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# MARITIME JURISDICTION IN THE THREE CHINA SEAS: OPTIONS FOR EQUITABLE SETTLEMENT

*Ji Guoxing*



## Summary

The three China Seas (the Yellow Sea, the East China Sea, and the South China Sea) are all enclosed or semi-enclosed and studded with so many offshore and mid-ocean islands that nowhere does the distance from one headland or island to another approach 400 nautical miles. With the extension of national jurisdiction over maritime resources, no seabed in the area is left unclaimed.

China has maritime jurisdictional disputes with other coastal states bordering on the China Seas. The disputes include continental shelf demarcation disputes with North Korea, South Korea, and Japan in the Yellow and East China Seas; territorial disputes over the Senkaku (Diaoyudao) Islands with Japan in the East China Sea; maritime delimitation disputes with Vietnam in the Gulf of Tonkin (The Beibu Gulf); and disputes over the Spratly (Nansha) Islands with Southeast Asian countries in the South China Sea.

The controversies involve two dimensions: territorial sovereignty over islands, and relevant jurisdictional rights and interests in maritime demarcation. The territorial disputes are a legacy of history, and the demarcation disputes are mainly due to differing interpretations of the law of the sea.

Beyond their historical roots, existing disputes are primarily related to oil resources. Disputes in the Yellow Sea and the East China Sea have intensified since oil reserves were reported in the areas in the late 1960s, and disputes in the South China Sea, which had been relatively tranquil for hun-

dreds of years, have emerged mainly since the 1973 oil crisis. Additionally, the disputes are related to the strategic location of the islands concerned, straddling major regional sea lanes.

In the post-Cold War Asia Pacific, economic development is the primary task for all regional countries. As demand for marine resources becomes more and more pressing, new approaches are needed for a negotiated settlement of these problems. Disputing parties must cooperate in seeking an equitable solution. There could be three options for the settlement of maritime jurisdictional disputes in the three China Seas:

*Option one* is that each claimant make due adjustments to its claims and negotiate for an equitable solution on the boundary delimitation in a spirit of compromise and accommodation. With the 1982 UN Convention on the Law of the Sea in effect, all sides now have a common and unified criterion to guide respective adjustments, and can negotiate taking related Convention stipulations as starting points.

*Option two* is to work for joint development in the disputed areas. Though this is only an expedient measure in the transitional period towards the final equitable settlement, it is indeed a practical and feasible approach, and the only alternative to no action. All parties could reap the benefits from the resources pending the final boundary settlement. What is meant by joint development is that the contracting parties are prepared to shelve the disputes within a specified period by making certain concessions and that the establishment of the

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joint development area would not affect the stand adopted by either country on the permanent delimitation of their maritime boundaries. The countries could continue to negotiate the boundary during the period of joint development. Besides, it would induce investors who would otherwise be dissuaded from investing due to the risks of economic and political instability resulting from the jurisdictional disputes over the areas in question.

*Option three* is to accept third-party assistance for the settlement of the disputes when the issues are deadlocked and when there is no hope of a compromise between the claimant States themselves.

Based on the UN Convention on the Law of the Sea, all claimants concerned should reconsider their own and others' interests, and make due adjustments in their claims. The principle of equity is of substantial importance in maritime delimitation, and every maritime delimitation should ensure an equitable solution. The interests of all relevant parties in the disputes should be taken into consideration. Negotiation and concession are much needed,

and third-party mediation, after all, should not be excluded as one way of achieving the solution. The negotiation process could start from cases easier to handle before proceeding to difficult cases. Comparatively speaking, the disputes in the Yellow Sea and the East China Sea are simpler than those in the South China Sea.

Since the sovereignty issue is difficult to tackle, joint development of resources could be taken first as a transitional measure towards the final settlement. As all parties are supportive of the idea of joint development, it is time to work out concrete and practical steps towards that end.

No matter which option is taken by the claimants on the way towards the settlement of the disputes, all parties should be jointly committed to maintain the status quo by refraining from any military and economic activities so as not to further complicate the situation, to renounce the use of force to avoid confrontation, and to guarantee the security and freedom of navigation in the sea-lanes in these seas.



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# MARITIME JURISDICTION IN THE THREE CHINA SEAS: OPTIONS FOR EQUITABLE SETTLEMENT

*Ji Guoxing*



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## Introduction

The three China Seas (the Yellow Sea, the East China Sea, and the South China Sea) are all enclosed or semi-enclosed and studded with so many offshore and mid-ocean islands that nowhere does the distance from one headland or island to another approach 400 nautical miles (nm). With the extension of national jurisdiction over maritime resources, no seabed area in the three China Seas is left unclaimed.

China, a coastal country bordering on the three China Seas, has maritime jurisdictional disputes with adjacent and opposite coastal states. These include continental shelf demarcation disputes with North Korea, South Korea, and Japan in the Yellow Sea and the East China Sea; territorial disputes over the Senkaku (Diaoyudao) Islands with Japan in the East China Sea; maritime delimitation disputes with Vietnam in the Gulf of Tonkin (The Beibu Gulf); and disputes over the Spratly (Nansha) Islands with some Southeast Asian countries in the South China Sea.

The controversies involve two dimensions: territorial sovereignty over islands, and relevant jurisdictional rights and interests in maritime demarcation. The territorial disputes are a legacy of history, and the demarcation disputes are mainly due to differing interpretations of the law of the sea.

Under the 1982 UN Law of the Sea Convention (which was negotiated from 1973 to 1982 and entered into force after 1994), a coastal state may lay claim to at least 200 nm (370.4 km) of jurisdiction, whether the claim is based on a continental shelf or an exclusive economic zone (EEZ). Islands, with the exception of “rocks which cannot

sustain human habitation or economic life of their own,” are considered to have continental shelves and EEZs in the same way as land territories.

Though these entitlements would theoretically benefit coastal states, they clearly complicate boundary issues in the three China Seas. Given the geography of the China Seas, continental shelf claims, in and of themselves, already create complex jurisdictional problems; when islands can be used to generate further jurisdictional claims on the continental shelf, the problems become even more complex.

Although historically rooted, existing disputes are driven primarily by regional interests in oil resources that may lie under the seas. In the three China Seas, many of the overlapping claims or unresolved boundaries involve basins with good petroleum potential. The disputes in the Yellow Sea and the East China Sea have intensified since oil reserves were reported in the areas in the late 1960s, and the disputes in the South China Sea, which had been relatively tranquil for hundreds of years, have emerged mainly since the 1973 oil crisis.

Additionally, the disputes are related to the strategic location of the islands concerned. The Senkaku Islands straddle the sea-lanes in the East China Sea, and the Spratly Islands straddle the major sea-lanes between the Pacific and Indian Oceans.

Recent events in the China Seas are illustrative of the explosiveness of these disputes and their capacity to shatter peace and stability in the Asian-Pacific region. The first of these was an armed

clash on 14 March 1988 between China and Vietnam in Gac Ma Reef (Chigua Jiao) in the Spratlys, where one Vietnamese freighter was sunk and two Vietnamese ships were severely damaged.

The second event was a sharp increase in tension which erupted over the Senkaku Islands following the Japan Maritime Safety Agency's 'authorizing' the construction of a lighthouse on one of the islands as an official marine beacon on 1 October 1990. The next day, Japan intercepted attempts by Taiwanese sportsmen and politicians to run a torch relay to reinforce Taiwan's claims to the islands, arousing protests from Taiwan, Hong Kong, and Macao.

In July, 1994 a tense face-off began when Vietnam began drilling in a concession China had granted to the U.S. Crestone Energy Corporation, and Chinese ships blocked the drilling rig.

In a dispute over the Mischief Reef between China and the Philippines, in early 1995 China built structures on the reef; Manila then blew up Chinese sovereignty stone markers over a number of other reefs and shoals, and detained 62 Chinese fishermen.

In the post-Cold War Asia Pacific, economic development is the primary task for all regional countries. As demand for marine resources has become more and more pressing, new approaches are needed for a negotiated settlement of such disputes. Disputing parties must cooperate in seeking an equitable solution in a spirit of compromise and mutual accommodation, beginning with a gradual process of negotiated solutions.

Based on the UN Convention on the Law of the Sea, all claimants concerned should reconsider their own and others' interests, and make due adjustments in their claims. The principle of equity is of substantial importance in maritime delimitation, and every maritime delimitation should ensure an equitable solution. The interests of all relevant parties in the disputes should be taken into consideration. Negotiation and concession are much needed, and third-party mediation, after all, should not be excluded as one way of achieving the solution. The negotiation process could start from cases easier to handle before proceeding to difficult cases. Comparatively speaking, the disputes in the Yellow Sea and the East China Sea are simpler than those in the South China Sea.

Since the sovereignty issue is difficult to tackle, joint development of resources could be taken first as a transitional measure towards the final settlement. As all parties are supportive of the idea of joint development, it is time to work out concrete and practical steps towards that end.

## The Existing Disputes

### The Yellow Sea

With an area of about 400,000 square kilometers, the Yellow Sea is enclosed by Korea on the east and by China on the west and north. Its basin has been estimated to contain anywhere from one to ten billion barrels of oil.<sup>1</sup> Moreover, it is one of the rare regions where fishing is possible in virtually all seasons. Largely as a result of such potentials, disputes in the Yellow Sea involve the demarcation of the continental shelf between China and North Korea, and between China and South Korea. (Figure 1) The Yellow Sea basin is shallow; depths average 55 meters and nowhere exceed 125 meters. Sea bed sedimentary subsoil analysis shows that the eastern third is floored by sands derived from Korean mountains, and that the remaining two-thirds on the west side are derived from the clay brought down by Chinese rivers.

Vis-à-vis North Korea, China claims most of the intervening Yellow Sea continental shelf based on the principle of the natural prolongation of land territory.<sup>2</sup> As "the Yellow River in China washes down into the Yellow Sea 15,000 million cubic yards of sediments every year,"<sup>3</sup> and as the silt line divides the clayey sediments coming from China from those sands derived from Korea, China specifically claims the continental area extending to the silt line, and further weights its claim by extension from Haiyang Island lying 43 nm off the Liaodong Peninsula. Within the Bay of Korea (in the northern part of the Yellow Sea), China upholds an equidistant line as the demarcation between the two countries.

