiting states' other coasts situated *outside* the delimitation area. For instance, the overall coasts of Norway and Denmark clearly are unequal; yet the parts of their coasts which actually were used as basepoints—those in the Skagerrak—in delimiting the Danish-Norwegian shelf boundary, are broadly equal in configuration and length.

It is submitted that in view of the great variety of coastal geographies, the labelling of two opposite coasts as being "broadly equal" inherently involves a measure of subjectivity. Some allowances for arguably different characterizations therefore are provided for. The brief remarks in Table 4 on salient geographical features also should shed some light on the labelling process. In some cases, the straight baselines may equalize otherwise broadly unequal coastlines.

The notions of "true" or "simplified" or "selective" equidistant lines are borrowed from Dr. Hodgson's usage[167] with certain modifications. Theoretically, in a "true" equidistant line, every point along the line must be equidistant from at least one basepoint on each coast; the turning points must be equidistant from three basepoints: one on one coast and the rest on the other. In practice, states follow that principle strictly in situations where their coasts are practically

165. *I.e.*, the multi-volume *New Directions in the Law of the Sea* (11 volumes as of August 1984). Other private sources have also been consulted, see Index to Sources Consulted in Table 4.

166. *Supra* note 42.

167. Hodgson & Smith (1977), *supra* note 160, pp. 188-92.

equal, but simplify, for administrative purposes, the boundary in certain localities by eliminating certain turning points, or by minor exchanges of areas. The former line thus is called a "true" median line while the latter is a "simplified" one. Both fall in the same category for being the closest to the geometrical median line. The "selective" equidistant line is one which is equidistant from the two baselines only at selected points of the boundary. As used here, this concept also includes boundaries, one or more segments of which are delimited under other principles or considerations. For instance, about 45 percent of the length of the Italy-Yugoslavia boundary was a true equidistant line; the rest was influenced heavily by equitable considerations necessitated by the presence of Yugoslav islands.[168] Similar situations appear in the Italy-Tunisia,[169] Iran-Saudi Arabia,[170] Australia-Indonesia,[171] and Canada-Denmark[172] boundaries.

Boundaries under the caption "other" refer to those delimited entirely under equitable or other considerations. It is unfortunate that the charts on which about ten percent of these 45 boundaries appear are unavailable; hence the impossibility of understanding the particular delimitation principle employed there. The principles actually applied may vary greatly. Where the boundary charts are published and studied, there is a strong consistency between the equidistant lines drawn on the charts and the references to the equidistance principle in the boundary agreements. Therefore, in some cases where charts are unavailable, the labelling of "true/simplified equidistance" is based on the references in treaty provisions,[173] subject, of course, to future studies on actual delimitations.

Despite some irregularities as stated above, a tentative general-

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168. *Supra* Chapter 4, note 37.

169. Italy-Tunisia shelf boundary, *ibid*., note 40.

170. Iran-Saudi Arabia shelf boundary, *ibid*., note 38.

171. Agreement Establishing Certain Seabed Boundaries, Australia-Indonesia, May 18, 1971, UNLS/18, p. 433; Agreement Establishing Certain Seabed Boundaries in the Area of the Timor and Arufura Seas Supplementary to the Agreement of 18 May 1971, Australia-Indonesia, 9 October 1972, *ibid*., p. 441. Both agreements, hereinafter referred to as the Australia-Indonesia shelf boundary agreement, are analyzed in "Territorial Sea and Continental Shelf Boundaries: Australia and Papua New Guinea-Indonesia," *Limits in the Seas*, No. 87, August 20, 1979. For further discussion, see *infra* text accompanying notes 270-80.

172. *Supra* Chapter 4, note 37.

173. *E.g*., the Columbia-Dominican Republic agreement, NDLOS, Vol. 8 (1980), p. 78. But in certain cases the designation in treaty text makes little sense. For instance, in Article 1 of the boundary agreement between Cuba and Haiti, it is stated that the EEZ shall be delimited "on the basis of the principle of equidistance *or* equity" (emphasis added). NDLOS, Vol. 8 (1980), p. 69.

ization seems possible on the basis of Table 4. While there are cases where the broad equality of opposite coasts was present but the parties resorted to principles other than the equidistance rule, there has been *no* instance where the coasts are *not* broadly equal but the parties nevertheless apply the equidistance principle. Logically, the existence of broadly equal coasts seems to constitute a *conditio sine qua non* to the application of the equidistance principle. A statistically positive correlation between these two variables thus can be established. This observation is supported by over 90 percent of the boundaries surveyed, with the delimitation principle of only three boundaries entirely unknown. Among the latter three, what is known is that all of them are located between two broadly equal coasts. Thus, even if all of them had been delimited under principles other than the equidistance rule, the above observation logically still would stand. This is so because the presence of broadly equal coasts is here established as a *necessary* condition, but not as a *sufficient* condition, to the application of the equidistance principle in its true, simplified, or selective versions.

(b) The *North Sea Cases*

The ICJ in this case reviewed at length the rationale, origin, and the legal status of the equidistance principle. It rejected the "fundamentalist aspect" for the contentions of Denmark and the Netherlands, namely the proposition that the equidistance rule was an *a priori* accompaniment of the continental shelf doctrine based upon the notion of proximity.[174] Meanwhile, the Court stressed that the natural prolongation principle, which conferred *ipso jure* title in respect of the continental shelf to the coastal state, was more fundamental to the continental shelf doctrine than the notion of proximity, which provided only *per se* title to land territory.[175] After reviewing the *travaux préparatoires* of Article 6 of the Shelf Convention, the Convention's provisions relating to reservations, and the state practice since 1958, the Court also dismissed the Danish and Dutch contentions that the equidistance rules either embodied or created customary rules of international law.[176]

It seems obvious that the Court was not addressing merely the equidistance principle as applied to an adjacent-coast situation, which was the subject of the *North Seas Cases*, but was examining

174. I.C.J. Reports 1969, pp. 28-31.
175. *Ibid.*, pp. 31-32.
176. *Ibid.*, pp. 32-46.

that principle in general. However, one is still inclined to view the geography of the three North Sea states (a concave German coast adjacent to two convex Danish and Dutch coasts (Map 13)) as the single most important factor underlying the Court's rejection of the equidistance rule since its application would obviously produce grossly inequitable results. An inevitable question immediately arises: would the Court's opinion hold true in an opposite-coast situations?

The Court in fact did address that question, albeit in a more casual way.[177] There are only two passages in the Court's opinion addressing the opposite situation and are thus worth quoting in full:

> 57. Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem—a conclusion which also finds some confirmation in the differences of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.
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> 58. If on the other hand, contrary to the view ex-

177. *Ibid.*, pp. 36-37.

> pressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.[178]

These passages present a more balanced picture of the equidistance principle. They should, of course, be read in their context. The Court then was comparing the equities between applying the equidistance rule in an opposite situation and applying it in an adjacent one. In the former, it is less likely to produce inequitable results if certain "disproportionately distorting" features are ignored. One difficulty with the dictum is that the geographical and geological contexts the Court had in mind are not entirely clear. Given the generality of its formation, the Court was presumably referring to the most common situation, i.e., two broadly equal or comparable coasts. Moreover, a geologically continuous continental shelf, which constitutes the natural prolongation of each state's territory, seems also to have been assumed. One is, accordingly, unable to predict what the Court's view would be if the assumed geographical and/or geological contexts were lacking. In any event, this dictum suggests nothing that supports an automatic and unconditional application of the equidistance principle in any opposite-coast situation and therefore should not derogate from the Court's general ruling that a delimitation should be effected by agreement in accordance with equitable principles.

(c) The *Anglo-French Arbitration*

Two geographical and legal factors that distinguish the *Anglo-French* case from the *North Sea Cases* render the former more relevant to the present question of the East China Sea. First, the Court of Arbitration was requested to actually delimit the course of the shelf boundary between France and the United Kingdom.[179] It thus had ample opportunity to weigh the specific geographical circum-

178. *Ibid.*
179. *Supra* note 40.

stances of the area in question. Second, the macrogeography involved in the *Anglo-French* case (Map 14), like that in the East China Sea and unlike that in the *North Sea Cases*, was an opposite-coast situation. The equidistance principle was more pertinent and its application accordingly had been closely examined.

In deciding the course of the boundary in the Channel Islands region, the Court began by identifying the "features and considerations" relevant to that region. The Court opined:

> . . . The region forms an integral part of the English Channel. . .; and for the purpose of delimiting its continental shelf the region has clearly, in the opinion of the Court, to be viewed in its context as part of that whole maritime area. . . . Along the whole 300 miles of the south coast of the Channel runs the mainland coast of the French Republic; along the whole 300 miles of the north coast of the Channel runs the mainland coast of the United Kingdom. Each country has some promontories on its coast and *the general result is that the coastlines of their mainlands face each other across the channel in a relation of approximate equality*.
>
> Between opposite States, . . . a median line boundary will in normal circumstances leave broadly equal areas of continental shelf to each State and constitute a delimitation in accordance with equitable principles. *It follows that where the coastlines of the two opposite states are themselves approximately equal in their relations to the continental shelf not only should the boundary in normal circumstances be the median line but the areas of shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable*.[180]

The Court then considered the presence of the Channel Islands and concluded that:

> Inevitably, the presence of these islands in the English Channel in that particular situation disturbs the balance of the geographical circumstances which would otherwise exist between the Parties in the region as a result of the *broad equality of the coastlines of their mainlands*.[181] (emphasis added)

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180. The Anglo-French Award, paras. 181-82.

181. *Ibid.*, para. 183.

It seems quite clear that for the equidistance principle to apply, the presence of an opposite-coast situation alone does not suffice. A more important geographical factor has to be present, namely, the coastlines of the two opposite states must be "approximately equal" in the sense that their respective length and irregular projections are broadly equal or comparable.

The geographical situation of the Atlantic region is distinguishable from that of the Channel Islands in that the areas of continental shelf to be delimited in the former lay "off" rather than "between" the coasts of France and the United Kingdom. This situation is similar to that of the continental shelf between China and Korea, and between Japan and Korea, in the East China Sea, but not between China and Japan (Map 1). The relevance of the Court's opinion in relation to the present case accordingly diminishes. However, the Court's reasoning in general still deserves attention. Relying on the "fact that in other respects the two States abut on the same continental shelf *with coast not remarkedly different in extent and broadly similar in their relations to that shelf*"[182] (emphasis added), the Court declared that the further seaward protrusion of the British Scilly Isles distorted the boundary delimited by reference to them, resulting in a "gain" of 4,000 square miles of shelf areas to the United Kingdom and a corresponding "loss" of the same magnitude to France.[183] A special circumstance in the sense of Article 6 of the Shelf Convention was, according to the Court, present and another boundary thus was justified to redress the inequity created.[184]

(d) The *Tunisian-Libyan Case*

The equidistance principle played a minor role in the decision of the ICJ in the *Tunisian-Libyan Case* primarily for two reasons. First, the Court, in recalling its 1969 judgment in the *North Sea Cases*, which also involved an adjacent-coast situation, reiterated that the equidistance method was not prescribed by a mandatory rule of international law; nor did it have any privileged status in relation to other methods in shelf delimitation.[185] Although that method had been employed frequently in state practice since 1969, the Court noted that states also deviated from it whenever equitable considerations dictated.[186] Second, the fact that both Tunisia and

182. *Ibid.*, para. 244.
183. *Ibid.*, para. 243.
184. *Ibid.*, para. 245.
185. I.C.J. Reports 1982, p. 79.
186. *Ibid.*

Libya were opposed to the use of the equidistance line, which they firmly believed would result in inequity in the present case, greatly impressed the Court.[187]

As the Court was requested under the parties' special agreement to clarify the delimitation method in the specific situation of the present case, it decided to adopt a two-sector-two-method approach, namely, applying two delimitation methods, respectively, in two sectors of the delimitation area.[188] In the first sector, which is immediately off the parties' territorial sea, the Court considered four possible lines before finally choosing the 26° northeast line as the shelf boundary[189] (Map 17). But, since the line is approximately perpendicular to the coast at Ras Ajdir, it becomes less appropriate as it extends farther out to the sea. Two factors required its change of course in the second sector: the abrupt turn of the coast of the Gulf of Gabes and the presence of the Kerkennah Islands and nearby low-tide elevations[190] (Map 15). As a perpendicular, the 26° line was unable to take account of these changed circumstances to which the Court attached great importance. A line based on other methods, which would veer in a more easterly direction than the 26° line, so as to reflect the geographical changes, therefore was called for.

In this connection the Court thought it proper to weigh the relevance of the equidistance line, which Tunisia once advocated in 1976 but dropped in its present memorial.[191] The Court first noted that it is the virtue as well as the weakness of the equidistance method to take full account of almost all the geographical variations of the coastline.[192] It then recalled its opinion in the *North Sea Cases* that the equidistance method would encounter much less difficulty in an opposite-coast situation than in an adjacent one. Then the Court concluded:

> The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States, and thus to produce a situation in which *the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations* than

187. *Ibid.*
188. *Ibid.*, pp. 82-83.
189. *Ibid.*, pp. 85.
190. *Ibid.*, pp. 86-89.
191. *Ibid.*, p. 87.
192. *Ibid.*, p. 88.

would otherwise be the case.[193] (emphasis added)

Since the final boundary delimited by the Court in the second sector was not an equidistance line, the equidistance principle thus only played a "reminder" role in pointing to the need for a line that takes full account of the relevant geographical circumstances in order to reach an equitable delimitation. The perspective in which the court placed the equidistance principle, which has given rise to criticism,[194] may be summarized below by quoting the Court's own words:

> Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that *equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed*.
>
> Nor does the Court consider that it is in the present case required, *as a first step*, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable. *A finding by the Court in favour of a delimitation by an equidistance line could only be based on considerations derived from an evaluation and balancing up of all relevant circumstances*. . . .[195] (emphasis added)

Given the limited role the equidistance principle played in the *Tunisian-Libyan Case*, the Court did not take the trouble to elaborate under what circumstances, other than the presence of certain geographical features, the application of the equidistance principle will lead to an equitable solution. Thus the *Tunisian-Libyan Case*, unlike the *Anglo-French* Arbitration, shed little light on whether the equidistance principle should apply to the Sino-Japanese shelf delimitation in the East China Sea.

The above analysis of the three cases confirms the conclusion that the applicability of the equidistance principle is a function or reflection of the geographical circumstances of a particular case. Specifically, the application of the equidistance principle seems to require a *broadly equal or comparable* geography of the coasts facing each other in an opposite-coast situation.

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193. *Ibid*.

194. *E.g*., E.D. Brown, "The Tunisia-Libya Continental Shelf Case: A Missed Opportunity," *Marine Policy*, Vol. 7 (1983), pp. 154-56.

195. I.C.J. Reports 1982, p. 79.

(e) The Equidistance Principle and the Sino-Japanese Seabed Delimitation

The above survey of international judicial cases suggests that while the *North Sea* and *Tunisian-Libyan Cases* did not specifically address the geographical circumstances under which the equidistance principle should apply, the *Anglo-French* Court did exactly that. The latter's ruling that the approximate equality of the coastlines of two opposite states makes equitable the application of the equidistance principle finds overwhelming support from state practices to date. The inevitable question therefore is: are the coastlines of China and Japan in the East China Sea broadly equal in their relations to the continental shelf?

(1) The North Region

If the Okinawa Trough did not exist, the equidistance principle would probably apply among the three states in the North Region *inter se*. For broad equality of coasts seems to be present *prima facie* between China and Korea, Korea and Japan, and China and Japan in that area (Map 1). Such broad equality exists initially in the Yellow Sea between the Chinese mainland coast and the west coast of Korea and in the Korea Strait between the southern Korean coast and Japan. Such broadly equal relationships continue southerly into the East China Sea, crossing the artificial boundaries between the Yellow Sea and the East China Sea, and between the East China Sea and the Korea Strait. The southerly extensions of the hypothetical Sino-Korean median line in the Yellow Sea and the existing Japan-ROK median line in the Korea Strait would divide approximately equally the continental shelf areas appertaining to each state. The two median lines would converge at a point with the geographical coordinates of 30°46.2′N latitude and 125°55.5′E longitude, which is now the westernmost point on the western limit of the Japan-ROK JDZ (Maps 6 and 1). Presumably, a Sino-Japanese median line would start at that point and extend in a southerly, then southwesterly, direction for about 90 miles, intersecting the 30°N parallel. The course of this median line would change if Danjo Gunto and Tori Shima were not used as basepoints and were not given full effect in the delimitation. Given the broadly comparable macrogeographies of the states' coasts, an equidistance line seems to be a good start for shelf delimitation in the North Region, subject to the proportionality test, to be discussed *infra*.

(2) The South Region

South of the 30°N parallel, with the Korean Peninsula, the Chejo Do, and Japan proper (Kyushu) out of the picture, the macrogeography of the East China Sea changes markedly (Map 1). In the west there still lie the coasts of the Chinese mainland and Taiwan; in the east, however, only those of the scattered Ryukyu Islands exist. Broad equality of coasts no longer presents itself *prima facie*. Moreover, the relationship of mainland (plus large islands) versus island chain is not unequal *per se*. The crucial tests, as suggested by the *North Sea* and *Anglo-French* cases involve the coastal configuration and the length of coastline. Does broad equality exist under each test between China (ROC and PRC) and Japan in the South Region?

Chapter 1 noted that the two seaward arcs formed by the Chinese mainland coast and the Ryukyu Islands chain largely are parallel. The addition of Taiwan's coastline to that of the Chinese mainland does not alter substantially this parallel relationship. Since the intervening water gaps between each island in the Ryukyu chain, the total length of which exceeds the total length of the landmass, hardly can be regarded as part of the islands' general configuration, then broad equality seems to be lacking.

As for the question of the length of coastline there is no obvious answer, however. A preliminary question is: how should the coastline be measured? Following all the sinuosities of the coast? Or its "general direction" and "coastal front" as suggested by the ICJ in the *North Sea* and *Tunisian-Libyan Cases*?[196] How should the length of islands be measured? Since the whole idea of measuring the length of coastline is intended for comparison, it matters little as long as the method is simple and equally applied.[197] Therefore, the "general direction" as well as the "coastal front" approaches to the mainland coast seem acceptable. Under the same rationale, an island's coast may be measured by its maximum length instead of following its sinuosities.[198] Under this formula, China (ROC and PRC) has, in the East China Sea, approximately 748 miles of coastline (365 miles in the South Region) for its mainland and Taiwan, whereas Japan has 415 miles for Kyushu, Osumi Gunto and the en-

196. I.C.J. Reports 1969, p. 52; I.C.J. Reports 1982, p. 91.

197. The *Tunisian-Libyan* judgment is in accord, I.C.J. Reports 1982, pp. 75-76.

198. The "maximum length" idea owes its origin to Donald E. Karl who developed it in Karl (1977), *supra* Chapter 4, note 36, p. 633, note 85 and accompanying text.

tire Ryukyu Islands (205 miles in the South Region).[199] For present purposes, the PRC's straight baselines are disregarded.

The above exercise indicates that broad equality does not seem to exist in the South Region between Chinese and Japanese territories in terms of coastal configuration and length. If the landmass of the Ryukyu Islands were as continuous as that of the four main islands of Japan proper, such a relationship probably would exist. Given the Ryukyus' broken-chain configuration with many intervening water gaps (the greatest distance being 120 miles between the Okinawa and Sakishima Guntos), it is only natural that their general configuration and length of coastline are not comparable to China's. In conclusion, the appliability of the equidistance principle to the South Region seems, absent broad equality of coastal geography, questionable, if not altogether impermissible.

3. The Equitability Test: Proportionality

The objection against the equidistance principle as applied to the South Region is directed primarily at its strict application, which is likely to result in disproportionate distortions of the boundary in view of the markedly incomparable configuration and length of coastlines of the two states in that region. This rationale brings into play the notion of proportionality in continental shelf delimitation. In fact, where the application of the equidistance principle is regarded as equitable, one element of such equity lies precisely in the broadly proportionate division it effects.[200] This element is quite visible in the opinions of the *North Sea Cases*, the *Anglo-French Arbitration*, and the *Tunisian-Libyan Case* quoted earlier. If, as suggested above, the landmass of the Ryukyus extended, like that of Japan proper, in a nearly uninterrupted fashion, the applicability of the equidistance principle probably would be assured, given the comparable configuration and coastal length and the resulting proportionate division of the assumed continuous continental shelf. It is therefore necessary to ascertain the legal status of the proportionality concept.

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199. For details about the calculations, see Table 5.

200. This point was well made by M.D. Blecher in Blecher (1979), *supra* note 9, pp. 73-77.

(a) Proportionality and the *North Sea Cases*, the *Anglo-French Arbitration*, and the *Tunisian-Libyan Case*

The proper role of the proportionality concept is not devoid of controversy. In the *North Sea Cases*, the Court specifically rejected the German contentions, "at least in the particular form they have taken," that each of the three North Sea states should get a "just and equitable share of the available continental shelf in proportion to the length of its coastline or sea-frontage."[201] The Court first distinguished delimitation from apportionment:

> Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal state and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though *in a number of cases the results may be comparable or even identical*.[202] (emphasis added)

It then dismissed the whole concept of "just and equitable share:"

> More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with . . . the most fundamental of all the rules of law relating to the continental shelf . . . namely that the rights of the coastal State in respect of the area of continental shelf that constitutes the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land . . . In short, there is here an inherent right.
>
> The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all,—for the fundamental concept involved does not admit of there being anything undivided to share out.[203]

Despite the strong language of these quotations, three inferences can be drawn. First, the Court did not reject the concept of proportionality as a factor in shelf delimitation, but it only discounted *an extreme application* of that concept. Second, the Court's objections are more theoretical than practical since the Court itself admitted

201. I.C.J. Reports 1969, p. 21.
202. *Ibid.*, pp. 21-22.
203. *Ibid.*, p. 22.

that "in a number of cases the result may be comparable or even identical." Third, and most importantly, the Court's reference in its final judgment to the concept of proportionality demands attention.

> A final factor to be taken account is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight and those with markedly concave or convex coasts, or *to reduce very irregular coastlines to their truer proportions*. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance principle method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.[204] (emphasis added)

Now the Court itself seemed to advocate the idea of proportionality, albeit in a less offensive fashion. This position in effect substantially modified its earlier rejection of the German contentions. (One may argue alternatively that the Court did not reject *this* part of the German contentions in the first place.) The message, somewhat confusing, seems to be that while the apportionment of the continental shelf into "just and equitable shares" is repugnant as a goal, it would be acceptable if it is brought about *accidentally* by delimitation under equitable principles. This distinction, even if discernible in theory, makes little sense in practice. Even the theoretical distinction cannot escape criticism.[205]

In the *Anglo-French Arbitration*, the Court's view is in accord with the ICJ's distinction between delimitation and apportionment.[206] But it specifically limited the effects of the latter's formula-

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204. I.C.J. Reports 1969, p. 52.
205. Grisel (1970), *supra* note 157.
206. Anglo-French Award, para. 78.

tion on the proportionality between the "coastal front" and the continental shelf entitlement to the particular geographical facts of the *North Sea Cases*.[207] It declared:

> In the present case, the role of proportionality in the delimitation of the continental shelf is, in the view of this Court, a broader one, not linked to any specific geographical feature. It is a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method.[208]

The role of proportionality thus is redefined as a "criterion or factor," and not a "general principle" providing an independent source of rights to areas of continental shelf,[209] and it is to be invoked only to check the presence of distortion.[210] Thus, both Courts define the role of proportionality as a factor; yet the ICJ would use it more positively while the *Anglo-French Court* would employ it only negatively.

In the *Tunisian-Libyan Case*, both parties stressed that the element of proportionality must be taken into account.[211] Finding itself in full agreement with the parties, the ICJ characterized that element as "a function [or aspect] of equity" and reiterated the relationship between it and the lengths of the coasts of states concerned.[212] In demonstrating the practical methods of delimitation in the present case, the Court, after having designated as shelf boundary the 26° line in the first sector to be connected by the 52° line in the second sector, used the element of proportionality as a test to evaluate the equitability of the shelf areas appertaining to each of the parties as a result of the delimitation by this boundary.[213] The Court first determined the area to be compared: the parallel of latitude passing through Ras Kaboudia and the meridian of longitude passing through Ras Tajoura.[214] The shelf boundary as delimited by the Court divided the seabed of the above area into two parts with an areal ratio of 60:40 between Tunisia and Libya.[215] The Court re-

207. *Ibid.*, para. 99.
208. *Ibid.*
209. *Ibid.*, para. 101.
210. *Ibid.*
211. I.C.J. Reports 1982, p. 43 and p. 75.
212. *Ibid.*, p. 76.
213. *Ibid.*, p. 91.
214. *Ibid.*
215. *Ibid.*

garded the ratio as comparable to the ratio of 69:31 in coastal lengths measured in the general direction of the two states' coasts and the ratio of 66:34 in coastal front measured by straight lines between the two states.[216] In conclusion,the Court stated that, "This result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity."[217]

Thus, the *Tunisian-Libyan Case* clearly confirms earlier decisions, particularly that of the *Anglo-French Arbitration*, that the element of proportionality is employed to test the equitability of a *given* boundary rather than to be used as an independent principle of continental shelf delimitation.

In sum, the notion of proportionality has been used in such a way that logically presupposes a general proportionality of the continental shelf entitlements between the parties in the delimitation area as the basis on which any distortion—a potential source of inequity—can be assessed accordingly. In the *North Sea Cases*, and the *Tunisian-Libyan Case*, the respective lengths of the coast of the three states serve as this basis of assessment, whereas in the *Anglo-French Arbitration* it was the broadly equal or comparable coastal geographies (including length and configuration) of the coasts of France and the United Kingdom.

(b) Proportionality and the Length of Coastline

Despite the slightly different forms of recognition accorded it, the proportionality concept in general seems to have been well recognized by international tribunals as well as by commentators.[218]

The linkage between the coastal length and the continental shelf entitlement also finds support in the fundamental concept that the "land dominates the sea"[219] declared by the ICJ. The coast of a state is where the land meets the sea under which the continental shelf lies and prolongs. Its length seems to be the single most objective criterion in measuring the continental shelf entitlement of a state. The

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216. *Ibid.*

217. *Ibid.*

218. Myres S. McDougal and William T. Burke, *Public Order of the Oceans: A Contemporary International Law of the Sea*, New Heaven and London: Yale University Press, 1962, p. 725; Shigeru Oda, "Proposals for Revising the Convention on the Continental Shelf," *Columbia Journal of Transnational Law*, Vol. 7 (1979), pp. 1, 27; Karl (1977), *supra* Chapter 4, note 36, pp. 665-72; Blecher (1979), *supra* note 200; Collins & Rogoff (1982), *supra* Introduction, note 23, p. 14.

219. I.C.J. Reports 1969, p. 50.

same has been true for the delimitation of other regimes of the seas for centuries. It would be unthinkable if a coastal state's maritime jurisdiction were determined by anything other than its coast. In its oft-cited quotation, which the *Anglo-French* Court endorsed, the ICJ opined:

> Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, *any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline*.[220] (emphasis added).

There are, however, objections to this "coastal length" approach to continental shelf delimitation. Opponents point out that it is vulnerable to manipulation by states in order to reach desired results.[221] Like any formula based on arithmetic calculations, potential manipulation of the factual input does exist; but this problem is not insurmountable. For instance, if the coastal length of a mainland is measured in the general direction of the coastline and islands by their maximum lengths, as was done earlier, rather than by following their sinuosities, the possibility of manipulation can be reduced substantially. The potential disagreement on the definition and equity of the "general direction" and the "maximum length" approaches is also possible, but it is certainly more manageable than requiring the parties to agree on the length of their coasts following all their sinuosities. Further, the coastal-length method does not requier a mathematically precise ratio of the length of coastline to the continental shelf entitlements, but rather requires a "reasonable proportionality," as the ICJ suggested. The percentage figures arrived at from the calculations only would serve as an indicator of the range of proportions for the parties. This clearly is demonstrated by the ICJ's computations in the *Tunisian-Libyan Case* discussed above. Finally, proportionality would and should operate always together with other delimitation principles since that notion *per se* semantically suggests no limits or boundaries. The chances of abuse thus further diminish.

(c) Proportionality and the Sino-Japanese Delimitation in the South Region

If the proportionality test as emodied by the coastal length ap-

220. *Ibid.*, p. 49.
221. Allen & Mitchell, *supra* Chapter 2, note 28, p. 812.

proach were applied to the South Region of the East China Sea, the resulting proportions of Chinese and Japanese continental shelves would look like those shown in Table 5.[222] The measurement of the length of the Chinese mainland coast in its general direction, ignoring the presence of minor protrusions and coastal islets, encounters little problem. But the shape of Taiwan poses a challenge to the equity of the "maximum length" approach to the coastal length of islands. Technically, Taiwan borders the East China Sea only at its northern and northeastern coasts with the rest of its coasts surrounded by the Taiwan Strait (west), the South China Sea (south), and the Philippine Sea (east) (Map 1). The "maximum length" approach, if strictly applied, would give Taiwan a coastal length of approximately 202 miles, a figure grossly incompatible with its actual length (81 miles) bordering the East China Sea, measured in the general direction of that part of its coast. Therefore, the "general direction" approach, which seems to fit better islands like Taiwan with sizes comparable to those of the mainland in some cases, is applied to Taiwan's northern and northeastern coasts as well as to the coast of Kyushu facing the East China Sea. On the other hand, the "maximum length" approach applies perfectly to the Ryukyus where the majority of the main islands are relatively small as compared to Taiwan, but long in shape. Their lengthy shape, unlike that of Taiwan, does not create problems, since they are mostly parallel to the general configuration of the East China Sea (Map 1).

The percentage figures in Table 5, 64 (or 65) percent for China and 36 (or 35) percent for Japan, are not intended to be mechanically applied in a way that divides up the whole South Region in precise shares. Rather, it is to be used to evaluate the inequities that might result from the strict application of a particular delimitation principle, or to serve as a guideline to the range of proportions an equitable delimitation ought to bring about.

4. Conclusion

The geographical factor has been, and will continue to be, one of the most important circumstances affecting the delimitation of continental shelf between neighboring states. A macroanalysis of the geography of the East China Sea, under the assumption that the Oki-

222. Calculations of the coastal lengths in Table 5 are based on U.S. Army Map Service, *The World, Series 1106, Sheet 8, Topographic Map: Southeastern Asia* (scale 1:5,000,000). This map may be obtained from the Defense Mapping Agency in Washington, D.C.

nawa Trough is non-existent, leads to the imaginary division of the area into two regions separated by the 30°N parallel. The division is justified by the distinctive macrogeographies of the two regions. In the North Region, all three states have coastal fronts with relatively heavy concentration of their territories. The broad equality of opposite coasts that exists in the Yellow Sea between China and Korea and in the Korea Strait between Korea and Japan continues southerly into the North Region. Consequently, the application of the equidistance principle, subject to the proportionality test, to the North Region seems to be broadly equitable and in general accord with international judicial decisions and state practice. On the other hand, the macrogeography of the South Region, where the Korea Peninsula and Japan proper largely cease to have any influence in boundary delimitation, calls for a markedly different treatment. The sharply incomparable coastal lengths of the Chinese mainland and Taiwan and the scattered Ryukyu Islands render a strict median-line solution *prima facie* inequitable. Although it may still be used as a reference line, it must again be subject to the proportionality test based on the length of the coast. The resulting ratio (China: 64 percent; Japan: 36 percent) provides a general range of proportions which an equitable delimitation ought to bring about. Actual delimitation of the boundary, however, has to await the review below of the regional geology and geomorphology in the East China Sea.

E. Geology and Geomorphology as Relevant Circumstances

In the preceding section, the geological and geomorphological aspects deliberately were disregarded in order to concentrate on the geographical circumstances of the East China Sea. Here we shall largely ignore the geographical aspects and exclusively examine the legal significance of the regional geology and geomorphology. In relation to the law on continental shelf, the geology and geomorphology of the seabed have two aspects: one concerns the seaward delimitation of the continental shelf; the other relates to inter-state delimitation. We shall deal with each aspect in the context of the East China Sea before assessing their implications for the Sino-Japanese seabed controversy.

1. Geology, Geomorphology, and the Natural Prolongation Principle

The definition (or seaward delimitation) of the continental shelf as adopted in Article 1 of the 1958 Shelf Convention contains two tests: depth (200 meters) and exploitability (wherever the superja-

cent water admits of exploitation). Designed to accommodate the interests of both the narrow-margin and broad-margin states, this definition fails to reflect truly the geological reality of the seabed, however. The juxtaposition of two criteria plus the vague words "adjacent to the coasts" have given rise to much confusion and controversy ever since 1958.[223] As if to becloud the already puzzling picture further, the ICJ in 1969 injected in the *North Sea Cases* a new element—natural prolongation of land territories—into the definition of the legal continental shelf. The Court formulated this "most fundamental" doctrine of the continental shelf in these words (in addition to those quoted on p. 161 *supra*):

> What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.[224]

And the geological or geomorphological underpinnings of that doctrine are also evident as the Court further noted:

> The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform. . . The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of appurtenance of the continental shelf to the State whose territory it does in fact prolong.[225]

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223. The question of the continental shelf's outer limit has been treated extensively by commentators. *See, e.g.*, Louis Henkin, "International Law and the Interest: The Law of the Seabed," *American Journal of International Law*, Vol. 63 (1969), p. 504; Luke W. Finlay, "The Outer Limit of the Continental Shelf: A Rejoinder to Professor Louis Henkin," *American Journal of International Law*, Vol. 64 (1970), p. 42; Louis Henkin, "A Reply to Mr. Finlay," *American Journal of International Law*, Vol. 64 (1970), p. 62; L.F.E. Goldie, "A Lexicographical Controversy—the Word 'Adjacent' in Article 1 of the Continental Shelf Convention," *American Journal of International Law*, Vol. 66 (1972), p. 829, and the references cited there.

224. I.C.J. Reports 1969, p. 31.

225. *Ibid.*, p. 51.

It is worth noting that, thirteen years later, that "most fundamental" doctrine of the continental shelf was downplayed by the ICJ in the 1982 *Tunisian-Libyan Case*, primarily because of the geophysical circumstances involved. In that case both Tunisia and Libya were in agreement as to the degree of importance they attributed to this concept.[226] They also regarded it as a major criterion for shelf delimitation, but they differed substantially in the definition and application of that principle to the present case.[227] At one point, Libya even went so far as to suggest that the natural prolongation was determinable as a matter of scientific fact by the application of geological criteria; equitable principles should therefore play no role in identifying the appurtenant continental shelf based upon the juridical concept of natural prolongation.[228]

Alarmed by the parties' excessive reliance on the literal interpretation of the 1969 *North Sea Cases* and the confusion and misunderstanding that case may have created as a result of overemphasizing the natural prolongation principle, the Court decided to place that principle in proper perspective by trimming its sweeping effect:

> The satisfaction of equitable principle is, in the delimitation process, of cardinal importance,. . ., and identification of natural prolongation may, *where the geographical circumstances are appropriate*, have an important role to play, in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases; but *the two considerations*—the satisfying of equitable principle and the identification of the natural prolongation—*are not to be placed on a plane of equality*.[229] (emphasis added).

As to the application of the natural prolongation principle to the present case, the Court stated that

> the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parites, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such;[230]

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226. I.C.J. Reports 1982, p. 43.
227. *Ibid.*
228. *Ibid.*, p. 44.
229. *Ibid.*, p. 47.
230. *Ibid.*, p. 92.