North Korea and South Korea adopt the median line principle for seabed demarcation between them.<sup>4</sup> In announcing its exclusive 200-mile eco-

<sup>1</sup> Mark J. Valencia, "Northeast Asia: Petroleum Potential, Jurisdictional Claims, and International Relations," *Ocean Development and International Law*, Vol. 20, 1989, p. 48, claims between one and ten billion bbl.; older sources claim up to sixteen billion bbl. "Based on the *graben* type of basin and a general petroleum content of 15,000 to 150,000 barrels per mi<sup>3</sup>, the basin could contain up to 16 billion barrels of oil." Willums, Jan-Olaf, "China's Offshore Potential," paper presented at the Workshop on the Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Research and Development, East-West Center, Honolulu, 5-12 August 1980.

<sup>2</sup> "Based on natural prolongation, China is convinced that the seabed boundary lies closer to the Korean Peninsula than it does to the Chinese coast." J.R.V. Prescott, "Maritime Jurisdiction in East Asian Seas," the East-West Environment and Policy Institute, Occasional Paper, No.4, East-West Center, 1987, p. 51.

<sup>3</sup> Encyclopedia Britannica, Vol. 23, 1970, p. 884.

<sup>4</sup> The median and equidistant line principles are premised on

conomic zone in July 1977, North Korea defined its economic zone outer limit based upon 'the half-line of the sea'. In August 1977, North Korea also declared a 50-mile military undary zone whose outer limit in the Yellow Sea coincides with that of its economic zone. South Korea has staked out unilaterally four sea-bed oil tracts in the Yellow Sea based on the median line principle, assuming that their seaward limit would constitute the boundary of the continental shelf shared with China.

In the Korea Bay, oil exploration is proceeding on both sides of what would be the median line between China and North Korea. China has discovered oil and gas within 50 miles of it; North Korea has drilled test wells and discovered oil about 50 km from the western extension of the military demarcation line between North and South Korea.

In the eastern Yellow Sea, the deltaic nature of the sediments is promising for further oil prospecting. The broad, interconnected basins in central Yellow sea are filled with high organic content sediments, including shale, and hence have good source rock characteristics. The land area of Subei-South Yellow Sea Basin is a commercial oil and gas producing area; and the wells with commercial oil and gas flows are situated mainly in the central and western parts of Dongtai Depression.

For the Bay of Korea Basin, a boundary along the silt line would give almost the entire basin to North Korea. However, "if the boundary were the equidistance line, most of the basin, including its core would fall to China. Only a small pod of 2,000 meters of sediment would lie on the North Korean side of the line."<sup>5</sup> In the Yellow Sea, the central area is surrounded by good prospective areas. Using the silt line as a boundary would place the entire basin on the Chinese side of the line. "If the boundary were the equidistance line, most of the basin would be on the Chinese side, but half of a pod, including a tip of the most prospective area,

would be on the Korean side."<sup>6</sup> Though China claims natural prolongation, it has exercised exploratory drilling to its side of a hypothetical median line asserted by Korea.

From a legal point of view, the disputes in the Yellow Sea should be easier to be resolved than the others. In the sea areas between China and North Korea, not only are the geographical circumstances relatively simpler, but also no offshore territory is under dispute between them. It seems to be an uncomplicated matter to draw maritime boundaries from the Yalu River. "The international boundary along the [watercourse] of the Yalu River reaches the sea through the well-marked channel called So Suido."<sup>7</sup> Between South Korea and China, there are no contested islands as well to complicate delimitation of the continental shelf between them. And numerous as the islands are in their offshore areas, they are situated fairly close to the coasts, so that their presence alone is not likely to cause serious inequity in the boundary delimitation. Furthermore, resolution will be facilitated by the fact that China now has diplomatic relations with the two Koreas.

The difficulties in the settlement first lie in the fact that Korea still remains under divided leadership between the South and the North and that few substantial improvements have been achieved in North-South relations. The scenario that the three sides get together for negotiation of their sea problems looks unrealistic in the near future. Also, each of them is locked in shelf and economic zone boundary problems in other areas contiguous to the Yellow Sea. "For this reason, any particular position taken with respect to one situation could militate against its own interests in another."<sup>8</sup> Third, China and North Korea have been unspecific with respect to the baseline from which the demarcation of a median line is to be measured.

### The East China Sea

The East China Sea "is thought to contain 10 to 100 billion barrels of oil with up to 10 billion barrels in the (South Korea-Japan) JDZ (Joint Development Zone)."<sup>9</sup> The southern East China Sea has good prospects for oil and gas "in its northern two-thirds and in its southwestern corner."<sup>10</sup> The dis-

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the idea that if contested sea boundaries overlap, regardless of undersea geological features, the median distance between the shorelines of the outermost land territories of the contesting nations shall be taken as the definitive boundary between them. Strictly speaking, "equidistant lines" are precise divisions based upon equal division of lines between paired points at the same latitude or longitude (as applicable) on opposing shores, while "median lines" are drawn after an imaginary smoothing of rough coastal edges. However, the terms are often used interchangeably, and only in extremely contentious cases in which the very slight divergences between the two could have any significant economic or strategic impact is there a useful distinction between them.

<sup>5</sup> Douglas M. Johnston and Mark J. Valencia, "Pacific Ocean Boundary Problems, Status and Solutions" (the Netherlands: Martinus Nijhoff Publishers, 1991), p. 116.

<sup>6</sup> Ibid

<sup>7</sup> J.R.V. Prescott, op. cit., p. 51.

<sup>8</sup> Choon-ho Park, Dalchoog Kim, Seo-Hang Lee edited, "The Regime of the Yellow Sea—Issues and Policy Options for Cooperation in the Changing Environment," the Institute of East and West Studies, Yonsei University, 1990, p. 40.

<sup>9</sup> Mark J. Valencia, op. cit., p. 48.

<sup>10</sup> Ibid.



putes there are mainly between China and Japan involving continental shelf delimitation and the sovereignty of the Senkaku (Diaoyudao) Islands. However, South Korea is also concerned with continental shelf delimitation in its northernmost portion. (Figure 2)

The East China Sea Basin covers about 300,000 square kilometers. It is shallow, with water depths of less than 200 m, except in the Okinawa Trough along the Japanese coast. Here the distance between the Chinese and Japanese land masses nowhere exceed 400 miles, so that unilateral claims naturally overlap.

China adheres to the natural prolongation of land territory principle, holding that "The East China Sea continental shelf is the natural extension of the Chinese continental territory. The People's Republic of China has inviolable sovereignty over the East China Sea continental shelf."<sup>11</sup> The Chinese continental shelf claim extends all the way to the axis of the Okinawa Trough, enclosing essentially all of the petroleum potential in the East China Sea. However, in its efforts at offshore oil development since 1980, China has limited its exploration mainly to its side of the Chinese-Japanese equidistant line. China has prospected for hydrocarbons in the western part of the East China Sea, and has drilled successful gas wells outside the shelf area contested with Japan and adjacent to an equidistant line. "Beijing, asserting the natural prolongation doctrine, advocated the creation of joint development zones that would give China a share of the resources on the Japanese side of the continental shelf, where the richest petroleum resources are believed to be concentrated."<sup>12</sup>

Japan stands for the equidistant line for its continental shelf, and ignores the pivotal Dongdao Island exposed at low tide 70 nautical miles off Shanghai. "The equidistance line between the undisputed islands of Japan and the Chinese mainland leaves an area of 9,000 nm<sup>2</sup> of the Asian continental shelf landward of the 200 meter isobath on the Japanese side of the line."<sup>13</sup> Thus, a large overlapping area occurs between China's and Japan's claims. Though "the Japanese block system extends beyond an equidistant line,"<sup>14</sup> (See Figure 2.) Japan has announced it would not authorize explo-

ration for petroleum in the disputed area until the matter is resolved.

South Korea, while adhering to the median line principle in the Yellow Sea, adheres instead to natural prolongation of land territory in the East China Sea, and extends its claims "as far south as 28° 36" of the northern latitude, over 250 miles from the nearest Korean territory, considerably beyond the 200 meter contour line into the Okinawa Trough" in its mining blocks.<sup>15</sup> There is an overlap between Japanese and South Korean claims, but they have exercised a joint development zone since 1974. China has denounced the joint development agreement as a violation of its rights. China says, "It stands to reason that the question of how to divide those parts of the continental shelf in the East China Sea involving other countries should be decided by China and the related countries through consultations."<sup>16</sup> China is now reported to have drilled wells on the western end of the joint development zone.

The existence of the Okinawa Trough makes the delimitation more complicated. The sea-bed in the East China Sea slopes gently from the Chinese coast, and to a lesser extent, from the Korean coast, until it drops abruptly into the Okinawa Trough whose depth reaches nearly 2,300 meters at its deepest. The Okinawa Trough does not follow the Japanese coast closely, and is highly irregular. China holds that the Okinawa Trough proves that the continental shelves of China and Japan are not connected, that the Trough serves as the boundary between them, and that the Trough should not be ignored in boundary delimitation. Japan, on the other hand, holds that the Trough is just an incidental depression in a continuous continental margin between the two countries, that Japan's 200 nm continental shelf claim is not affected by it, and that any legal effect of the trough should be ignored as a factor in delimiting the East China Sea continental shelf.

Moreover, the ownership of the Senkaku (Diaoyudao) Islands further directly affects the boundary delimitation. China and Japan thus both claim sovereignty over the islands, and stick to their own arguments.

The Senkaku Islands consist of five uninhabited islets and three barren rocks, located approximately 120 nautical miles northeast of Taiwan, 200 nautical miles east of the China mainland coast, and about 200 nautical miles southwest of Okinawa.

<sup>11</sup> "Statement by the Chinese Ministry of Foreign Affairs, 13 June 1977," *Beijing Review*, 17 June 1977, p. 17.

<sup>12</sup> Harrison, Selig S., "the Taiwan Issue and Seabed Petroleum Development in the East China Sea," paper for the Conference on Current Issues in East Asia, held at St. John's University in Jamaica, New York, 25 October 1985.

<sup>13</sup> Mark J. Valencia, op. cit., p. 47.

<sup>14</sup> *Ibid.*, p. 50.

<sup>15</sup> Choon-ho Park, "East Asia and the Law of the Sea," Seoul National University, 2nd edition, 1985, p. 11.

<sup>16</sup> *Xinhua Monthly*, Beijing, 11 Feb. 1974.

nawa. They are all at the edge of the East China Sea continental shelf fronting the Okinawa Trough on the south. The depth of the surrounding waters is about 100-150 meters, with the exception of a deep cleft in the continental shelf just south and east of islands that separates them from the Ryukyu Islands. The total land area is about 7 square kilometers. The sea areas around the Senkaku Island are rich in fishery resources, and are assumed to be rich in oil and gas reserves. Besides, the islands are strategically located, straddling the sea-lanes in the East China Sea.

China holds that the Islands "have been an inalienable part of Chinese territory since ancient times, and appertain to China's Taiwan";<sup>17</sup> and that the seizure by the Japanese government of these islands cannot change that historical fact.<sup>18</sup>

China argues that historically the Islands were discovered and named by China hundreds of years before the Ryukyu fisherman Tatsushiro Koga discovered them in 1884, as was alleged by Japan. Reference to the Islands is found in a number of Chinese writings dating back to the mid-16 century.

From the point of usage, the fishing grounds around the Islands have been regular haunts of Chinese fishermen, who used the Islands as storm shelters as well. In 1893, Empress Dowager Tsu Shih of the Qing Dynasty issued an imperial edict granting three islets of the Diaoyudao Islands to one of her subjects Sheng Xuanhuai for collecting herbs. This was an official act on China's side. China argues that discovery accompanied by some formal act of usage is sufficient to establish sovereignty over the Islands.

From the point of international treaty, China holds that when Taiwan and all the islands appertaining or belonging to it were ceded to Japan in April 1895 as a result of China's defeat in the Sino-Japanese War, the Diaoyudao Islands were undoubtedly included in that part of the Chinese territory so ceded. Japan's unilateral proclamation of annexation of the Islands in 1895 can therefore have no legal effect. In 1945 when Japan surrendered to the Allies, it accepted the terms as set forth in the Cairo and Potsdam Declarations regarding the return of the Chinese territories including the Diaoyudao Islands. Regarding the San Francisco Peace Treaty of 1951 signed by Japan

and the Allies, Chapter 2 of the Treaty stipulates that 'Japan renounced all rights, title, and claim to Formosa (Taiwan) and the Pescadores'. China, which was not invited to the Peace Conference, interprets the name Formosa to include the Diaoyudao Islands.

Japan holds that the Senkakus are Japanese territory. The Japanese arguments are: First, the ownership of the Islands had not been established by China, or any other state, up until 1894. In other words, they were *terra nullius* (land belonging to no country). They were discovered by Ryukyu fisherman Tatsushiro Koga in 1884. "It was not until 1895, when the Japanese cabinet decided to incorporate part of the islands into the Prefecture of Okinawa, that the ownership of the islands was first established."<sup>19</sup> A statement issued by the Japanese Foreign Ministry in 1972 said, "In and after 1885, the (Japanese) government repeatedly conducted field surveys on the Senkaku Islands, and having confirmed with prudence that they were not merely uninhabited islands but also had no traces of control by Qing (China), made a cabinet decision on January 14, 1895, to the effect that a marker post would be put up in the Islands, and thus, decided to incorporate them formally into our country's territory."<sup>20</sup>

Second, Japan insists that the incorporation of the Senkaku Islands was unrelated to the successful progress of the war against China, and the Islands were not included in the Shimonoseki Treaty signed concluding the Sino-Japanese War by which China ceded to Japan Formosa together with all islands pertaining to it. Japan asserts that "After the Sino-Japanese War, but before the Treaty of Shimonoseki, the Islands were formally annexed to the Ryukyus."<sup>21</sup>

Third, the Senkaku Islands were not included in the territories Japan had to give up according to the San Francisco Peace Treaty. When the Ryukyu Islands were placed under the U.S. military administration at the end of the Second World War and subsequently under U.S. trusteeship in accordance with the San Francisco Peace Treaty, the Senkaku Islands were always included in the Ryukyu Islands. Besides, the Okinawa Reversion Treaty also included the Islands in the areas to be restored.

<sup>17</sup> "Statement of PRC's Ministry of Foreign Affairs, 30 Dec. 1971," *Beijing Review*, 1 Jan. 1972, p. 13.

<sup>18</sup> For full historical background and analysis, see Ji Guoxing, "the Diaoyudao (Senkaku) Disputes and Prospects for Settlement," *The Korean Journal of Defense Analysis*, Vol. VI, No. 2, Winter 1994, pp. 285-311.

<sup>19</sup> Choon-ho Park, "Continental Shelf Issues in the Yellow Sea and the East China Sea," *Law of the Sea Institute*, University of Rhode Island, Occasional Paper, No.15, 1972, p. 41.

<sup>20</sup> See J.R.V. Prescott, *op. cit.*, p. 54-55.

<sup>21</sup> Gerald W. Berkley, "the Issue of Sovereignty over Diaoyudao," paper for the 34th International Congress of Asian and African States, University of Hong Kong, 23-27 August 1993.

To sum up, China holds that the Senkaku Islands were part of its territory until April 1895, when they were ceded to Japan after losing a war. China believes whatever happened after April 1895 cannot be considered relevant in undermining China's long-standing claim. Japan asserts that the Islands belonged to no country until January 1895, when they were incorporated into Japanese territory by the cabinet decision. Japan argues what happened before January 1895 cannot diminish Japan's sovereignty.

Besides, there is the controversy over the maritime rights the Senkaku Islands are entitled to have. China holds that the Senkaku Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have continental shelf. Japan holds that the Islands are entitled to have continental shelf, and intends to use them as base points for continental shelf claims on the East China Sea. In this case, "Possession of the islands would confer on the owner title to over 11,700 nm<sup>2</sup> of the Asian continental shelf landward of the 200 m isobath."<sup>22</sup> If China owns the Senkaku Islands, it would own most of the southern portion of the East China Sea Basin, with Japan retaining only the eastern margin of the basin. If Japan owns the Senkakus, much more of the basin would fall to it. "If the islands were ignored in a boundary settlement, the southern portion of the East China Sea Basin would be split relatively evenly in terms of a real extent and sediment thickness."<sup>23</sup>

Tension over the Senkakus has occurred now and then during recent decades. For example, there was a 'Protect the Diaoyudaos Movement' among the Chinese communities in Taiwan, Hong Kong and in major metropolitan centers of North America in September 1970; and protests against Japan's claims to the Islands by permitting the renovation of a lighthouse on one of the islets mounted in Taiwan, Hong Kong and Macao in October 1990. When relations between China and Japan were normalized in 1972, both sides agreed to shelve the disputes. However, different interpretations exist in regard to this shelving. The Chinese side regards the shelving as a way of maintaining bilateral friendly relations for future negotiations; the Japanese side seems to regard more or less the shelving as a way of consolidating Japan's present control of the Islands as a *fait accompli*.

China has proposed to Japan that since the issue of sovereignty over the Islands is shelved,

they might cooperate in joint studies on exploration and development of oil in the sea areas around the Islands, but "Japan, which currently controls the Senkakus, is reluctant to acknowledge formally that its sovereignty there is uncertain."<sup>24</sup> Japan appears to have in mind a median-line arrangement that would permit oil development to move ahead regardless of how the question of title to the Senkakus is settled.

### The Gulf of Tonkin (the Beibu Gulf)

The Gulf of Tonkin is a semi-enclosed gulf embraced by the mainland of China and Vietnam as well as China's Hainan Island. Except for the announced width of the territorial sea within which China and Vietnam have exercised their jurisdiction respectively, the two sides have never delimited their sea boundary in the Gulf, and current disputes involve the demarcation of that boundary and the differing interpretations of the 1887 Sino-French Convention regarding it (Figure 3). In view of the fact that the Gulf continental shelf is the natural land extension of both China and Vietnam, and that the Gulf is 170 nm wide at the maximum, China and Vietnam should share the Gulf's resources.

In December 1973, a Vietnamese Vice Foreign Minister explicitly said, "The Tonkin Gulf sea area has not been divided between the two countries because Vietnam has been at war all the time."<sup>25</sup> He thus proposed to China to hold negotiations on the division of its sea area. However, when the talks started, the Vietnamese side contradicted itself, claiming that the sea area in the Tonkin Gulf had long been delimited. Vietnam asserts that "The convention between France and the Qing Government of China signed in Beijing on 26 June 1887 unmistakably defined the north-south straight line to the east of Tra-Co (i.e. longitude 108° 03'13" E) as the sea boundary between Vietnam and China in the Tonkin Gulf."<sup>26</sup> It further asserts that in the last hundred years or so since the signing of the Convention, the French colonial authorities and later the Vietnamese Government has consciously and consistently exercised sovereignty and jurisdiction within this line. In November 1982, Vietnam reaffirmed the area west of the longitude stipulated in the 1887 convention as its "historic internal waters." "Vietnam apparently was using the principle of natural prolonga-

<sup>24</sup> Ibid, p. 55.

<sup>25</sup> Han Nianlong et al., "Diplomacy of Contemporary China," (Hong Kong: New Horizon Press, 1990) p. 335.

<sup>26</sup> Ibid.

<sup>22</sup> Mark J. Valencia, op. cit., p. 47.

<sup>23</sup> Ibid, p. 48.

tion of the continental margin to claim Vietnamese jurisdiction over the shelf up to China's 12 nm territorial sea boundary."<sup>27</sup>

China's position on the Gulf's delimitation is based on the principle of equidistance. China holds that, in consideration of the geographical features of the Tonkin Gulf and the relevant provisions in international law, China and Vietnam should share the natural resources of the Tonkin Gulf and divide the Gulf between them on a fair and reasonable basis.