Thus, by attributing the irrelevance of the natural prolongation principle to the particular geophysical facts of the present case, the Court seemed to imply that if the relevant delimitation area does not constitute a single shelf, then certain criteria for delimitation may be derived from the principle of natural prolongation. The Court went further to point out that the geomorphological features present in the delimitation area were not sufficiently distinct to disrupt the geological continuity of the shelf, although it still may be considered as one of the relevant circumstances in delimiting an equitable boundary.[231] The Tripolitanian Furrow, a minor submarine valley but the most distinct geomorphological feature in the area, on the presence of which Tunisia relied as the "natural submarine frontier" of Libya's natural prolongation, was thus taken by the Court into account as a geomorphologically relevant circumstance but was given no weight in influencing the ultimate boundary.[232]

While the ICJ and commentators[233] were struggling with the exact meaning of the "natural prolongation" principle as it relates to the geology and geomorphology of the seabed, its impact was already deeply felt in a hitherto little noticed area—the East China Sea. The advent of that principle could not have been more timely for the ROK and ROC which, amid the euphoria brought about by the Emery Report, were eager to stake out their claims as far as possible into the East China Sea. The deep Okinawa Trough, which is situated closer to Japan than to the ROK or the ROC territories, was regarded by the latter two states as marking the outer limits of the continental shelf of the East China Sea under the natural prolongation principle. Both of them argued that the Japanese shelf as generated by Kyushu and the Ryukyus would prolong for a short distance and terminate in the vicinity of the Trough, whereas both Chinese and Korean shelves also would reach the Trough and the logical boundary would be a mid-channel line (Map 1). As discussed in Chapter 2 *supra*, the eastern limits of the ROC's claims (Map 9) and the ROK's concession area (Map 5), which largely follow the mid-channel line, clearly demonstrate the two states' reliance on the natural prolongation principle.

The way that principle was invoked seems to imply two possible

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231. *Ibid.*, p. 58.

232. *Ibid.*, pp. 55-58.

233. Robert Y. Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment," *International & Comparative Law Quarterly*, Vol. 18 (1969), p. 819; Brown (1971), *supra* Chapter 4, note 129, pp. 32-35; Wolfgang Friedman, *The Future of the Oceans*, New York: G. Braziller, 1971, pp. 41-43.

interpretations of it to the geological and geomorphological background of the East China Sea. The first is that the natural prolongation of a coastal state's territory is co-terminous with the outer limit of the continental margin (the shelf, the slope, and the rise), or at least with the base of the continental slope; that the Okinawa Trough is just such an outer limit of East Asian continental margin, or base of slope, where the seabed abruptly drops off to a depth exceeding 2,000 meters; and that the Okinawa Trough constitutes the boundary between the East Asian continent and the Pacific Ocean, with the shelf to its west being "continental" in crustal structure and the Ryukyu Islands to its east being "oceanic" in origin—volcanic outcroppings rising from the ocean floor. Under this interpretation, the natural prolongations of both the Chinese and Japanese territories in the East China Sea meet and end in the Okinawa Trough.

A second interpretation places the continent-ocean boundary (or the base of the slope) not in the Okinawa Trough but in the Ryukyu Trench in the Pacific Ocean east of the Ryukyu Islands (Map 1). The shelf, the Trough, and the island arc in the East China Sea landward of the Ryukyu Trench are considered but constituent parts of a highly irregular continental margin. The whole seabed of the continental shelf, the Trough, and the insular shelf therefore is subject to national jurisdiction and to boundary delimitation. However, as this theory affirms, the Okinawa Trough is such a distinct geomorphological feature that it marks the end of the natural prolongation of the territories of both China (and Korea) and Japan.

The first interpretation emphasizes the geological implication of the natural prolongation principle and bases its whole theory on the assumption that the Okinawa Trough marks the natural boundary of the East Asian continental crust and the Pacific oceanic crust. The second interpretation stresses more the *geomorphological* import of the natural prolongation principle and disregards the underlying crustal structure of the East China Sea and beyond.

The ICJ did not define specifically, in the *North Sea Cases* or the *Tunisian-Libyan Case*, how far or to what extent a coastal State's territory should or could prolong "naturally." One reason may be that the whole disputed areas were sitting on the geological shelf of the North Sea and the Pelagian Sea respectively and hence there was no need for the Court to elaborate on this question. But the Court's dicta seems to admit of both interpretations suggested above.[234] It

234. When discussing the question of adjacency, the Court did refer to "localities where, physically, the continental shelf begins to merge with the ocean depths" I.C.J.

seems that the application of the natural prolongation principle, with its geological and geomorphological underpinnings, really depends on how earth scientists characterize and classify certain submarine relief features such as the Okinawa Trough.

Some geologists who have studied the area do not treat the Okinawa Trough as part of the Asian continental shelf.[235] Nor do they specify precisely the crustal structure underlying the Trough, though they tend to believe that it is underlain by oceanic crust.[236] Others[237] regard the Trough, on the basis of its remarkably high heat flow, as "an embryo of a marginal sea basin,"[238] thus identifying it with more than 40 marginal ocean basins of the world.[239] The crustal structures of these marginal basins are, however, far from uniform. Some are definitely continental, *e.g.*, the North Sea and the Yellow Sea, or definitely oceanic, *e.g.*, the Gulf of Mexico. Others belong to neither type, but have an intermediate character, *e.g.*, the Sea of Japan.[240] Still other geologists think of the Trough simply as a continental bor-

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Reports 1969, p. 30. Despite the obvious error in that the geological continental shelf does not "merge with the ocean depths" immediately (could it be that what the Court meant was the *legal* continental shelf?), the Court was certainly aware of the issue in general and might have intended to include the whole slope as part of the natural prolongation of the coastal state. On the other hand, the Court did not make that point clear enough. And its reference to the Norwegian Trough, *ibid.*, p. 32, strongly implied that natural prolongation of the coastal state would terminate at the edge of the geological shelf in its narrowest sense. Commentators are widely divided on this question. *See supra* note 233.

235. *See* K.O. Emery et al., *supra* Chapter 1, note 7, pp. 13-38; John M. Wageman, W.C. Hilde & K.O. Emery, *ibid.*, pp. 1611, 1612-40.

236. *Ibid.* In a letter to this author dated April 30, 1980, Emery wrote [hereinafter cited as the Emery Letter]:

> So far as I know the structure of the crust beneath the Okinawa Trough is unproven, *but I am reasonably sure that it will turn out to be oceanic, not continental*. It is beyond the continental slope (generally the oceanward limit of the continental crust) and it is limited by volcanic islands of oceanic origin. Seismic refraction is needed to prove the origin. (emphasis added)

237. A. Sugimura and S. Uyeda, *Island Arcs: Japan and Its Environs*, Development in Geotectonics 3, Amsterdam-London-New York: Elsevier Scientific Publishing Company, 1973, p. 64. S. Uyeda "Northwest Pacific Trench Margins," in C. Burk and C.L. Drake ed., *The Geology of Continental Margins*, New York: Springer-Verlag, 1974, pp. 477, 483.

238. A. Sugimura and S. Uyeda, *supra* note 237, pp. 64-65; Uyeda, *supra* note 237, p. 477.

239. Hedberg (1970), *supra* Chapter 1, note 10, pp. 27-28.

240. H.W. Menard, "Transitional Types of Crust under Small Ocean Basins," *Geophysical Research*, Vol. 72 (1967), pp. 3061, 3063-64, 3071 [hereinafter cited as Menard (1967)].

derland,[241] a highly irregular relief feature in the continental margin with depths "well in excess of those typical of continental shelves."[242] A textbook example exists off the southern California coast.

All the above theories suffer from the same defect—they do not respond to the legally relevant question with certainty: what type of crust, continental or oceanic, does the Okinawa Trough overlie? But if the Pacific oceanic crust slides, as the plate-spreading theory postulates, under the Asian continental crust via the chain of trenches (including the Ryukyu Trench), then the Okinawa Trough could well overlie a crust of an intermediate character[243] belonging to neither the continental or oceanic origin.

The above discussion plainly shows that even the earth scientists do not speak with a certain voice on the proper classification of the Okinawa Trough. Still less can lawyers agree upon its legal status in seaward delimitation, for they have to base their opinion, at least in part, on geological and geomorphological findings under the natural prolongation principle. Indeed, nature does not lend itself to classifications and to definition of strict borderlines as desired by man. However inconclusive the geological answer to the question may be, international efforts to rewrite the law on continental shelf virtually may have made that question moot. The LOS Convention provides in Article 76, Paragraphs 1 and 10:

> 1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend

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241. Hollis D. Hedberg, "Political Boundaries and Economic Resources of the Oceans," in *Marine Technology and Law: Development of Hydrocarbon Resources and Offshore Structures*, Proceedings of the 2nd International Ocean Symposium, Ocean Association of Japan, Tokyo, 1977, p. 39 (1978). Emery disagreed. He said:

> The Okinawa Trough is not part of the continent like the continental borderland off California. The latter is landward of the continental slope and is known to be underlain by continental crust.

Emery Letter, *supra* note 236.

242. *Scientific Considerations Relating to the Continental Shelf*, Memorandum by the Secretariat of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), UN Doc. A/CONF.13/2 and Add. 1 (20 September 1957), UNCLOS I, *Official Records*, Vol. 1 (Preparatory Documents) (1958), pp. 38, 39 [hereinafter cited as the UNESCO Memo (1957)]. This memorandum is noted further in *infra* text accompanying note 246.

243. Northcutt Ely and Robert F. Pietrowski, "Boundary of Seabed Jurisdiction off the Pacific Coast of Asia," *Natural Resources Lawyer*, Vol. 8 (1975), pp. 622-23; Note, "Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Natural Continental Shelf," *Virginia Journal of International Law*, Vol. 17 (1976), pp. 96-102 [hereinafter cited as Virginia Note (1976)].

> beyond its territorial sea through the natural prolongation of its land territory to the outer edge of the continental margin, *or to a distance of 200 nautical miles from the baselines* from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend to that distance.
>
> 10. The provisions of this article are *without prejudice to the question of delimitation* of the continental shelf between States with opposite or adjacent coasts.[244] (emphasis added)

The rest of that article deals at length with the technical delimitation of the outer limits of the continental margin. For our purpose, Paragraphs 1 and 10 are sufficient. The second sentence of Paragraph 1 grants to a coastal state 200 miles of shelf jurisdiction irrespective of the submarine geology or geomorphology in the area. In other words, no matter where the real continental margin ends, the Ryukyu Islands would be entitled, at least theoretically, to 200 miles of continental shelf on each and every side of their coasts. As noted earlier, the width of the semi-enclosed East China Sea nowhere exceeds 400 miles; so that the Ryukyus could not possibly have a maritime zone of more than 200 miles (probably much less), given the need for delimitation under Paragraph 10. The issue thus changes from one of seaward delmitation under Article 76 (1) to one of interstate delimitation under Article 83. The pertinent question then becomes: how much *weight* should the Okinawa Trough, as a geologically or geomorphologically relevant circumstance, have in the Sino-Japanese seabed delimitation?

2. *The Legal Status of Troughs in Continental Shelf Delimitation between Opposite States*

In ascertaining the legal status of troughs in shelf delimitation, we again shall look for guidance from various sources of international law, including the Shelf Convention, state practices, the *North Sea Cases*, the *Anglo-French Arbitration*, the *Tunisian-Libyan Case*, and the LOS Convention.

(a) The Shelf Convention

The main *travaux préparatoires* of the Shelf Convention, namely, the deliberations at the United Nations International Law Commission, contain only casual references to submarine relief fea-

244. A/CONF.62/122, 7 October 1982, pp. 33-34.

tures similar to troughs. In the Comments on its 1953 Draft Article on the Continental Shelf, the ILC stated, with respect to the definition of continental shelf:

> Thus, although the depth of two hundred meters as a limit of the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in special cases in which submerged areas, of a depth less than two hundred meters, situated in a considerable proximity to the coast are separated by a narrow channel deeper than two hundred meters from the part of the continental shelf adjacent to the coast. Such shallow areas *must*, in these cases, be considered as continuous to that part of the shelf. It would be for the State relying on this exception to the general rule to establish its claim to an equitable modification of the rule. In case of dispute, it must be a matter for arbitral determination whether a shallow submarine area falls within the rule as here formulated.[245] (emphasis added)

Except for the fact that the word "must" was replaced by "could," virtually the same language appeared in the ILC's 1956 Commentary[246] to Draft Article 67, which later became Article 1 of the Shelf Convention. The ILC did not elaborate on the exact contents of such a formulation. Nor was this question seriously discussed in the Conference or addressed by the Shelf Convention.

It is of interest to note that the ILC's comments were attached to the legal definition of the continental shelf rather than to the rules of delimitation between states. The fact that both the 1953 and 1956 Comments suggested "arbitral determination" in case of dispute clearly indicates the ILC's awareness of this problem in both situations. In any case, given its sketchy formulation, the comment does not seem to be amenable to actual application, apart from the fact that it was but a weakly-worded comment to a draft article.

It also may be noted that the problem of geomorphological irregularities in the continental shelf was discussed in detail in a technical memorandum prepared by a group of geologists convened by the United Nations Educational, Scientific, and Cultural Organization (UNESCO)[247] shortly before the Geneva Conference in 1958.

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245. YBILC (1953), Vol. 2, *supra* Chapter 4, note 12, p. 214.

246. YBILC (1956), Vol. 2, *supra* Chapter 4, note 14, p. 297.

247. *Supra* note 242, p. 39.

Three types of marked geological depressions, other than the shallow and small submarine valleys, were considered:

> (a) [T]he depressions that communicate with the deep sea beyond the ouer edge of the shelf only over a sill at the level, or nearly at the level of the shelf floor; (b) wide flat-floor troughs lacking a sill in the outer part; and (c) the narrow canyon-like valley which slope out to the deep-sea floor.[248]

The Norwegian Trough, cited as an example of the first type, was regarded as constituting a part of the geological shelf adjacent to it. The canyons off California, falling under the third type, were considered more controversial. But the geologists, interestingly enough, argued that "from the point of view of convenience for international legislation," it should be treated as part of the surrounding shelf. No mention was made of the Okinawa Trough which, on its merits, fits into none of the three types.

(b) State Practice

There have been very few cases in which distinct geomorphological features are present and capable of being used directly as a shelf boundary or influencing the potential boundary. The vast majority of shelf boundaries delimited to date are located in enclosed or semi-enclosed seas with relatively shallow waters and a single, continuous geological shelf, such as the Persian Gulf, the Baltic Sea, and the North Sea. Minor discontinuities sometimes exist (such as the Hurd Deep to be discussed in connection with the *Anglo-French Arbitration* below), but they by no means disrupt the essential unity of the shelf of the respective seas as a whole. For those areas with more distinct features, such as submarine areas well in excess of 200 meters, few have the necessary channel-like shape and parallel location even to be considered for a boundary. For instance, there are such large deeps exceeding 1,000 meters in the Adriatic Sea, yet they are so evenly distributed in relation to the Italian and Yugoslav coasts that their effects on the boundary, if any, are equalized.[249] The same can be said of almost all the shelf boundaries involving Italy in the Mediterranean Sea[250] and India in the Bay of Bengal, Gulf of Man-

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248. *Ibid.*, pp. 43-44.

249. *See supra* Chapter 4, note 38.

250. Italy-Yugoslavia shelf boundary, *ibid.*; Italy-Tunisia shelf boundary, *supra* Chapter 4, note 40; Italy-Spain shelf boundary, *supra* note 173, Italy-Greece shelf boundary, Senato della Repubblica (vii Legislatura), No. 1443. [1977].

nar, and Arabian Sea[251] as well as the Canadian-Danish shelf boundary in the Davis Strait between Canada and Greenland.[252]

One possible exception may be the Northeast Channel in the Gulf of Maine that divides the Georges Bank on the U.S. side and the Browns Bank on the Canadian side. The delimitation of maritime boundary between the U.S. and Canada is now pending before a special chamber of the ICJ.[253] The boundary claimed by the U.S. roughly follows the mid-channel line of the Northeast Channel.[254]

The Northeast Channel extends 70 km. (38 miles) long and 40 km. (22 miles) wide, with an average water depth of less than 300 meters, as compared to 90 meters of average depth in waters over the Georges Bank and the Browns Bank.[255] Geomorphologically, it connects the Georges Basin in the Gulf and the outer edge of the continental margin bordering the Atlantic ocean floor.[256] Geologically, the Channel was formed by fluvial erosion effected by a well-developed pre-Tertiary drainage system in the Gulf of Maine at the site of the Georges Basin and the Channel itself.[257]

Considered as a whole, the Northeast Channel, distinct as it is compared to nearby submarine relief features, is nevertheless a minor depression of the continental shelf not on the same plane as the Norwegian, Timor and Okinawa Troughs to be discussed *infra*. (See Table 6.) Moreover, there is as yet no boundary based on the presence of the Channel; it is only a claim by the United States. In his search for distinct belief features in state practice on shelf delimita-

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251. *E.g.*, India-Indonesia shelf boundary, *supra* Chapter 4, note 42; India-Sri Lanka historical water boundary, *supra* Chapter 4, note 44. Another maritime boundary was delimited in 1976. Agreement on the Maritime Boundary in the Gulf of Mannar and the Bay of Bengal and Related Matters, India-Sri Lanka, March 23, 1976. "Maritime Boundaries: India-Sri Lanka," *Limits in the Seas*, No. 77, February 16, 1978. In the same year India also delimited its maritime boundary with Maldives. Agreement on Maritime Boundary in the Arabia Sea and Related Matters, India-Maldives, 28 December 1976. *See* "Maritime Boundary: India-Maldives and Maldives' Claimed Economic Zone," *Limits in the Seas*, No. 78, July 24, 1978.

252. "Continental Shelf Boundary: Canada-Greenland", *Limits in the Seas*, No. 72, August 4, 1976.

253. Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Canada), Order of 20 January 1982 Constituting the Chamber, I.C.J. Reports 1982, p. 3.

254. United States Department of State, *Maritime Boundaries between the United States and Canada*, Public Notice 506, reprinted in *Federal Register*, Vol. 41 (1976), pp. 48, 619.

255. See J. Allan Ballard and F.H. Sorensen, "Preglacial Structure of Georges Basin and Northeast Channel, Gulf of Maine", *AAPG Bulletin*, Vol. 52 (1968), p. 494.

256. *Ibid.*, p. 495 (figure).

257. *Ibid.*, pp. 498-99.

tion eligible for the present purpose, this author has been able to find only three boundaries and one joint development zone that lie near such eligible features: the Norway-United Kingdom[258] and Denmark-Norway[259] boundaries near the Norwegian Trough, the Australia-Indonesia boundary[260] near the Timor Trough, and the Japan-ROK Joint Development Zone near the Okinawa Trough.[261]

(1) The Norway-United Kingdom Shelf Boundary

The North Sea[262] (Map 13) has an area of 222,000 sq. miles. Other than the Norwegian Trough and a few small and isolated deeps, the water depths are less than 200 meters. The Norwegian Trough is a well-defined submarine depression lying 2 to 10 miles off the south and west coasts of Norway. It has a depth ranging from 200 to 670 meters, a width from 20 to 81 miles, and a length of around 430 miles. Norway and the United Kingdom delimited their shelf boundary in 1965 by a true median line measured from their respective coasts.

The boundary is a pioneer of its kind in several aspects.[263] The parties' disregard of the presence of the Norwegian Trough in drawing the median line is but one of them. With respect to the reasons for ignoring the Trough, note the following:

(a) Conclusive geological evidence[264] has long established that the Trough, like numerous fjords along the Norwegian coasts, is but a result of deeper planning activities by glaciation during the Glacial Epoch when the sea level was much lower than it is today. So its geological continuity with the rest of the North Sea shelf has never

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258. *Supra* Chapter 4, note 34.

259. *Ibid.*, note 37.

260. *Supra* note 127.

261. "Continental Shelf Boundary and Joint Development Zone: Japan-Republic of Korea," *Limits in the Seas*, No. 75, September 2, 1977.

262. The geography and geomorphology of the North Sea is based on the *Encyclopedia of Oceanography, supra* Chapter 1, note 5, p. 543 (North Sea).

263. The other important contribution of this agreement was its provision on unitization of common mineral deposits (Article 4). For details, see Lagoni (1979), *supra* Chapter 3, note 3, pp. 229-33.

264. O. Holtedahl, *The Submarine Relief off the Norwegian Coast*, (Oslo, 1940); Hans Holtedahl, *On the Norwegian Continental Terrace, Primarily Outside Möre-Romsdal*, Bergen: John Griegs Boktrykkeri, 1955, *cited in* the UNESCO Memo (1957), *supra* note 242, pp. 41, 43. *See* also Hedberg (1970), *supra* Chapter 1, note 10, p. 28. It was stated:

> Some of these marginal semi-enclosed seas are definitely epicontinental, such as *the North Sea*, Persian Gulf, Irish Sea, *Yellow Sea*. . .These are underlain by continental crust and generally have thick sedimentary fillings. Most of them have water depths of no more than a few hundred meters. (emphasis added).

been changed, despite the fact that it is much deeper (up to 670 meters) than the rest of the shelf (up to 200 meters).

(b) The United Kingdom has always taken the view that the equidistance principle should apply in the North Sea, given the broad equality between its coast and that of Norway. The two states also had been in agreement on ignoring the presence of the Norwegian Trough long before they negotiated the 1965 boundary agreement. During the 1958 Geneva Conference, delegates from the two states specifically supported the geological finding that the Trough was a part of the North Sea shelf.[265] When the United Kingdom unilaterally declared its continental shelf jurisdiction in 1964,[266] the outer limits of the claim actually lay 2 to 12 miles *west* of the true median line[267] (i.e., more landward to the British than to the Norwegian coast). According to one publicist who has studied Britain's shelf law and policy:

> The British restraint arose from the pragmatic desire to proceed as quickly as possible and to avoid time-consuming disputes, and an acknowledgment that equity would appear to be on the side of opposition to a greatly extended British claim reaching to the Norwegian Trench [sic].[268]

In any event, the Anglo-Norwegian boundary was the result of a variety of legal and extra-legal considerations. But it seems fair to conclude that the conclusive geological evidence about the shelf and the Trough provides the primary justification and makes any contrary argument difficult.

(2) The Denmark-Norway Shelf Boundary[269]

Denmark and Norway face each other across the bay-like Skag-

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265. *See* UNCLOS I, *Official Records*, Vol. 6 (1958), pp. 41 (statement of Miss Gutteridge, delegate of the United Kingdom), 48 (statement of Mr. Stabell, the Norwegian delegate).

266. Continental Shelf Act of 1964, UNLS/15, p. 445; Continental Shelf (designation of Areas) Order 1964 (12 May 1964), *ibid*., p. 447.

267. Richard Young, "Offshore Claims and Problems in the North Sea," *American Journal of International Law*, Vol. 59 (1965), pp. 505, 511.

268. L.F.E. Goldie, "A Symposium on the Geneva Conventions and the Need for Future Codifications," *in* Lewis M. Alexander ed., *The Law of the Sea: Offshore Boundaries and Zones*, Proceedings of the First Conference on the Law of the Sea sponsored by the Law of the Sea Institute, University of Rhode Island, Columbus, Ohio: The Ohio State University Press, 1967, pp. 273, 277 [hereinafter cited as Goldie (1967)].

269. The geographical and bathymetrical descriptions of the Denmark-Norway shelf boundary is based on *Europe: The North Sea* (U.S. Naval Chart, H.O. 4840, 18th ed., Nov. 1945, rev. Mar. 1966) which is attached to "Continental Shelf Boundaries: The

errak with an average width of 60 miles (Map 13). In the northern half of the seabed, the Norwegian Trough closely follows the Norwegian coastline and runs nearly throughout the Skagerrak for a distance of 100 miles. It then turns north at where the Skagerrak opens to the North Sea. The southern half of the seabed in the Skagerrak, with superjacent water less than 200 meters in depth, is continuous from the vast North Sea continental shelf.

Denmark and Norway delimited their shelf boundary in 1965 by a true median line. The eastern terminal of the boundary begins in the Skagerrak where the Norwegian-Swedish shelf boundary ends, and extends all the way to the North Sea until it reaches the trijunction point of the Anglo-Norwegian and Anglo-Danish boundaries. Of the 255-mile boundary, 31 percent, or 80 miles, is in the Skagerrak where the Trough is present and 69 percent, or 175 miles, is in the North Sea where the seabed is relatively continuous. In the Skagerrak, the 200-meter isobath and the median line lie side by side and intersect nearly at the mid-point of the latter.

A few observations are in order. Geologically, as noted in connection with the Anglo-Norwegian shelf boundary, the Norwegian Trough is an integral part of the North Sea continental shelf. Geological continuity of the whole seabed in the North Sea renders irrelevant the Norwegian Trough *qua* geological circumstances in shelf boundary delimitation in the region. Geographically, the coasts of Denmark and Norway present a textbook case of opposite coasts. Broad equality of coasts in the Skagerrak is self-evident. In the North Sea where the shelf lies "off" rather than "between" the coasts, the basic opposite relationship and broad equality continue. An equidistant boundary seems, therefore, *prima facie*, equitable. Possible alternative boundaries based on geomorphological features such as the 200 meter isobath or the mid-channel line of the Trough are justified neither by any "special circumstances" nor by any other equitable consideration.

In conclusion, the geological unity of the seabed in the Norway-United Kingdom and Denmark-Norway cases seems to be a condition precedent to the application of the equidistance principle. A trough is, after all, a geological feature. Geographical factors may constitute a sufficient condition and make the median line boundary imperative. It is only natural that the three states involved disre-

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North Sea," *Limits in the Seas*, No. 10, June 14, 1974. Unfortunately this chart is too big to be reproduced here.

garded the Norwegian Trough, which had become a neutral factor in light of conclusive scientific evidence.

(3) The Australia-Indonesia Shelf Boundary[270]

Australia fronts Indonesia across the Timor Sea in the west and the Arufura Sea in the east where vast shelves and deep trenches coexist (Map 18). The two seas are semi-enclosed, with Timor, Tanimbar, Aru, New Guinea, and other Indonesian islands forming a chain in the north and the Australian continent in the south. The shelves, known as the Sohul Shelf in the west and the Arufura Shelf in the east, slope gently north for a distance of roughly 170 and 350 miles, respectively, from the northern coast of Australia. The superjacent water has a depth of 50 to 140 meters. The shelves abruptly decline to the Timor Trough and Arufura Trough with maximum depths of 3,200 and 3,650 meters, respectively. The Arufura Trough, which is surrounded by Indonesian islands, and the Timor Trough, which lies much closer to the Indonesian than Australian territories, intersect at an angle of about 120 degrees near the Indonesian island of Tanimbar. They are in fact part of the arc of deep troughs and trenches extending from the Ceram Sea in central Indonesia to the Java Trench in the Indian Ocean. Geologically, the Timor Trough is an elongate submarine basin of young age classified by geologists as a marginal deep. The whole Timor Sea and the southwestern part of the Arufura Sea will be the focus of the following analysis.

In 1971 and 1972, two shelf boundary agreements[271] were signed between Australia and Indonesia (not including the one in 1973[272] with Australia acting on behalf of the then dependent Papua New Guinea) in the area just described (Maps 19 and 20). At the time East Timor was still a Portuguese colony and disputes between Lisbon and Canberra on the legal character of the Timor Trough had prevented any shelf delimitation in that area. A "gap" thus exists. By 1978 East Timor had been incorporated by Indonesia and difficult negotiations between Canberra and Jakarta have been

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270. The descriptions of geography, geomorphology, and geology of the Australia-Indonesia shelf boundary area are based on *Encyclopedia of Oceanography, supra* Chapter 1, note 5, pp. 44 (Arufura Sea), 755 (Sahul Shelf), 923 (Timor Sea), and *Limits in the Seas*, No. 87 *supra* note 171.

271. *Limits in the Seas*, No. 87, *supra* note 171.

272. Agreement Concerning Certain Boundaries between Indonesia and Papua New Guinea, Indonesia-Australia, 26 January 1973, UNLS/18, p. 444. The text of this agreement is reprinted nearly in full, and the boundary is analyzed, in *Limits in the Seas*, No. 87, *supra* note 171, pp. 4, 11.

under way since then to delimit the gap area.[273] Constructed with 25 turning and terminal points, the existing boundary has two segments with 133°23'E longitude as the dividing line on which Pont A12 is located. The segment of the boundary delimited by the 1971 agreement (hereinafter referred to as the Eastern Segment) begins at Point A2 and ends at point A12. Point A3 is the trijunction point of the median line boundaries of Australia, Indonesia, and Papua New Guinea (Map 19).

The boundary delimited by the 1972 agreement (hereinafter referred to as the Western Segment) begins at Point A12 and ends at Point 25 (Map 20). The entire Eastern Segment lies in the Arufura Shelf (200 meter or less) whereas the Western Segment rests, with minor exceptions, either in the sill (1,400 meters or more) that separates the Arufural Trough from the Timor Trough or in the Timor Trough (2,000 meters or more). The Eastern Segment, 378 miles long, is a true median line drawn between the normal baselines between the two coasts.[274] Indonesia's straight baselines were ignored.[275] The Western Segment was delimited in accordance with equitable principles, taking into account the existing Australian oil concession blocks and the submarine geomorphology.[276] The Western Segment, 551 miles long, is located from 20 to 80 miles north of the hypothetical true median line and 20 to 65 miles south of the deepest-water line between the two 200-meter isobaths contiguous from the respective coasts.[277] The boundary thus delimited is said to be negotiated between the true median line and the deepest-water line, resulting in unequal proportions appertaining to each state.[278] The ratio is roughly three to one or two to one in favor of Australia.

A number of observations can be made with respect to the choice of delimitation principles, the weight given to regional geomorphology, and the macrogeography. First of all, Australia and Indonesia had applied the equidistance principle only to the Arufura Shelf which geologically is continuous from New Guinea and Australian continent. In areas beyond the 200-meter isobath where the

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273. *Limits in the Seas*, No. 87, *supra* note 171, pp. 4, 11. *See also* Ron Richardson, "Drawing the Seabed Line," *Far Eastern Economic Review*, March 10, 1978, p. 79; R.D. Lumb, "The Delimitation of Maritime Boundaries in the Timor Sea," *Australian Yearbook of International Law*, Vol. 7 (1981), p. 72.

274. *Limits in the Seas*, No. 87, *supra* note 171, p. 7.

275. *Ibid.*

276. *Ibid.*

277. *Ibid.*

278. *Ibid.*

deep Timor Trough separates the two geological shelves continuously from the two parties' coasts, the equidistance principle was employed merely for reference in negotiating a boundary according to equitable principles. An innovative combination of median and deep-water lines produced an intermediate boundary. Second, the geomorphology of the Timor Sea, particularly the presence of the Timor Trough, appears to be the most important "relevant circumstance" considered by the parties.[279] The notion of a deepest-water line drawn between the two 200-meter isobaths clearly shows that the presence of the deep Timor Trough was taken fully into account and given considerable weight, although it was not the only decisive factor in the delimitation. Finally, the boundary seems, in terms of macrogeography, to have been delimited pursuant to the notions of broad equality of coasts and proportionality (Maps 18 and 19). The Eastern Segment lies between the coasts of New Guinea (the second largest island on earth) and the Aru Islands on the one hand, and the coast of northern Australia on the other. Each coast has large bays or bights as well as promontories facing each other (Map 18); the broad equality of coasts seems obvious. The Western Segment, however, is situated between the western part of the Australia coast and a chain of Indonesian islands interrupted by a number of water gaps ranging in distance from 10 to 50 miles. The delimitation of the Western Segment seems to have brought about a reasonable degree of proportionality between the lengths of the parties' respective coasts in the particular area (Australia: 751 miles (67 percent); Indonesia; 365 miles (33 percent) and the continental shelf areas appertaining to them (Australia: 67-75 percent; Indonesia: 33-25

279. The observation is in part supported by a statement of Australia's Foreign Minister, Mr. W. McMahon, made on October 30, 1970, in Australia's House of Representatives. *Australian Yearbook of International Law 1970-1973*, (1975), pp. 145, 145-48. He first interpreted the natural prolongation concept, recently declared by the ICJ in the *North Sea Cases*, as a morphological one which, when applied to the seabed, would include the "lower edge of the [continental] margin". He then defended the Australian claim in the following words:

> [T]he rights claimed by Australia in the Timor Sea are based unmistakably on the morphological structure of the sea bed. [He then described the Timor Trough.] *The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves*, and not one and the same shelf, separating the two opposite coasts. The fall-back median line between the two coasts, provided for in the Convention in the absence of agreement, would not apply for there is no common area to delimit. This Australian view is of course well known to Indonesia. There has in fact been recent exchange of views, still incomplete, between Indonesian and Australian officials (emphasis added).

Ibid., p. 146.

percent).[280] The striking resemblance of physical conditions between the Timor Sea and the East China Sea will be analyzed further below.

(4) The Japan-ROK Joint Development Zone

It was pointed out in Chapter 2 that the JDZ falls entirely on the Japanese side of the Japan-ROK hypothetical median line. While the JDZ's northeastern rim largely follows this median line, its eastern rim actually coincides with the eastern rim of the ROK's Block K-7 (Maps 5 and 6), which is the easternmost limit of the ROK's continental shelf claim based on the natural prolongation principle. Approximately half of the JDZ's eastern rim lies right in the middle of the Okinawa Trough, roughly following the deepest-water line (Map 1).

Thus, the JDZ is located between the ROK's claimed shelf limit based on the natural prolongation principle and Japan's claimed shelf limit based on the equidistance principle. It is a typical compromise,[281] with each party's claimed limit being given roughly half effect in delimiting the ultimate zone which, as suggested earlier in this Chapter, functions as a *de facto* shelf boundary zone.

In this sense, the presence of the Okinawa Trough, as represented by the deepest-water line, did influence the delimitation of the JDZ. The fact that Japan was willing to recognize the presence of the Okinawa Trough as a relevant circumstance and to give it partial effect in shelf zone delimitation will have significant implications for Sino-Japanese shelf delimitation.

(c) The *North Sea Cases*

This case involved no question of distinct geological depression. When the tripartitie dispute was brought before the ICJ, the Norwegian Trough had been dealt with satisfactorily, as discussed above. The Court nevertheless addressed the question of the Trough:

> Without attempting to pronounce on the status of that feature, the Court notes *that the shelf areas in the North Sea*

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280. The coastal length of Australia (902 miles) is measured in the general direction of the coastline whereas the lengths of the Indonesian islands (516) by their total maximum lengths. The maximum length of the coast of Portuguese Timor (151 miles) is subtracted from both figures since that part of the shelf remains undelimited.

281. For a similar view, see Sang-Myon Rhee, "The Application of Equitable Principles to Resolve the United States-Canada Dispute Over East Coast Fishery Resources," *Harvard International Law Journal*, Vol. 21 (1980), p. 678, note 48.

> *separated from the Norwegian coast by the 80-100 kilometers of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation*. They are nevertheless considered by the States parties to the relevant delimitations. . . to appertain to Norway up to the median line [Map 12]. True these median lines are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.[282] (emphasis added)

The context of this passage was that the Court was then discussing notions of "proximity," "adjacency," "equidistance," and "natural prolongation."[283] The Court indicated that notions of "proximity" or "adjacency" were not as fundamental to the continental shelf doctrine as the natural prolongation principle. By using the Norwegian Trough as an example, the Court was able to show that but for the parties' disregard of the Trough, a part of the shelf areas west of the Trough, although nearer to Norway than to the United Kingdom, could not have been properly appurtenant to Norway because neither was it adjacent to, nor a natural prolongation of, the Norwegian coast.

Having no direct bearing on the outcome of the case, this passage is clearly dictum. But because the doctrine of *stare decisis* is unknown in international law, the "distinction between the *ratio* of a judgment and *obiter dicta* is less important than it usually is in municipal law,"[284] and the weight of this passage cannot be dismissed lightly as such.

(d) The *Anglo-French Arbitration*

It was briefly noted earlier that apart from the general geological continuity of the English Channel, an irregular relief feature was a source of a minor controversy. This was an alleged distinct fault or series of faults, known as the Hurd Deep. With a width of one to three miles, a depth of over 100 meters, and a length of 80 miles, it is situated in the middle of the Channel to the north of the Channel

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282. I.C.J. Reports 1969, p. 32. In his dissenting opinion, Judge Morelli also regarded the shelf in the North Sea west of the Trough as *not* appertaining to Norway. The Norway-United Kingdom delimitation was said to have "transferred" certain shelf areas in favor of Norway which would not otherwise constitute a part of Norway's geological shelf. *Ibid.*, p. 199.