Regarding the Sino–French Convention signed in Beijing on 26 June 1887 after the Sino–French war in 1885, the stipulations pertinent to the boundary in Guangdong section are: “As for the islands in the sea, those to the east of the southward red line drawn by the commissioners of the two countries, passing through the hill at the east tip of the Tra-Co, belong to China, and those to its west, Jiutoushan Island and the other islands, belong to Annam.”<sup>28</sup> It is obvious that this red line defined by the 1887 Convention only indicated the ownership of the offshore islands without involving the delimitation of the entire Tonkin Gulf. In fact, the term “Tonkin Gulf” is not mentioned at all in the Convention, nor is the entire “Tonkin Gulf” marked in the map attached to the Convention. As Douglas M. Johnston and Mark J. Valencia say, “The text of the 1887 Sino–French Convention does use the term *frontiere*, which at that time usually had a territorial significance, but a close reading suggests that the purpose was functionally restrictive: to divide the islands into administrative zones, not to allocate waters or seabed or their resources.”<sup>29</sup> Moreover, given the circumstances at the time of signing the treaty at the end of the 19th century when “the doctrine of free passage on the seas” was prevalent, it was inconceivable that China and France should regard the Tonkin Gulf as an inland sea and divide it up. Besides, the Convention does not stipulate whether the red line has a northern or southern terminus. “If extended to the north, it would intersect the coast of China, and its extension to the south intersects the coast of Vietnam between Hue and Da Nang.”<sup>30</sup> In its note to the Chinese legation in Paris in 1933, the Quai d’Orsay said, among other things, that the delimita-

tion line in the 1887 Sino–French Convention “should be considered as a local one applicable only to the Mancay area in northern Vietnam.” Otherwise, the French note said, “The line would cut across the central part of Vietnam, making that region and many Vietnamese islands part of Chinese territory.”<sup>31</sup>

The Vietnamese assertion that for nearly a hundred years the French colonial authorities and later the Vietnamese Government has exercised their sovereignty and jurisdiction within the longitude 108° 3' 13" is groundless. In December 1926, the French Government declared that its 1888 law prohibiting foreign vessels from fishing within 3 nm of its territorial sea should be applicable to all its colonies. Thus the Law should naturally be applicable to the Tonkin Gulf. In September 1964, the Government of the Democratic Republic of Vietnam declared the width of its territorial sea to be 12 nm and also published a map showing its territory sea boundary in the Tonkin Gulf. If the vast sea area in the Tonkin Gulf to the west of Longitude 108° 3' 13" were Vietnam's own as is now claimed, and if Vietnam had consistently exercised sovereignty and jurisdiction within that vast sea area, it is untenable that Vietnam would have drawn a sea boundary line within its own inland sea. Thus, the “sea boundary line” in the Tonkin Gulf as currently claimed by Vietnam is both historically and practically.

In this dispute, the resource stakes are high. The Tonkin Gulf abounds in hydrocarbon resources. Foreign oil companies have been drilling near, if not in, the disputed areas. Some U.S., French and Italian companies have had agreements with both China and Vietnam in the area. “Chinese crews have drilled five wells in the North Bay Basin, and there is a total of nine discoveries in eleven wells in the gulf.”<sup>32</sup> The area also has rich fishery. For a long time both countries have exploited shared stocks of mackerel intensively.

China has proposed that a rectangular “neutral zone” in the middle of the Gulf, bounded by the 18° and 20° parallels and 107° and 108° meridians, be kept free from exploration until the two countries could reach agreement on the delimitation. China's agreements with Western oil companies for oil exploration work off the west coast of Hainan Island have been drawn with a western boundary of 108° E, so as not to breach the “neutral zone.”

<sup>27</sup> La Grange, Carolyn, “South China Sea Disputes,” Working Paper No.1 (Honolulu: East-West Center Environment and Policy Institute, 1980).

<sup>28</sup> Han Nianlong et al., *op. cit.*, p. 336.

<sup>29</sup> Douglas M. Johnston and Mark J. Valencia, *op. cit.*, p. 149.

<sup>30</sup> Joseph R. Morgan and Mark J. Valencia edited for the East-West Environment and Policy Institute, Honolulu, Hawaii, “Atlas for Marine Policy in Southeast Asian Seas” (Berkeley: University of California Press, 1983), p. 50.

<sup>31</sup> Choon-ho Park, Jae Kyu Park ed., “The Law of the Sea: Problems from the East Asian Perspectives” (Honolulu: University of Hawaii Law of the Sea Institute, 1987), p. 465.

<sup>32</sup> Joseph R. Morgan and Mark J. Valencia edited, *op. cit.*, p. 115.

Vietnam has never accepted this proposal, but has suspended its negotiations or agreements with foreign oil companies for exploration of the Gulf. Both parties have refrained from exploring or exploiting petroleum in the buffer zone.

The Sino–Vietnamese talks on the Tonkin Gulf have been held intermittently since August 1974, and have produced no results. On 20 June 1993, both sides signed an agreement on the basic principles for resolving the land boundaries and the demarcation of the Tonkin Gulf, laying a groundwork for peaceful negotiation.

Negotiations could be based on the principle of equidistance or that of equity. If equidistance is to be used, the island Ile Bach-Long-Vi, 53 m above sea level, is important in the delimitation, since its location 38 nm from the nearest Vietnamese territory would extend the line of equidistance in Vietnam's favor and would allocate an additional 1700 nm<sup>2</sup> of maritime territory to Vietnam. China might maintain that the location of Ile Bach-Long-Vi constitutes special circumstances that render a line of equidistance inappropriate. “Discounting Ile Bach-Long-Vi, a line of equidistance, which might be reasonable under the equity principle, would be advantageous to China.”<sup>33</sup>

### The Spratly (Nansha) Islands

The disputes in the Spratly Islands in the South China Sea involve five countries and six parties, namely, China, China's Taiwan, Vietnam, the Philippines, Malaysia and Brunei. The disputes embrace the sovereignty issue over the Spratly Islands, and the delimitation of maritime boundaries in the sea areas adjacent to the Spratly Islands in the southern part of the South China Sea. (Figure 4)

The South China Sea is a steep basin abruptly dropping off to abyssal plains at the center. “There is virtually no continental shelf along the Philippine side, the 200 m isodepth line on the southeast running very closely along Palawan and Luzon. Only on the side of the Chinese mainland, Taiwan, and, to a lesser extent, Vietnam, is there some breadth of continental shelf.”<sup>34</sup>

The Spratly Islands consist of more than 400 islands, banks, reefs, shoals, atolls and cays. Among them, 33 rise above the sea, and 7 have an area exceeding 0.5 sq. km. They lie scattered over an area of about 400 nm from east to west and about 500 nm from north to south. The sea areas contained by these islands are 800,000 sq. km or

38 percent of South China Sea waters. Until 1960s, much of this area was not accurately surveyed, but was portrayed as “Dangerous Ground” on maps.

The Spratly Islands abound in tropical fish, minerals and other marine resources. One study estimates that the South China Sea has a yearly harvest of five million tons of fish. The islands also have great potential for undersea oil and gas exploitation. Surveys made by China indicate that about 25 billion cubic meters of gas and 105 billion barrels of oil exist in the continental shelf around the Spratly Islands. Seabed areas near James Shoal (Zhengmu Ansha), Spratly Island (Nanwei Dao), and Reed Bank (Liyue Tan) are known to have extractable oil fields. The 9,700 sq. mile area around Vanguard Bank (Wai'an Tan) is estimated to contain 1 billion barrels of oil. Within the sea area of 310,000 sq. km around James Shoal, North and South Luconia Shoals, oil and gas reserves are estimated at 13 billion to 17 billion tons. In offshore Brunei, oil reserves are estimated at 1.3–2.0 billion barrels, and proven gas reserves are in the range of 7.7–10 trillion ft<sup>3</sup>.

Although to develop oil would not be commercially justifiable with current technology, due to water depths of up to 2,500 meters, the claimants are evidently resource-oriented. The area had been relatively tranquil for hundreds of years, and disputes in the main have emerged since the 1973 oil crisis. Advances in drilling technology and the rising interest of foreign companies in searching for petroleum resources in the South China Sea have intensified the disputes. What is at stake in the disputes is the oil to be found around the islands and in the adjacent continental shelf.

The Spratly Islands, sitting astride major sea-lanes, are also of great strategic significance. The lanes communicate on the southwest with the Indian Ocean through Malacca-Singapore Straits, and on the northeast with the East China Sea and the Pacific Ocean. Tension in the area could affect the flow of traffic—maritime trade and commerce as well as military transport—between the Pacific and Indian Oceans. Countries like the U.S. and Japan are much concerned about free access through the sea lanes and air corridors there.

The Islands have been claimed wholly by China and Vietnam, and partly by the Philippines, Malaysia, and Brunei, based on various historical, geographical and legalistic grounds. Except for Brunei, all the claimants now have established military presence there, and a jagged, interlocking and crazy-quilt pattern of occupation has been formed, making the situation tense and explosive. At present, Vietnam has occupied 27 islands and

<sup>33</sup> Ibid, p. 50.

<sup>34</sup> Choon-ho Park, Jae Kyu Park edited, op. cit., p. 459.

reefs in the western and central parts of the archipelago; the Philippines, 8 in the eastern part; Malaysia, 3 in the southern part; China, 7 and China's Taiwan, 1 in the central part.

The grounds for the claims on the part of China and China's Taiwan are the same. China's stand is that the Spratlys "have always been an inalienable part of Chinese territory since ancient times."<sup>35</sup>

First, China holds that China discovered the islands more than 2,100 years ago at the time of the Han Dynasty, i.e., hundreds of years before Vietnam began asserting its claims, and that China meets the requirements of "acquisition by discovery" in accordance with the concept of "intertemporal law" in international arbitration and adjudication.

Second, China has displayed state authority over the Spratlys since Zheng He (Cheng Ho), on behalf of the Ming Court, incorporated the Spratlys into China's domain in the early 15th century. In spite of geographical limitations for permanent settlement at that time, there has been an uninterrupted presence of Chinese on the islands for hundreds of years. "In a remote, uninhabited territory the degree of authority actually displayed may be relatively small, whereas in a populated area the degree must be greater."<sup>36</sup> From the late 19th century to the 1940s, France and Japan, covetous of the Spratlys, successively attempted to assert claims on the islands, but all without success owing to strong opposition from China.

Third, as the Spratlys were under the control of the Japanese during the Second World War, China was legally restored its sovereignty over the Spratlys according to the 1951 San Francisco Peace Treaty signed on 8 September 1951. Chapter 2 of the Treaty provides that "Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands." Though the Treaty does not stipulate unequivocally that these islands be returned to China after renunciation, Japan is implicated in its thinking and desire to return these islands to China. The evidence is that in 1952, the year after the San Francisco Treaty was signed, the 15th map of Southeast Asia of the *Standard World Atlas*, recommended by the signature of the then Japanese Foreign Minister, Matsuzaki, marks as part of China all the Paracel and Spratly islands which Japan had to renounce as stipulated by the

Peace Treaty.<sup>37</sup> When China took over the Spratly Islands from Japan in 1946, and published new names for each of the Islands, neither Vietnam nor any country protested to China regarding to its actions.

Vietnam's stand is also mainly based on historical grounds. The former Saigon government, which attended the 1951 San Francisco Peace Conference, first affirmed its right to the Spratlys at the conference by saying that these islands "have always belonged to Vietnam." After the Philippines claimed the islands in 1956, Vietnam renewed its interests in the islands and tried to assert its claim. It asserted that "In 1834, under the reign of Emperor Minh Mang, the Spratlys appeared in the first Vietnamese map as an integral part of the national territory."<sup>38</sup> In September 1973, it further announced the formal incorporation of 11 main islands in the Spratlys into its Phuc Tuy Province.