283. *Ibid.*, pp. 29-32.

284. *See* Brown (1971), *supra* Chapter 4, note 129, p. 32.

Islands[285] (Map 14). In its alternative and final submissions,[286] the United Kingdom considered it as major and persistent rifts, deserving the denomination of the "Hurd Deep Fault Zone" and marking the limits of the respective natural prolongations of the two states in the Channel. The United Kingdom further proposed that the axis of this fault zone be used as the shelf boundary, as an alternative to the median line, in the English Channel as well as in the Atlantic region.[287]

The Court of Arbitration rejected the British proposal on two grounds. First, the Hurd Deep was but a minor fault(s), as compared to the Norwegian Trough which the United Kingdom itself ignored in shelf delimitation with Norway, and could not disrupt the essential unity of the continental shelf in question.[288] Second, given such a unity, discarding the equidistance or any other delimitation method in favor simply of a boundary along the axis of the Hurd Deep (or Hurd Deep Fault Zone) would find no legal justification either under the "special circumstances" exception of Article 6 of the Shelf Convention or under customary international law in order to remedy any particular inequity.[289]

The Hurd Deep was in fact noted in the UNESCO memorandum mentioned earlier as one of the "isolated deeps [forming] part of the shelf in which they are embedded"[290] and should not have any limiting effect. In other words, there has been strong scientific evidence to disregard the presence of these minor and isolated depressions in an essentially continuous continental shelf.

Two inferences may be drawn from a close examination of the Court's opinion. First, if the geological depression in question, be it a deep or a trough, is substantial enough to disrupt the essential geological unity or continuity of the continental shelf in question, then the deep or trough could be used as a basis for delimiting a shelf boundary. Thus, by emphasizing the physical character of the trough, the Court in fact threw the question back again to geologists who, however, do not always have the answer. Second, even if the trough constitutes no rift of the geological unity of the continental shelf, a shelf boundary based on the trough still could be justified if the presence of the trough constitutes a "special circumstance" under

285. Anglo-French Award, paras. 9, 12.
286. *Ibid.*, para. 104.
287. *Ibid.*, para. 105.
288. *Ibid.*, para. 107.
289. *Ibid.*, paras. 108, 109.
290. UNESCO Memo (1957), *supra* note 242, p. 43.

Article 6 of the Shelf Convention, or if a boundary following the trough is needed to redress an inequity in the delimitation area. This formulation places the role of the trough in its proper perspective. But it appears too general to be of much help elsewhere, since the controversy over the denotation of "special circumstances" and "inequity" is no less substantial than the legal status of troughs itself.

To sum up, the *Anglo-French* Court of Arbitration went a step further than the ICJ in the *North Sea Cases* in laying down guidelines with respect to the legal status of troughs in shelf delimitation. Given the geologically insignificant nature of the Hurd Deep-Hurd Deep Fault Zone, the Court's dismissal of it clearly did not negate the relevance of troughs in general in shelf delimitation. Rather, a trough could be used as shelf boundary in cases where it separates two geological shelves, constitutes a special circumstance, or is needed to remedy a particular inequity.

(e) The *Tunisian-Libyan Case*

During the major debate over the natural prolongation principle mentioned earlier, Tunisia and Libya flooded the Court with geological facts and arguments concerning the delimitation area that nearly turned this battle of international lawyers to that of earth scientists.[291] The Court, unimpressed, ended the debate by concluding that

> despite the confident assertions of the geologists on both sides that a given area is "an evident prolongation" or "the real prolongation" of the one or the other State, for legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations.[292]

Again, the role of geological circumstances is set in proper perspective.

The Court then turned to the parties' arguments based on geomorphology and bathymetry where submarine depressions, among other features, were examined and evaluated.[293] Tunisia contended that the marine topography of the Pelagian Block, on which the present delimitation area lies, showed the presence of three major fea-

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291. I.C.J. Reports 1982, pp. 49-58; Continental Shelf, Separate Opinion of Jimenez de Arechaga, *ibid.*, p. 110.

292. *Ibid.*, p. 53.

293. *Ibid.*, p. 54.

tures, one of which is of interest here.[294] It is known as Tripolitanian Furrow, a submarine valley running roughly parallel to the Libyan coast between 13° and 15° east. Tunisia considered it a continuation under the sea of the Gulf of Gabes and contended that it was a "natural submarine frontier" of Libya's natural prolongation in the Pelagian Sea.[295]

Again unconvinced, the Court opined:

> As for the features relied on by Tunisia, the Court . . . is unable to find that any of them involve such *a marked disruption or discontinuance of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations*. As was noted in argument, so substantial a feature as the Hurd Deep was not attributed such a significance in the Franco-British Arbitration of 1977 concerning the Delimitation of the Continental Shelf. The only feature of any substantial relevance is the Tripolitanian Furrow; but that submarine valley does not display any really marked relief until it has run considerably further to the east than the area relevant to the delimitation. . . .[296] (emphasis added)

Since the Hurd Deep discussed above is insubstantial as compared to either the Norwegian Trough, the Okinawa Trough, or the Timor Trough (Table 6), the Tripolitanian Furrow rightly was given no weight. Like the *Anglo-French* Court of Arbirtration, the ICJ seems to imply that a genuinely substantial geomorphological feature which disrupts or discontinues the seabed to such an extent as to indicate indisputably two continental shelves may well serve as a basis for shelf boundary delimitation. Of course, the Court cannot be expected to come up with, in the abstract, any specific or quantitative criteria regarding the "substantiality" of a given geomorphological feature. Such a feature has to be identified individually on the merits of each case.

(f) The LOS Convention

The legal continental shelf as defined in Article 76 of the LOS Convention was noted earlier, as was the article on shelf delimitation (Article 83). Other than those general references to geomorphology in UNCLOS III by delegates noted earlier, no specific reference is

294. *Ibid.*, p. 55.
295. *Ibid.*, p. 56.
296. *Ibid.*, p. 57.

made in the LOS Convention or its *travaux préparatoires* to the legal status of troughs or depressions.

(g) Summary

The above survey of various sources of conventional and customary international law yields no definite rules on the legal status of troughs or depressions in regard to delimitation of continental shelf, due primarily to their diversity of physical characteristics (Table 6). While the presence of the Hurd Deep and the Norwegian Trough was ignored, the presence of the Timor Trough and the Okinawa Trough was given substantial weight. Although the small number of precedents to date permits one to make no final conclusion, some general observations are possible.

Geologically, the Norwegian Trough, the Hurd Deep and the Tripolitanian Furrow are underlain by the continental crust of the earth's surface with its geophysical properties (such as seismic velocity, density, thickness, and heat flow) distinctly discernible from those of the ocean crust underlying the oceans and some marginal ocean basins. Geomophologically, these depressions either are surrounded by the adjacent shelf or separated from the ocean depths by a submarine sill comparable in level with the rest of the shelf. Bathymetrically, the water depths in these depressions are at the most a few hundred meters greater than those superjacent to the shelf. The physical circumstances thus overwhelmingly support the view that these depressions are part of the geological shelf around them. There appears to be little room for contrary scientific argument, despite the ICJ's legal arguments (on the Norwegian Trough) to the contrary.

The Timor Trough presents an entirely different situation. Geologically, its origin is neither clearly continental nor oceanic. It may be in a transition from one to the other.[297] Geomorphologi-

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297. *See generally* Menard (1967), *supra* note 240, where he concluded:

> Small ocean basins are underlain by crustal types that are generally unlike those of typical continents or oceans. The basins can be considered to be in different stages of development.

Ibid., p. 3072. There are two sequences of crustal development of those ocean basins: one is from continental crust to oceanic crust, *e.g.*, the Japan Sea basin; the other is the reverse, *e.g.*, the Gulf of Mexico. Menard also stated:

> [I]t appears that the crust in regions of complex island arcs has been changed in ways that cause it to have characteristics intermediate between normal oceanic and continental crust. ***Nevertheless, it is much more similar to an oceanic than to a continental crust*** (emphasis added).

Ibid., p. 3064.

cally, it is connected with other deeper troughs or trenches by a submarine sill more than 1,400 meters in depth, much deeper than the adjacent shelf. Bathymetrically, the water depth in the Trough is 15 to 30 times that of the shelf, but about two-thirds or one-half of that of the nearby oceans (5,000 to 6,000 meters). The Trough, with its intermediary geophysical character, appears to have received correspondingly intermediary legal treatment in the shelf delimitation. Its presence was not the only decisive factor, but it significantly influenced the course of the boundary.

Nearly the same comments made above can apply to the Okinawa Trough except that it is slightly shorter, narrower, and shallower, with slightly lower submarine sills, and situated in a slightly less open environment, than the Timor Trough (Table 6). But physical characteristics aside, it should not be forgotten that the presence of the Okinawa Trough was taken into account in delimiting a joint development zone and not a shelf boundary, as was the case with the Timor Trough.

Given the imperfect (and by no means concurrent) understanding of troughs by geologists, lawyers can only tentatively conclude that the legal status of troughs is determined primarily by their individual physical characteristics. But the presence of some troughs with substantial length, width, and depth did get considerable weight in influencing the shelf boundary or *de facto* boundary zone.

3. Concluding Remarks: The Okinawa Trough and the Sino-Japanese Seabed Delimitation

The above discussion demonstrates that there has been no conclusive scientific evidence either supporting or refuting the proposition that the Okinawa Trough marks the outer limits of the East Asian continental slope. Having neither continental nor oceanic geophysical properties, the Okinawa Trough, like the Timor Trough, could well be an intermediate feature. In any case, the consensus of the international community, as reflected by Article 76 of the LOS Convention, on the legal definition (or seaward delimitation) of the continental shelf has rendered the geological debate on the Okinawa Trough largely moot. Ceasing to be an "Article 76 problem" makes the Trough no less a problem under Article 83—inter-state delimitations—that arises from its distinct geomorphological, if not geological, features. The pertinent question, then, shifts to: should the presence of the Trough nevertheless be allowed to mark an inter-state shelf boundary (and not just a joint development zone)?

The foregoing search for guidance from various sources of in-

ternational law indicates that the answer to this question has to be sought by looking into the physical characteristics of a particular trough or depression involved. It seems useful, therefore, to compare the physical characteristics of the Okinawa Trough to those of other troughs or depressions which have been addressed by international tribunals or shelf boundaries treaties.

A glance at Table 6 should quickly dismiss the relevance of the Hurd Deep for purposes of comparision. The distinction in physical dimensions between it and the rest is too obvious to deserve elaboration. The *Anglo-French* Arbitral Court's correct disregard of it thus sheds little light on the legal significance of the Okinawa Trough.

The Norwegian Trough presents, at least, a case where a comparison with the Okinawa Trough makes sense. Geographically, both are located in marginal, semi-enclosed seas. But in terms of length, width, and depth, they are quite distinct from each other, if one considers the distances between coasts and the average water depth in the surrounding shelves. Geologically, the whole North Sea, including the Norwegian Trough, is definitely underlain by continental crust whereas the nature of the underlying crust of the Okinawa Trough is still disputed among geologists. Geomorphologically, the Norwegian Trough is connected with the Atlantic Ocean by a submarine sill (less than 300 meters in depth) nearly at the level of the adjacent shelf whereas the sill connecting the Okinawa Trough and the Pacific Ocean is 500 to 1,000 meters or more. In sum, the two troughs have more differences than similarities. The observation is in accord with the consensus among commentators who have compared the two troughs.[298]

On the other hand, the Timor Trough bears striking resemblances to the Okinawa Trough, as Table 6 clearly shows, in geography, physical dimensions (length, width, and depth), geological structure, and geomorphology. Even more striking are a few other aspects worthy of elaboration. First, both cases involve a mainland state (Australia and China (PRC and ROC)) and an island state (Indonesia and Japan). The former has a vast shallow geological shelf continuous from its coast and the latter is fronted within a short distance seaward by a deep and substantial trough more than 2,000 meters in depth. Second, both cases, in macrogeographical terms, have parallel coastal configurations with a mainland facing an island chain cut off by a number of water gaps. Third, both Australia and

298. *E.g.*, Park (1972), *supra* Chapter 1, note 18, p. 34; Goldie (1973), *supra* Chapter 4, note 36, pp. 254-57.

China (at least the ROC) have unilaterally extended their shelf jurisdictions to the middle of the trough, taking the regional geomorphology as the only decisive factor in shelf delimitation. Meanwhile, both Indonesia and Japan have based their continental shelf claims on the equidistance principle and advocated the disregard of the trough in shelf delimitation.

It is crystal-clear that the only precedent in shelf *boundary* delimitation comparable to the Okinawa Trough is that of the Timor Trough. Such a comparison exists, as just noted, in a much larger context as well. It is submitted that as a matter of law, the Australian-Indonesian treatment of the Timor Trough is not binding on third parties. Furthermore, a portion of the Timor Sea between the former Portuguese East Timor and Australia has yet to be delimited. None of these considerations, however, should preclude the Australian-Indonesian case from becoming the most relevant precedent for China (PRC and ROC) and Japan to consider or to follow. Besides, the notion of a "deepest-water line" adopted by Australia is not entirely without foundation in international law. As used in delimiting boundaries in border rivers, the "thalweg" principle,[299] *i.e.*, using the middle of a navigable channel instead of that of the whole river as the international boundary, long has been established in customary international law. That principle occasionally has been applied by analogy to international straits and to the oceans by commentators.[300]

On the other hand, the Okinawa Trough itself has played an important role in the delimitation of the Japan-ROK Joint Development Zone. Although Japan always may distinguish a joint development zone from a shelf boundary as such, the relevance of the Okinawa Trough as a distinct geomorphological feature appears to have been firmly established.

In conclusion, the relevance of regional geology and geomorphology of the East China Sea consists in the presence of the Okinawa Trough, which may be represented by a deepest-water line or a mid-channel line. This line *per se* should not be the only decisive

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299. For a discussion of the thalweg principle, see Justice Cardozo's opinion in New Jersey v. Delaware, 291 U.S. 361 (1934); James W. Garner, "The Doctrine of the Thalweg as a Rule of International Law," *American Journal of International Law*, Vol. 29 (1935), p. 309; L. Oppenheim, *International Law*, Vol. 1, 8th ed. by H. Lauterpacht, London: Longmans, Green and Co., 1955, p. 532; Daniel P. O'Connell, *International Law*, Vol. 1, London: Sevens & Sons, 1970, p. 429.

300. *E.g.*, Daniel P. O'Connell, *International Law, supra* note 299, p. 496; Goldie (1967), *supra* note 268, p. 275.

factor in the Sino-Japanese seabed delimitation, but rather should be considered as a relevant circumstance or as an important basis or starting point in the course of negotiations.

F. Summary and Suggestions

1. Summary

A summary of this chapter, in view of its length, is necessary before suggestions are presented. In the introduction of this chapter, the methodology for analyzing the delimitation problem was set out. Following the prevailing trend of customary international law in this regard, various sources of international law were scrutinized to ascertain the specific denotation of the concept "relevant circumstances." Recognizing that according to equitable principles the choice of any delimitation principle is but a function or reflection of the "relevant circumstances" of the particular case, the chapter then identified them and determined their relevance and weight in the setting of the East China Sea. Some were dismissed as irrelevant while others appeared partially or potentially relevant. This exercise served to narrow the focus on a few vital circumstances, i.e., geography, geology, and geomorphology. In order to isolate each circumstance for convenience of discussion, an assumption was made in the discussion on geography, whereas in the discussion on geology (and geomorphology) this geographical consideration generally was downplayed.

As the equidistance principle is always identified with opposite-state situations, we began the discussion on geography with the applicability of the equidistance principle. A detailed survey of various sources of international law, particularly dozens of existing boundaries, suggested that the physical circumstances most amenable to the application of the equidistance principle were the presence of two geographical elements: comparable coastal configurations and broad equality of coasts. This seems to be the case in the North Region of the East China Sea, defined as the shelf areas north of the 30°N parallel, which is the trijunction area of the three states' claimed continental shelf. Absence of both of these circumstances in the South Region of the East China Sea led to the discussion of the proportionality test, which, on the basis of the length of coastlines of China (the mainland and Taiwan) and Japan (the Ryukyus), produced a ratio of approximately 64 to 36. This ratio, as emphasized repeatedly, is intended to be a *guideline*, not a *rule*, for conducting negotiations. It represents a reasonable proportionality which an equitable delimitation should bring about, as suggested by the ICJ in the *North Sea*

Cases and the *Tunisian-Libyan Case*, in the East China Sea. The equidistance principle, though rejected for the South Region, nevertheless could be used for reference purposes.

The discussion on the geology (and geomorphology) of the East China Sea took a similar course. The natural prolongation principle, as expounded by the ICJ in the *North Sea Cases* and the *Tunisian-Libyan Case*, seemed to imply a rather elastic seaward limit of the continental shelf depending on various legal and geological interpretations of the seabed. While a more precise definition has emerged with the advent of the LOS Convention, the state practice and judicial decisions to date, albeit at an embryonic stage, largely seemed to have followed the consensus of geologists with respect to the origin of distinct geological or geomorphological features. Simply stated, where the predominant geological view suggests that certain deeps or troughs are part of the surrounding geological shelf, they are allowed no influence on shelf delimitation; where the origin of these features is still unclear, they are allowed *some* effect on the shelf boundary. Since the Okinawa Trough falls into the latter category, it was suggested that either the mid-channel line or the deepest-water line of the Trough be used as one of the bases for constructing the ultimate shelf boundary between China (PRC and ROC) and Japan, but not as an absolute factor.

2. Suggestions

If the geographical and geological (and geomorphological) dimensions are considered together, the division of the North and South Regions along the 30°N parallel still seems valid. Geographically, the North Region is dominated by the presence of substantial landmass of the three littoral states with comparable coastal lengths. Geomorphologically, the Okinawa Trough has its shallowest part in this region in which it nowhere exceeds 900 meters as compared to 1,000 to 2,714 meters in the South Region. The geological structure of the Trough near Kyushu also is different from that of the rest of the Trough (Map 3). In any case, if the geological and geomorphological evidences are not strong enough to warrant a separate treatment, they *and* the geographical considerations are. Hence the strong justification for applying the equidistance principle in the North Region, to be adjusted, of course, by the proportionality ratio of 64:36. The significance of the Trough is subordinated, though it still should be considered. Admittedly, the North Region will be a troublesome area given the added complication of the Japan-ROK JDZ, the bulk of which is in that region. And considerations of *real-*

politik could, as noted earlier, delay a final legal solution indefinitely.

The addition of the geological (or geomorphological) dimension to the South Region means that the presence of the Okinawa Trough would in some way affect the ultimate shelf boundary. A possible solution is for Japan and China (PRC and ROC) to negotiate a boundary on the basis of either the median line (Map 1) which is mid-way between the two coasts, or the mid-channel (or deepest-water) line of the Okinawa Trough (Map 1), which is closer to the Ryukyus than to mainland China or Taiwan, taking into account the reasonable proportions suggested. Adoption of one over the other would reflect the parties' emphasis on geographical or geological factors. The result, however, should be comparable insofar as the ultimate division is concerned. Alternatively, they could use both the median line and the mid-channel line as a starting point and negotiate an intermediary boundary as did Canberra and Jakarta in 1972. The boundary so delimited probably would lie somewhere along the 200-meter isobath (Map 1), a result again similar to the Australia-Indonesia shelf boundary in the Timor Sea. Exchanges of minor areas may be necessary for convenience, as is common in state practice.

The solutions suggested reject the single-method or single-principle approaches adopted by China (PRC and ROC) and Japan. Japan's insistence on applying the equidistance principle across-the-board in the whole East China Sea regardless of the geophysical reality clearly is not supported by either international law as intimated by international tribunals, state practice, or the emerging norms of the law of the sea. An equitability test for delimitation, *i.e.*, proportionality, thus is applied to bring about an equitable result. On the other hand, the insistence of China (the PRC and ROC) on applying the natural prolongation principle does more to restate the problem than to offer a solution, since it is clear that one of the sticky issues here precisely is whether the seabed of the Okinawa Trough constitutes a part of the natural prolongation of either state's coast. To treat the Okinawa Trough as an absolute limiting factor may derive support from findings of some geologists, as well as from the *North Sea Cases*. But subsequent developments, in particular the LOS Convention, have defined the legal continental shelf in a way that makes the submarine geomorphological features within 200 miles from shore virtually irrelevant.[301] The implications for the legal sta-

301. For a related discussion, see Choon-Ho Park, "The Sino-Japanese-Korean Sea

tus of geologically undetermined troughs is that in *inter-state delimitations* it becomes not an absolute limit of national jurisdiction, barring conclusive geological evidence to the contrary, but a relevant circumstance to be considered in the course of negotiations. Simply stated, the suggested solutions modify the equidistance principle by the notion of proportionality and treat the presence of the Okinawa Trough as but *one* of the factors that influence the ultimate Sino-Japanese shelf boundary.

The East China Sea finds itself in a complex geographical, geological, and geomorphological setting. Equitable principles require that it be treated accordingly without "refashioning nature."[302] The suggested differentiation of the regions and the multi-method or multi-principle approach simply are a reflection of this complex reality of nature.

Resources Controversy and the Hypothesis of a 200-Mile Economic Zone," *Harvard International Law Journal*, Vol. 16 (1975), p. 27. The PRC and ROC might argue that their shelf claims are protected as "acquired rights" under the then prevailing customary international law—the *North Sea Continental Shelf Cases*, particularly the Court's opinions on the natural prolongation principle and on the legal character of the Norwegian Trough. This arguable position suffers from several difficulties. First, the interpretation of the *North Sea Cases* is not completely without controversy in respect of the seaward extent of the natural prolongation principle noted earlier. In other words, under another interpretation the whole seabed landward of the Ryukyu Trench could constitute the *legal* continental shelf and the Okinawa Trough therefore does not necessarily delimit the Japanese claims of shelf jurisdiction. Second, absent an agreement between China and Japan or a binding adjudication on the delimitation of their respective continental shelf in the East China Sea, unilateral claims of either the PRC or the ROC alone could hardly constitute any acquired rights when such claims, when made, were strongly excepted to by Japan as noted in Chapter 2.

302. *Supra* note 220 and accompanying text.

CHAPTER 6 RELEVANCE OF THE PEKING-TAIPEI RIVALRY: THE "DOMESTIC ASPECT" OF THE SEABED DISPUTE

A. The Scope of Inquiry

Chapter 3 demonstrated that the potentially overlapping concession areas of the PRC and the ROC (Map 11), primarily in the Taiwan Strait, could give rise to a host of questions: Which government has the exclusive sovereign rights to exploit the seabed? Which concessionaire has the exclusive mining rights? If oil is found there, who has title to it? If the oil is shipped to a foreign country by the concessionaire of the PRC or ROC or its assignee, how successfully can the other side contest the title in the court of that country? If that country has switched recognition from Taipei to Peking, would the outcome of the litigation be different accordingly? Would the forum simply follow the foreign policy of the executive branch or take a more realistic view of the situation? In the absence of diplomatic recognition, to what extent would the legal acts of the ROC, particularly those dealing with seabed exploitation, receive judicial cognizance? Are they acts of state? Or nullities? Is the title question between two rival governments at all justiciable?

These questions clearly are not matters of domestic law of the PRC or ROC. Nor can they be treated as purely questions of international law of, say, continental shelf delimitation. Objectively, each side has "a defined territory and population under the control of a government [engaging] in foreign relations."[1] But a *subjective* element, *i.e.*, that each views the other as equal, is lacking entirely. Claiming that it alone represents China, each sees the relationship with the other not as one between states but as one between a legitimate government and a rebel group engaging in an unfinished civil war.

A third approach focuses on the attitude of foreign governments and courts toward the PRC or ROC *qua* recognized or unrecognized governments. This approach seems to be the most profitable one within the present context, for a foreign court is the only place where a *legal* battle possibly could take place. As long as the oil recovered from the overlapping zone remains in the hands of the ROC or PRC,

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1. American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the Untied States*, St. Paul, Minn.: American Law Institute Publishers, 1965, § 4 (state defined).

the title problem continues to be a "domestic" issue between Peking and Taipei. It is only susceptible of political or military solutions, ranging from a negotiated settlement to armed conflict. The former is out of the question, given Taipei's adamant refusal to negotiate with Peking on any issue. The latter is not impossible, but would occur only as part of the resumed civil war which is quite unlikely, as we shall discuss below. In any event, no law will play any important part at this stage.

In contrast, if the oil found in the overlapping zone changes hands and reaches a foreign soil, the title issue could be litigated in the courts of that country, since considerable private interest would be at stake.[2] Moreover, the courts in a number of states have had many occasions to adjudicate similar issues and to build up a solid body of case law.[3] In most countries, recognition of foreign governments is a political question reserved for the executive branch of the government. But recognition has various legal *consequences* which fall within the exclusive domain of the judicial branch.

In this chapter, the relevance of the Peking-Taipei rivalry is defined along these lines. Based on a number of considerations,[4] the United Kingdom, Japan, and the United States are chosen as forum states where a legal battle may be fought. Before plunging into the practices of these three states, we shall first review the state of rivalry, in both historical and contemporary perspectives, between Peking and Taipei.

B. The Peking-Taipei Rivalry: Two Aspects

The Peking-Taipei rivalry involves various dimensions. For purposes of this study, we shall deal only with those that have direct bearing on the legal personality of the rivals and which affect their claim to the title to oil litigated in a foreign court; that means the

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2. *See, e.g.*, Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196 (1978), *cert. denied*, 442 U.S. 928 (1979). This case is discussed *infra* in the text.

3. *See generally* Daniel P. O'Connell, *International Law*, Vol. 1, 2d ed. London: Stevens & Sons, 1970, pp. 166-92.

4. The considerations include the following: Oil companies from these three states are engaged by the ROC and PRC in their respective offshore programs. They are likely candidates for a legal battle. Secondly, all three states have held, and two are still holding, the position that the legal status of Taiwan is undetermined despite their recognition of the PRC. This position has material bearing on the question under consideration. Thirdly, the courts of all three states have dealt with cases involving Peking and Taipei or similar questions. These cases provide a reasonable basis for discussing the present question.

question of recognition and diplomatic relations. To appreciate the intensity of the rivalry, it is useful briefly to relate the military dimension:

1. The Suspended Civil War

The establishment of the PRC on the Chinese mainland and the retreat of the ROC to Taiwan in 1949 concluded the first phase of the Chinese Civil War which had raged on the mainland since 1946 but had its origin dating back to the 1920s.[5] From 1949 to 1979, tension remained between the forces of the two rivals but hosilities were erratic and largely confined to a few offshore islands off the Chinese mainland and their coastal waters and air space.[6] The PRC's heavy bombardment of the Quemoy and Matsu Islands, which drew world attention in 1958, has subsided ever since with the inauguration of an "even-number-day" cease-fire.[7] Exchanges of artillery barrages involved shells containing propaganda leaflets instead of high explosives. Even this token reminder of the unfinished civil war was removed in 1979 when Washington and Peking established diplomatic relations.[8] Technically the civil war continues, although the resumption of hostilities seems unlikely, given the new political reality in East Asia. Having a local military superiority,[9] the ROC's navy and air force regularly patrol the Taiwan Strait; so do the PRC forces in coastal waters near the mainland. Both sides seem to have honored tacitly a *de facto* demarcation line in the Strait, though its precise location remains undefined. The ROC's oil concession blocks are presumably located on the ROC (east) side of that line (Map 9).

Unlike the civil war in Spain[10] and Nigeria,[11] the Chinese civil

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5. *See generally* John K. Fairbank, *United States and China*, 4th ed., Cambridge: Harvard University Press, 1979, and the references cited therein.

6. *See* Hungdah Chiu, "China, the United States, and the Question of Taiwan," in *China and the Question of Taiwan*, edited by Hungdah Chiu, New York: Praeger Publishers, 1973, pp. 142-51.

7. *Ibid.*, p. 151.

8. *New York Times*, January 1, 1979, p. 1.

9. Ralph N. Clough, *Island China*, Cambridge: Harvard University Press, 1978, p. 99.

10. *See generally* Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, New York: The Macmillan Company, 1939.

11. *See generally* John J. Stemlau, *The International Politics of the Nigerian Civil War 1967-70*, Princeton, N.J.: Princeton University Press, 1977, pp. 74-76 (dealing with the law of governmental succession and oil concessions).

war has given rise to few questions of international law.[12] The establishment of the PRC in 1949 apparently prompted many states to conclude that the civil war was over and the relevant question was whether to extend recognition to the new regime in Peking. But the continued existence in Taiwan of another Chinese government, claiming to represent all China, a situation unprecedented in international relations, greatly complicated the question and posed a challenge to conventional rules of international law and practices of diplomatic intercourse.

2. Competition for International Recognition

This competition between Taipei and Peking consists in establishing diplomatic relations with pre-existing and emerging members of the international community, for diplomatic ties between two governments imply mutual recognition.[13] Since neither Peking nor Taipei accepts a "two China" concept, no state has ever been able to maintain diplomatic relations with both.[14] There is presented below an overview of the diplomatic gains and losses of the two rivals, followed by a descriptive analysis of the international community's attitude towards Peking's claim of sovereignty over Taiwan.

(a) The Three-Decade Contest

The Soviet Bloc and other communist states, some of which were themselves newly independent, promptly extended recognition to the PRC shortly after its establishment in October 1949.[15] Fourteen non-communist states (half were European) followed suit in six months.[16] By April 1950, the PRC had been recognized by 26 states

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12. One exception may be the ROC's proclaimed "closure" of Chinese mainland ports and territorial waters during 1949-1954. Over 70 foreign vessels were stopped, fired upon, turned away, or sunk. For a legal discussion, see Wu Tang, *Chung-kuo Yu Kuo-chi-fa* [China and International Law], Taipei: Committee on Chinese Cultural Enterprise Publishers, 1957, pp. 264-68. L.H. Woolsey, "Closure of Ports by the Chinese Nationalist Government," *American Journal of International Law*, Vol. 44 (1950), p. 352.

13. Green H. Hackworth, *Digest of International Law*, Vol. 1 Washington D.C.: Government Printing Offices, 1940, pp. 166-67.

14. Nigeria before 1971 recognized both Peking and Taipei but was unable to have diplomatic ties with either. Senegal recognized the PRC but established diplomatic relations with the ROC. The PRC thus refused to recognize Senegal. *See* James C. Hsiung, *Law and Policy of China's Foreign Relations*, New York: Columbia University Press, 1972, p. 223.

15. *Ibid.*, pp. 209, 391 note 29.

16. *Ibid.*

and had diplomatic relations with all but Israel.[17] At the same time, the ROC still maintained relations with 53 states.[18]

The PRC's intervention in the Korean War in late 1950 and the subsequent condemnation of it as an aggressor by the United Nations[19] arrested this trend in its favor until 1955. The following decade saw the emergence of many newly independent nations in Africa, which became subsequently a major diplomatic battleground for the PRC and ROC. As of 1966, the PRC almost doubled its diplomatic ties to 50, whereas the ROC's also climbed slightly to 60.[20] Out of 21 states having diplomatic ties with neither, six recognized the PRC, two recognized both, and two had consular relations with the ROC.[21]

The devastating Cultural Revolution (1966-69) on the Chinese mainland considerably disrupted the PRC's foreign relations. During that period, it gained only one state (51) while the ROC picked up eight more (68).[22] Canada's recognition of the PRC in October 1970,[23] however, set in motion a new surge of diplomatic gains for Peking. The shift of the United States' China policy in 1971 and the PRC's admission to (and the ROC's expulsion from) the United Nations in the same year made the momentum unstoppable. By August, 1984, 132 states had recognized the PRC while the ROC's diplomatic ties had shrunk to 25.[24]

The 1970's indeed witnessed the biggest diplomatic success for the PRC with more than half of its diplomatic ties established during that decade. Meanwhile, in addition to losses of bilateral diplomatic ties, the ROC also has been expelled from virtually all the important inter-governmental organizations.[25] The wave of diplomatic setbacks forces Taipei to adopt a variety of unorthodox ways of con-

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17. Cohen & Chiu, *supra* Introduction, note 11, Vol. 1, p. 213.

18. Ralph N. Clough, *supra* note 9, p. 153.

19. General Assembly Resolution 498 (V), UNGAOR, Vol. 5, Supplement (No. 20A), p. 1, UN Doc. A/1775/Add.1 (1951).

20. Ralph N. Clough, *supra* note 9, p. 153.

21. United Nations Association of the United States of America, *China, the United Nations, and the United States Policy*, New York: U.N. Association of the U.S.A., 1966, p. 54 (Appendix C).

22. This is the author's count based on Ralph N. Cough, *supra* note 9, pp. 153-54.

23. *New York Times*, October 14, 1970, p. 1.

24. This is the author's count based on various sources. Among the 132 states that have recognize the PRC, four (Bahrain, Bhutan, Indonesia, and Israel) have not yet established diplomatic ties with Peking.

25. Ralph N. Clough, *supra* note 9, pp. 155-60. The latest expulsions were from the International Monetary Fund, the World Bank and its affiliated institutions. *New York Times*, April 18, 1980, p. D1.

ducting its foreign relations with the rest of the world.[26] Despite lack of formal diplomatic ties, the ROC now has "substantive" relations (trade, cultural exchange, etc.) with over 140 states, each having various degrees of officiality.

(b) Peking's Claim to Taiwan

The recognition of the PRC by a state and the establishment of diplomatic relations with it are, as a rule, announced in a joint communiqué issued simultaneously in Peking and the capital of the recognizing state. Prior to 1970, the joint communiqués invariably restated, with few exceptions, the PRC's claim to be the sole legal government of China.[27] This formulation does not commit necessarily the recognizing state to the PRC's claim to Taiwan, however. Since 1970, the PRC has insisted that its sovereignty over Taiwan be recognized expressly as such.[28] States desiring to establish relations with the PRC generally have been reluctant to do so at the possible expense of their informal ties with the ROC. Eventually six compromise formulations dealing with this question were developed in 83 joint communiqués issued since 1970.[29] They are presented below in descending order according to the extent of commitment.

Ten states, including Portugal[30] and Jordan,[31] "*recognize*" that "Taiwan (or Taiwan Province) is an *inalienable part of the PRC*." These states seemed to have accepted unequivocally the PRC's position.

In a second formulation, the PRC's position was "acknowledged" by eight states, including the United Kingdom.[32]

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26. *See generally* Thomas J. Bellows, *Taiwan's Foreign Policy in the 1970's: A Case Study of Adaptation and Viability*, Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 4, Baltimore: University of Maryland Law School, 1977 (Hungdah Chiu ed.).

27. James C. Hsiung, *supra* note 14, p. 223. The France-PRC joint communiqué was an important exception in which no mention was made of either the "sole Chinese government" question or the legal status of Taiwan. For the text, see *Peking Review*, January 31, 1964, p. 10.

28. Canada was the first state to indicate its position, or lack of it, on the status of Taiwan. *Ibid*, October 16, 1970, p. 12.

29. Lyushun Shen, "The Taiwan Issue in Peking's Foreign Relations in the 1970s: A Systematic Review," *Chinese Yearbook of International Law and Affairs*, Vol. 1 (1981), pp. 77-78. Eight more joint communiqués have been issued since then.

30. *Beijing Review* [formerly *Peking Review*], February 16, 1979, p. 3.

31. *Peking Review*, April 22, 1977, pp. 10-11.

32. *Ibid*., March 17, 1972, p. 3.

Another three states including Japan[33] "understand and respect" or "respect" this PRC position.

The fourth model, employed only by the United States,[34] stipulates that Washington "acknowledges" the "*Chinese* position" that "there is but one China and Taiwan is part of *China*."

In a neutral tone, Canada, Italy,[35] Belgium[36] and twelve other European and South American states merely "take note of" the PRC position.

Still another 46 states having diplomatic (or consular) relations with the PRC omitted the Taiwan question in the joint communiqués.[37] Thirteen of them even failed to mention that the PRC was the "sole legal government of China."[38]

Two things merit attention. The first is the language used in reflecting the recognizing state's cognizance of the PRC's position. "Recognize" undoubtedly connotes "accept," but "understand and respect," "respect," or "acknowledge" seem to imply something short of acceptance, though certainly more than just awareness, which "take note of" reflects.[39] The other variable is the object of cognizance. In most cases it was the *PRC*'s position that was being considered. The object was, however, the *Chinese* position in a few other cases. Since it is well-known that the ROC also regards itself as the only Chinese government and Taiwan as its province, the verbal nuance could be significant in different contexts. This semantic game of diplomacy admittedly tells only part of the recognizing states' intent. Much depends on their subsqeunt practice.

As the ROC still maintains extensive commercial relations with those states that have recognized the PRC, their cognizance or acceptance of Peking's sovereignty over Taiwan could legally affect their "substantive" ties with Taipei. Supposedly, legal effects of recognition and non-recognition are to be determined by the courts. Yet in a number of countries the views of the executive branch have influenced heavily judicial decisions. An examination of the executive and judicial practices of the three countries chosen as forum

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33. *Ibid.*, October 6, 1972, pp. 12-13.

34. *Ibid.*, December 22, 1978, p. 8.

35. *Ibid.*, November 13, 1970, p. 6.

36. *Ibid.*, October 29, 1971, p. 4.

37. Lyushun Shen, *supra* note 29.

38. *Ibid.*

39. *Webster's New International Dictionary of the English Language Unabridged*, 1976, pp. 17, 1934, 2490.

states for our hypothetical legal battle, namely, the United Kingdom, Japan, and the United States, is therefore warranted.

C. The Peking-Taipei Rivalry in Foreign Courts with Special References to the United Kingdom, Japan, and the United States

1. Scenario of the Hypothetical Legal Battle

Litigation between Taipei and Peking over title to undersea oil in foreign courts may be less conceivable as long as the oil remains under the seabed. But the intensity of the oil hunt offshore by Taipei and Peking in the past few years makes such an eventuality less and less hypothetical. It is helpful to envision the most likely scenario from which legal consequences flow. We first look into the possible plaintiff and defendant.

The ROC has been a net oil importing country in the past decades.[40] By no stretch of imagination can one expect it to export oil, even if the ROC found a bonanza on the seabed. Domestic consumption would eat up the bulk, if not the whole, of the oil find. Moreover, no marketing network can be set up overnight, even if there is surplus oil for export. One therefore can assume with confidence that Chinese Petroleum Corporation (the state oil enterprise) itself would not market the oil abroad. It most likely would be distributed through the existing sales outlets of the CPC's foreign partners or assignees. In fact, under the joint venture contract, the foreign partner may export its share of the oil production after commercial discovery.[41] The potential litigant therefore would be either CPC's foreign co-venturer or its assignee.

To the extent of government control of the oil industry, the same is true with respect to the PRC. The administration of its oil production and export are vested in two state enterprises under the Ministry of Petroleum Industry and the Ministry of Foreign Economic Relations and Trade, respectively.[42] Since the latter has no marketing outlets of its own abroad, the potential party to the legal battle would be either the foreign concessionaire, who brings the oil

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40. *See generally, Petroleum History of China, supra* Chapter 2, note 85.

41. *E.g.*, the CPC/Conoco Contract, art. VII (right to export petroleum). The contract is in the author's possession.

42. Randall W. Hardym, *China's Oil Future: A Case of Modest Expectations*, Boulder, Colorado: Westview Press, 1979, p. 101. It is unclear as of this writing in August 1984 whether the newly established China National Offshore Oil Corporation (CNOOC) may market oil directly abroad. It is assumed that it cannot.

into the forum state, or the assignee of the PRC's state enterprise in charge of oil export. So the legal battle would be fought by two foreign oil or trading companies rather than by two governmental instrumentalities of the PRC and the ROC. For convenience, the litigants hereafter are referred to as the "PRC's assignee" or the "ROC's assignee," respectively. Thus, questions of *locus standi* of unrecognized government and sovereign immunity would not arise.[43] Also, the defendant would logically possess the oil in question.

The central issue of the lawsuit would be the title to oil recovered from the overlapping concession blocks. That either foreign assignee holds a valid title to the disputed oil can be assumed since transactions that effect the granting of concession or assignment would take place within the territory under the effective control of the PRC or the ROC and under their respective laws. The question posed to the foreign court is, rather, which title should be *recognized* under the law and policy of the forum state. This of course would lead to a host of other legal issues.

Since all the three forum states chosen here have recognized the PRC, derecognized the ROC, and in varying degrees acknowledged the PRC's claim to Taiwan, the legal issues before the courts may be threefold. First, to what extent is the judiciary bound by the executive's recognition policy and practice? Second, to what extent would the courts take judicial cognizance of the legislative and administrative acts of a recognized or unrecognized government? Third, if the legal acts of two rival governments are in conflict, are such conflicts justiciable?

2. *United Kingdom Practice*

(a) Practice of the British Government

The United Kingdom was the first Western nation to recognize the PRC as the *de jure* government of China on January 6, 1950. Thereupon, it ceased to recognize the ROC as such. London continued to maintain, however, a consulate in Taiwan. This British practice, understandably offensive to the PRC, led to the latter's adamant refusal for 22 years to raise their bilateral relationship from the level of *chargé d'affaires* to that of ambassadors. Prompted by America's shift of China policy, London decided in March 1972 to exchange

43. For a discussion of these questions, see generally Daniel P. O'Connell, *supra* note 3, pp. 166-83.

ambassadors with Peking.[44] The joint communiqué announcing the move stated:

> The Government of the United Kingdom, *acknowledging* the position of the Chinese Government that Taiwan is a province of the People's Republic of China, have decided to remove their *official* representation in Taiwan on 13th March 1972.[45] (Emphasis added.)

Thus, the United Kingdom reversed its position on Taiwan's legal status, held for 22 years. Britain's acceptance of the PRC's position was further confirmed by the accompanying statement of Sir Alec Douglas-Home, the British Foreign Secretary, in the House of Commons on the same day.[46]

It is clear that the United Kingdom has, since March 13, 1972, acknowledged the *de jure* sovereignty of the PRC over Taiwan. A question arises, however, as to the legal status of the ROC in the eyes of the British Government between January 6, 1950 and March 13, 1972. The stationing of a British consul in Taiwan during that period further complicates the question. Did the United Kingdom implicitly recognize the ROC as the *de facto* government of Taiwan? The answer to this question will have material bearing on the question of seabed rights because all the laws and regulations of the ROC dealing with seabed exploitation and all but one of CPC's joint venture contracts had become effective before 1972. If the ROC was recognized as the *de facto* government of Taiwan, the validity of its laws and regulations would be judicially recognized by English courts; otherwise, the courts are free, and in some cases bound, to declare them as nullities. We shall review below the British practice in search of the answer.

In *Civil Air Transport v. Central Air Transport Corporation*,[47] the

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44. *New York Times*, March 14, 1972, p. 1.

45. *Supra* note 32.

46. He said:

> Both the Government of the People's Republic of China and Taipeh [sic] maintain that Taiwan is part of China. We held the view both at Cairo and at Potsdam that Taiwan should be restored to China. That view has not changed. We think that the Taiwan question is China's internal affair to be settled by the Chinese people themselves.

Great Britain, Parliament, *Parliamentary Debates* (House of Commons), 5th Ser., Vol. 833 (March 13-24, 1972), p. 32.

47. [1953] A.C. 70; [1952] All E.R. 733; *British International Law Cases*, Vol. 7 (1969), p. 523. This case was discussed in F.A. Mann, "Recognition of Sovereignty," *Modern Law Review*, Vol. 16 (1953) p. 226; Comment, *Michigan Law Review*, Vol. 52 (1953), p. 307; 'Aristerides', "The Chinese Aircraft in Hong Kong," *International Law Quarterly*,

British Foreign Office, in reply to questions put to it by the Hong Kong trial court respecting China, stated on February 11, 1950 that Britain had switched *de facto* as well as *de jure* recognition from the Nationalist Government to the Communist Government of China. It specifically drew the Court's attention to the fact that

> H.M. Government recognize that the Nationalist Government has ceased to be the *de facto* government of the Republic of China. *It ceased to be the* de facto *government of different parts of the territories of the Republic of China as from the dates on which it ceased to be in effective control of those parts*.[48] (emphasis added.)

With respect to the status of Taiwan, the Foreign Office continued:

> On October 25, 1945, as a result of an order issued on the basis of consultation and agreement between the Allied Powers concerned, the Japanese forces in Formosa [i.e., Taiwan] surrendered to Chiang Kai-shek. Thereupon, with the consent of the Allied Powers, administration of Formosa [i.e., Taiwan] was undertaken by the Government of the Republic of China. At present [the governor of the island] has not repudiated the superior authority of the Nationalist Government.[49]

Britain's position on Taiwan's status further was clarified by Foreign Secretary Eden in the House of Commons on February 4, 1955:

> Under the Peace Treaty [between Japan and the ROC] of April, 1952, Japan formally renounced all right, title and claim to Formosa [i.e., Taiwan] and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. *Formosa* [i.e., *Taiwan*] *and the Pescadores are therefore*, in view of Her Majesty's Government, *territory the* de jure *sovereignty over which is uncertain or undetermined*.[50] (Emphasis added.)

Vol. 4 (1951), p. 159; [Note], *British Yearbook of International Law*, Vol. 29 (1952), p. 464.

48. [1953] A.C. 87.

49. *Ibid*.

50. Great Britain, Parliament, *Parliamentary Debates*, (House of Commons), 5th Ser., Vol. 536 (Jan. 25-Feb. 11, 1955), pp. 159-60; Majorie M. Whiteman, *Digest of International Law*, Vol. 3, Washington, D.C.: Government Printing Office, 1964, p. 565.

In *Luigi Monta of Genoa v. Cechofracht Co.*,[51] the Foreign Office certified in 1956 that ". . .Her Majesty's Government did not recognize that any government was located in Formosa [i.e., Taiwan] in July and August, 1953."[52]

In June 1964, London's relations with Taiwan were explained by Robert Mathew, Under Secretary for Foreign Affairs, in the House of Commons in the following terms:

> Our senior consular officer in Taiwan holds the rank of Consul. As he does not have diplomatic status, no question of accreditation arises. His relations are only with the local provincial authorities, and he has no contact with the Central Nationalist authorities. . . . As we do not recognize any of the authorities in Taiwan as constituting a Government, Her Majesty's Government do not consider that it would be appropriate to accept consular officers appointed by these authorities.[53]

Since no material political change has occurred in Taiwan since 1949, the above British position vis-a-vis Taiwan remained valid until March 13, 1972.

Since 1972, the British Government has had only one occasion to summarize its position: that occurred in an executive certificate in *Reel v. Holder and Another*[54] decided in 1979:

> HMG [Her Majesty's Government] do not, and have never regarded Taiwan as a state. Nor do we regard the Chinese Nationalist authorities in Taiwan as a Government and have not done so since 1950, when we ceased to recognize them as the Government of China. . . The Government of the United Kingdom acknowledge the position of the Chinese Government that Taiwan is a province of the People's Republic of China.[55]

It is generally agreed that recognition, *de jure* or *de facto*, is a matter of intent on the part of the recognizing state.[56] Here the United Kingdom's intent in denying the ROC as the *de jure* or *de*

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51. [1956] 2 Q.B. 552; [1956] 2 All E.R. 769; *British International Law Cases*, Vol. 7 (1969), p. 540.

52. [1956] 2 Q.B. 553.

53. Great Britain, Parliament, *Parliamentary Debates* (House of Commons), 5th Ser., Vol. 696 (June 8-19, 1964), p. 908.

54. [1979] 3 All E.R. 1041; (1979) 1 W.L.R. 1252.

55. [1979] 3 All. E.R. 1050-51.

56. Green H. Hackworth, *supra* note 13, Vol. 1, p. 166.

facto government of China (not including Taiwan) is beyond doubt. The British position on the undetermined legal status of Taiwan and the "military occupation" of it by the ROC also precludes the possibility of a British recognition of ROC as the *de jure* government of Taiwan. But Britain's intent, or lack of it, in recognizing the ROC as the *de facto* government of Taiwan seems less clear as a result of continued British official representation on the island. Yet London's repeated denials of recognition of the authorities in Taiwan as a "government" should preclude any implication to the contrary, even though the kind of recognition (*de jure* or *de facto*) being denied was not specified. Actually, even if the British mission were accredited to the central government of the ROC, the circumstances probably would still have barred the implication of *de facto* recognition. British practice abounds in instances where British missions were sent to unrecognized states with express denial of recognition, *de facto* or *de jure*.[57] Even in the absence of the excuse of a legally uncertain Taiwan, the United Kingdom still could have maintained a consul in Taiwan, as a part of China, without conferring recognition on the ROC as the *de facto* government of Taiwan.

On the other hand, the existence of the ROC as a government exercising sovereignty in Taiwan is a fact Britain has not denied. Its non-recognition of the ROC, a policy not entirely consistent with its recognition practice based on the effectiveness of the government,[58] obviously is dictated by its policy toward the PRC.

(b) Practice of English Courts

It has been an established practice of English courts to seek information from the Foreign Office regarding certain international facts,[59] such as whether a foreign state or government is recognized by Britain or whether a state of war exists. The information, issued in a statement known as the "executive certificate," is generally binding on the courts.[60] But in cases where the Foreign Office feels reluc-

57. Hersch Lautérpacht, *Recognition in International Law*, Cambridge: Cambridge University Press, 1947, pp. 346-47.

58. *Ibid.*, pp. 116-24. Britain may, however, argue that the State of China could not obtain sovereignty over Taiwan merely as a result of military occupation without a peace treaty with the defeated Japan which was still the *de jure* sovereign of that island. Since the 1951, 1952 peace treaties with Japan did not specify the new *de jure* sovereign of Taiwan, Britain was bound by its treaty obligation to withhold recognition to the ROC despite its effective control of the island.

59. Daniel P. O'Connell, *supra* note 3, pp. 113-19.

60. *Ibid.* Insofar as recognition of government is concerned, Britain decided in 1980 to cease according recognition to government but only to reveal its dealings with regimes

tant to be conclusive in an uncertain or delicate situation, the certificate tends to be "temporizing" and the courts are at liberty to admit additional evidence in drawing their own conclusions.[61] In recent decades, English courts have occasionally departed, in the name of justice, from the views of the Foreign Office in cases where the existence of an unrecognized government and its legal acts were at issue. It is useful to review a number of cases on recognition of states or governments in appreciating the prevailing trend in this regard.

English courts traditionally have been hostile toward unrecognized governments.[62] Believing that the King cannot speak with two voices,[63] they invariably withheld judicial cognizance from governments unrecognized by the British government. In *Luther v. Sagor*,[64] a decree of the newly established Soviet government in Russia purporting to nationalize the plaintiff's company was denied validity in the King's Bench for lack of recognition by Britain. Pending appeal, London extended *de facto* recognition to Moscow. Judgment was reversed on appeal.[65] This case reinforced the long English tradition and demonstrated the sharp distinction in legal effects between recognition and non-recognition.

The Italian annexation of Ethiopia in 1936 gave rise to the coincidence of two governments: one recognized by Britain as *de jure* government and the other as *de facto*. In a litigation over public funds abroad, the Ethiopian emperor, who had been recognized as the *de jure* sovereign of Ethiopia, lost when such recognition was withdrawn by the British government. The Court of Appeal in *Haile Selassie v. Cable and Wireless Limited* (No. 2)[66] reasoned that since the British government had switched *de jure* recognition from the

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that come to power unconstitutionally. For details, see Clive R. Symmons, "United Kingdom Abolition of the Doctrine of Government: A Rose by Another Name?" *Public Law*, 1981, p. 249.

61. *See* A.B. Lyons, "Judicial Application of International Law and the 'Temporizing' Certificate of the Executive," *British Yearbook of International Law*, Vol. 29 (1952), p. 227.

62. Daniel P. O'Connell, *supra* note 3, pp. 167-72.

63. *Ibid.*, pp. 116-17.

64. [1921] 3 K.B. 532; [1921] All E.R. 138; *British International Law Cases*, Vol. 2 (1965), p. 97.

65. *Accord*: White, Child and Beney Ltd. v. Eagle Star & British Dominions Insurance Company, (1922) 38 T.L.R. 616; [1922] All E.R. 482; Princess Paley Olga v. Weisz and Others, [1929] 1 K.B. 718; [1928] All E.R. 513.

66. [1939] 1 Ch. 182; [1938] 3 All E.R. 677; *British International Law Cases*, Vol. 2 (1965), p. 171.

Ethiopian Emperor to the King of Italy, the latter, as Emperor of Abyssinia, "is entitled by succession to the public property of the State of Abyssinia, and the later Emperor of Abyssinia's title thereto is no longer recognized as existent."[67] The Court stated that "it is not disputed that that right of succession is to be dated back at any rate to the date when the *de facto* recognition . . . took place."[68] The right of succession to public property abroad will have important bearing on the discussion below.

In the *Civil Air Transport* case cited earlier the Judicial Committee of the Privy Council dealt squarely with the question of conflicting claims of the two Chinese governments to public property in Hong Kong. The issue before the court was whether Britain's recognition of the PRC on January 5, 1950 had the retroactive effect of invalidating the sale of government aircraft located in Hong Kong by the ROC to two Americans prior to that date. The Privy Council upheld the validity of the sale on the ground that recognition worked retroactively only to validate the acts of the erstwhile unrecognized government but not to invalidate those of the *de jure* government prior to de-recognition.[69] No question, however, was raised as to either the succession rights of the PRC government or the status of the ROC and its legal acts *after* British de-recognition.

The first case that dealt with the ROC's legal personality was *Luigi Monta*, referred to earlier. The issue was whether the ROC, which was regarded in the British Foreign Office's executive certificate as a nongovernment, nevertheless should be considered as a government for the purpose of construing a war risks clause in a charter party. The Court declared that the certificate neither was conclusive nor exclusive of other evidence.[70] It went on to say that the "government" referred to in a war risks clause need not be a government recognized by Britain. Mr. Justice Seller, refuting the proposition that "if there is no recognition there is on government," opined:

> Apparently the government situated and functioning in Formosa [i.e., Taiwan] was at one time recognized by this country, and it does not follow because recognition has ceased that the government, once recognized, has in any way altered its activities or lost such powers or authority as

67. [1939] 1 Ch. 182.

68. *Ibid.*

69. [1953] A.C. 93.

70. [1956] 2 Q.B. 565.

it had been exercising.[71]

The de-factoism of *Luigi* was absent in a 1965 patent case, the *In Re Harshaw Chemical Company's Patent*.[72] The patentee applied for an extension of the term of his patent, relating to a chemical method using nickel, on the ground of war loss (including loss of opportunity) based on the difficulty of developing the invention over the period of nickel scarcity during the Korean War. Under the Patent Act of 1949, if such loss were occasioned by reason of hostilities between Britain and "any foreign state", extension may be granted. The Court, based on a brief and conclusive certificate from the Foreign Office stating that North Korea was unrecognized as a sovereign state, took a restrictive view of the statutory language and rejected the application.

But the *de facto* legal personality of another satellite state of the Soviet Union was recognized, in an unorthodox fashion, by the House of Lords in *Carl Zeiss Stiftung v. Rayner and Keeler*.[73] The 12-year passing-off battle was initiated by the Carl Zeiss *Stiftung* (Foundation), an optical instrument firm in East Germany, to enjoin the use of its trade name by a West German firm, also known as Carl Zeiss *Stiftung*, and its British distributors. The Foreign Office certified that East Germany was unrecognized,[74] but added:

> Her Majesty's Government have recognized the State and Government of the Union of Soviet Socialist Republics as *de jure* entitled to exercise governing authority in respect of [East Germany].[75]

Following this curious formulation, the House of Lords held that

> although the German Democratic Republic is not recognized by Her Majesty's Government, its acts should be recognized by the courts as lawful, not as the acts of a sovereign state, but as acts done by a subordinate body which the U.S.S.R. set up to act on its behalf, since a *de jure* governing body cannot disclaim responsibility for the acts of subordinate bodies set up by it.[76]

It seems that the House of Lords invented from the executive

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71. *Ibid.*, p. 567.

72. [1965] R.C.P. 97. Curiously, *Luigi* was not even mentioned in the opinion.

73. [1967] A.C. 853; [1966] 2 All E.R. 536; *British International Law Cases*, Vol. 8 (1971), p. 207.

74. [1967] A.C. 854.

75. *Ibid.*, p. 855.

76. *Ibid.*

certificate a theory under which East Germany acts as the agent of the Soviet Union.[77] The decision was, on its face, in full accord with the *Luther v. Sagor* rule, but the House of Lords (*per* Lord Wilberforce) did express its doubts on the rigidity and sweeping effect of that rule.[78] In this sense, the reasoning of this decision could be viewed as an effort to by-pass the unpalatable effect of that rule.

The de-factoism of *Luigi* was revived in a 1970 case with the same factual pattern as in *Harshaw Chemical*. In *In Re Al-Fin Corporation's Patents*[79] the Court, citing *Luigi*, construed the Patent Act in a way that North Korea was regarded as a "foreign state" within the meaning of the statute. It must be remembered that the Foreign Office, though denying British recognition of North Korea, did note in its certificate that North Korea controlled the area of Korea north of the 38th Parallel.[80] The Foreign Office also advised the Court to draw its own conclusion of law. It may be said that given the Court's reliance on *Luigi*, even if the executive certificate had been intended to be conclusive, as in *Harshaw Chemical*, the case would have come out the same way.

In a more recent case, *Hesperides Hotels v. Aegean Turkish Holidays and Muftizade*,[81] decided in 1978, all the issues that concern us:

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77. Daniel P. O'Connell, *supra* note 3, p. 170.

78. Lord Wiberforce stated:

> In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit and that *where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined)* the courts may, in the interest of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. No trace of any such doctrine is yet to be found in English law, but equally in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognized governments, which would prevent its acceptance or which [would] prescribe the absolute and total invalidity of all laws and acts flowing from unrecognized governments. . . *I should wish to regard it as an open question, in English law*. . . (emphasis added).

[1967] A.C. 954.

79. [1970] 1 Ch. 160; [1969] 3 All E.R. 396; *British International Law Cases*, Vol. 9 91973), p. 1. For a discussion on exceptions to traditional English law on recognition (including the *Al-Fin* case), see J.G. Merrills, "Recognition and Construction," *International & Comparative Law Quarterly*, Vol. 20 (1970), p. 476.

80. [1970] 1 Ch. 160.

81. [1978] 3 W.L.R. 378, H.L.; [1978] 1 All E.R. 277. This case was noted in *British Yearbook of International Law*, Vol. 49 (1978), p. 259; *Cambridge Law Journal*, 1978, p. 48; Malcolm Shaw, "Legal Acts of an Unrecognized Entity," *Law Quarterly Review*, Vol. 94 (1978), p. 500; J.G. Merrills, "Trespass to Foreign Land," *International and Comparative Law Quarterly*, Vol. 28 (1979), pp. 523-25; Zaim M. Nedjati, "Acts of Unrecognized

the conclusiveness of the executive certificate, judicial cognizance of an unrecognized government, and justiciability of the question in our hypothetical case, were squarely dealt with. Plaintiffs were Greek-Cypriot companies that owned hotels in Northern Cyprus, which were taken over by Turkish-Cypriots after the Turkish invasion in 1974 and were run by the latter under a lease from the new authorities calling themselves the "Turkish Federated State of Cyprus" (TFSC). Owners of the plaintiff companies fled to southern Cyprus where a Greek-Cypriot administration was in control. Plaintiffs sought to enjoin the defendants, an English Travel Agent and the London representative of TFSC, from promoting holidays in the plaintiffs' hotels.

One of the issues before the Court was what law, as *lex loci delicti*, should apply to make the alleged trespass actionable in England. In reply to an inquiry by the Court, the Foreign Office stated that Britain did not recognize the TFSC either as the *de jure* or *de facto* government of Cyprus and that the only lawful government recognized in Cyprus was the Republic of Cyprus set up by the Cyprus Act of 1960.[82]

Lord Denning of the Court of Appeal, in response to the argument that the Court should follow the executive certificate and regard as nullities the laws of TFSC that authorized the occupation of the premises, made an elaborate discussion of this issue. His views are worth quoting at length:

> That doctrine is said to be based on the need for the executive and the courts to speak with one voice. If the executive do not recognise the usurping government, nor should the courts: see *The Arantzazu Mendi* by Lord Atkin. But there are those who do not subscribe to that view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the *external* consequences of recognition, vis-a-vis other states. The courts are concerned with the *internal*

Governments," *ibid.*, Vol. 30 (1981), pp. 388, 391, 397. This issue of judicial cognizance was dealt with only in Lord Dennings' opinion in the Court of Appeal. The other two law judges, while expressing some sympathy with Lord Denning's views, focused on the question of trespass on foreign land. [1978] 1 All E.R. 277, 291, 293. On appeal to the House of Lords, their Lordships considered it unnecessary to decide this issue which was fully argued. [1978] 3 W.L.R. 378, 382, 388. The House of Lords allowed the appeal in part to permit the action to continue as regards the chattels (contents of the two hotels) but not land or immovable property. *Ibid.*, p. 387, 395.

82. [1978] 1 All E.R. 281.

> consequences of it, vis-a-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it in its impact on individuals as justice and common sense require, provided always that there are no considerations of public policy against it.[83] (original footnote omitted)
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> . . . .
>
> If it were necessary to make a choice between these conflicting doctrines, *I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognized by Her Majesty's Government de jure or de facto*, at any rate in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth; and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.[84] (emphasis added)

He then concluded on the question of justiciability:

> Although this case has involved much discussion on many points, I think it could be disposed of on a broad ground of public policy. Underlying this case is a divergence of view between two autonomous administrations in Cyprus. The northern administration sets itself up as an administration entitled to pass laws requisitioning this property. The southern administration denies the claim and says that the requisitioning was unlawful. *It is not the province of these courts to resolve such a dispute*. It is a dispute which should be settled by negotiation between the two administrations aided, we hope, by intermediaries of good will. It is indeed, we hope, being settled at this very moment by negotiations in Vienna. If a settlement is reached it should deal with all questions relating to the taking of property, compensation and so forth. But, whether it is settled or not, it is not for these courts to decide between these conflicting views. *The dispute, in my view, is not justi-*

83. *Ibid.*, p. 282.
84. *Ibid.*, p. 283.

> *ciable here*. The action should be struck out as not sustainable. I would allow the appeal accordingly.[85] (emphasis added).

In *Reel v. Holder and Another*[86] decided in 1981, the English courts were faced with a direct confrontation between national athletic bodies of the PRC and ROC regarding membership in the England-based International Amateur Athletic Federation (IAAF). Under Rule 1(2) of the IAAF, membership is open to "national governing body" of any "country," and it is expressly provided that the jurisdiction of IAAF members is limited to the "political boundaries of the country they represent." In 1954, the IAAF accepted the application for membership of the PRC body from the Chinese mainland while it also extended an invitation to the ROC body from Taiwan to apply. The ROC applied in 1956 and was accepted as a member in due course. The PRC body then withdrew in protest in 1958. Twenty years later, in the IAAF's 1978 meeting, a resolution was passed to re-admit the PRC body as the sole representative of the country "China" with jurisdiction covering Taiwan. This, in effect, amounted to excluding the ROC body from membership. The ROC body thereupon sued the IAAF in English courts to annul the resolution.

Judge Forbes of the Queens Bench Division, finding no reason for equating "country" with "nation" and noting that neither the PRC body nor the ROC body had control of athletes in the other body's territory, found the resolution in violation of the IAAF Rule 1(a) and thus void.[87] On appeal, judgment was affirmed. Lord Denning of the Court of Appeal opined:

> In the rule, "the jurisdiction of members of the Federation shall be limited to the political boundaries of the country they represent", the governing word is "country". *One "country" is Taiwan. Another "country" is mainland China. The jurisdiction of the Athletic Association of Taiwan is limited to Taiwan. The jurisdiction of Athletic Association of mainland China is limited to mainland China*.[88] (emphasis added)

And Law Judge Eveleigh concurred:

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85. *Ibid*., p. 286.

86. Reel v. Holder and another, [1981] 3 All E.R.; [1981] 1 W.L.R. 1226, C.A. affirming [1979] 3 All E.R. 1041; 1 W.L.R. 1252.

87. [1979] 3 All E.R. 1052.

88. [1981] 3 All E.R. 325.

> The word "country" has been used in the rules in order to delineate the area of authority. They do not use the word in the sense of sovereign state.
>
> . . .
>
> That rule clearly contemplates that there may be an existing member of the IAAF which is a colony and not itself a sovereign state. I think that the word is used in the rules in the sense of an area or part of the world where the applicant has authority in relation to athletics and an area to which the word "country" is appropriate because the *inhabitants share the right to live there in common as one distinct people. This is a question to be answered broadly and not on a political basis alone.* Political status may have some relevance. It may perhaps help to see the inhabitants as being one people, but is is not the decisive factor.[89] (emphasis added)

In restoring the ROC body's lost membership, both courts were carefully confining themselves to interpreting the rules of the IAAF, which are legally a contract among its members, without touching upon the sensitive issue of who represents the state of China in the IAAF. Yet it still is significant that the ROC and PRC were, for the purpose of contract interpretation, considered two distinct "countries," mutually exclusive of each other. In no cases other than colonies has the word "country" ever been interpreted as something less than a sovereign state. Given the British Foreign and Commonwealth Relation Office's certificate cited earlier, such a decision could not have been reached without a strong sense of de factoism on the part of the judges concerned. In fact, the Court of Appeal showed the same degree of de factoism earlier in solving a similar problem in relation to badminton in an unreported 1977 case *Shen Fu Chang v. Stellan Mohlin* (July 5, 1977).[90] In that case, Judge Robert Goff made a declaration that Taiwan could be a member of the International Badminton Federation.[91] Although the question of judicial cognizance of an unrecognized government's legal acts was not involved in either cases, both cases will help the new trend of judicial realism take shape in England.

In sum, the above cases show a gradual but definite departure by English courts from their traditional rigid position on unrecog-

89. *Ibid.*, pp. 326-27.
90. *Ibid.*, p. 324.
91. *Ibid.*

nized governments and their legal acts. As a result, English courts are less inclined to follow unreservedly the views of the Foreign Office and have become increasingly independent in these matters. Yet the old tradition remains strong.[92] Although more judicial development of the new de-factoism is needed before a definite rule could emerge, the view that a government, not recognized *de jure* or at least *de facto* by the British Government, should be regarded by English courts as non-existent, is being totally abandoned.

(c) Implications for the Peking-Taipei Contest for Seabed Oil

If the PRC's or ROC's assignee brings an action to contest the other's title to oil in question in an English court, how would the court decide? The court would, as usual, consult the Foreign Office, which can be expected to issue a certificate outlining the position of the British government. However conclusive that certificate might purport to be, the Court probably would not accept it blindly in exclusion of other evidence, as a number of recent cases have shown. One therefore may assume with some confidence that the Court would consider the parties' arguments and the authorities on which they rely in reaching its own conclusion. It is thus useful to look into the potential contentions of the PRC's and ROC's assignees.

(1) The "Public Property" Argument

The PRC's assignee, either as plaintiff or defendant, would argue, citing *Haile Selassie*, that since Britain has recognized the PRC as the only *de jure* government of all China, including Taiwan, and since the oil in question is a public property belonging to the Chinese State, only the PRC has title to it. He further would contend that since Britain does not recognize the ROC as a government, the validity of all the ROC's legal acts, including those that effected the assignment of the oil to the ROC's assignee, should be denied by English courts. He would invoke a chain of authorities in his support prior to and after *Luther v. Sagor*.

This argument deserves scrutiny. Transfer of public property, *e.g.*, land, buildings, bank accounts, from a displaced government to its successor regime *within* the dispossessed territory occurs as a matter of course in cases of governmental succession effected either

92. Lord Denning was criticized for having gone too far and for his alleged misunderstanding of Lord Wilberforce's dictum in *Carl Zeiss* which he quoted. Malcolm Shaw, *supra* note 81, p. 502.

through normal or revolutionary means. This is what actually happened on the Chinese mainland after 1949. If the property is situated *abroad* and the title thereto is contested by the rival regimes, usually the court of the state in which the property is located will determine the rightful owner of it on the basis of recognition by that state. *Haile Selassie* and *Civil Air Transport* are precedents in point.[93] But is the oil in dispute a "public property?"

The oil is not property before it is recovered from the subsoil of the continental shelf. If the PRC recovers it, then the PRC has title to the oil because it, as a government recognized by Britain, has sovereign rights under international law over resources in its continental shelf. The ROC's assignee would have little basis to claim the oil, regardless of whether the oil has been assigned by the PRC to a private party. However, if the oil is recovered by the ROC and assigned to a private assignee, the "public property" argument seems questionable even though the oil is now under English jurisdiction. In this context, the date of Britain's acknowledgment of the PRC's *de jure* sovereignty over Taiwan, *i.e.*, March 13, 1972, becomes critical.

Since Britain before that date did not consider Taiwan as part of China, the PRC may not claim any property in Taiwan owned by the ROC, including the oil in question, as public property belonging to the State of China. After the oil was assigned to a private party and shipped to England, it ceased to be *public* property. Moreover, neither the PRC nor its assignee can claim it under *Haile Selassie*.

However, the PRC's assignee would assert that the PRC may claim title to all public property situated in Taiwan after March 13, 1972, including the oil in question, on the ground that Britain has acknowledged the PRC's sovereignty over Taiwan at that time. He further would assert that since the ROC long has been derecognized by Britain as a government of China, it has no authority to assign any public property of China in Taiwan after that date to a private party. As a result, the argument continues, the ROC's assignee holds no legal title to the oil in question. If the court accepts this line of argument, the impact on the ROC would be devastating. From then on, not only would the ROC be a non-entity in the eyes of English courts, but title to all properties owned or acquired by the ROC automatically would become vested in the PRC as far as English law is

93. There are a number of American cases in this regard. *E.g.*, The Rogdai, 278 F. 294 (N.D. Cal. 1920); Bank of China v. Wells Fargo Bank and Union Trust Company, 104 F. Supp. 59 (N.D. Cal. 1952); Republic of China v. American Express Co., 195 F.2d 230 (2d Cir. 1952).

concerned. The disruption of international transactions involving the ROC as a party would be enormous and far-reaching.

There seems to be no rule in English law that gives such sweeping and unjust effect to recognition by the British government, especially when the property in question has been transferred to private hands. The rule of *Haile Selassie*, where the property remained in the hands of the derecognized government, does not apply here. More importantly, if the recent emergence of judicial de factoism toward unrecognized governments makes any sense, the English court would not be blind to the reality in Taiwan, as *Reel v. Holder* has shown, where the ROC continues to exercise *de facto* sovereignty. More likely than not, the court would look into additional evidence and determine to what extent it would recognize legal acts of the ROC which underlie the validity of the title of the ROC's assignee.

(2) The *De Facto* Doctrine

To determine whether the ROC's legal acts warrant judicial cognizance the court would have to consider whether such cognizance would violate the public policy of the forum as well as the nature of the legal acts in question. It is clear that Britain's derecognition of the ROC did not result from any inherent illegality, as in the case of Rhodesia,[94] or Britain's international obligation of non-recognition, as in the case of Transkei and Bophuthatswana in South Africa.[95] This absence of objection on public policy grounds does not solve the problem, however. Difficult questions remain re-

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94. Rhodesia's unilateral independence in 1965 was illegal in that it was *ultra vires*, since independence could only be granted by an act of the British Parliament. *See* J.E.S. Fawcett, "Security Council Resolutions on Rhodesia," *British Yearbook of International Law*, Vol. 41 (1965-1966), pp. 103, 105.