The attitude of the Hanoi government, which has controlled the whole of Vietnam since the collapse of the Saigon government in 1975, has not been consistent in respect of the Spratlys. Before 1975, Hanoi officially acknowledged the Spratlys as being Chinese territory. Its Vice Foreign Minister Ung Van Khiem stated on 15 June 1956 to the Chinese *Charge d'Affaires* Li Zhimin that "According to Vietnamese data, the Xisha (Paracel) and Nansha (Spratly) Islands are historically part of Chinese territory."<sup>39</sup> In September 1958 when China proclaimed the breadth of its territorial sea to be 12 nm and specified that this provision applies to all Chinese territories including the Spratlys, Vietnam's late premier Pham Van Dong in his note to Beijing affirmed that Vietnam "recognizes and supports" China's declaration and "respects this decision."<sup>40</sup> However, in May 1975, the China Department of the Vietnamese Foreign Ministry changed the stand and said that "The Truong Sa Islands (Nansha Islands) had been Vietnamese territory since ancient times."<sup>41</sup> In late 1975, a new territorial map of the reunited Vietnam for the first time included the Spratlys, and in May 1977 Vietnam specifically declared that its territorial waters included the Spratlys.

The Philippines' claim is based on "discovery," "proximity," and "national security." The

<sup>35</sup> Han Nianlong et al., op. cit., p. 331.

<sup>36</sup> Kriangsak Kittichaisaree, "The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia," Oxford University Press, 1987, p. 141.

<sup>37</sup> Document by the Ministry of Foreign Affairs of the PRC, 30 January 1980.

<sup>38</sup> Choon-ho Park, "East Asia and the Law of the Sea," p. 212. Cited from 'Fact Sheet', No.2/74, South Vietnam Embassy, Washington DC, 28 January 1974.

<sup>39</sup> Han Nianlong et al., op. cit., p. 332.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, p. 333.

Philippine claim started in 1947 when the then Philippine Secretary of Foreign Affairs Carlos P. Garcia demanded that some islands of the Spratlys, which were occupied by Japan during World War Two and were used by Japan as a staging area to launch attacks on the Philippines, be given to the Philippines. In May 1956, Tomas Cloma, owner of a Philippine fishing vessel company and director of the Philippine Maritime Institute, explored the Spratlys together with his brothers and 40 crew, and claimed to have discovered and occupied 53 islands and reefs of 64,976 sq. nm in the Spratlys. They proclaimed “formal ownership” over them, hoisted the Philippine national flag and renamed these islands and reefs the Kalayaan (Freedomland) Island group. In his letter to Carlos Garcia, the then Philippine Vice President and Foreign Minister, Cloma asserted his occupation was based on “discovery and occupation.” Garcia replied that judging from the point of “occupation” and “proximity,” there are no reasons for these islands and reefs not to be under Philippine jurisdiction.<sup>42</sup> In April 1972, the Philippine government incorporated the Kalayaan group into Palawan Province as a municipality. In 1974, the Philippine government claimed that “Its location rendered it strategically important to Philippine national security.”<sup>43</sup> In 1978, the Philippine Presidential Decree No. 1599 underscored the fact that Kalayaan is within the Philippine 200-mile exclusive economic zone. On the whole the Philippine claim extends over an area of 70,150 sq. nm,<sup>44</sup> which includes most of the larger islands in the Spratlys.

Malaysia's claim on the Spratleys is more or less based on “proximity.” Malaysia's claim “is based on the conviction that the islands are situated on its continental shelf, well within its declared exclusive economic zone (EEZ), security, and its proximity to the mainland.”<sup>45</sup> By publishing on 21 December 1979 a new map on its territorial waters and continental shelf boundaries, Malaysia has staked its claims to about a dozen tiny reefs and atolls in the southeastern portion of the Spratlys.

According to foreign analysts, “Neither country's (the Philippines and Malaysia) claim can be said to be particularly well grounded in interna-

tional law, which offers very few universal principles that could be said to 'govern' in a dispute of this kind.”<sup>46</sup>

Brunei's claim is also based on “proximity.” It claims ownership on one reef called Louisa Reef (Canting Jail). But, proximity is not at all a ground for acquiring territory in international law. It contravenes international justice and peace. “In any case, there is no rule establishing *ipso jure* the presumption of sovereignty in favor of a particular state merely by virtue of the contiguity of the state to the territory in question.”<sup>47</sup>

Now the South China Sea has been filled with various overlapping sea boundaries. China drew in 1947 a nine-dashed intermittent line surrounding the Spratlys as its boundary line and has been kept up till now in China's maps. It encompasses the majority parts of the South China Sea, just offshore from the other littoral states. Hanoi declared its EEZ and continental shelf in May 1977, which includes as well the majority parts of the South China Sea. As to the Philippines, apart from the Kalayaan group line, it claimed in June 1978 an EEZ covering the eastern part of the South China Sea. Malaysia claimed a continental shelf line in December 1979 and declared its 200 nm EEZ in May 1980, covering the southern part of the South China Sea. Brunei's Fishery Limits Enactment of 1982 declared a 200 nm exclusive fishery zone for Brunei, which touches upon the extreme southern sector of the Spratly area. If Brunei declares a 200 nm EEZ around Louisa Reef, that zone would extend further into the Spratlys. Indonesia announced a seabed boundary line in October 1969 around the Natuna Island, and it overlaps with the claims of Vietnam and Malaysia. It declared a 200 nm EEZ in March 1980. Indonesia's offshore claims may bring Jakarta into potential conflict with the others because James Shoal is near the Natuna Island.

<sup>42</sup> Cheng Hurng Yu, “The South China Sea Islands, Sovereignty and International Conflicts,” You Shi Cultural Enterprise Co., Taipei, 1987, p. 83–85.

<sup>43</sup> Neil Frank R. Ferrer, “The Philippines and the South China Sea Islands: Overview and Documents,” Center for International Relations and Strategic Studies, Foreign Service Institute, the Philippines, CIRSS Papers No.1, December 1993, p. 12.

<sup>44</sup> BA Hamzah, “The Spratlys: What Can Be Done to Enhance Confidence,” ISIS Research Note, Malaysia, 1990.

<sup>45</sup> *Ibid.*

<sup>46</sup> Douglas M. Johnston and Mark J. Valencia, *op. cit.*, p. 127. Cited from Ariff, M.O., “The Philippines' Claim to Sabah: Its Historical, Legal and Political Implications,” Oxford University Press, 1970.

<sup>47</sup> Kriangsak Kittichaisaree, *op. cit.*, p. 141.

## Analyses of the Disputes

The present disputes embrace four issues related to international law in general and the law of the sea in particular.

### Baseline of Territorial Sea

The United Nations Convention on the Law of the Sea in 1982 stipulates that, “Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nm.” (Chapter 3) Since the territorial sea baseline is the starting point for measuring territorial sea, contiguous zone, continental shelf and EEZ, differences in respect of territorial sea baseline inevitably lead to disputes in maritime jurisdiction.

The concept on territorial sea baseline in the law of the sea is rather vague. Depending on different geographical conditions, it might be a low-tide line or a straight baseline. The low-tide line has been prescribed as the normal baseline in conventional and customary law. However, “In localities where the coastline is deeply indented and cut into, the method of straight baseline joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.” (Chapter 7) Besides, the Convention also stipulates that an archipelagic state may draw a straight baseline to define the breadth of its territorial sea.

The low-tide line is the normal baseline method which is accepted by all countries, “Each coastal state would seek to insure that the low-tide baseline of the other would not be drawn too seaward from the coast”;<sup>48</sup> whereas the method of straight baseline easily arouses disputes, because countries are inclined to abuse its use to enlarge their own maritime jurisdiction.

Countries concerned in the present disputes all adopt the method of straight baseline. The majority of these straight baselines are unilateral, and are not recognized by others.

China adopts in its Territorial Sea Proclamation of 1958 and the Law of Territorial Waters and Contiguous Zones of 1992 the straight baseline system, “connecting base points on the mainland coast and on the outermost of the coastal islands”; however, it has not specified the base points. North Korea claimed territorial waters of 12 nm in August 1977 adopting straight baseline, but has been unspecific with respect to the baseline. South Korea has specified its straight baselines with refer-

ence to its Territorial Sea Law of 1977. Japan proclaimed territorial sea 12 nm wide in July 1977 by adopting straight baseline.

Vietnam declared its baseline of territorial waters on 12 November 1982. It adopts the straight baselines linking the farthest parts of the coast and the outermost points of offshore islands. “The system uses nine turning points, two of which are more than 80 nm offshore, while three others are more than 50 nm offshore. The four longest of the ten baselines are 162, 161, 149, and 105 nm long, enclosing a water area of 27,000 sq. nm in all.”<sup>49</sup> In doing so, it has met with protests from the other related countries. Thailand, for example, has stated that the drawing of baselines of Vietnamese territorial sea was “at variance with the well-established rules of international law.”<sup>50</sup>

Malaysia has used the straight baseline system. For instance, the baseline in the Straits of Malacca links the remote islands of Perak and Jarak, resulting in claims to territorial waters that in one place are 59 nm from the nearest fragment of Malaysian territory. The straight baselines in the vicinity of the mouth of Golok River between Thailand and Malaysia, and near Langkawi Island in the Andaman Sea, have adversely affected the maritime claims of Thailand. The segment passing through Langkawi Island extends the territorial sea of Malaysia to 30 nm from the land territory.<sup>51</sup>

The former Philippine territorial waters, defined in the treaty between the U.S. and Spain in 1898, and the treaty between the United States and Britain in 1930, were drawn along meridian and parallel lines and shaped rectangularity. In 1961, the Philippines adopted delimitation in accordance with straight archipelagic baselines in place of the meridian and parallel lines.

As a starting point for the settlement of the disputes, the countries concerned should first hold consultations and reach agreement on their baselines. As the three China Seas are narrow and are studded with offshore islands, for the convenience of boundary demarcation, it is preferable that the countries concerned in principle ignore the effects of offshore islands outside the belts of territorial sea on the baselines of territorial sea. Otherwise, the situation will be very complicated.