95. Transkei declared its independence from South Africa on October 26, 1976. *New York Times*, October 26, 1976, p. 1. Bophuthatswana, another one of the nine *bantustans*, or tribal homelands, in South Africa, did so in December 1977. The United Nations General Assembly passed, immediately after Transkei's declaration of independence, a resolution declaring that independence null and void because it consolidated South Africa's *Apartheid* policies, and condemned the establishment of all *bantustans*. General Assembly Resolution 31/6, UNGAOR, Vol. 31, Supplement (No. 39) p. 10, UN Doc. A/31/39 (1977). The resolution was passed unanimously. Other than south Africa, no U.N. member state has granted recognition to Transkei. The international obligation of non-recognition derives its authority from the U.N. Charter, customary international law of human rights, and multilateral treaties to which Britain is a party (*e.g.*, the International Covenant on Civil and Political Rights). For a discussion on Transkei, see Merrie F. Witkin, "Transkei: An Analysis of the Practice of Recognition—Political or Legal?" *Harvard International Law Journal*, Vol. 18 (1977), p. 605.

specting whether to limit judicial cognizance to "perfunctory acts of administration," as stated by *Carl Zeiss* (*per* Lord Wilberforce),[96] such as certification of marriage or divorce, or to include other exercises of governmental authority, as intimated in *Hesperides* (*per* Lord Denning in Court of Appeal),[97] which presumably include the power to exploit seabed oil and dispose of it.

On the other hand, the PRC, as a recognized government, should have little difficulty getting judicial cognizance of its law and decrees that validate the title of its assignee.[98] If the *Hesperides* rule prevails, which is not unlikely in view of the new trend of realism in English cases, a real conflict would emerge before the court, namely, one between the legal acts of two rival governments of the same state. The situation bears considerable resemblance to that of Cyprus where two mutually independent administrations co-exist and effectively control their respective territories. More complicated than *Hesperides* is the fact that the Peking-Taipei rivalry involves oil recovered from an area of the seabed over which they both lack sovereignty, *stricto sensu*, under customary international law.[99] A further attempt by the court to ascertain the respective *de facto* jurisdiction of the ROC and PRC practically would require a determination of the shelf boundary in the Taiwan Strait between the ROC and the PRC. At this point, even the most liberal judge would find the task formidable, since no law exists regarding the delimitation of continental shelf between two rival governments of the same state. A logical step for the court to take would be to declare the dispute non-justiciable, as Lord Denning did in *Hesperides*. This means that the plaintiff's contest would fail and that the defendant would retain the oil which he must have had already in possession.

If the *Hesperides* rule did not prevail, then the ROC's legal acts dealing with seabed exploitation would not be recognized. Regardless of who sues, the ROC's assignee would lose.

In conclusion, the newly emerged de factoism on the part of English courts could benefit the ROC's assignee, but only if the assignment took place before March 13, 1972, and only if he has the oil and is sued as defendant. The best outcome he can hope for is a dismissal of the suit for lack of jurisdiction under *Hesperides*. If he

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96. *See* his opinion quoted in *supra* note 78.

97. *See* the quotation in text accompanying note 84 *supra*.

98. On judicial cognizance of recognized governments, see Daniel P. O'Connell, *supra* note 3, p. 183.

99. A state has, under Article 2 of the Continental Shelf Convention, only sovereign rights to the *natural resources* in the continental shelf, but not to the shelf *itself*.

sues as a plaintiff, his chances for winning in all circumstances are slim.

3. Japanese Practice

(a) Practice of the Japanese Government

Japan's post-war China policy was influenced heavily by the United States. Having regained full sovereignty from the Allied Powers under the 1951 San Francisco Peace Treaty, Japan in 1952 signed a separate peace treaty with the ROC,[100] a country which was, like the PRC, not invited to the peace conference.[101] The 1952 treaty terminated the state of war between China and Japan[102] and the Japanese sovereignty over Taiwan[103] and served as the basis for a host of other bilateral treaties.[104] Exchange of ambassadors in that year between Tokyo and Taipei marked the resumption of diplomatic relations.

In the next two decades, Tokyo, following the American lead, continued to recognize Taipei and support the ROC's seat in the United Nations until the latter's expulsion in 1971. On the other hand, Japan managed to maintain unofficial economic relations with the PRC. The reversal of Washington's China policy in 1971 shocked Tokyo and accelerated the process of "normalization of relations" between Tokyo and Peking. In the joint communiqué of September 29, 1972, establishing diplomatic relations between them, it was declared:

> The government of Japan recognizes the government of the People's Republic of China as the sole legal government of China.
>
> The Government of the People's Republic of China reaffirms that Taiwan is an inalienable part of the territory of the People's Republic of China. The government of Japan *fully understands and respects* this stand of the government of China and adheres to its stand of complying with Article 8 of the Potsdam Proclamation.[105] (emphasis

100. Treaty of Peace, Republic of China-Japan, April 28, 1952, UNTS, Vol. 138, p. 38.

101. This was due to disagreement between the U.S., which recognized the ROC, and the U.K., the U.S.S.R. and other countries that had recognized the PRC, with respect to which government should represent China in the peace conference. The compromise reached was that neither would be invited. Hungdah Chiu, *supra* note 6, p. 125.

102. ROC-Japan Peace Treaty, art. 1.

103. *Ibid.*, art. 2.

104. *Ibid.*, arts. 7, 8, 9.

105. *Peking Review*, October 6, 1972, pp. 12-13.

added)

In a subsequent press conference, Japanese Foreign Minister Ohira said:

> The Japanese government holds that as a result of the normalization of Japan-China relations, the Japan-China peace treaty *has lost the meaning of its existence and is declared to be terminated*, although this question is not mentioned in the joint statement.[106] (emphasis added)

On the same day, Japan and the ROC severed diplomatic relations.[107] But Taipei and Tokyo soon set up functional substitutes of embassies in the capitals of each country to carry on trade and other unofficial relations.[108]

One important question left open is Japan's position on the legal status of Taiwan. While Peking regarded the joint communiqué as committing Japan to the former's sovereignty over Taiwan, Tokyo held a different view.[109] The Japanese view that Taiwan's legal status remains undetermined is consistent with the peace trea-

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106. *Ibid.*, p. 15.

107. *Free China Weekly*, October 1, 1972, p. 1.

108. The Japanese embassy in Taipei was replaced by the branch office of a private entity known as Interchange Association (ICA) whereas the ROC's embassy in Tokyo was superseded by the branch office of the East Asia Relations Association (EARA), a similar entity. On December 26, 1972, an agreement was signed between ICA and EARA to provide for the continuance of extensive trade, cultural and other unofficial relations between the two countries. Most of the staff of ICA and EARA were drawn from the foreign ministries and other governmental agencies of the ROC and Japan. On the post-1972 Japan-ROC relations, see David N. Rowe, "Informal Diplomatic Relations: The Case of Japan and the Republic of China, 1972-1974," Hamden, Connecticut: Shoe String Press, 1975; James W. Morley, "The Japanese Formula for Normalization and Its Relevance for U.S. China Policy, *in* Hungdah Chiu ed. *Normalizing Relations with the People's Republic of China: Problems, Analysis and Documents*, Occasional Papers/ Reprints Series in Contemporary Asian Studies, No. 3, Baltimore: University of Maryland Law School, 1978 (Hungdah Chiu ed.), p. 121.

109. According to Takakazu Kuriyama, the then Head of the Treaties Division, Treaty Bureau, Foreign Ministry of Japan, the Japanese government was, in the joint communiqué, addressing what the status of Taiwan *should be* rather than what *it is*. He said:

> [The Japanese Government] has consequently no objection to the islands becoming part of the territory of the People's Republic of China and has no intention whatsoever to support the independence of Taiwan.

Takakazu Kuriyama, "Some Legal Aspects of the Japan-China Joint Communiqué," *Japanese Annual of International Law*, Vol. 17 (1973), pp. 42, 45.

Contrary to the popular impression that Japan had recognized Peking's claim to Taiwan, Tokyo denied that it was the Japanese position. *New York Times*, November 6,1972, p. 22.

ties and its official statements prior to 1972.[110] Moreover, the Japanese government did not regard the joint communiqué as a treaty.[111] It seems fair to say that by "fully understand[ing] and respect[ing]" the PRC's position, Japan neither opposed nor endorsed that position, despite the contrary views of some Japanese publicists.[112]

Another question is the legal status of the ROC vis-a-vis Japan. Unlike the United Kingdom, Japan did not indicate expressly its withdrawal of recognition, but merely advised the ROC that Japan could no longer maintain diplomatic ties with it. Nevertheless, such an implication seems obvious. In addition to Japan's recognition of the PRC as the *sole* legal government of China, the termination of the ROC-Japan Peace Treaty, which was largely dispositive and declaratory in nature and could have survived a mere rupture of diplomatic relations,[113] was another indication. A third instance involved the embassy premises of the ROC in Tokyo. The Japanese government, which had been asked by the ROC to take these premises into

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110. For the official pronouncements of Japan's position on the legal status of Taiwan, see the statement of the Director of the Treaties Bureau of the Ministry of Foreign Affairs in the Japanese House of Representatives on February 2, 1961, *Japanese Annual of International Law*, Vol. 8 (1964), p. 101, and the statement of the same ministry on March 12, 1964 in the House of Councillors, *ibid*., Vol. 10, 64-65 (1966). Japan considered that only the Allied Powers who defeated Japan in World War II had the authority to determine Taiwan's status.

111. Takakazu Kuriyama, *supra* note 101, p. 50.

112. *E.g*., Keishiro Iriye, "The Joint Communiqué of Japan and the People's Republic of China and the Taiwan Issue," *Japanese Annual of International Law*, Vol. 17 (1973), pp. 52, 55-61. Mr. Iriye, professor of international law at Waseda University, argued that Taiwan was "tacitly recognized as having been returned to Chinese sovereignty" when the 1952 ROC-Japan peace treaty came into force. Therefore, when Japan recognized the PRC as the only legal government of China, sovereignty over Taiwan became vested in the PRC. He went so far as to conclude that all natural and juridical persons in Taiwan should be treated as nationals of the PRC. *Ibid*.

113. The Japanese government considered that, as was obvious from Foreign Minister Ohira's statement quoted above, the termination of the Japan-ROC peace treaty was a result of derecognizing the ROC as the government of the State of China with which the treaty was concluded. Kuriyama, *supra* note 101, pp. 48-49. In fact, the declaratory and dispositive provisions, such as termination of the state of war between China and Japan and Japan's renunciation of its claim to Taiwan, were considered by the Japanese government to have survived de-recognition of the ROC. This was why Japan did not conclude a second peace treaty with the PRC in order to terminate the state of war. (The 1978 Japan-PRC Peace and Friendship Treaty had nothing to do with the termination of the state of war.) But in order to accomodate the PRC's demand that Japan renounce the Japan-ROC peace treaty which the PRC regarded as null and void *ab initio*, the joint communiqué referred to the termination of "abnormal state of affairs" that had existed between Japan and the PRC. *Peking Review*, October 6, 1972, p. 12.

its custody,[114] handed over the properties to the PRC in March 1973 on the ground that the PRC, as the sole legal government of China recognized by Japan, was entitled to any diplomatic property of the State of China.[115]

(b) Practice of Japanese Courts

The emergence, right at Japan's doorstep, of two pairs of rival governments in China and Korea and the presence of large numbers of persons of Chinese and Korean origin in Japan have given Japanese courts ample opportunity to deal with legal questions affiliated with unrecognized governments, notably the *lex patriae* of these aliens in matters of marriage, divorce, and other legal acts of domestic relations.[116] Japanese courts generally follow the theory of "one state, two governments" or that of "two states" to apply the Japanese choice-of-law rules with largely similar results.[117] Of importance here is that despite the approaches employed, judicial cognizance of the validity of the laws of the PRC, which were not recognized by Japan until 1972, and of the DPRK (North Korea), which is still unrecognized, invariably has been granted.[118] That governmental recognition (public international law) and choice-of-law problems (private international law) should be kept separate is a generally accepted judicial belief. A typical formulation appeared in the opinion of the Patent Tribunal of the Japanese Patent Agency, in the Japanese version of the *Carl Zeiss* case, in regard to the validity of East German law:

> But the capacity of a person is to be determined by *lex patriae* under the principle of private international law, and it is widely recognized that the law in a territory of which the person in question has his origin can be designated as *lex patriae* as long as the territory possesses an effective legal order, [regardless of] whether it is not recognized as a State or whether its legal status is not yet finally determined in the eyes of Japan.[119]

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114. *Chung-yang Jih-pao*, December 28, 1972, p. 1.

115. *Mainichi Shimbun*, March 15, 1973, p. 2. The ROC's Foreign Ministry protested the action, but did not challenge it in Japanese courts. *Chung-yang Jih-pao*, March 16, 1973, p. 1.

116. *See generally* Yoshiro Hayata, "The *Lex Patriae* of Chinese and Koreans [sic]," *Japanese Annual of International Law*, Vol. 9 (1965), p. 57.

117. *Ibid.*, pp. 60-67.

118. *Ibid.*, p. 59, note 8.

119. Award of July 17, 1963, The Patent Tribunal, *translated in ibid.*, pp. 132, 134.

In a more recent case,[120] East Germany also was treated as a state and its laws recognized judicially for purposes of Japanese trademark and patent laws.

Since Japan's switch of recognition from Taipei to Peking in 1972, there only have been two municipal cases that touched upon the question of recognition and its legal consequences. One, decided in 1975,[121] related to the constitutionality of Japan's termination of the peace treaty with the ROC, and has no material bearing on the question under discussion. The other case, *Republic of China v. Yu Ping-huan et al.*,[122] decided in 1982, concerned the transfer of a Chinese student dormitory acquired by the ROC in 1952 to the PRC as a result of Japan's recognition of the latter. Initially, the Kyoto District Court upheld the transfer, reasoning that

> [a]ccording to the facts found, the land and building thereon are public property for public use, considering the source of money alloted for the purchase thereof and the purpose of the use thereof, which China purchased in order to continuously use as a dormitory for Chinese students in Japan.[123]

It also said that the PRC, recognized by Japan as the sole legal government of China, was entitled to the public property in question owned by the ROC since 1952 in the name of the State of China.[124] The Court clearly relied on the theory of governmental succession in international law to justify the transfer. More interesting than the *ratio decidendi* was the fact that the ROC, as plaintiff and represented by its former ambassador Chen Chih-mai to Japan, was granted *locus standi*. The Court said:

> Furthermore, the plaintiff's capacity to be a *party* must be examined, since the Japanese government [has] recognized the People's Republic of China as the sole legitimate Government in China; however, *it is an unquestionable fact that the plaintiff still dominates [Taiwan] and the surrounding islands and constitutes a* de facto *State*, and such would encounter no problem in seeking settlement by the Japanese

120. Decision of June 3, 1973, Tokyo High Court, *ibid.*, Vol. 19 (1975), p. 187.

121. Decision of September 11, 1975, Hiroshima High Court, *ibid.*, Vol. 21 (1977), p. 159.

122. Decision of September 16, 1977, Kyoto District Court, *ibid.*, Vol. 22 (1978), p. 151.

123. *Ibid.*, p. 155.

124. *Ibid.*

> Court of disputes arising from international private transactions and others, and thus it is not necessary to deny the capacity of the plaintiff to be a *party*.[125] (emphasis added)

On appeal to the Osaka High Court, the judgment upholding the transfer was reversed and remanded to the Kyoto District Court. However, Osaka High Court accepted the Kyoto District Court's view on the *locus standi* question, theorizing that

> whether the plaintiff has the capacity to sue depends on whether it is a *de facto* government and whether the litigation concerns private legal dispute.[126]

It went on to state that although Japanese courts must, like all government agencies, fully understand and respect the PRC's position regarding Taiwan, that does not mean "Japan is obligated to ignore the existence of the plaintiff or to prevent Japanese national from entering into private legal relationships with the plaintiff."[127] The Court reasoned that since the plaintiff actually ruled and dominated Taiwan and the surrounding islands and the property in question did not have direct state functions, the plaintiff had the capacity to sue.

On the question of transfer of public property as a result of governmental succession, the Court opined:

> The fact that the plaintiff still actually rules and dominates Taiwan and the surrounding islands as a *de facto* government makes the succession of government from the plaintiff to the People's Republic of China as a result of Japan-China normalization of relations an *incomplete succession*. The retroactive legal effect of Japan's switch of recognition to the People's Republic of China as the sole legal government of China does not affect ownership of the property in question which, having no direct state functions, was acquired by the plaintiff in 1952 when it was still the government recognized by Japan. The People's Republic of China therefore cannot claim ownership of the property in question on the ground of governmental succession (which it has not done). Consequently, the plaintiff has not, as a matter of course, lost the ownership of the property in question after the Japan-China normalization of rela-

125. *Ibid.*, p. 156.

126. Decision of April 14, 1982, Osaka High Court, p. 10 (A copy of the decision and its Chinese translation are in the author's possession.).

127. *Ibid.*

tions.[128] (emphasis added)

The concept of "incomplete governmental succession" and the characterization of the property in question were both innovative and enlightening. Both points gave the Court enough leeway to bypass the unrealistic and undesirable effects of recognition of government under traditional rules of international law. Of particular significance is the confirmation of the rule, long established in the United States and England,[129] that recognition works retroactively only to validate acts of the erstwhile unrecognized government but not to invalidate those acts of the *de jure* government prior to derecognition.

Regardless of whether the ROC, if sued, would be able to claim sovereign immunity, the strong de factoism of Japanese courts toward unrecognized governments and their legal acts seems obvious and consistent.

(c) Implications for the Peking-Taipei Contest for Seabed Oil

If the legal battle between the assignees of the ROC and PRC is fought in a Japanese court, the scenario probably would be different from that in an English court. The Japanese court would not consult the Foreign Ministry, but merely take judicial notice of the switch of recognition and the attending developments, as did the two courts in the two cases noted above. The contentions of the parties would be similar but their reception by the Japanese courts may be quite different.

Since Japan had recognized the ROC before September 29, 1972, Japanese courts probably would not, under the act of state doctrine, sit in judgment on the validity of the ROC's legal acts (including those relating to oil exploitation and sale) prior to that date unless they violate international law or the public policy of the forum.[130] Japan's recognition of the PRC may not invalidate retroac-

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128. *Ibid.*, pp. 14-15.

129. E.g., Guaranty Trust Co., v. United States, 304 U.S. 126 (1938); Gdynia Ameryka Linie v. Boguslawski, [1953] A.C. 11; Civil Air Transport Inc. v. Central Air Transport Corporation, [1953] A.C. 70.

130. It is submitted that the act of state doctrine is not generally regarded as a rule of international law. L. Oppenheim, *International Law*, Vol. 1, 8th ed. by H. Lauterpacht, London: Longmans, Green and Co., 1955, p. 267. Various considerations underlie the application of this doctrine in state practices, including constitutional requirements, comity between nations, and municipal conflict of law rules. Under Article 98 of the 1946 Japanese Constitution, Japan will abide by "treaties concluded" by it and the "estab-

tively any of them.[131] The fact that the Japan-ROC Peace Treaty was declared "terminated" rather than "null and void *ab initio*," as demanded by the PRC, is indicative of Japan's policy to minimize disruption of the legal relationship that existed between Tokyo and Taipei between 1952 and 1972. If the ROC recovered the oil and assigned it to a private party before September 29, 1972, validity of the assignment hardly could be challenged. The PRC's assignee thus would not be able to claim the oil in question as public property.

If the above assignment took place *after* September 29, 1972, the PRC's assignee could argue that since title to the oil in question passed from the ROC to the PRC as a result of Japan's recognition of the latter, the assignment became invalid. This argument bases its strength on two possible propositions. First, Japan, through recognition of the PRC, has accepted its *de jure* sovereignty over Taiwan. Second, the PRC is entitled to whatever property belonged to the State of China, now represented by the PRC. The Japanese have, as noted earlier, made it clear that they did not accede to the first proposition in 1972. The second proposition, based on the governmental succession theory in international law, seems acceptable to both the Japanese government and courts, which have actually employed it with respect to the ROC and PRC. Yet this theory does not seem to apply in the present case, as in the *Yu Ping-huan* case. The "public property" as conceived by the Japanese government and courts appears to include only that owned by the ROC in Japan for direct state functions, such as embassy premises. In the present case, before the oil in question left Taiwan, it was, regardless of whether the assignment had taken place, beyond the reach of the PRC for lack of *de jure* jurisdiction. After it reached Japanese soil, unless the assignment had not been effective, it had become private property on which the PRC could lay no claim.

It is not impossible, however, that the Japanese Courts might construe the Japanese position in the joint communiqué of September 29, 1972 as accepting the PRC's *de jure* sovereignty over Taiwan,[132] a step the Japanese government refused to take. The situation then would be identical to that in the English court where

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lished law of nations" Japanese courts are thus free not to recognize foreign law, in this case, the ROC law. But Japanese judicial practice to date points to the contrary conclusion, as discussed above.

131. *Supra* note 129. This is the established rule in the United States and the United Kingdom.

132. This seems to be a possible but unlikely scenario for two reasons: First, it is in contravention of the intention of the Japanese Government; second, the joint communi-

the assignment of the oil from the ROC to a private party took place after Britain's acknowledgement of the PRC's *de jure* sovereignty over Taiwan, as discussed above. How would a Japanese court decide? Unlike their English counterparts, Japanese courts have no tradition of animosity toward unrecognized governments. The fact that both the Kyoto District Court and the Osaka High Court treated the ROC as a "*de facto* State" and accorded it *locus standi*, which would have been unthinkable in an English court,[133] bespeaks the strong judicial realism. Moreover, an unreserved acceptance of the PRC's claim to Taiwan, construed literally, would lead to unjust and absurd results, as noted earlier. Therefore, even if a Japanese court should construe the Japanese position in the joint communiqué more strongly than it was intended, the court probably would not determine the resulting legal consequences as the PRC desires. But just how far a Japanese court would go in adjusting the conflicting claims of a *de jure* and a *de facto* government actually controlling separate territories is unclear, for there has been no judicial precedent similar to *Hesperides*. If the *de facto* doctrine in *Yu Ping-huan* is any guide, a declaration of nonjusticiability is not an unlikely result.

In sum, it seems that the ROC's assignee would be in a stronger position vis-a-vis the PRC's assignee in a Japanese court than he would be in an English court. If he has the oil, and the assignment took place before 1972, he definitely would be able to keep it. If the assignment was effected after Tokyo had switched recognition from Taipei to Peking, in most cases he still would win, unless the Japanese courts reverse their strong realist tradition. On the other hand, Japanese judicial realism would help the PRC's assignee as a defendant if the oil was assigned to him before September 29, 1972, when the PRC was unrecognized. And after that date his likely success of defense would be assured. In conclusion, whoever has the oil in his possession is likely to resist successfully the legal challenge from the other side.

(4) United States Practice

(a) Practice of the Executive Branch and Congress

The outbreak of the Korean War in June 1950 dramatically

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qué, in particular the statement on Taiwan, not being a treaty, cannot be applied as positive law by Japanese courts. *See* note 129 and accompanying text.

133. The City of Berne v. The Bank of England, (1804) 9 Ves. Jun 347; (1804) 32 E.R. 636; *British International Law Cases*, Vol. 2 (1965), p. 1. *See generally* Daniel P. O'Connel, *supra* note 3, p. 168.

changed the United States' hands-off policy toward the Chinese Civil War. Washington immediately sent in the Seventh Fleet to "neutralize" the Taiwan Strait.[134] In an accompanying statement, President Truman declared that the status of Taiwan was undetermined,[135] a reversal of the American position held since 1945.[136] The United States subsequently managed to bring Japan into line on this question[137] in the San Francisco Peace Treaty in which Japan renounced its sovereignty over Taiwan in favor of no one. In 1954, a mutual defense treaty was signed between Taipei and Washington[138] in which the ROC's "territories" were defined as Taiwan and the Pescadores.[139] In the following years the U.S. continued to recognize the ROC and supported its seat in the United Nations until 1971.

President Nixon's trip to the PRC, announced in mid-1971, signified a fundamental change. At the end of his visit in February 1972, President Nixon, along with the PRC's Premier Chou En-lai, issued a joint communiqué in Shanghai which stated:

> The United States *acknowledges* that *all Chinese* on either side of the Taiwan Strait maintain there is but one China and that Taiwan is part of China. The United States Government *does not challenge* that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.[140] (emphasis added)

The document admits of various interpretations. While the State

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134. Prior to that, the U.S. Government ceased all military assistance to the Nationalist Government and expected Taiwan to fall into communist hands. Hungdah Chiu, *supra* note 6, p. 2115.

135. President Truman's Statement on the Mission of the U.S. Seventh Fleet in the Formosa Area, June 27, 1950, *American Foreign Policy, 1950-1955*, Vol. 2, *Basic Documents*, Washington, D.C.: Government Printing Office, p. 2468, excerpted in Hungdah Chiu, *supra* note 6, p. 228.

136. As late as January 5, 1950, President Truman still accepted the Chinese sovereignty over Taiwan, at least implicitly. Hungdah Chiu, *supra* note 6, p. 115.

137. *Ibid.*, pp. 122-27.

138. Mutual Defense Treaty, United States-Republic of China, December 2, 1954, UST, Vol. 6, p. 433; TIAS No. 3178; UNTS, Vol. 248, p. 213.

139. Art. 6. In a subsequent exchange of notes, however, the ROC's territory was understood to be "all territory now and hereafter under its control". UST, Vol. 6, p. 450; UNTS, Vol. 248, p. 226.

140. *Department State Bulletin*, Vol. 66 (1972), pp. 435, 437-38.

At the time of negotiating the Shanghai Communiqué, Secretary of State Kissinger reportedly intended to use the word "accepts" rather than "does not challenge" in the text. But he was rebuffed, possibly by President Nixon, in that attempt. Stanley Karnow, "Our Next Move on China," *New York Times*, August 14, 1977 (Magazine), p. 34, *re-*

Department officials denied that it represented any change of the U.S. position on the status of Taiwan,[141] held since the Korean War, Peking expectedly interpreted it as evidencing Wasington's recognition of Taiwan as part of China's territory.[142]

In Feburary 1973 the U.S. and the PRC set up a "liason office" in each other's capitals with full diplomatic privileges and immunities.[143] On December 15, 1978, President Carter announced that the U.S. and the PRC had agreed to establish diplomatic relations as of January 1, 1979.[144] The joint communiqué issued at the time declared:

> The United States of America recognized the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.
> The United States of America and the People's Republic of China *reaffirm* the principles agreed on by the two sides in the Shanghai Communiqué and emphasize once again that. . .
> The Government of the United States of America *acknowledges* the Chinese position that there is but one China and Taiwan is part of China.[145] (emphasis added)

While the U.S. deliberately chose to use the word "acknowledge," as it did in the Shanghai Communiqué, the PRC's text[146] used *ch'eng-jen* ("recognize" in English). The linguistic disparity reflects their different positions on Taiwan's status.

In a separate statement[147] issued the next day, the United States declared that it would terminate diplomatic relations with the ROC as of January 1, 1979 and the 1954 Mutual Defense Treaty a year from then.[148] Meanwhile, the Carter Administration submitted to

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ferred to in Hungdah Chiu, "Certain Legal Aspects of Recognizing the People's Republic of China," *Case Western Reserve Journal of International Law*, Vol. 11 (1979), p. 409.

141. "Transcript of ['Meet the Press'] TV Interview with [Marshall] Green" [in Tokyo], *Mainichi Daily News*, March 29, 1972, p. 2. Mr. Green was the then Assistant Secretary of State for East Asian and Pacific Affairs.

142. *Peking Review*, March 9, 1973, p. 11.

143. *New York Times*, February 23, 1973, p. 1; *ibid.*, p. 14.

144. *Ibid.*, December 16, 1978, p. 1.

145. *Ibid.*, p. 8; *Department of State Bulletin*, Vol. 79 (1979), p. 25.

146. *Jen-min Jih-pao*, December 16, 1979, p. 1.

147. *New York Times*, December 17, 1978, p. A22.

148. Article X of the ROC-U.S. Mutual Defense Treaty provided that either party may terminate the treaty on one year's notice.

Congress a bill purporting to provide a legal framework for maintaining unofficial relations with the ROC.[149] The bill underwent intensive debates in Congress before passing both Houses with substantial modifications that favored the ROC.[150] It was signed into law in early April.[151] The legislation, known as the Taiwan Relations Act of 1979,[152] keeps intact all but formal diplomatic ties with the ROC. Most existing diplomatic and consular establishments remain unchanged except their names;[153] so do several dozens of bilateral treaties.[154] As one commentator amazingly noted, the Act in

149. U.S. Congress, Senate, *A Bill to Promote the Foreign Policy of the United States through the Maintenance of Commercial, Cultural, and Other Relations with the People on Taiwan on An Unofficial Basis, and for Other Purposes*, S.245, 96th Cong., 1st Sess., 1979.

150. *See, e.g.*, U.S. Congress, Senate, Committee on Foreign Relations, *Taiwan, Hearings*, before the Committee on Foreign Relations, Senate on S.245, 96th Cong., 1st Sess., 1979.

151. United States, *Weekly Compilation of Presidential Documents*, Vol. 15 (1979), pp. 640-41.

152. Taiwan Relations Act of 1979, Pub. L. No. 96-8; 93 Stat. 14 (1979); 22 U.S.C.A. § 3301 (Supp. I 1979).

153. A non-profit organization incorporated under the District of Columbia law, known as the American Institute in Taiwan (AIT), set up branch offices in Taiwan to replace the former U.S. embassy and consulates. The AIT's counterpart, the Coordination Council for North American Affairs (CCNAA), maintains more than half of the ROC's former diplomatic and consular establishments in the U.S. through its branch offices. Governmental business between the ROC and the U.S., such as sale of arms, is transacted via these two entities. For a political discussion on how the post-1978 relations between the ROC and the U.S. have been conducted, see Leonard Unger, "Derecognition Worked", *Foreign Policy*, No. 36 (Fall 1979), p. 105. Mr. Unger was the last U.S. ambassador to the ROC.

154. The Taiwan Relations Act allows all treaties between the U.S. and the ROC to continue "unless and until terminated in accordance with law" 22 U.S.C.A. § 3303(c) (Supp. I 1979). A number of these existing treaties require updating or modification. If major changes are needed, then they may have to be renegotiated between AIT and CCNAA. For a discussion, see R. Sean Randolph, "The Status of Agreements between the American Institute in Taiwan and the Coordination Council for North American Affairs," *International Lawyer*, Vol. 15 (1981), p. 249.

President Carter's authority to terminate the 1954 ROC-U.S. Mutual Defense Treaty was challenged in court by 24 members of Congress. The U.S. Supreme Court eventually ordered the trial court to dismiss the suit without oral argument. 48 U.S.L.W. 3402 (S. Ct. 1979). The year-long litigation has spawn a body of legal literature. *See, e.g.*, J. Terry Emerson, "The Legislative Role in Treaty Abrogation," *Journal of Legislation*, Vol. 5 (1978), p. 309; David J. Scheffer, "The Law of Treaty Termination as Applied to the United States Derecognition of the Republic of China," *Harvard International Law Journal*, vol. 19 (1978), p. 931; Michael Resiman and Myres S. McDouglas, "Who Can Terminate Mutual Defense Treaties?" *National Law Journal*, May 21, 1979, p. 19; Edward M. Kennedy, "Normal Relations with China: Good Law, Good Policy," *American Bar Association Journal*, Vol. 65 (1979), p. 194; Barry Goldwater, "Treaty Termination Is A Shared Power," *ibid.*, p. 198; Herbert J. Hansell, "Memo-

effect constituted a "legislative re-recognition" of the ROC after the Executive Branch's derecognition.[155]

On August 17, 1982, the U.S. and the PRC restated, in yet another joint communiqué intended to settle the thorny question of U.S. arms sales to Taiwan, part of the 1979 joint communiqué regarding the recognition of the PRC as the sole legal government of China and the acknowledgement of the Chinese position that there is but one China and Taiwan is part of China.[156] To the extent of the above two questions, this new document, known as the "August 17 Communiqué", merely reiterates the U.S. position held since 1972 and adds nothing new.

(b) Implications for the Peking-Taipei Contest for Seabed Oil

Although initially influenced by the English courts' rigid adherence to the distinction between recognition and non-recognition of foreign governments, American courts have departed not infrequently from that doctrine since the Civil War.[157] In this century, the executive hostility, indifference, or friendliness toward an unrecognized government in various circumstances also has played an important part, since American courts normally consult the State Department before making decisions in recognition cases.[158] It is difficult to generalize the American judicial practice, for it has not always been consistent. Nevertheless, the special circumstances surrounding the situation of the ROC, which is unrecognized but friendly, should prompt the courts to take a realistic attitude toward its *de facto* existence and its legal acts.

But the Taiwan Relations Act has made such legal inquiry un-

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randum for the Secretary of State: President's Power to Give Notice of Termination of the U.S.-ROC Mutual Defense Treaty, *reprinted* in *Hearings on S.254, supra* note 150, p. 189.

155. Carl I. Gable, "Taiwan Relations Act: Legislative Re-recognition," *Vanderbilt Journal of Transnational Law*, Vol. 12 (1979), p. 511.

156. U.S. Department of State, *U.S.-China Joint Communiqué*, Current Policy, No. 413, Washington, D.C.: Government Printing Office, 1982. For a concise background analysis, see Lyushun Shen, "The Washington-Peking Controversy over U.S. Arms Sales to Taiwan: Diplomacy of Ambiguity and Escalation," *Chinese Yearbook of International Law and Affairs*, Vol. 2 (1982), p. 98.

157. Daniel P. O'Connel, *supra* note 3, pp. 172, 175-76. The decisive case in the post-Civil War era was Underhill v. Hernandez, 168 U.S. 250 (1897).

158. A.B. Lyons, "The Conclusiveness of the 'Suggestions' and Certificate of the American State Department," *British Yearbook of International Law*, Vol. 24 (1947), p. 116; Daniel P. O'Connell, *supra* note 3, pp. 119-22.

necessary. Anticipating potential adverse legal effects[159] flowing from the derecognition of the ROC, Congress has, in that legislation, taken care of nearly all the uncertainties. Insofar as the ROC and the U.S. are concerned, the Act supersedes the American case law respecting the effects of non-recognition. Consequently, we need only to consider the hypothetical case before us in the light of the executive practice and provisions of the Act.

The first question one might ask is: Has the U.S. merely severed diplomatic relations with the ROC or has it withdrawn recognition from (or derecognized) it? Nowhere did the PRC-U.S. joint communiqué mention this. Nor does the Taiwan Relations Act make this point clear.[160] However, as we suggested earlier, recognition or non-recognition in international law is essentially a matter of intent. On the political plane, the intent of the U.S. executive branch to derecognize the ROC as the government of China is obvious from its recognition of the PRC as such. In fact, derecognition may be effected implicitly, as the American Law Institute puts it:

> Ordinarily changes in recognition of a government occur only when another regime is recognized. Usually there is no declaration by the recognizing state, at the time it recognizes the displacing government, that it withdraws its recognition from the government displaced. The withdrawal is assumed.[161]

The continuation of all existing treaties, except the Mutual Defense Treaty, between the U.S. and the ROC despite absence of recognition also is not without precedent in international relations.[162] Since virtually all the *legal* consequences of non-recognition have been insulated effectively by Congress from the *political* act of derecognition of the ROC by the Executive Branch, the traditional distinction between recognition and non-recognition has lost much of its practical significance insofar as ROC-U.S. relations are concerned.

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159. These adverse effects have been dealt with in Victor H. Li, *De-Recognizing Taiwan: The Legal Problems*, Washington, D.C.: Carnegie Endowment for International Peace, 1977.

160. In four out of five instances in which the Act characterizes the state of relations between Taipei and Washington as being "absence of diplomatic relations *or* recognition" (emphasis added). In the fifth instance "or" is replaced by "and". 22 U.S.C.A. § 3303(a), (b)(3)(A), (b)(5), (b)(7), (b)(8).

161. American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States*, St. Paul, Minn.: American Law Institute Publishers, 1965, § 96, Comment c.

162. *See generally* Bernard R. Bot, *Nonrecognition and Treaty Relations*, Leiden, the Netherlands: Sijthoff, 1968.

The second question concerns the PRC's sovereignty, or lack of it, over Taiwan. The U.S. did not accept the PRC's position in the Shanghai Communiqué, as was obvious from the language in that document, the negotiations leading to it,[163] and the subsequent denials by American officials. The PRC-U.S. joint communiqué of January 1, 1979 employed slightly different wording, but since it was expressly intended to reaffirm the principles of the Shanghai Communiqué, the Shanghai Communiqué should govern. The same can be said of the August 17 Communiqué of 1982. Therefore, the PRC hardly can invoke any of these documents in an American court as evidencing U.S. recognition of its sovereignty over Taiwan.

The Taiwan Relations Act leaves no doubt that the ROC will be protected fully by U.S. law in an American court in the absence of recognition: the ROC will be treated as a foreign state or government,[164] for the purpose of American law, capable of suing or being sued in American courts.[165] More unequivocal is the provision on property rights:

> For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership or other rights or interest in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.[166]

This provision obviously covers properties which the PRC considers as belonging to the State of China and to which, accordingly, it has succession rights. Before this provision is tested in court, its validity should be assumed.[167] In any event, the accumulated effects of the

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163. *See supra* note 140.

164. The Act provides:

> Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

U.S.C.A. § 3303(b)(1) (Supp. I 1979).

165. *Ibid.*, § 3303(b)(7).

166. *Ibid.*, § 3303(b)(3)(B).

167. The position of the U.S. Government with respect to public property owned by the ROC in the U.S. was that real estate acquired by China prior to the establishment of the PRC (Oct. 1, 1949) should be transferred to Peking whereas properties subsequently acquired by the ROC should remain in the hands of Taipei. Carl I. Gable, *supra* note 155, p. 529 (interview with State Department officials). The ROC's embassy premises obviously fall within the first category. Shortly after President Carter's announcement of

Act amount to at least *de facto* recognition of the ROC as the government of Taiwan. What does this "most recognized unrecognized government"[168] status mean to the dispute over title to seabed oil?

During the period between 1949 an 1979, the U.S. recognized the ROC as the *de jure* government of China, but on various occasions the U.S. implied that it did not recognize the ROC's *de jure* sovereignty over the Chinese mainland not under ROC control.[169] Meanwhile, Washington's dealings with Peking in the 1970s, including the visits of U.S. presidents and high officials, the signing of joint communiqués, and the exchange of quasi-diplomatic missions, clearly implied *de facto* recognition of the PRC as the government of the Chinese mainland. The legal status of Peking and Taipei in relation to Washington was switched after January 1, 1979. The only difference was that while the ROC's *de facto* status was guaranteed by the Taiwan Relations Act, the PRC's status prior to 1979 would have to depend largely on case law, the courts' judicial notice of events, and advice from the State Department. An American court may well regard them as two *de facto* sovereigns despite the "one China" concept held by them and, less whole-heartedly, by the U.S. Government. The implication for the seabed oil dispute is obvious: American courts will refrain from exercising jurisdiction over the

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U.S. recognition of the PRC but before it came into effect on January 1, 1979, the ROC assigned these properties to an American organization known as Friends of Free China at a nominal price of ten dollars. *Congressional Record*, Vol. 125, (daily ed. March 12, 1979), p. S2474. The State Department was said to have indicated that it regarded this transaction as invalid and would support the PRC's claim if the PRC chose to challenge the transaction in court. *Ibid.*, p. S2473. This question was hotly debated in the Senate Foreign Relations Committee. *Ibid.*, p. S2472-84. By a vote of 49 to 36, the present provision was adopted. *Ibid.*, p. S2484. Senator Hatch during the debate cited in support of the present provision the American and English cases referred to in note 129 *supra* and the fact that Ottawa did not support Peking's claim to Taipei's embassy premises sold to friendly hands. *Ibid.*, p. S2476. After the passage of the Act, the State Department seemed to have quietly dropped the idea of supporting the claim of Peking which showed little interest in an uncertain legal battle.

168. Words of Professor Detlev F. Vagts of Harvard Law School in a conversation with the author.

169. The 1954 Mutual Defense Treaty, as noted earlier, defined the ROC's territory as "Taiwan and the Pescadores." All the existing treaties have limited their territorial application in respect to the ROC to Taiwan. Victor H. Li, *supra* note 159, p. 32. In a joint communiqué issued on October 23, 1958 after the visit of Secretary of State John Foster Dulles to Taiwan, it was stated that "[t]he United States recognizes that the Republic of China is the authentic spokesman for *Free China* and of the hopes and aspirations entertained by the great mass of the Chinese people". (emphasis added) *American Foreign Policy, Current Documents*, Washington, D.C.: Government Printing Office, 1958, pp. 1184-85, *cited in* Hungdah Chiu, *supra* note 6, p. 287.

dispute on the ground that it is a political, and thus non-justiciable, question.

The legal situation is best illustrated in a 1978 case in which offshore oil concessionaires and assignees in two Persian Gulf countries fought over title to oil recovered from overlapping parts of their concessions. In *Occidental of Umm al Qaywayn v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*,[170] the Court of Appeals reasoned that the appellant's title to the oil in question depended on his ownership of the concession block. Since the block was situated within the newly declared 12-mile territorial sea of an island the sovereignty of which was in dispute, the Court considered that a determination of the boundary between the claimants' concession blocks was impossible without first solving the territorial dispute and delimiting the adjacent continental shelf between these states. Relying in part on a State Department letter suggesting "unquestionable U.S. neutrality"[171] in the sensitive Middle East, the Court held that the issue *sub judice* was a political question with respect to which it had no jurisdiction.[172]

More recently, courts in the state of New York also had a chance to appreciate an intractable "Two-Chinas" case with a fact pattern similar to that of *Reel v. Holder* decided by the English court, discussed earlier. In the February 1980 *Liang Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.* case,[173] the plaintiff, a skier from the ROC, sought a permanent injunction to stay the Winter Olympic Games at Lake Placid, New York unless the defendant, a non-profit operator of the games, allowed the plaintiff to use the flag, emblem, name, and anthem of the Republic of China. The Supreme Court (Special Term) granted the motion for injunction. On appeal, the Appellate Division allowed the United States Attorney to file a statement of interest of the United States. In it, the Court was urged to refrain from exercising jurisdiction to resolve a dispute which has at its core the international "Two-Chinas" problem. The Appellate Division took the advice and denied the plaintiff's motion, and the Court of Appeals affirmed. Behind the *ratio decidendi* again was the political question doctrine.

In the present case, the State Department can be expected to discourage the courts from taking jurisdiction because of the sensitivity of the issue. The court, faced with the formidable task of de-

170. 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).
171. 577 F.2d 1204.
172. *Ibid.*, p. 1204-05.
173. 72 App. Div. 2d 439 (N.Y.S. Ct. 1980), *aff'd* 49 N.Y.2d 771 (N.Y. Ct. App. 1980).

termining the respective continental shelf jurisdictions of the ROC and PRC, can also be expected to follow the *Occidental* rule, particularly if the executive branch intervenes. Accordingly, whoever possesses the oil will remain the holder of title.

D. Concluding Remarks

The rivalry between Peking and Taipei has expressed itself in various forms: from civil war, to the contest for diplomatic relations and, potentially, to the title of seabed oil. No principle of international law is capable of resolving the present conflict conceived by the parties as one between a legitimate government and a rebel group. Since each side has engaged a number of Western oil companies in its respective offshore oil program, the rivalry could well find its way into a foreign courtroom.

If the legal battle is fought in an English court, the ROC's assignee probably would lose, either as plaintiff or defendant, in most cases, unless the recently developed judicial realism toward unrecognized governments as shown in *Hesperides* is followed vigorously. In both Japanese and American courts, whichever assignee has the oil in his possession probably would be able to keep it essentially for the same reason—the court would find that the resolution of the dispute entails handling judicially unmanageable issues. The ROC will be, however, better protected in U.S. courts under the Taiwan Relations Act, the equivalent of which is lacking in Japanese law.

The analysis of the hypothetical legal battle incidentally reveals the fundamental inadequacy of traditional rules of international law of recognition in dealing with the China puzzle. The ROC became an unrecognized government as a result of derecognition. In all cases the move was not based on legal grounds such as loss of elements of statehood, but policy considerations of the derecognizing state. These policy considerations should be distinguished further from those that underlie the non-recognition of allegedly illegal regimes such as Rhodesia and Transkei. Therefore, treating the China puzzle simply as a "representation" question, as in the case of China's U.N. seat, is most unsatisfactory because it disregards reality. On the other hand, recognition of two governments representing the same state but ruling different parts of its territory remains a fantasy in political theory. A possible solution to the dilemma is a separation of executive and legislative (and likely judicial) recognitions along the lines of the Taiwan Relations Act. This approach thus far has proved to be a workable middle ground between the

rigidity of the one-state-one-government doctrine and the reality of international politics.

How relevant is the Peking-Taipei rivalry to the East Asia oil dispute? We noted earlier that for all practical purposes the dispute exists only between China (the ROC and the PRC) and Japan. It seems fair to say that the rivalry is legally irrelevant to Japan except that the legal battle may be fought in Japanese courts. A reconciliation between Taipei and Peking would not alter materially their largely common legal position on seabed issues vis-a-vis Japan; nor would the resumption of hostilities between them. As long as each side maintains its "one-China" policy and China in its foreign relations consistently is represented by one one government, the rivalry remains largely a domestic issue.

CONCLUSIONS

The East China Sea oil controversy has the most formidable possible elements of international conflicts in maritime boundaries. Geographically, this semi-enclosed sea is surrounded by a continent with irregular coasts and islands of all possible sizes, locations, and economic utilities. Geomorphologically, the generally vast and flat seabed possesses, before it plunges into the Pacific ocean floor, multifarious relief features, including a deep, long undersea trough with controversial legal status. Geologically, the crustal origin of the Okinawa Trough, which has crucial legal implications on the seaward limit of continental shelf, is still debated among geologists. As if the geophysical environment were not enough, there are five governments within the three coastal nations, two of which are the so-called "divided states". Most of these governments have laid claims to essentially the same seabed. Confrontations between rival governments in the two divided states have made impossible any regional effort to bring about a pacific settlement of the seabed disputes. Vague rules of existing international law on seabed delimitation only aggravated the situation.

Despite the multiplicity of claimants, the East China Sea oil controversy is basically a Sino-Japanese conflict. One reason is that Korea has the same geophysical environment as does China in relation to that of Japan. A more important factor is that the ROK and Japan have successfully delimited their seabed boundary in the Korea Strait and established a Joint Development Zone covering the whole area where their claims and concessions used to overlap. Absent future animosity between Seoul and Tokyo, the seabed dispute will be shelved indefinitely.

The Sino-Japanese conflict has two dimensions: the territorial dispute over the Taio-yu-t'ai (Senkaku) Islands and the question of delimiting the vast continental shelf of the East China Sea. Many commentators have considered the issues inseparable; settlement of the first is seen as a *conditio sine qua non* to that of the second. This author has argued that this view is untenable in view of recent legal developments in state practice, international adjudications, and the UNCLOS III on the regime of islands. Various sources of the international law of the sea indicate that islands which have size, location, economic utility, and legal status comparable to those of the Tiao-yu-t'ais have been invariably ignored in seabed boundary delimitations between opposite states. This suggests that regardless of

their ultimate owner, the Tiao-yu-t'ais will only have a maximum 12-mile territorial sea around them. They will not be permitted to generate their own continental shelf or exclusive economic zone beyond that limit. The implication of this conclusion to the Sino-Japanese maritime conflict is obvious: the territorial and the seabed issues are separable; the latter may be dealt with before the former is finally resolved.

Establishing the irrelevance of the Tiao-yu-t'ai territorial dispute to, and detaching it from, the Sino-Japanese seabed controversy makes the latter at last more manageable, if not any easier. The rules of international law on continental shelf delimitation have been in flux. Yet a discernable consensus among nations was been building up in the past decade through the *North Sea Continental Shelf Cases*, the *Anglo-French Continental Shelf Arbitration*, and the *Tunisian-Libyan Continental Shelf Case*, the mounting state practice, and deliberations at UNCLOS III as crystallized in the United Nations Convention on the Law of the Sea. That consensus calls for delimitation of seabed boundaries by agreement between the disputing parties according to equitable principles, taking into account all the relevant circumstances.

In the context of the East China Sea, the applicable "equitable principle" for seabed delimitation could be the equidistance principle, as advocated by Japan, or the natural prolongation principle, as advocated by China (the ROC and the PRC), or a combination of both and/or other principles. In fact, the thrust of state practice, judicial decisions, and the LOS Convention is that the applicable principle is to be determined by the geophysical realities of the delimitation area rather the reverse. It is therefore necessary to first identify and assess the relevant circumstances of the East China Sea. This process reveals that they are circumstances relevant to other dispute settings but irrelevant here; there are also circumstances that are only partially or potentially relevant. The most relevant circumstances, the analysis shows, are macrogeography and geology (and geomorphology) of the region under study.

The macrogeography of the East China Sea is underscored by the lack of broadly comparable coastlines of China (mainland and Taiwan) and Japan in terms of coastal configuration and length. It renders inequitable the application of the equidistance principle in areas south of the 30°N latitude. On the other hand, the proportionality test, formulated by the ICJ in the *North Sea* Cases and the *Tunisian-Libyan Case*, provides a sensible approach. It calls for a boundary that brings about a reasonable proportionality between the

lengths of the coastal states' respective coastlines and their continental shelf entitlements in a given region. Though somewhat controversial in delimitation theory among international jurists, the test offers a practical and equitable guideline. The percentage proportions (64% for China (mainland and Taiwan) and 36% for Japan) resulting from applying that test in the East China Sea south of the 30°N latitude set such a guideline (rather than a rule) for future Sino-Japanese seabed delimitations.

Considerations of the geology and geomorphology of the East China Sea are centered on the natural prolongation principle and the legal status of the deep Okinawa Trough. Since the exact seaward extent of continental shelf allowable under the natural prolongation principle has been much debated among lawyers, the insistence of China (the ROC and the PRC) on applying this principle does no more than restate the problem. Moreover, the new definition of continental shelf in the 1982 LOS Convention in effect neutralizes that principle. Japan's insistence, on the other hand, on applying the equidistance principle across-the-board not only finds little support from the regional macrogeography but also ignores the submarine geophysical reality. The approach suggested by this author modifies the unpalatable effect of the equidistance principle by applying the proportionality test and treat the Okinawa Trough as but one of the important factors, rather than the only one, that influence the future course of the seabed boundary. This approach rejects the two extremes and puts the issue back in perspective.

The expected product of this approach, with certain allowance for negotiation by the parties, is a boundary composed of two segments separated by the 30°N latitude (Map 1). North of the parallel in the North Region the application of the equidistance principle is justified by the presence of the broadly equal coastlines of China, Korea, and Japan. This result is in fact dictated by extensions of the two median lines, one existing and the other imaginary, in the Korea Strait between Japan and Korea and in the Yellow Sea between Korea and China. South of the 30°N latitude in the South Region neither the mid-channel line of the Okinawa Trough, as advocated by the ROC under the natural prolongation principle, nor the median line drawn between the Ryukyus (excluding the Taio-yu-t'ais) and China (mainland and Taiwan), as advocated by Japan under the equidistance principle, should be determinative of the boundary. Rather, either one of the two lines should be used only as a starting point for negotiation between the parties, taking into account the guideline for proportions (64:36). The final boundary would lie

somewhere between the above two lines, probably closer to the mid-channel line of the Okinawa Trough than to the median line, so as to bring about the stated proportions. In this regard, the 1972 Australia-Indonesia seabed boundary in the Timor Sea, which is strikingly comparable geophysically to the East China Sea in almost every aspect, would shed much light on the delimitation process here.

The Peking-Taipei rivalry injected an uncertain but interesting element into the seabed discussion which has hitherto proceeded on the basis of an one-China assumption. Politically, its relevance to the final seabed settlement is beyond doubt, since both sides are dead serious about their seabed claims. That Taipei keeps making claims of sovereignty over the Tiao-yu-t'ais and adjacent continental shelf every time it gets wind of a reported Peking-Tokyo negotiation on this matter is illustrative of the ROC's concern. The legal relevance, if any, of the rivalry would probably find itself only in unusual scenarios where a legal battle is fought over the ownership of oil produced from the disputed seabed. The question posed to the court would be which government is entitled to the oil under international and municipal laws of recognition and government succession. The survey of judicial practices and executive policies (to the extent they influenced judicial attitudes) of the United Kingdom, Japan, and the United States shows that the courts in all three states probably will disqualify themselves from passing judgment on what they consider essentially a political question. The practical result would be that whichever party has actual possession of the oil would be able to retain title. The analysis only confirms the foregone conclusion that the Peking-Taipei rivalry is politically crucial but legally irrelevant to the seabed delimitation in the East China Sea.

This study has primarily focused on the legal aspects of the East China Sea oil controversy. It is, of course, not a pure legal problem; political and economic forces at work may be more important in shaping and resolving the conflict. This observation should not, however, deter lawyers from tackling the legal problems involved because a clear understanding of the legal issues helps to clarify them and facilitates political negotiations.

Adoption by UNCLOS III of the LOS Convention in 1982 does not provide immediate answers to questions discussed here. But since both the two Chinese governments and Japan are likely to accept the LOS Convention,* it would at least have some impact on

* The ROC will probably abide by the Convention although Taipei cannot formally accede to it. For details, see text accompanying notes 81-91 in Chapter 4 *supra*.

the legal arguments they employ in making political and economic trade-offs. This study has in fact relied heavily on provisions of the LOS Convention as a basis for analysis. Arguments advanced in the analyses and suggestions could prove relevant for the parties to reach agreement.

Admittedly, the Peking-Taipei rivalry remains a major stumbling block to any peaceful settlement of the Sino-Japanese seabed dispute. Cooperation between the two Chinese governments on seabed issue vis-a-vis Japan will not come without overall rapproachement between them in a much larger context. Predicting future development in this regard which will also determine the fate of the four remaining joint ventures CPC has with U.S. oil companies, is of course beyond the scope of this study.

APPENDIX: TABLES AND MAPS

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APPENDIX: *TABLES AND MAPS*

Table 1
Japan, the ROK and the ROC*: Overlapping Concession Blocks and the Japan-ROK Joint Development Zone (JDZ) in the East China Sea as of Dec. 31, 1983

JAPAN / ROK & ROC	J-1a	J-1b	J-1c	J-2	J-3a	J-3b	J-3c	J-4
K-4								
K-5					o			
K-6					o			oo
K-7				o	o	o	o	o
C-2	x	x						
C-3	x	x	x	x				
C-4				x				
C-5				x	x			
ROC / ROK	K-4	K-5	K-6	K-7				

J: Japan; K: ROK; C: ROC
x: Overlaps
o: Blocks in the JDZ (formerly overlaps)
oo: Blocks the dispute regarding which has been settled

* The PRC's claims, vague but extensive, could overlap with most, if not all, of the concession blocks in the East China Sea.

Concession Holders

Japan		ROC	
J-1a	Uruma	C-1	CPC
J-1b	Japex	C-2	CPC, CPC/Gulf
J-1c	Alaska	C-3	CPC, CPC/Oceanic
J-2	Teikoku	C-4	CPC/Clinton
J-3a	Japan-ROK JDZ & Nippon	C-5	CPC/Texfel
J-3b	Japan-ROK JDZ & Teikoku		
J-3c	Japan-ROK JDZ & New West Japan		
J-4	New West Japan & West Japan		

ROK	
K-1	Open (formerly Caltex)
K-2	Open (formerly Gulf)
K-3	Open (formerly Shell)
K-4	Zapata (southern corner) (formerly Gulf)
K-5	Caltex & Japan-ROK JDZ (formerly Caltex)
K-6	Open (formerly Shell)
K-7	Japan-ROK JDZ (formerly Koam)

Table 2

Outline of Legal Positions of the Japan, ROK, the ROC, and the PRC on Key Issues of the East China Sea Continental Shelf Delimitation

Issue	ROK	Japan	ROC	PRC
1. Sovereignty of the Tiao-yu-t'ais	Not applicable	Claiming	Claiming	Claiming
2. Definition (seaward extent) of continental shelf	Natural prolongation; minimum 200 n. miles	Maximum 200 n. miles	Natural prolongation; no fixed limit	Natural prolongation; maximum limit determined by agreement; may exceed 200 n. miles
3. Principle for inter-state shelf delimitation	Natural prolongation & equidistance principles	Equidistance principle	Natural prolongation principle	Multi-state consultation under equitable principles
4. Seabed rights for mid-ocean islets	No (beyond 12 n. miles)*	Same as continents	No (in inter-state delimitation)	Uncertain; inclined toward no rights
5. Limiting effect of Okinawa Trough	Yes*	No**	Yes*	Yes*

* Implicit in official statement or related actions.

** Japan was flexible in practice as shown in the Japan-ROK JDZ delimitation.

Table 3

Physical Geography of the Tiao-yu-t'ai (Senkaku) Islets*

Name (Chinese/ Japanese)	Area** km^2/mi^2/acres	Maximum elevation (meters)	Vegetation	Remarks
1. Tiao-yu (Uotsuri)	4.5 1.7 1,088	383	Palm trees, prickly, pear, and *Statice arbuscula*	Potable water available
2. Huang-wei (Kuba)	1.1 0.4 256	117	Same as above	No potable water
3. Nan-hsiao (Minami-kojima)	0.465 0.18 115	149	Little	Nickname "Snake Island"
4. Pei-hsiao (Kita-kojima)	0.303 0.12 75	135	Little or none	Nickname "Bird Island"
5. Ch'ih-wei (Taisho)	0.15 0.06 37	84	None	Barren rock
6. Ch'ung-pei-yen (Okinokitawa)	0.014 (est.) 0.005 3.5	28	None	Barren rock
7. Ch'ung-nan-yen (Okinominamiiwa)	0.005 (est.) 0.002 1.2	13	None	Barren rock
8. Fei-lai (Tobise)	0.0006 (est.) 0.0002 0.014	N.A.	None	Barren rock
Total Area:	6.5 sq. km 2.5 sq. mi 1,575 acres			

* Sources: See the references cited in Chapter 4, note 6.

** 1 sq. mi=640 acres=2.59 sq. km; 1 sq km=247 acres=0.39 sq. mi.

Table 4

State Practice on Continental Shelf Delimitation between Opposite-Coast States

Location & State Parties	Year*	Delimitation Principle**	Broad Equality of Coastline***	Remarks
EUROPE				
North Sea				
Norway-UK	1965	E	Yes	Norwegian Trough ignored.
Denmark-Norway	1965	E	Yes	Norweigan Trough ignored.
Denmark-UK	1971	E	Yes	Boundary only 11 miles long.
Netherlands-UK	1965 1971	E	Yes	Continent v. large island.
W. Germany-UK	1971	Other	Yes	Boundary only 8 miles long.
[France-UK]	1977	SE	Yes	Delimited by arbitration.
Baltic Sea				
Finland-USSR	1965 1967 1967	E	Yes	Adjacent *and* opposite coasts.
Norway-Sweden	1968	SE	Yes	Adjacent *and* opposite
Finland-Sweden	1972	Other	Yes	Continent plus large coastal island v. continent.
Mediterrenean Sea				
Italy-Yugoslavia	1968	SE	Yes	Islands specially treated.
Italy-Tunisia	1971 (1978)	SE	Yes	Islands specially treated.

* Year of signature. Multiple years show subsequent amendment or extension of existing boundary. Year in parenthesis is date of ratification beyond one year from date of signature.

** Abbreviations: *E*: Equidistance principle (true or simplified); *SE*: Selective equidistance; *Other*: Other principle or principles excluding the equidistance principle; *?*: Information unavailable; *NIF*: Not in force.

*** See text of note 166 and accompanying text in Chapter 5 for details.

Location & State Parties	Year*	Delimitation Principle**	Broad Equality of Coastline***	Remarks
EUROPE (cont.)				
Italy-Tunisia	1971 (1978)	SE	Yes	Islands specially treated.
Italy-Spain	1974	E	Yes	Islands v. islands.
Italy-Greece	1977	SE	Arguably yes	Peninsula and island v. Peninsula and island.
Black Sea				
Turkey-USSR	1978	?	Yes	Continent v. continent.
ASIA				
Persian Gulf				
Bahrain-Saudi Arabia	1958	SE	Yes	Large island v. continent.
Iran-Saudi Arabia	1968	SE	Yes	Islands specially treated.
Iran-Qatar	1969	E	Arguably yes	Continent v. peninsula.
Bahrain-Iran	1971	SE	Yes	Boundary only 28 miles long.
Iran-Oman	1974	SE	Arguably yes	Concave continent v. portuding peninsula.
Iran-United Arab Emirates (NIF)	1974	Other	Yes	Various considerations.
Red Sea				
Saudi Arabia-Sudan	1974	Other	Yes	No single boundary delimited; a "Common Zone" established.
Arabian Sea & Bay of Bengal				
India-Sri Lanka	1974 1976	SE	Yes	Continent v. very large island.
India-Indonesia	1974 1977	SE	Yes	Islands v. islands.

Location & State Parties	Year*	Delimitation Principle**	Broad Equality of Coastline***	Remarks
ASIA (cont.)				
India-Maldives	1976	SE	Arguably yes	Continent and islands v. islands.
Andaman Sea				
Indonesia-Thailand	1971 1975 1978	SE	Yes	Part of peninsula v. part of large island.
India-Thailand	1978	SE	Arguably yes	Large island v. continent.
South China Sea				
Indonesia-Malaysia (Malacca Strait included)	1969 1971	Other	Yes	Large island v. peninsula.
Korea Strait				
Japan-Rep. of Korea	1974	SE	Yes	Large islands v. peninsula (in the Korean Strait); Joint Development Zone in the East China Sea.
Arufura & Timor Seas				
Australia-Indonesia	1971 1972	SE	Yes	Continent v. large islands chain; Timor Trough taken into account.
Australia-Papua New Guinea	1978	SE	Yes	Protruding peninsula v. very large island (the two meet at right angle).
THE AMERICAS				
Caribbean Sea				
Trinidad & Tobago-Venezuela	1942	Other	No	Continent v. large island.
Colombia-Panama	1976	Other	Yes	Adjacent *and* opposite coasts.

Location & State Parties	Year*	Delimitation Principle**	Broad Equality of Coastline***	Remarks
THE AMERICAS (cont.)				
Caribbean Sea (cont.)				
Colombia-Costa Rica	1977	Other	Arguably no	
Cuba-Haiti	1977	?	Arguably yes	Island v. island with highly concave coast.
Netherlands (Antilles) - Venezuela	1978	Other	Arguably no	Islands v. continent with concave coast and islands.
Colombia-Dominican Republic	1978	E	Yes	Large island v. continent.
Colombia-Haiti	1978	E	Yes	Large island v. continent.
US (Puerto Rico) - Venezuela	1978 (1980)	E	Yes	Large island v. continent.
Dominican Republic - Venezuela	1979	?	Yes	Large island v. continent and small islands.
Gulf of Mexico				
US-Cuba (NIF)	1977	Other	No	Large island v. peninsula (the two meet at 120° angle).
US (Eastern Gulf)-Mexico (NIF)	1978	E	Yes	Small Mexican islets taken into account.
Labrador Sea				
Canada v. Denmark (Greenland)	1973	SE	Yes	Very large island v. very large island.

Location & State Parties	Year*	Delimitation Principle**	Broad Equality of Coastline***	Remarks
THE OCEANS				
Pacific Ocean				
US (American Somoa)-Cook Islands (NIF)	1980	E	Yes	Islands v. islands; all islands used as basepoints.
US (American Somoa)-New Zealand (Tokelau) (NIF)	1980	E	Yes	Islands v. islands; all islands used as basepoints.
Indian Ocean				
France (Réunion)-Mauritius	1980	E	Yes	Islands similarly shaped and sized.

Delimitation-Principle Index to Table 4

True/Simplified Equidistance	Selective Equidistance	Other	Unknown
Colombia-Dominican Rep.	Australia-Indonesia	Colombia-Costa Rica	Cuba-Haiti
Colombia-Haiti	Australia-Pauper New Guinea	Colombia-Panama	Dominican Rep.-Venezuela
Denmark-Norway	Bahrain-Iran	Finland-Sweden	Turkey-USSR
Denmark-UK	Bahrain-Saudi Arabia	German, W.-UK	
Finland-USSR	Canada-Denmark (Greenland)	Indonesia-Malaysia	
France (Réunion)-Mauritius	France-UK	Iran-United Arab Emirates	
Iran-Qatar	Greece-Italy	Netherlands (Antilles)-Venezuela	
Italy-Spain	India-Indonesia	Saudi Arabia-Sudan	
Netherlands-UK	India-Maldives	Trinidad & Tobago-Venezuela	
Norway-UK	India-Sri Lanka	US-Cuba	
US (Samoa)-Cook Islands	India-Thailand		
US (eastern Gulf)-Mexico	Indonesia-Thailand		
US (Samoa)-New Zealand (Tokelau)	Iran-Oman		
US (Puerto Rico)-Venezuela	Iran-Saudi Arabia		
	Italy-Tunisia		
	Italy-Yugoslavia		
	Japan-Rep. of Korea		
	Norway-Sweden		
Subtotal: 14	Subtotal: 18	Subtotal: 10	Subtotal: 3

TOTAL: 45

Index to Sources Consulted in Table 4

Abbreviations

AJIL: *American Journal of International Law*.

ILM: *International Legal Meterials*.

LIS: *Limits in the Seas* series (97 issues as of 1984)

UNLS: *United Nations Legislative Series* (four related volumes as of 1984: *UNLS/15* (1970), *UNLS/16* (1974), *UNLS/18* (1976), and *UNLS/19* (1980)).

NDLOS: *New Directions in the Law of the Seas* (11 volumes as of 1984)

Smith: Robert W. Smith, "The Maritime Boundaries of the United States," *Geographical Review*, Vol. 71 (1981), pp. 395-410.

Feldman: Mark B. Feldman & David Colson, "The Maritime Boundaries of the United States," *AJIL*, Vol. 75 (1981), pp. 729-63.

Nweihed: Kaldone G. Nweihed, "EZ (Uneasy) Delimitation in the Semi-Enlcosed Caribbean Sea: Recent Agreements Between Venezuela and Her Neighbors," *Ocean Development and International Law Journal*, Vol. 8 (1980), pp. 1-33.

Note: Unless otherwise indicated, all the sources cited below contain text of the shelf boundary agreements. All *LIS* issues have excellent charts attached. *ILM* and *NDLOS* sometimes have maps or sketches. *UNLS* have texts only. The other three private sources have some maps and discussions.

Australia-Indonesia: *LIS*, No. 87 (1979); *UNLS/18*, pp. 433, 441.

Australia-Papua New Guinea: *LIS*, No. 87 (1979), *NDLOS*, Vol. 8 (1980), p. 215.

Bahrain-Iran: *LIS*, No. 58 (1974); *UNLS/16*, p. 428.

Bahrain-Saudi Arabia: *LIS*, No. 12 (1970); *UNLS/16*, p. 409.

Canada-Denmark (Greenland): *LIS*, No. 72 (1976); *UNLS/18*, p. 447.

Colombia-Costa Rica: *LIS* No. 84 (1979); *NDLOS*, Vol. 8 (1980), p. 93.

Colombia-Dominican Republic: *NDLOS*, Vol. 8 (1980), p. 78; *Nweihed*, p. 8 (Map) and p. 33, note 37.

Colombia-Haiti: *NDLOS*, Vol. 8 (1980), p. 76; *Nweihed*, p. 8 (Map).

Index to Sources Consulted in Table 4 (cont.)

Colombia-Panama: *LIS*, No. 79 (1978); *NDLOS*, Vol. 8 (1980), p. 88.

Cuba-Haiti: *NDLOS*, Vol. 8 (1980), p. 69; *Nweihed*, p. 8 (Map).

Denmark-Norway: *LIS*, No. 10 (1974 Revised); *UNLS/15*, p. 780.

Denmark-UK: *LIS*, No. 10 (1974 Revised); *UNLS/15*, p. 780.

Dominican Republic-Venezuela, *NDLOS*, Vol. 8 (1980), p. 80.

Finland-Sweden: *LIS*, No. 71 (1975).

Finland-USSR: *LIS*, Nos. 16 (1970), 56 (1973); *UNLS/15*, p. 777.

France-UK: *Anglo-French Arbitral Award*, *ILM*, Vol. 18 (1979), p. 397.

France (Réunion)-Mauritius: *LIS*, No. 95 (1982).

Germany, West-UK: *LIS*, No. 10 (1974 Revised); *UNLS/18*, p. 435.

Greece-Italy: *LIS*, No. 96 (1982).

India-Indoinesia: *LIS* Nos. 62 (1975), 93 (1981).

India-Maldives: *LIS*, No. 78 (1978).

India-Sri Lanka: *LIS*, Nos. 66 (1975) and 77 (1978); *UNLS/19*, pp. 396, 402, 412-15.

India-Thailand: *LIS*, No. 93 (1981).

Indonesia-Malaysia: *LIS* No. 1 (1970); *UNLS/16*, p. 417.

Indonesia-Thailand: *LIS*, Nos. 81 (1978), 93 (1981); *NDLOS*, Vol. 6 (1977), p. 746.

Iran-Oman: *LIS*, No. 67 (1976); *UNLS/19*, p. 450.

Iran-Qatar: *LIS*, No. 25 (1970).

Iran-Saudi Arabia: *LIS*, No. 24 (1970); *UNLS/18*, p. 433.

Iran-United Arab Emirates: *LIS*, No. 63 (1975).

Italy-Spain: *NDLOS*, Vol. 5 (1977), p. 261; *LIS*, No. 90 (1980).

Italy-Tunisia: *LIS*, No. 89 (1980).

Italy-Yugoslavia: *LIS*, No. 9 (1970).

Japan-Republic of Korea: *LIS*, No. 75 (1977).

Netherlands-UK: *LIS*, No. 10 (1974 Revised); *UNLS/15*, p. 778; *UNLS/16*, p. 430.

Index to Sources Consulted in Table 4 (cont.)

Netherlands (Antilles)-Venezuela: *Nweihed*, p. 5 (Map) and pp. 23-29 (restatement of text and discussion).

Norway-Sweden: *LIS*, No. 2 (1970); *UNLS/16*, p. 413.

Norway-UK: *LIS*, No. 10 (1974 Revised); *UNLS/16*, p. 775.

Saudi Arabia-Sudan: *UNLS/18*, p. 452.

Trinidad & Tobago-Venezuela: *LIS*, No. 11 (1970).

Turkey-USSR: Rainer, Lagoni, "Oil and Gas Deposits across National Frontiers," *AJIL*, Vol. 73 (1979), p. 230, note 62 (no text included).

US (Samoa)-Cook Islands: Text of treaty in *Message from the President of the United States Transmitting the [Treaty between the U.S. and Cook Islands]*, Senate Executive Document P, 96th Congress, 2nd Session (1980); Map in *Smith*, p. 409.

US-Cuba: *ILM*, Vol. 17 (1978), p. 110; *NDLOS*, Vol. 8 (1980), p. 66; *Smith*, pp. 401-402 (Map on p. 403); *Feldman*, p. 746.

US (eastern Gulf)-Mexico: *ILM*, Vol. 17 (1978), p. 1073; *NDLOS*, Vol. 8 (1980), p. 63; *Smith*, pp. 402-405 (Map on p. 404); *Feldman*, pp. 743-45 (Map on p. 745).

US (Samoa)- New Zealand (Tokelau): *Department of State Bulletin*, Vol. 81, No. 2049 (April 1981), p. 48 (no text included); *Smith*, pp. 407-10 (Map on p. 409); *Feldman*, pp. 748-49.

US (Puerto Rico)-Venezuela: *TIAS*, No. 9890; *NDLOS*, Vol. 8 (1980), p. 84; *LIS*, No. 91 (1980).