For example, the barren island Dong Dao, exposed at low tide 70 nm off Shanghai, might complicate the delimitation in the East China Sea. “Using that uninhabited offshore island as the base

<sup>48</sup> Choon-ho Park, Dalchoog Kim, Seo-Hang Lee edited, *op. cit.*, p. 41.

<sup>49</sup> Kriangsak Kittichaisaree, *op. cit.*, p. 16–17.

<sup>50</sup> *Ibid.*, p. 182.

<sup>51</sup> *Ibid.*, p. 18.



point would affect one of the (South Korean) four points with very good promise of gas or oil.”<sup>52</sup> The Sassuksan Island about 62 miles off the southwest coast of the Korean Peninsula would also complicate the delimitation in the Yellow Sea. If the island can be given full effect and the equidistance rule applies, it would give South Korea substantial advantage in delimiting its boundary vis-à-vis China. The controversy between Japan and South Korea in the East China Sea originates from Japan's persistence, in the face of objections from South Korea, in using a group of uninhabited and isolated islets and rocks, called Danjo Gunto and Torishima as its base points for a claim on maritime jurisdiction between Japan and South Korea.

In the Bashi Channel, the Philippines draws its straight archipelagic baselines in the north from the outermost islands of Batan Islands and Babuyan Islands. The area of the two islands is 793 sq. km, and the water area within this archipelagic line is 12,996.78 sq. km. The water-land ratio is 16.39 to 1. Chapter 47 of the Law of the Sea Convention stipulates, “The ratio of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.” Evidently the Philippine straight archipelagic baselines have to recede to the northernmost points of Luzon Island.

### Principles of Continental Shelf Demarcation

The concept of continental shelf has long been a controversial issue. The relevant stipulation in the law of the sea has itself been under changes and is still not perfect. The 1958 Convention on the Continental Shelf adopted the 200-meter depth criterion and the exploitability test. Later on the principle of natural prolongation of land territory was created in 1969 by the International Court in its judgment of the North Sea Continental Shelf Cases, but this principle has yet to be defined precisely. The Third UN Convention on the Law of the Sea in 1982 adopts a new definition, and defines a 200 nm limit in place of the 200-meter depth criterion. It stipulates that the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to (1) the outer edge of the continental margin, or (2) a distance of 200 nm from the baselines from which the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance. (Chapter 76:1) This new definition, despite its intention to minimize conflict and eliminate ambiguity, is

itself a source of new conflicts. The definition has complicated the maritime boundary issues in the three China Seas, because in these seas there are few spots where a 200 nm limit can be applied without overlapping with those of the other coastal states.

During this evolutionary process, several tendencies are worth notice. One is “the relative demise of the natural prolongation concept and the emphasis on geographical circumstances and coastal configurations.”<sup>53</sup> It seems that the doctrine of natural prolongation has been overridden by the 200 nm limit regime and “is now somewhat discredited as a basis for continental shelf delimitation.”<sup>54</sup>

Another is the inclined ignorance of the factor of trough in affecting the shelf demarcation. Recent adjudications have tended “to reduce the relevance of geomorphological features such as the trough cited by China.”<sup>55</sup> Under the regime of the 200 nm limit, “The Okinawa Trough could cease to be a limiting factor on Japan in the delimitation of the East China Sea continental shelf.”<sup>56</sup>

The third is the emphasis given to the application of the median or equidistance line for achieving an equitable solution in the interests of convenience. Although all countries agree that agreement through consultation precedes the median line and that the median line principle can be applied, it is only in the absence of an agreement, and unless justified by special circumstances, state practices have shown that they have all applied the method of equidistance as points of departure in the initial stage of negotiations and have made adjustments later on based on that. “Judicial and arbitral decisions, though have not yet regarded the equidistance rule having an obligatory force, nevertheless have endorsed its legal and practical value in just about all decisions.”<sup>57</sup> For example, the Agreement on Continental Shelf Boundaries signed between Indonesia and Malaysia in 1969 adopts the median line method in delimiting the maritime boundaries between West Malaysia and Indonesia, and the revised equidistant line method in delimiting the maritime boundaries between East Malaysia and Indonesia.

<sup>53</sup> David Joseph Attard, “The Exclusive Economic Zone in International Law,” Oxford University Press, 1987, p. 275.

<sup>54</sup> Douglas M. Johnston and Mark J. Valencia, *op. cit.*, p. 166.

<sup>55</sup> *Ibid.*, p. 165.

<sup>56</sup> Choon-ho Park, “East Asia and the Law of the Sea,” p. 258.

<sup>57</sup> Surya P. Sharma, “Delimitation of Land and Sea Boundaries between Neighbouring Countries,” Lancers Books, India, 1989, p. 117.

<sup>52</sup> Choon-ho Park, Jae Kyu Park *ed.*, *op. cit.*, p. 261–262.

In line with recent developments, the application of the equidistance principle, although not obligatory, could be decisive in the settlement of disputes in the China Seas in those instances where it could be applied equitably. The natural prolongation principle and the silt line claim ought to be reconsidered. The natural prolongation principle would be advantageous to China in the East China Sea, but would be disadvantageous to China in the Tonkin Gulf and the South China Sea. “China’s use of the natural prolongation principle in the East China Sea vis-à-vis Japan contradicts its opposition to Vietnam’s use of this principle in the Gulf.”<sup>58</sup> The silt line would be advantageous to China in the Yellow Sea, but would be disadvantageous to China in the Korea Bay and the East China Sea. Besides, it is better for a country to adopt the same principle for the convenience of its maritime delimitation. Otherwise the inconsistency would delay the settlement process. The practice such as the South Korea’s insistence on the equidistance principle in the Yellow Sea on the one hand and the natural prolongation principle in the East China Sea has complicated the process.

### **The Ownership of Islands**

Most of maritime jurisdictional disputes are concerned with the ownership of islands, which is usually very difficult to solve.

In respect to the sovereignty of the Spratly and the Senkaku Islands, various factors need to be taken into consideration. Among them, the historical title and the present status are most important.

Speaking from historical title, China’s claims are stronger than those of Vietnam and Japan. China discovered the Spratlys and the Senkakus hundreds of years before Vietnam and Japan respectively. The Vietnamese assertion that the Spratlys were an integral part of Vietnamese territory in 1834 is short of proof. The Vietnamese assertion that in 1834 the Spratlys were under the reign of Emperor Minh Mang can not be justified because Vietnam was still a Chinese protectorate before 1875, and it was against logic and common sense that a vassal state could occupy a piece of territory of its suzerain state. The Japanese allegation that the Senkakus were discovered by Tatsushiro Koga in 1884 appears to have now faded away even in Japan.

The interpretation of a historical treaty is inseparable from the historical background in which the treaty was signed. The “red line” defined in the 1887 Sino–French Convention only indicates the

ownership of the offshore islands between China and Vietnam without involving the delimitation of the Tonkin Gulf and the South China Sea. “It seems unlikely that this decision was intended to allocate to either China or Vietnam a maritime area of more than 3 nm from the coast, bearing in mind the 3 nm maximum breadth of the territorial sea at that time.”<sup>59</sup> If Vietnam insists that it delimits the sea boundary in the Tonkin Gulf, then China might use it as a further proof that the Spratlys belong to China, because the Spratlys lie east of this red line.

As to the Japanese annexation of the Senkaku Islands, it is closely related to its victory in the Sino-Japanese War and to the usurpation of the Shimonoseki Treaty of 1895. Japan hesitated to make its claim to the islands for ten years previously in fear of possible friction with China, despite repeated requests by the Okinawa Prefecture. This hesitation only ended on the eve of China’s defeat in the War. The islands were ceded to Japan in 1895 simultaneously with Taiwan as part of the islands appertaining to Taiwan.

The status of the present occupation of the islands is an important factor as well to be reckoned with in the settlement. Those islands and reefs which have already been occupied will not be unconditionally abandoned by the claimants concerned. But further occupation should be prevented, and who is occupying more islands at present should be irrelevant to the settlement. One has to admit “the improbability that any one country can hope to obtain the whole area.”<sup>60</sup>

### **The Entitlements of Islands**

The presence of islands is one of the major issues causing complication in boundary negotiation, because the geographical features of islands are so diverse that no single standard meets the common interests of the majority of states. The legal status of islands in the delimitation of maritime boundary has in fact not been fully resolved.

The relevant stipulations in the 1982 UN Convention on the Law of the Sea are rather vague and ambiguous. The Convention grants that islands may have territorial seas, contiguous zones, EEZs and continental shelves in the same way as land territory, but denies shelf and EEZ rights to “rocks which cannot sustain human habitation or economic life of their own.” (Chapter 121:3) Difficulties then exist in identifying whether or not an island can sustain human habitation or economic life. In implementing the stipulations, countries are

<sup>58</sup> Douglas M. Johnston and Mark J. Valencia, *op. cit.*, p. 149.

<sup>59</sup> Kriangsak Kittichaisaree, *op. cit.*, p. 43.

<sup>60</sup> Douglas M. Johnston and Mark J. Valencia, *op. cit.*, p. 124.

usually accustomed to interpret in the way which best suits their interests. None of the parties to the disputes would confine its interests to the physical value of the islands claimed, but would count on the economic value of what it might be entitled to. In enclosed or semi-enclosed seas, even an obscure island large enough to qualify for a basepoint, could substantially affect boundary delimitation between or among the coastal states in favor of its owner.

In state practices, there are generally three approaches to solving the presence of islands in maritime delimitation. "The first would be to draw a boundary ignoring the existence of islands; the second would give full effect to islands; and the third would give effect to islands depending on relevant factors such as distance from the coast, size, population, and economic and political development."<sup>61</sup> Most bilateral treaties ignore the effect of small islands in boundary delimitation. The question of whether islands should be ignored, given full effect, or given a limited or partial effect, depends ultimately on the extent to which they are factors of inequity, and on the negotiations and the willingness of acceptability by the parties concerned. When Malaysia delimited its continental shelf in 1979, it disregarded the islands of others and their entitlements to a continental shelf. Malaysia simply drew equidistant boundaries, ignoring these islands altogether, and gave rise to a series of protests from its neighbors.

Regarding the Senkaku Islands, since they are small, uninhabited, and cannot sustain economic life of their own, they could only be given partial effect and are not entitled to have a continental shelf. Limiting the Senkaku Islands to only a 12 nm territorial sea would have no significant legal effects on the boundary delimitation in the East China Sea, thus making the settlement process much easier. The desirable approach is to agree to a 12 nm territorial sea enclosure around the Senkaku.