Table 5

The Proportionality Test: The Lengths of Coastlines[1] of the Chinese and Japanese Territories in Relation to Their Continental Shelf Areas in the East China Sea

(Lengths in nautical miles)

I. Coastline Measured by Its General Direction

China (PRC & ROC)		*Japan*	
		North Region (north of 30°N)	
Mainland[2]	383	Kyushu[5] & Goto Retto	182
		Osumi Gunto	28
		South Region (south of 30°N)	
Mainland[3]	284	(Ryukyu Islands)	
Taiwan[4]	81	Tokara Gunto	11
		Amami Gunto	64
		Okinawa Gunto	74
		Sakishima Gunto	56
Total:	748		415
Ratio:	64.3(%)		35.7(%)
		South Region Only	
China (PRC & ROC):	365	Japan:	205
Ratio:	64%		36%

II. Coastline Measured by Straight Lines (Coastal Front)

China (PRC & ROC):	680	Japan:	360
Ratio:	65%		35%

[1] The coasts of the Chinese mainland are measured in the general direction of the coastline instead of following all their sinuosities. The coasts of islands are measured by their maximum lengths except those of Taiwan and Kyushu which are treated as mainlands for the present purposes. The PRC's straight baselines are disregarded.

[2] From 33°17'N to 30°N latitude (approximately the headland of the Hangchow Bay).

[3] From 30°N latitude to Hai-t'an Island in the Fukien Province opposite Taiwan.

[4] Measured in the general direction of its northern and northeastern coasts bordering the East China Sea. Those bordering the Philippines Sea and the South China Sea are excluded. *See* Map 1.

[5] Measured in the general direction of its western coast facing the East China Sea. Those coasts of Kyushu bordering the Korea Strait and the Pacific Ocean are excluded.

Table 6

Physical Characteristics of the Hurd Deep, the Norwegian Trough, the Okinawa Trough, and the Timor Trough

	Hurd Deep	Norwegian Trough	Okinawa Trough	Timor Trough
Location	English Channel	North Sea	East China Sea	Timor Sea
Distance beg. opp. coasts (n. miles)	50-90	60-300	60-280	175-300
Length (n. miles)	80	470	620	625
Width (n. miles)	1-3	20-81	65-100	70-100
Depth (meters)	102-167	200-670	500-2, 717 Over 1/2 of area exceeds 1,000; over 1/5 exceeds 2,000	500-3, 200 Over 2/3 of area exceeds 1,000; Over 1/4 exceeds 2,000.
Average Depth of surrounding shelves (meters)	76	90	90	95
Underlying crust structure	Continental	Continental	Oceanic or transitional (?)	Oceanic or transitional (?)
Geomorphology	Isolated deep wholly surrounded by shelves	Communicating with ocean depths by a sill comparable in depth with adjacent shelves	Communicating with ocean depths by sills much deeper than the adjacent shelves (Okinawa Trough: 500-1,000 meters; Timor Trough: 1,400 meters).	

Table 7

Certain Data Relating to the Chinese Petroleum Corporation's Joint Ventures with Six U.S. Oil Companies

	Contract Dates Signature Approval Expiration	Location of Contract Area	Shortest and Longest Distances from Taiwan (n. miles)	Shortest Distance from Chinese mainland (n miles)	Shortest Distance from Japan incl. Ryukyus (n. miles)	Present Status of Contract (as of Dec. 31, 1983)
Amoco	7-27-70 9-21-70 Sept. '78	Zone I Taiwan Strait (north)	10-35	35	—	Terminated Sept. '78
Conoco	3-37-71 7-23-71 Sept. '78	Zone I Taiwan Strait (south)	10-120	60	—	Terminated Sept. '78
Gulf	7-28-70 9-21-70 Mar. '80	Zone II E. China Sea	10-195	55	35	Suspended under *force majeure* clause
Oceanic	8-13-70 9-21-70 Mar. '79	Zone III E. China Sea	110-280	70	85	Suspended under *force majeure* clause
Clinton	9-22-70 9-26-70 Mar. '78	Zone IV E. China Sea	250-390	110	70	Suspended under *force majeure* clause
Texfel	6-17-72 8-29-72 Aug. '80	Zone V E. China Sea	290-415	120	80	Suspended under *force majeure* clause

List of Maps

Note on Permission to Reproduce Certain Maps

1. Permission to reproduce maps 6, 8 and 10 was kindly granted by American Association of Petroleum in a letter dated September 12, 1984.
2. Permission to reproduce maps 7 and 9 was kindly granted by the Carnegie Endowment for International Peace in a letter dated November 8, 1984.
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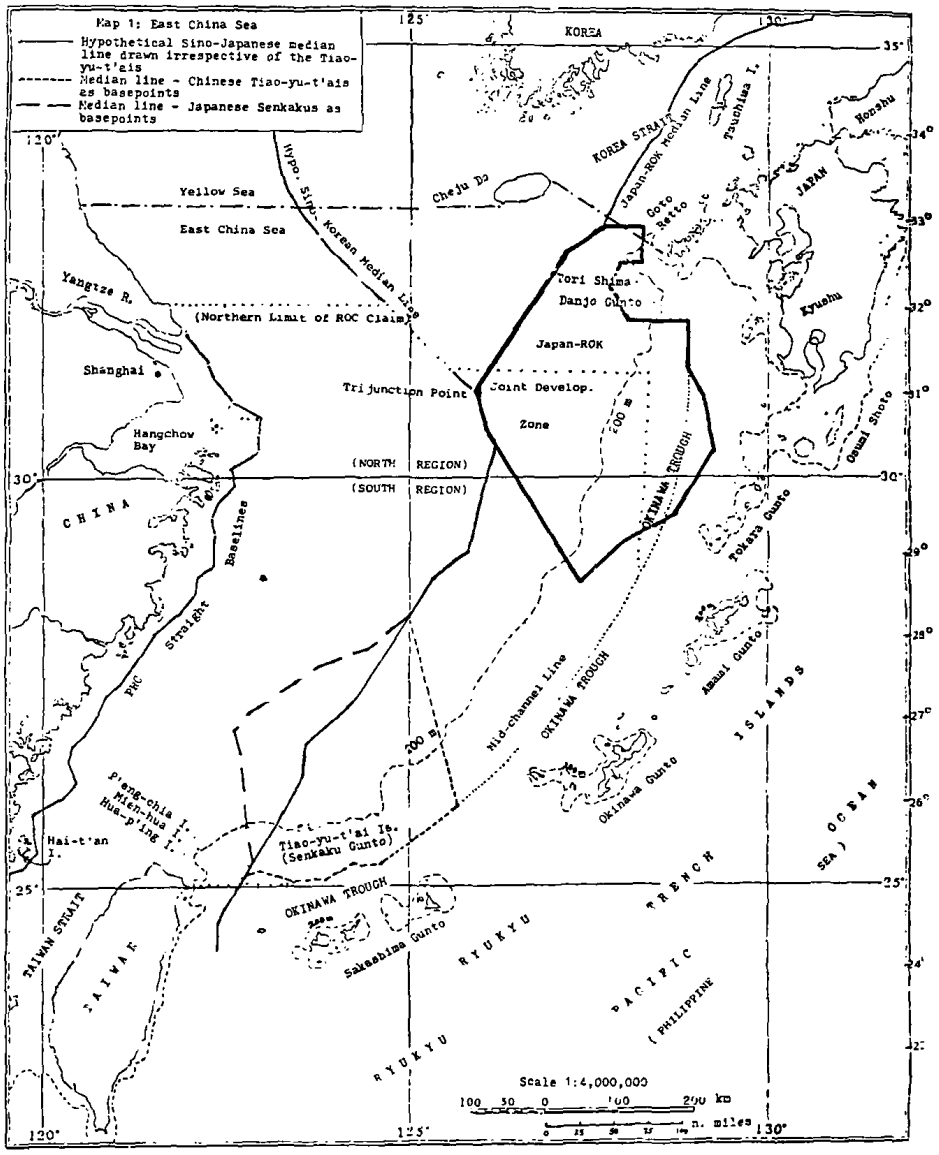
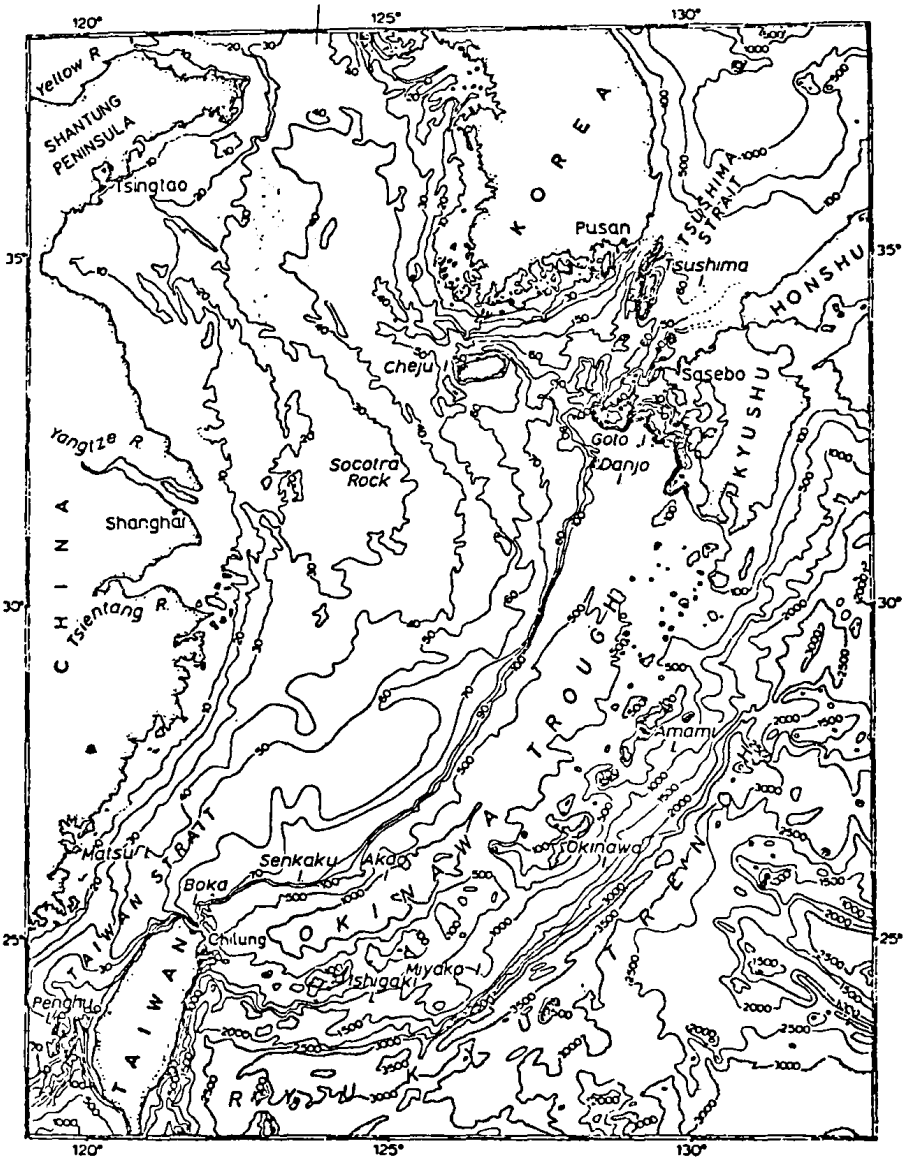
Map 1: East China Sea: Geography



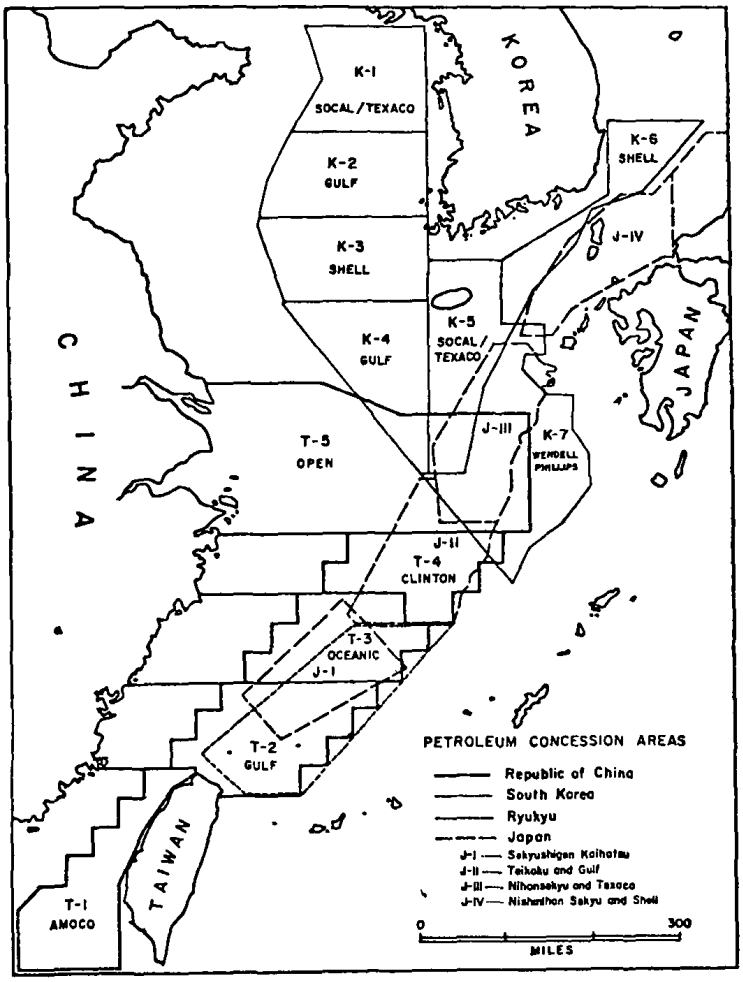


Map 2: East China Sea: Geomorphology

(contours in fathoms)

Source: K.O. Emery et al.,"Geological Structure and Water Characteristics of the East China Sea and Yellow Sea", UNECAFE/CCOP Technical Bulletin, Vol. 2(1969), pp. 3, 15 (Fig. 2).

Map 4: East China Sea: Unilateral Claims and Concession Areas (as of 1971)



Source: U.S. State Dep't Map No. 267 7-71 (State RGE).

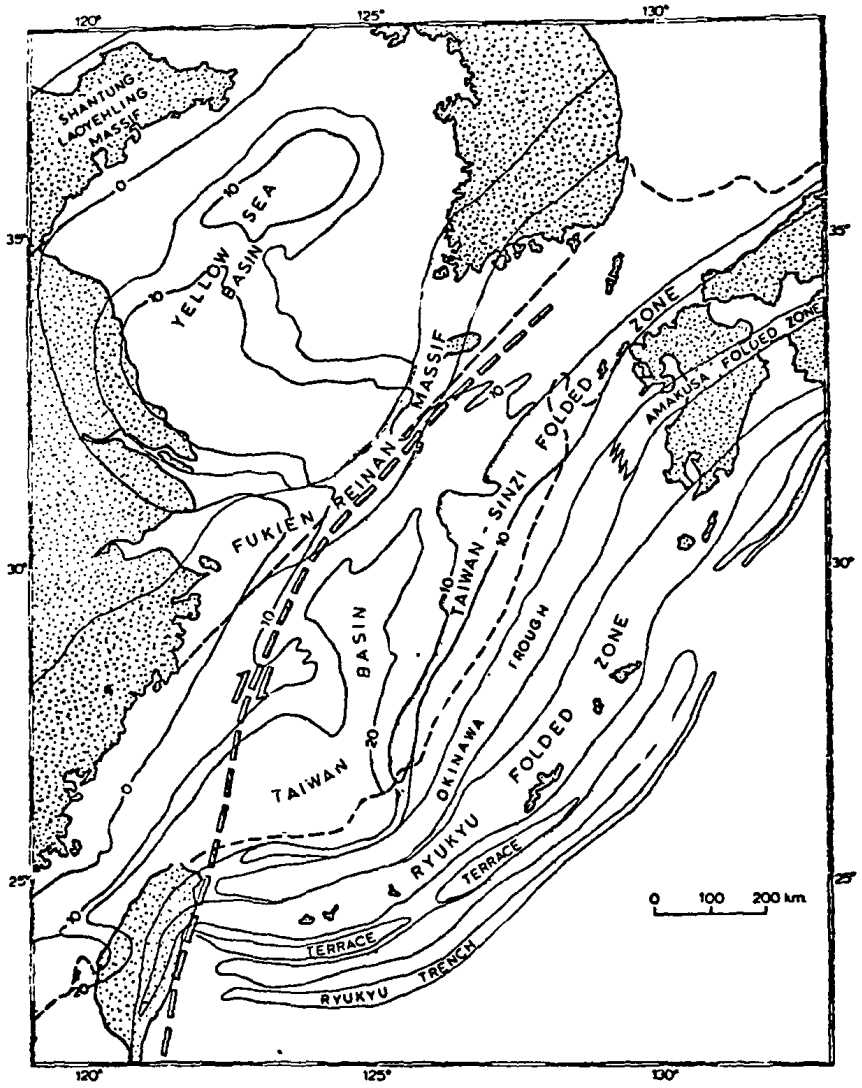
Notes: 1. "SOCAL/TEXACO" is referred to elsewhere as "Caltex".

2. "Sekiyu Shigen Kaihatsu" (J-I) means "Japan Petroleum Exploration Company" or "Japex".

3. "Teikoku" (J-II) means "Imperial". Some of Teikoku's concessions appear in Map 6 under Teseki, a Gulf-Teikoku joint-venture.

4. "Nihonsekiyu" (J-III) means "Japan Oil".

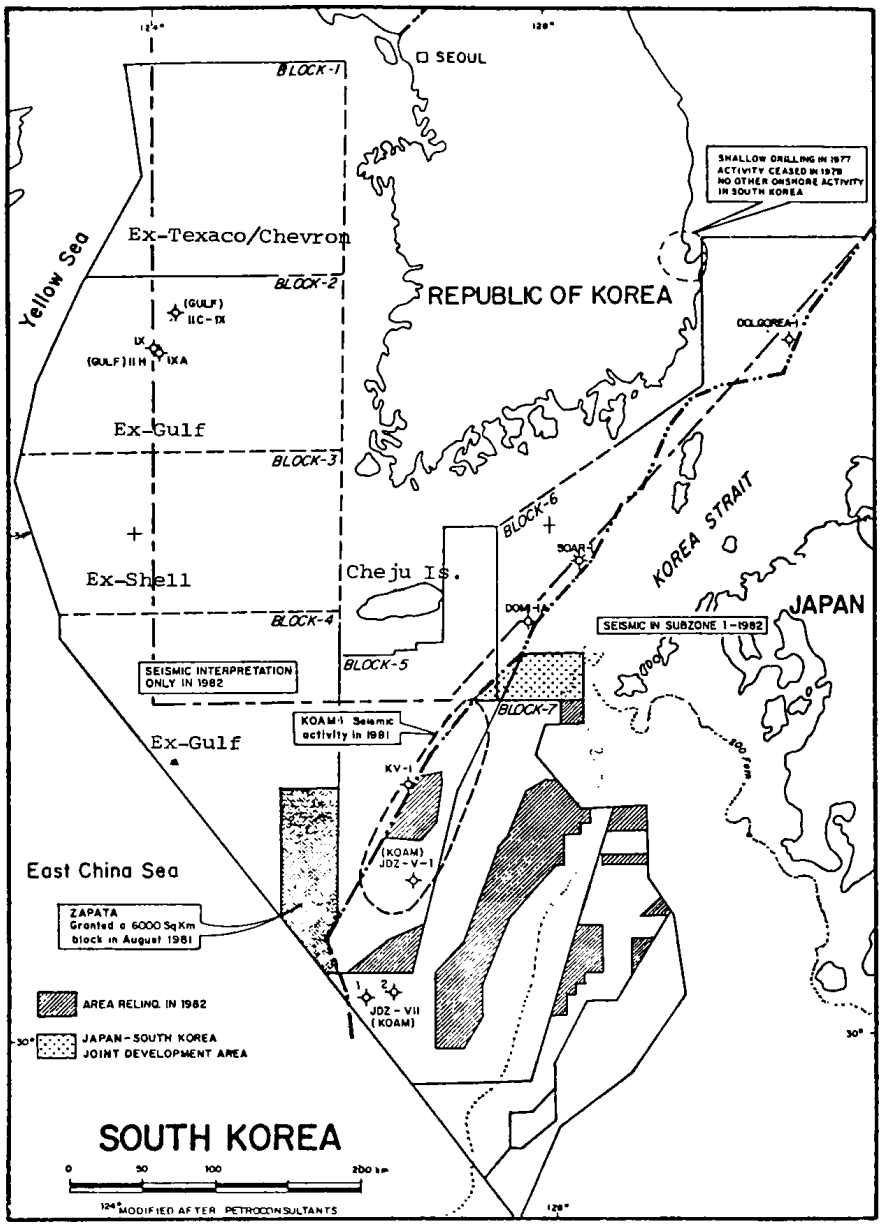
5. "Nishi Nihon Sekiyu" (J-IV) means "West Japan Oil" Block J-IV was assigned to New West Japan Oil, a subsidiary of West Japan Oil, in 1977. See Chapter 2, note 70 and accompanying text.



Map 3: East China Sea: Geology

(Contours indicate thickness of sediment (hundreds of meters) beneath the East China Sea.)

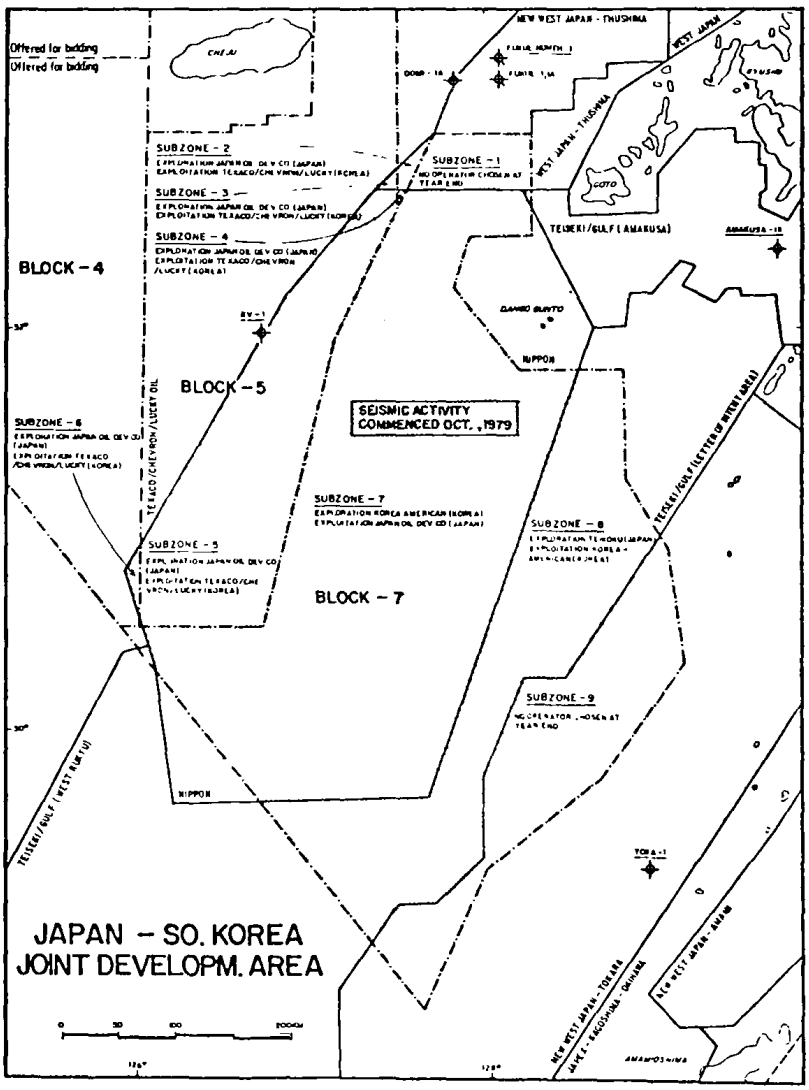
Source: K.O. Emery et al., "Geological Structure and Some Water Characteristics of the East China Sea and Yellow Sea, UNECAFE/CCOP Technical Bulletin, Vol. 2 (1969), pp. 3, 40 (Fig. 17).



Map 5: Republic of Korea: Offshore Oil Concessions (as of December 31, 1982)

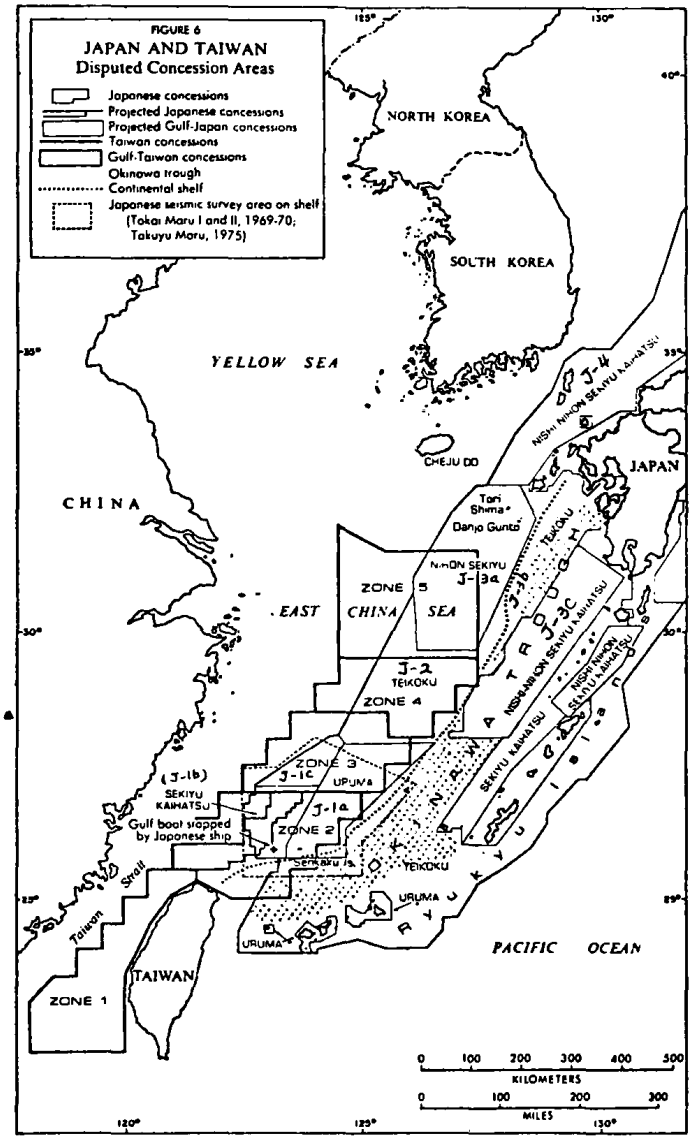
Source: G.L. Fletcher, "Oil and Gas Developments in Far East in 1982: South Korea," AAPG Bulletin, Vol. 67 (1983), p. 1924 (Fig. 24).

——— The ROK's 1952 continental shelf claim. See Chapter 2, note 11.



Map 6: Japan-Republic of Korea Joint Development Zone and Subzones 1-9 (as of December 31, 1979). (For new developments, see Map 5 supra.)

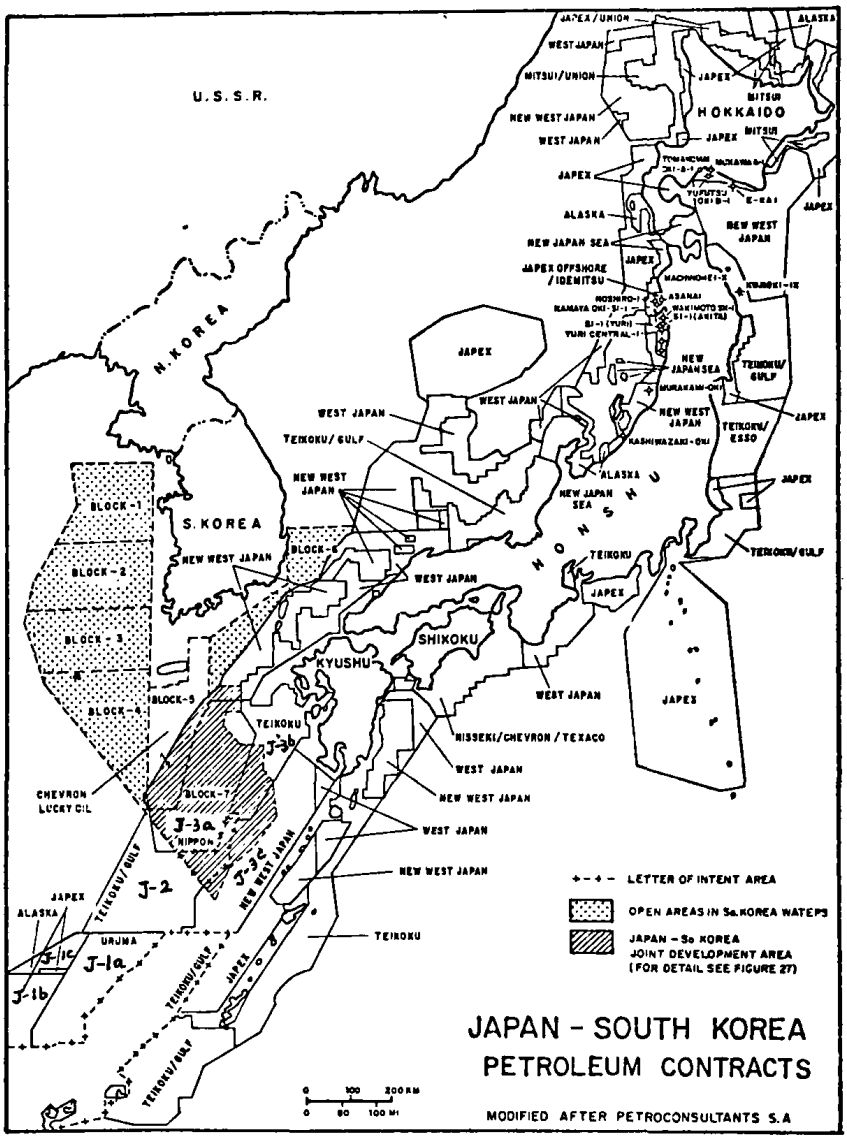
Source: G.L. Fletcher,"Petromeum Developments in Far East, 1979: South Korea," AAPG Bulletin, Vol. 64 (1980), p. 1955 (Fig. 30).



Map 7: Japan and the Republic of China: Offshore Oil Concessions

Source: Selig S. Harrison, China, Oil and Asia: Conflict Ahead? (New York: Columbia University Press, 1977), p. 46 et seq. (Fig. 6).

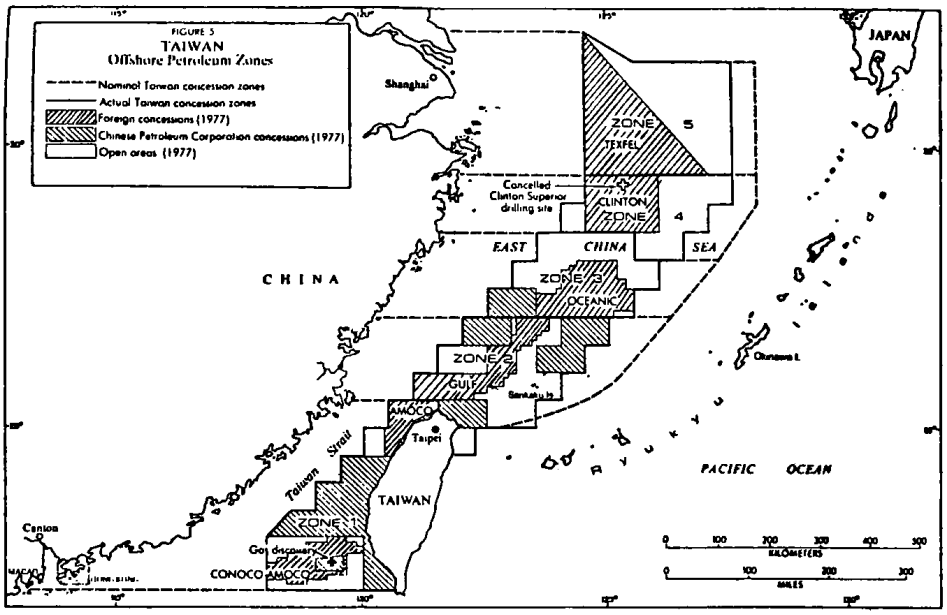
Note: Compare this map to Maps 8 and 9 to get a clearer picture of Japan's claims and concessions. This map does not show colors in Harrison's original. For details of concession holders and overlapping zones, see Table 1 supra.



Map 8: Japan: Offshore Oil Concessions in the East China Sea (left bottom corner)(as of December 31, 1979)

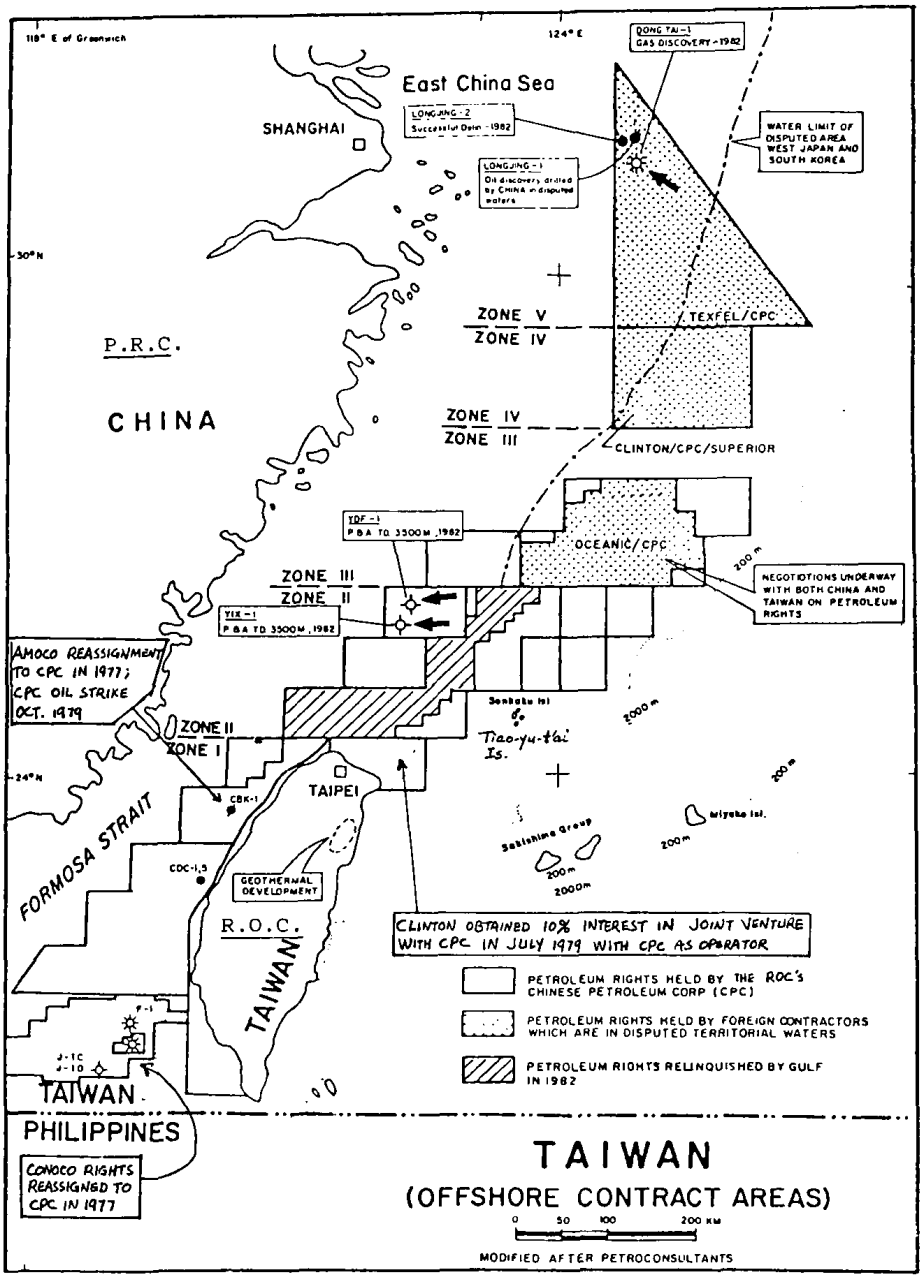
Source: G.L. Fletcher, "Petroleum Developments in Far East, 1979: Japan," AAPG Bulletin, Vol. 64 (1980), p. 1941 (Fig. 16)

Note: For details about concession holders, see Table 1 supra and Chapter 2 supra under "Japan".