Regarding the Spratly Islands, one might divide them into several categories. The underwater banks, shoals, and cays which constitute the majority parts of the Spratly group should be ignored. Artificial islets in principle should be ignored, but those artificial islets with human occupation and habitation might be given partial effect and be entitled to have 12 nm territorial sea. Those 33 islands and rocks which stand permanently above the sea level should all be entitled to have 12 nm territorial sea; and 26 among them, "being naturally formed

areas of land surrounded by water and standing above high tide"<sup>62</sup> should be given full effect. "All of the 26 islands of the Spratly group, may be used to make claims to territorial waters, contiguous zones, EEZs and continental shelves."<sup>63</sup> At present, these islands with full effect have all been occupied by respective claimants.

As China holds that the Spratlys have been an inalienable part of Chinese territory, for the delimitation of the continental shelf, China might take such islands as Itu Aba Island, Thitu Island, Flat Island, Nanshan Island, Commodore Reef, Swallow Reef, Amboyna Cay, Spratly Island as base points, draw straight lines connecting these base points in a rectangular form, and thus define the 200 nm continental shelf instead of the nine-dashed intermittent line.

## Equitable Approaches in Existing International Maritime Boundary Agreements

**T**he question of maritime boundaries is a newly-emerging issue. The previous lack of legal concern for delimiting the boundaries is mainly attributable to the fact that the seabed and subsoil have no human population warranting legal control and that the valuable resources they contain had not been within human control until recent times. The subject has assumed greater importance only in recent decades, as the new campaign for seaward expansion has resulted in the addition of the concepts of the continental shelf and the EEZ to territorial sea zones.

The stipulations of the law of the sea regarding maritime delimitation are rather general. The 1982 Convention on the Law of the Sea provides that the delimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line where appropriate and taking account of all circumstances prevailing in the area concerned. (Chapter 83:1) The International Court attaches a reasonable degree of decisive importance to the role of equidistance in the process of maritime boundary delimitation although it has

<sup>61</sup> David Joseph Attard, *op. cit.*, p. 261.

<sup>62</sup> J.R.V. Prescott, *op. cit.*, p. 51.

<sup>63</sup> *Ibid.*

ruled that, for achieving the most equitable solution, circumstances other than equidistant line also merit adequate consideration.

Existing international ocean boundary agreements provide useful guidance for how to achieve an equitable solution. In these agreements the legal and practical value of equidistance principle has been endorsed. Though no boundary line plotted in these agreements could be qualified as a true equidistant line, an equidistant line is a good the 'starting point' for negotiation, for it does provide a point of reference for by contracting states in their pursuit of fairness or equity. The equidistant line approach could be used by the littoral States in the three China Seas in seeking equitable solution to their disputes.

There are now more than one hundred maritime delimitation agreements in the world signed bilaterally or trilaterally. Among them, there are about twenty agreements signed by related East Asian countries. Two agreements are in Northeast Asia, i.e., the Japan–South Korea Agreement Establishing a Continental Shelf Boundary and Agreement Concerning the Joint Development of the Southern Part of the Continental Shelf (30 Jan. 1974); the others are in Southeast Asia. Indonesia, being an archipelagic country and much concerned over its maritime interests, has been most active in negotiating boundary delimitations with its neighboring countries.<sup>64</sup>

The common characteristics of these existing agreements in the Asian region are: First, they were concluded between politically friendly governments whose good international relations contributed to enhancing the acceptability or the flexibility of the position of the other side. The good atmosphere in international relations and the willingness of leaders to compromise are significant to the success of the negotiations. What may

seem to be a recognition of equitable considerations may in fact be an example of political compromise or of regional cooperation.

Second, in accordance with the principle of equity, the delimitation methods usually employed are the median or equidistant line. The 'inequity', if any, of the delimitation is remedied through some modifications of the delimiting lines. While the equidistance method has been frequently used, states have not hesitated to deviate from the method if it does not produce an equitable result.

Third, the unity of mineral deposits is preserved so as to avoid the risk of prejudicial or wasteful exploitation wherever a continental shelf boundary straddles a mineral deposit. An interim agreement of joint exploitation of the overlapping zone and the joint authority option tends to be preferred in State practice.

Fourth, the balancing of all equitable considerations, rather than the reliance on one consideration to the exclusion of others, has been the best method of delimitation.

The following is a more detailed analyses of the existing international agreements in achieving an equitable solution.

### **Territorial Sea Boundary Agreements**

#### *Straight Baselines of the Coastal States*

Although the 1958 Convention on the Territorial Sea and Contiguous zone and the 1982 UN Law of the Sea Convention "regard the use of straight baselines as being limited to exceptional geographical circumstances, and although few States have a coastline that is anywhere near as indented or fringed with islands as that of Norway, about half of the world's coastal States have in fact drawn straight baselines along all or part of their coast."<sup>65</sup> As shown between Malaysia and Indonesia, not long before the boundary negotiation began, Malaysia constructed its straight baselines, apparently intending to put itself on an equal footing in the division of the continental shelf with Indonesia which had previously drawn its own straight baselines. For similar reasons, France and Spain had to create their 'artificial coast-lines' first before they delimited in 1975 their continental shelf line in the Bay of Biscay. Thus, concerned parties might first accept one another's straight baseline claims as starting points in the negotiation process.

<sup>64</sup> The first agreement was concluded between Indonesia and Malaysia on 27 Oct. 1969. This was followed by the agreement of 18 May 1971 between Indonesia and Australia establishing certain sea-bed boundaries; the Indonesia-Thailand Agreement of 17 Dec. 1971; the Indonesia-Thailand-Malaysia Agreement of 21 Dec. 1971; the Indonesia–Australia Agreement of 9 Oct. 1972 in the area of the Timor and Arafura Sea; the Indonesia-Singapore Agreement of 25 May 1973 stipulating the territorial sea boundary lines; the Indonesia-India Agreement of 8 Aug. 1974; the Indonesia-Thailand Agreement in the Andaman Sea on 11 Dec. 1975; the Indonesia-India Agreement on 14 Jan. 1977 relating to the extension of the continental shelf boundary in the Andaman sea and the Indian Ocean; the Indonesia-India-Thailand Agreement of 22 June 1978 delimiting the seabed of the Andaman sea off the western entrance of the Straits of Malacca. On that date, Thailand also concluded a seabed boundary agreement in the Andaman Sea with India, separating India's Nicobar Islands and the Thai coast by a series of median lines.

<sup>65</sup> Kuen-Chen Fu, "Equitable Considerations in Maritime Boundary Agreements, An Analysis," *Soochow Law Review*, Taipei, Vol. 6, No. 1, Feb., 1989, p. 140.

### *Modified Equidistance Principle on the Territorial Sea*

State practice shows that while the equidistance principle has been used in most of territorial sea boundary agreements, in almost all these cases the principle has been modified. For example, the declaration signed by Denmark and Sweden concerning the boundaries in the Sund on 30 Jan. 1932 adopted the equidistance principle in the northern and southern segments of the boundary line; however, the remaining part of the line was a result of negotiation for the benefit of navigation of these two states, and was not equidistant from the opposite shores.<sup>66</sup> The equitable consideration of the baselines apparently becomes more important when more than two states are trying to decide a common boundary intersecting point. The boundary agreements in the North Sea and the Persian Gulf area suggest that "In every such case, the common point is always a negotiated point, not settled by any mathematical formula."<sup>67</sup>

### *Different Treatments of Islands*

The legal status of islands varies from case to case. In the agreement between the U.S. and Mexico on 23 Nov. 1970, the Mexican offshore island, *Islas Los Coronados*, was given full value in delimitation. In the agreement between Newfoundland (Canada) and St. Pierre and Miquelon (France) signed on 27 March 1972, four turning or terminal points among the nine total resulted from negotiation, some taking islands into account, some not. In the agreement between Indonesia and Singapore signed on 25 May 1973, all islands were used as base points. Turning Point 5 was situated equidistantly between the Indonesian island of *Batu Berhanti* and an unnamed islet east of *Pulau Sakijang Petepah* of Singapore.

### *Economic Interests and Other Geographical Considerations*

Economic interests represent the realities of the situation which may enhance the reasonableness or cogency of the drawing of territorial sea boundaries and coastal configurations relevant to the boundaries. The 1975 Gambia-Senegal Boundary Agreement takes into account the existence of the *Allaheii* River mouth between the adjacent coasts of the two states. The U.S. and Mexico adopted an interesting procedure of exchanging areas for the convenience of the fishermen of both states. Since

the Mexican island *Coronados* was taken into account, the boundary line from the shore to the point where this island begins to affect the equidistant line was simplified by an equal exchange of territory. The recalculation of a terminal point on the line affected, i.e., the first point after leaving the land terminus, involved a transfer of 608,141 sq. m from Mexico to the U.S. and 608,139 sq. m from the U.S. to Mexico.<sup>68</sup>

### *Concession of Territorial Sea*

Sometimes a part of the territorial sea may be given up to obtain a successful boundary agreement. This happened in the narrow strait area delimitation agreement between Indonesia and Singapore. Five of the six turning points are found on the Indonesian side of the 'median line', and the second point even lies within the straight baseline of Indonesia, i.e., within the internal water area of Indonesia. In the Agreement of 20 May 1965 between Finland and the USSR, the USSR had to accept a breadth of territorial sea of less than 12 miles in the Gulf of Finland.

### **Continental Shelf and Maritime Zone Boundary Agreements**

Continental shelf boundary (CSB) agreements delimit only the sea-bed; and maritime zone boundary (MZB) agreements include the delimitation of both the sea-bed and the water column (usually referred to as economic or fishing zone), and the delimitation of water column only.

### *Simplification of the Boundary Lines*

The existing agreements have made efforts to make the final boundaries simple by either using the equidistance method or by negotiating non-equidistant points in deciding the terminal or turning points of the boundary lines. For example, in the Netherlands-Federal Republic of Germany CSB Agreement (1 Dec. 1964) which contains a total of nine points, only five points are equidistant, and the other four points are negotiated non-equidistant points. In the Brazil-Uruguay MZB Agreement (21 July 1972) and in the Senegal-Guinea Bissau MZB Agreement (26 April 1960), only one single straight line following an azimuth or a parallel has been designated as the boundary line.

Seeking simplicity may involve an exchange of territory. In exchanging areas, the true equidistant line may often be used as a yardstick to obtain

<sup>66</sup> Office of the Geographer, U.S. Department of State, "Limits in the Sea," No. 26, 16 July 1970.