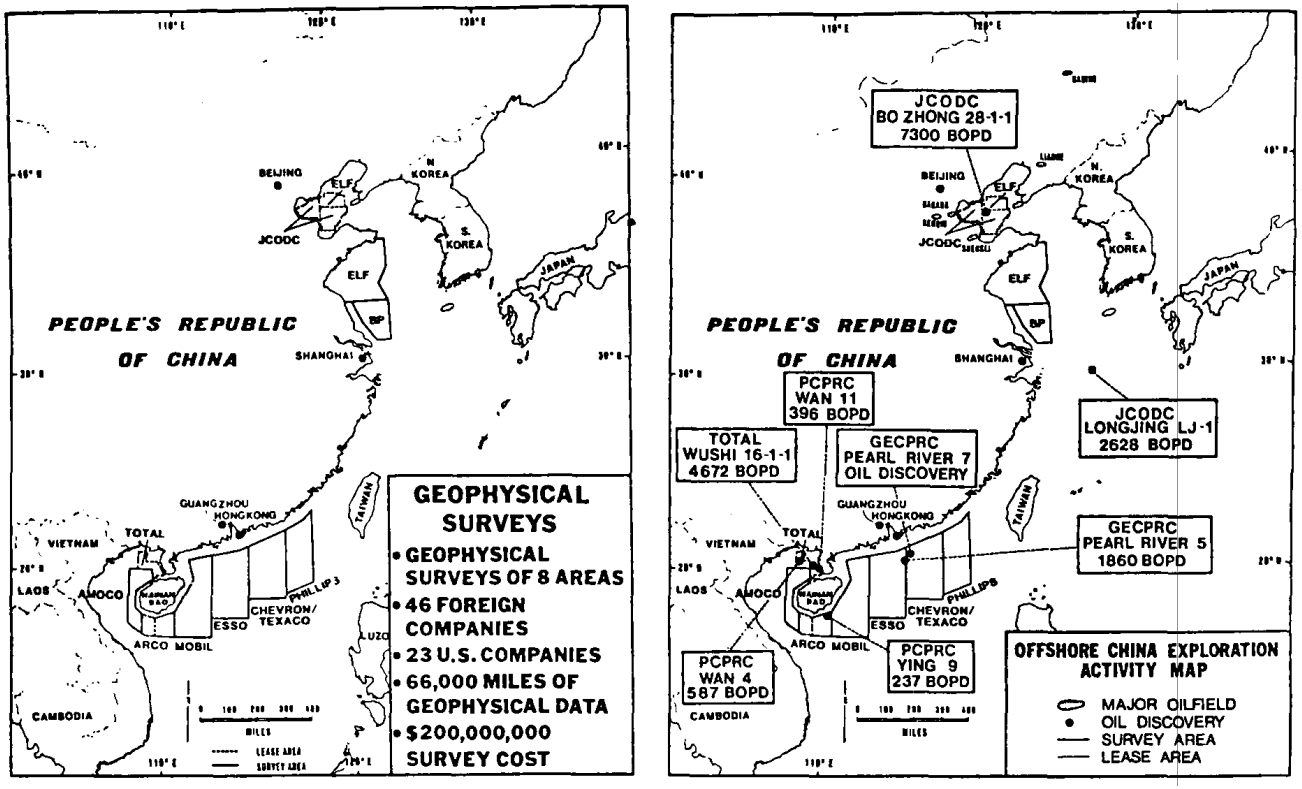
Map 9: Republic of China: Five "Reserved Offshore Petroleum Zones" (delineated October 15, 1970) and Oil Concessions (as of mid-1977)

Source: Selig S. Harrison, China, Oil, and Asia: Conflict Ahead? (New York: Columbia University Press, 1977), p. 46 et seq. (Fig. 5).



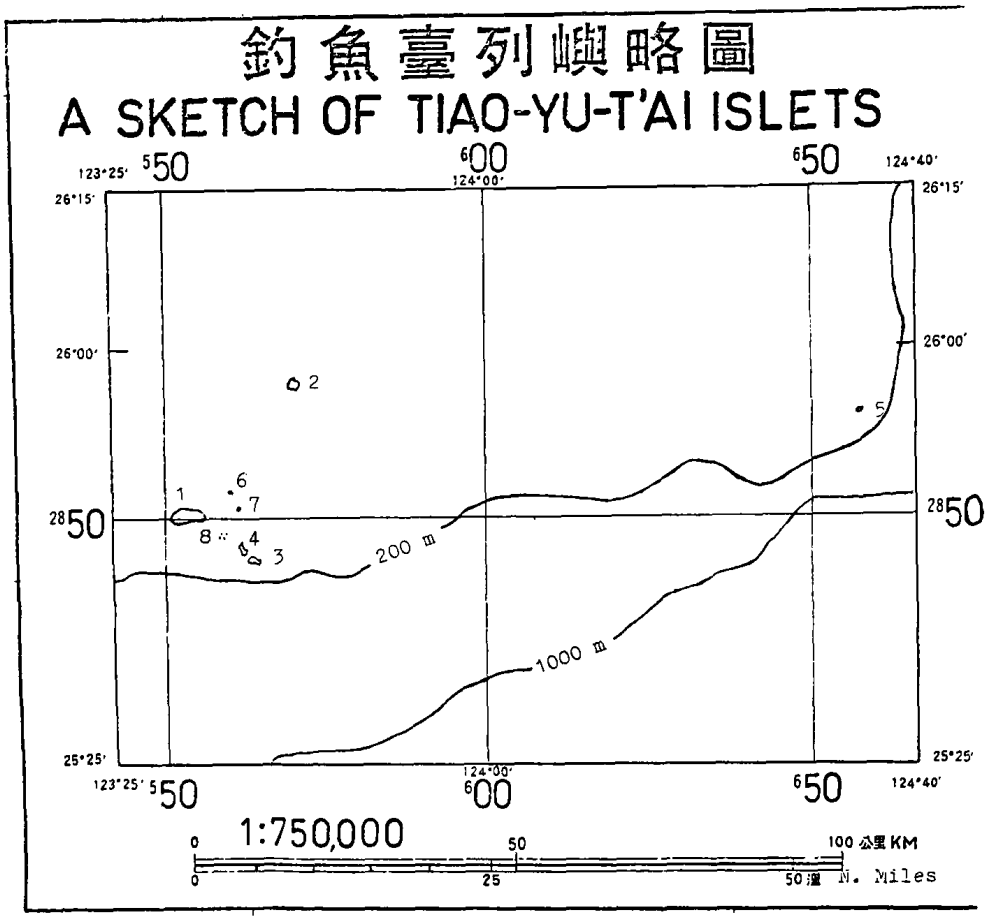
Map 10: Republic of China: Offshore Oil Concessions (as of December 31, 1982)

Source: G.L. Fletcher, "Oil and Gas Developments in Far East in 1982: Taiwan," AAPG Bulletin, Vol. 67 (1983), p. 1927 (Fig. 27), with updates supplied by this author.



Map 11: People's Republic of China: Geophysical Survey and Offshore Oil Exploration Areas

Source: Statement of David S. Holland, senior vice president of Pennzoil, to the Senate Foreign Relations Committee on February 4, 1982, United States-China Economic Relations: A Reappraisal, (Washington, D.C.: Government Printing Office, April 1982), pp. 87, 92.

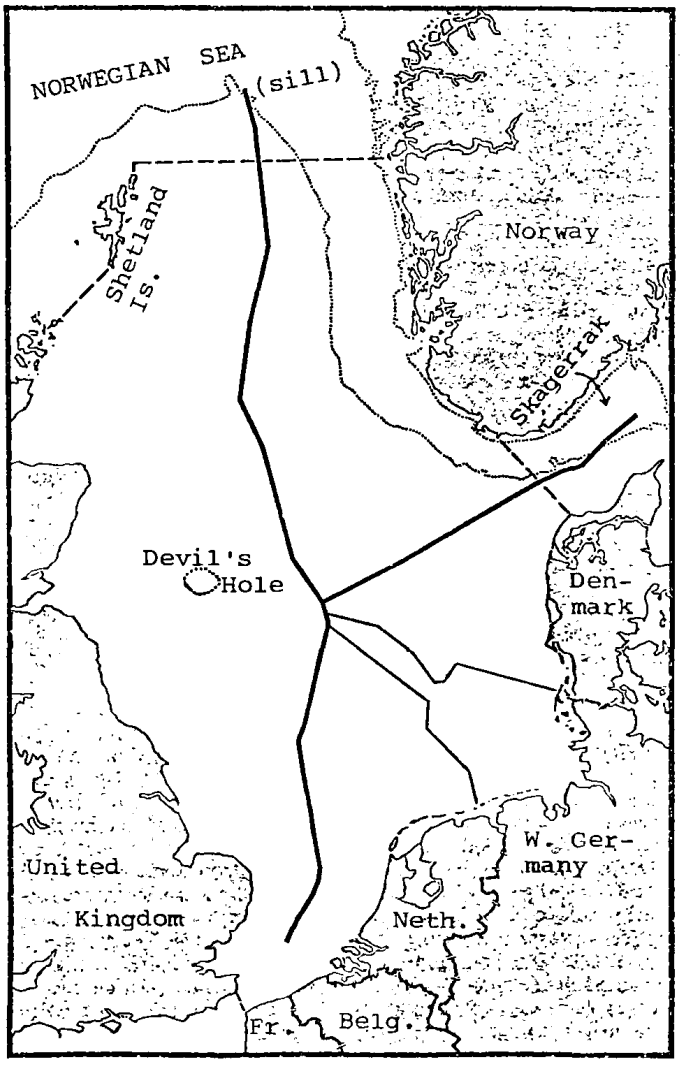


Map 12: Tiao-yu-t'ai (Senkaku) Islets [Japanese names in parenthesis]

1.Tiao-yu (Uotsuri)
2.Huang-wei (Kuba)
3.Nan-hsiao (Minami-kojima)
4.Pei-hsiao (Kita-kojima)
5.Ch'ih-wei (Taisho)
6.Ch'ung-pei-yen (Okinokitawa)
7.Ch'ung-nan-yen (Okinominamiiwa)
8.Fei-lai (Tobise)

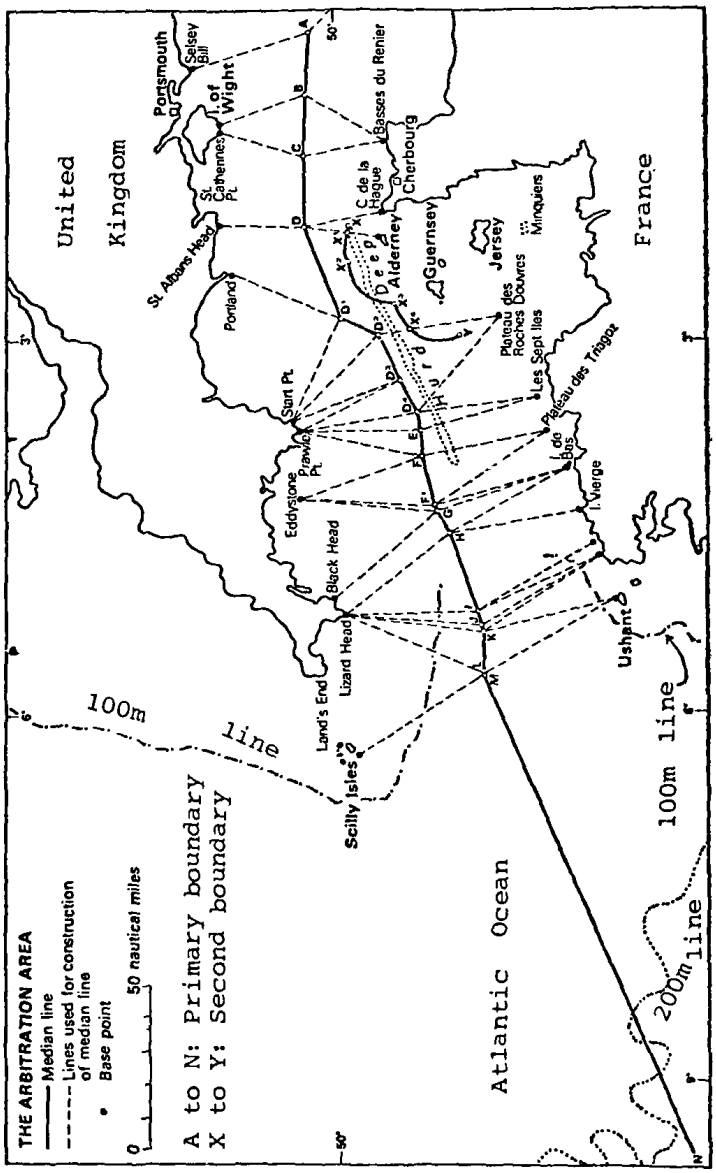
Source: Sha Hsueh-chun, Tiao-yu-t'ai Lieh-yu T'u [A Map of the Tiao-yu-t'ai Islets](Taipei 1972). See Chapter 4, note 6. This sketch is an integral part of that map. The 200-meter and 1,000-meter contour lines are added by this author on the basis of T.Chase et al., Bathymetry of the North Pacific, Chart No. 5 (Scripps Institution of Oceanography & Institute of Marine Resources, La Jolla, California,1970). See Chapter 1, note 6.

Map 13: North Sea Continental Shelf Boundaries

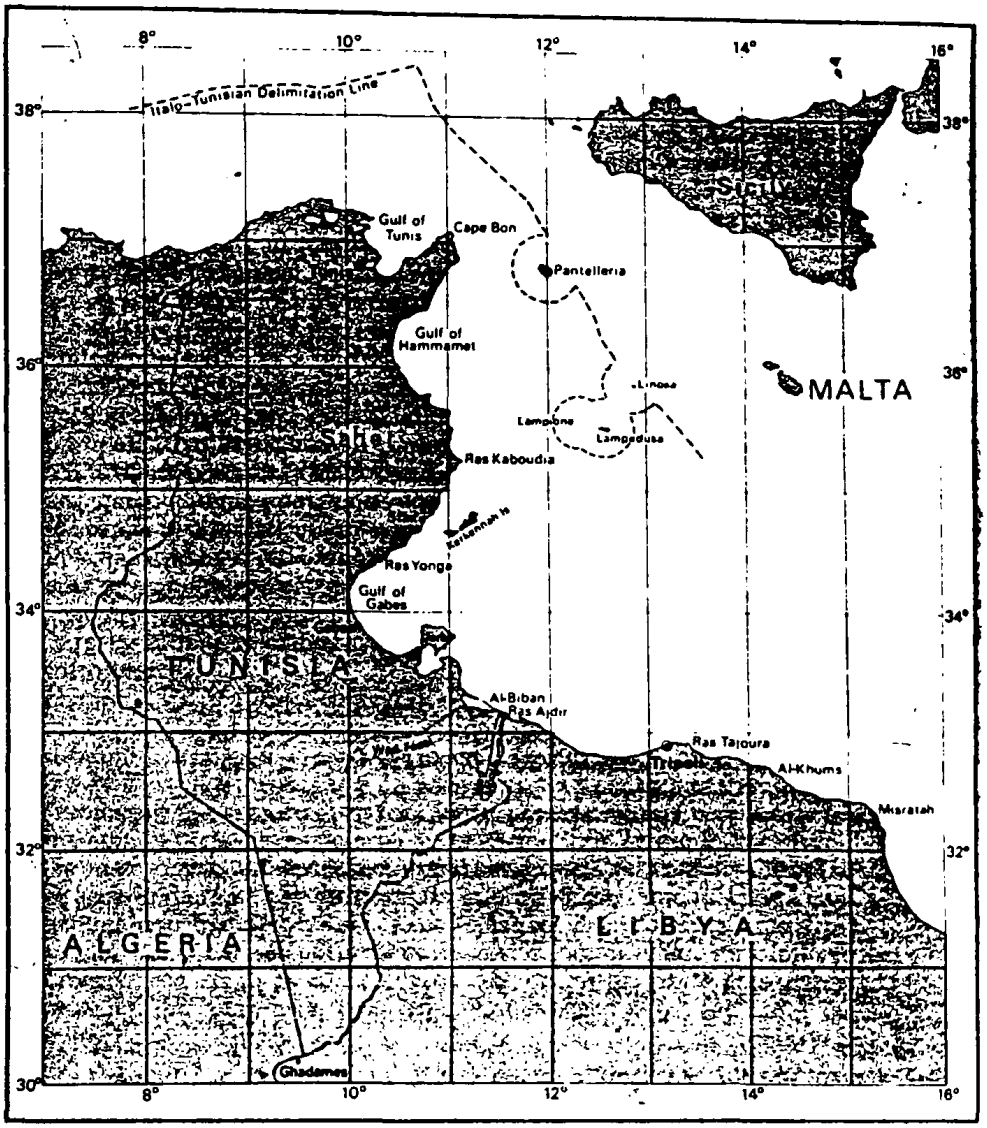


Source: North Sea Continental Shelf Cases, I.C.J. Reports 1982, p. 15 (Map 1).

Map 14: Anglo-French Continental Shelf Boundaries

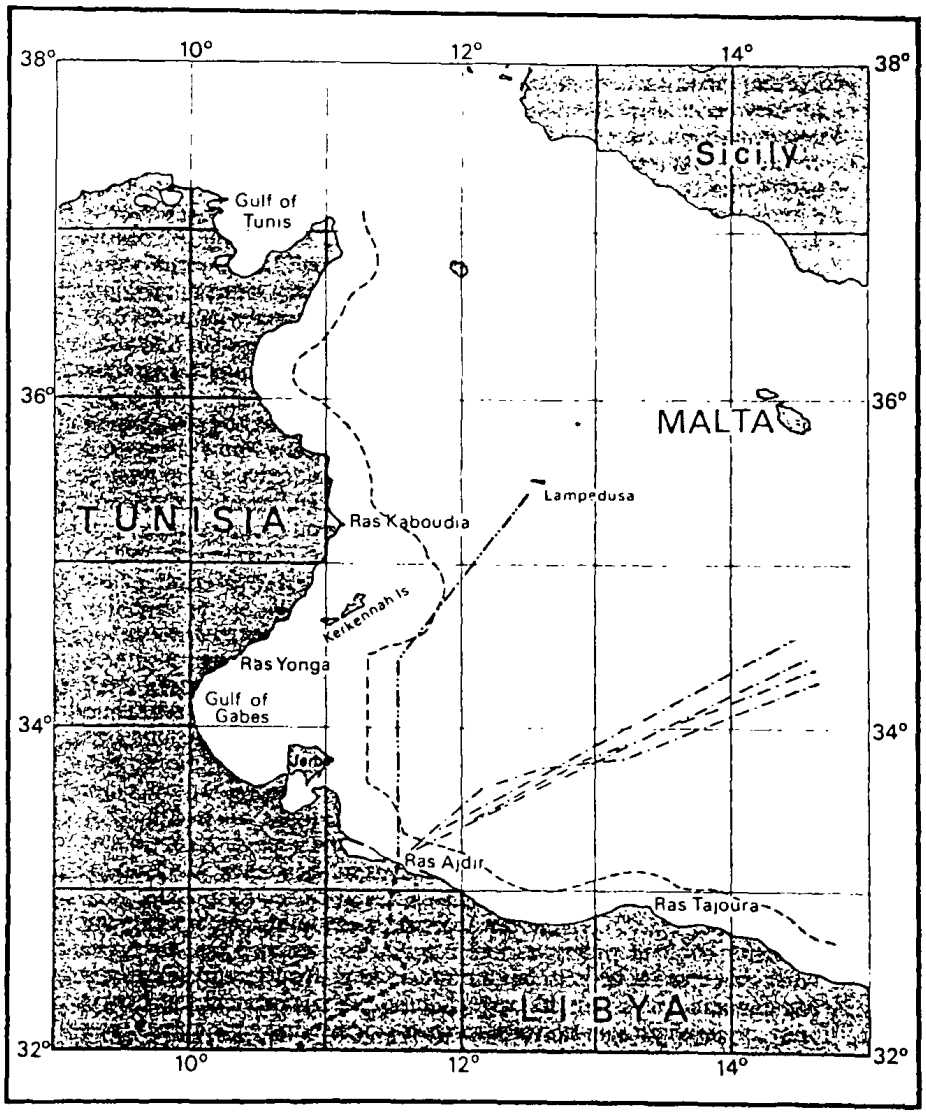


Source: Derek W. Bowett, "The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches," British Yearbook of International Law, Vol. 49 (1978), p. 2.



Map 15: Tunisian and Libyan Coasts Facing the Mediterranean Sea

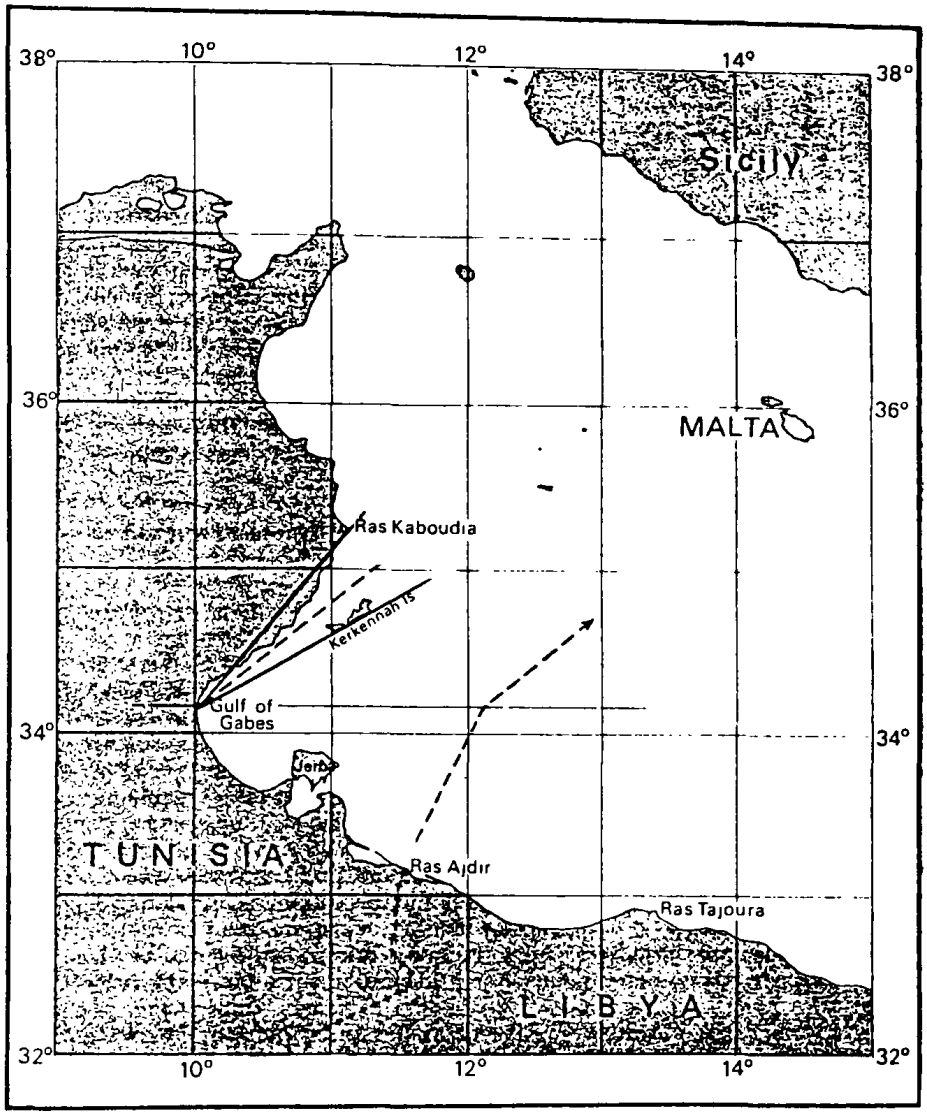
Source: Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) I.C.J. Reports 1982, p. 36



Map 16: Tunisian and Libyan Unilateral Claims.

- - - - - - - Limit of territorial waters claimed by each Party.
— · — · — · — Line resulting from Libyan method of delimitation.
— · — · — — Sheaf of lines resulting from Tunisian methods of delimitation.

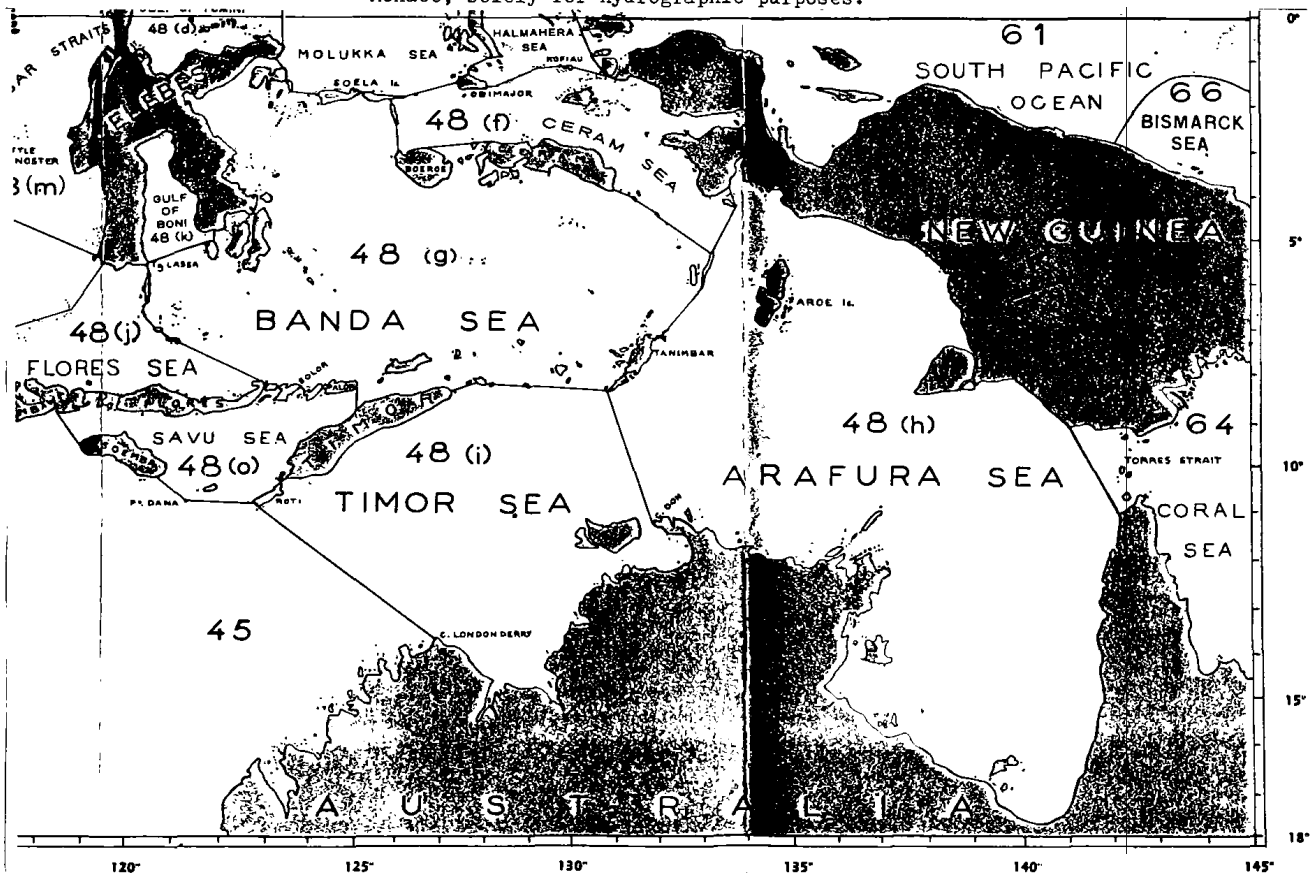
Source: Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiraya) I.C.J. Reports 1982, p. 81.



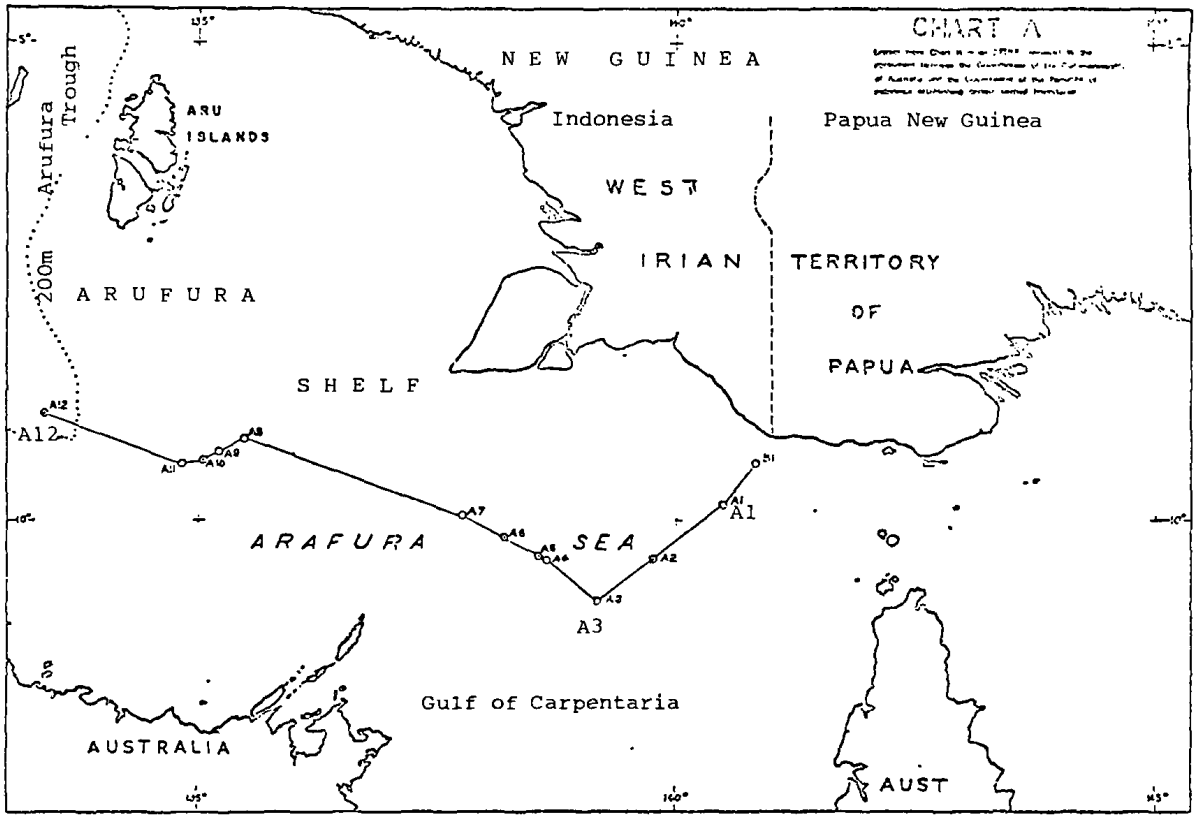
Map 17: The Tunisian-Libyan Continental Shelf Boundary as Decided by the International Court of Justic

Source: Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiraya) I.C.J. Reports 1982, p. 90.

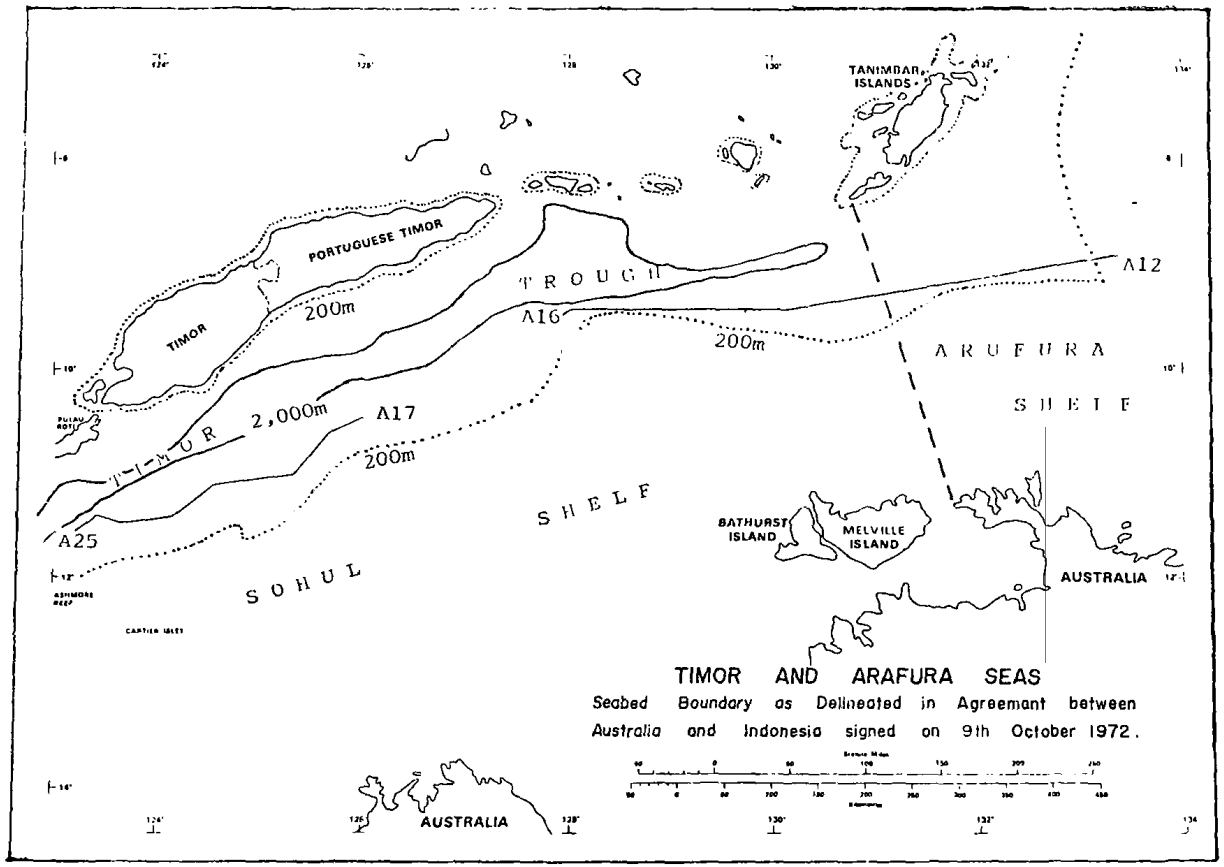
Map 18: Timor Sea and Arafura Sea (Source: Special Publication No. 23 "Limits of Oceans and Seas", 3rd Edition 1953, published by the International Hydrographic Bureau, Monaco, solely for hydrographic purposes.



Map 19: The Australia-Indonesia Equidistant Shelf Boundary (the "Eastern Segment") as Delimited in the Agreement of May 18, 1971. (Source: International Legal Materials, Vol. 10 (1971), p. 834)



Map 20: The Australia-Indonesia Equitable Shelf Boundary (the "Western Segment") as Delimited in the Agreement of October 9, 1972 (Source: International Legal Materials, Vol. 12 (1973), p. 357)



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Author's Note: Listed here are selected portion of the documents, books and articles consulted during the course of writing this book. All treaties, oil contracts, maps and navigation charts, newspaper articles, letters, and interviews are omitted for saving space. Full citations of those omitted references may be found in footnotes of each chapter.

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