<sup>67</sup> Kuen-Chen Fu, op. cit., p. 142.

<sup>68</sup> Office of the Geographer, op. cit., No. 45, 11 Aug. 1972.

equal exchange. The France-Brazil MZB Agreement (30 Jan. 1981) effects an exchange of areas of approximate equivalence. In wider maritime areas, contracting States seem to choose fewer turning points and to be more willing to exchange territories for a simplified boundary line whereas in narrow straits or gulf areas, States tend to be more precise and to choose more turning points to construct a zigzag line. In the Portugal-Spain CSB Agreement (12 Feb. 1976), they simply set the northern line as the parallel of the 41° 51' 57" north latitude, and their southern line as the parallel of the 7° 23' 48" west longitude. In the northern boundary area, Spain gives up some area; and in the southern boundary area, Portugal gives up some area. On the other hand, in the CSB agreement between Finland and the USSR on 20 May 1965, there are twenty-one turning or terminal points in the short line delimiting the narrow Gulf of Finland encompassed by many off-shore islets of the two States.

#### *Proportionality*

Proportionality is one possible relevant factor to be used for correcting the distortions that arise from the use of a method that fails to take account of coastal configuration. Proportionality may take two forms: proportionality between the areas of continental shelf to the lengths of the respective coastlines, and proportionality as an overall test of equity. In the Australia-Papua New Guinea MZB agreement (18 Dec. 1978), the boundary reflected a reasonable degree of proportionality between Papua New Guinea's coast and the Australian islands' coasts.<sup>69</sup> In the Federal Republic of Germany-UK CSB Agreement (25 Nov. 1971), due to the 'special circumstances' arising from the concavity of the coast of the Federal Republic of Germany, this agreement, together with pertaining agreements between the FRG and the Netherlands, gives the FRG about 12,000 sq. km more than it would otherwise have if the boundary between the three countries had been settled on the basis of the equidistance principle.<sup>70</sup>

#### *Offshore Islands*

Offshore islands have sometimes been given full effect, sometimes limited effect (half-effect, or a one-third, or a one-quarter effect), and sometimes no effect at all in the boundary delimitation. There is no identifiable general rule for pre-assigning

different values to different islands. It depends ultimately on the extent to which they are factors of inequity.

Among the existing CSB and MZB agreements, there are quite a lot which give offshore islands full effect. The Andaman and Nicobar Islands in the Andaman Sea, which are about 600 nm from the Indian mainland, and Burma's Coco Islands, which are about 100 nm from the Burmese straight baseline, as well as another Burmese tiny island named Narcondam which is an uninhabited craterless, extinct volcano with an area of 7 sq. km, 710 m above sea level, are all given full weight in drawing the median and equidistant boundary line in the April 1984 maritime boundary delimitation agreement between India and Burma.

In some agreements, some islands are given full or partial effect and others are totally ignored. The Saudi Arabia-Iran CSB Agreement (24 Oct. 1968) gives the Saudi island of Arabi and the Iranian island of Farsi the 12 nm territorial sea respectively. Other off-shore islands are ignored. In the Qatar-Abu Dhabi CSB Agreement (30 March 1969), the island of Dayyinah, located at the boundary area, is given a 3 nm territorial sea, while other islets are given no effect at all.

Several MZB agreements have given either partial or full effect to uninhabitable rocks, cays or atolls. In the Venezuela-Netherlands MZB Agreement (30 March 1978), Aves Island, despite its very small size and lack of habitation, was given full effect as a basepoint. Also, in the U.S.-Cook Islands MZB Agreement (11 July 1980), uninhabited atolls—including Rose Island and Suvorov Island—are all given full effect as base points. The boundary line of the Columbia-Panama MZB Agreement (20 Nov. 1976) was also adjusted because partial effect was given to some uninhabited cays in the Caribbean Sea.<sup>71</sup>

A special related case is the Channel Islands dispute between France and Britain. The Court of Arbitration found that, because the Channel Islands were 'on the wrong side' of the median line between States with 'almost equal coastlines', 'close to the French coast', and 'wholly detached geographically' from Britain, to divert the mid-channel median line would effect a 'radical distortion of the boundary creative of inequity'. It therefore enclaved the Channel Islands in a 12 nm shelf zone, within the French shelf, and retained the median line between the two States.<sup>72</sup>

<sup>69</sup> David Joseph Attard, *op. cit.*, p. 258.

<sup>70</sup> Office of Geographer, *supra* note 2, No. 10, Revised, 14 June 1974.

<sup>71</sup> Office of Geographer, *Gulf of Maine Case*, Annex Vol. 1 to the Canadian Reply, *supra* note, at 29, 31, 33.

<sup>72</sup> David Joseph Attard, *op. cit.*, p. 262.

*Geomorphological Variations*

Sea-bed physical characteristics are generally given serious consideration in the boundary delimitation. The final negotiated boundary of the Australia–Indonesia CSB Agreement (Timor and Arafura Seas) (9 Oct. 1972) actually follows the continental slope bordering the Timor Trench. The location of turning points A12 to A16 relates primarily to the geomorphological provinces underlying the Arafura Sea.

However, in several cases, prominent geomorphological variations are simply ignored. In both the Norway–UK CSB Agreement (10 March 1965) and the Sweden–Norway CSB Agreement (24 July 1968), the Norwegian Trough which has a depth of up to 371 fathoms was ignored. In the Spain–France CSB Agreement (29 Jan. 1974), the Cape Breton Trench was disregarded. In the Norway–Iceland CSB Agreement (22 Oct. 1981), a submarine depression between Iceland and Jan Mayen Ridge played no part in the delimitation.

*Economic Interests*

The claims over the maritime zones are basically economy-oriented, and existing economic interests and known natural resources are eligible for consideration as criteria to be applied in the delimitation process. States, more often than not, adopt such a position by drawing a boundary line or lines with the existing drilling operations and sites remaining on the side of the concession-granting state, with some adjustment of the boundary line in some other place, if necessary, to compensate the other side.

The Saudi Arabia–Iran CSB Agreement (24 Oct. 1968) is a modification of the median line agreement initiated by the two States on 13 December 1965. The 1965 Agreement was never ratified because Iran apparently felt that the Agreement did not provide an equitable division of the sea-bed resources. This view predominated after new mineral resources (the Marjan–Fereydom deposits) were discovered in the northern zone of the 1965 line. The revision of the 1965 line affected the northern segment of the boundary line between points 8 and 14. As Shigeru Oda, an ICJ judge, observed, the Saudi Arabia–Iran line “was actually drawn near the coast of Saudi Arabia in favor of Iran’s claim. This was hardly a geographical median line, but it represented a solution based on the economic realities of equitable distribution of resources.”<sup>73</sup>

<sup>73</sup> Oda, “International Law of the Resources of the Sea,” 127, Hague Recueil 445 (1969-11).

In the Qatar–Abu Dhabi CSB Agreement (30 March 1969), while points A & D are equidistant, points B & C are non-equidistant. According to the Agreement, Point B was designated to coincide with the location of an oil field (al-Bundug Well No. 1). The Agreement provides the oil field is to be shared equally. For economic reasons, both countries have stipulated that the development of the field is to be carried out by one concessionaire ADMA according to the terms of its concession with the ruler of Abu Dhabi. However, provisions were made for mutual consultation over the exploitation of the field and for equal sharing of all royalties, profits and other government fees due in respect of the oil field.

In the FRG–Denmark CSB Agreement and the FRG–Netherlands Agreement (both on 28 Jan. 1971), existing structures and known resources played important roles in the delimitation. Certain exploration areas, which were licensed by the Netherlands and Denmark but had to fall on the FRG side of the new continental shelf line, were allowed to be continuously explored. A provision was made to permit the existing licensee to apply for a fresh license from the FRG government. Detailed provisions were also made regarding the unity of resources which extends across the boundary line.<sup>74</sup>

*Historic Use of the Maritime Zones*

State practice favors the recognition of historic rights in the drawing of maritime boundaries. The India–Sri Lanka Agreement on the boundary in Historic Waters (26 June 1974) preserves the traditional fishing rights of both parties. In the Australia–Papua New Guinea MZB Agreement (18 Dec. 1978), specific provisions were made to secure the traditional activities and rights of the inhabitants in the border area. A specific ‘Protected Zone’ was established according to the agreement, “to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.”<sup>75</sup>

*Prior Agreement of the Other Party Required for Boundary Area Exploitation*

The Canada–Denmark (Greenland) CSB Agreement (17 Dec. 1973) includes a provision which states that “Neither Party shall issue licenses for exploitation of mineral resources in the area bor-

<sup>74</sup> Office of Geographer, supra note 2, No. 10, Revised, 14 June 1974.

<sup>75</sup> Office of Geographer, Gulf of Maine Case, Annex Vol. 1 to the Canadian Reply, supra note 17, at 529-602.

dering the dividing line without the prior agreement of the other Party as to the exact determination of the geographic coordinates of points of that part of the dividing line bordering upon the areas in question.<sup>76</sup>

The Australia–Indonesia CSB Agreement (9 October 1972) provides that, if any single accumulation of liquid hydrocarbons or natural gas, or if any other mineral deposit beneath the sea-bed, extends across any of the boundary lines, the two governments will seek to reach an agreement on the matter in which the accumulation or deposit shall be exploited and on the equitable sharing of the benefits arising from such exploitation.

*Special Cooperative Exploitation Zone or Revenue Sharing Zone*

The Japan–South Korea CSB Agreement (30 January 1974) created a Joint Development Zone with 24,111 sq. nm. The Parties agreed to keep the agreement remaining in force for a period of at least 50 years. In total nine sub-zones are defined, in each of which exploration and exploitation of the reported potential mineral resources can be conducted by concessionaires of both States.<sup>77</sup> The Norway–Iceland CSB Agreement (22 Oct. 1981) established a 'Joint Venture Area' at the Jan Mayen Ridge area.

A revenue sharing case can be found in the Saudi Arabia–Bahrain CSB Agreement (22 Feb. 1958). The northern segments of the CSB line coincide with the border line of a special oil field area 'Fashtu bu Saafa Hexagon'. The special area is located totally on the Saudi Arabia side of the CSB line, under thorough jurisdiction of Saudi Arabia. Nevertheless, the two opposite neighboring States agreed that the oil resources of this area should be developed as the Saudi Arabians saw fit, but revenues received from the exploitation of the petroleum should be evenly divided between the two states.

It is noteworthy that in the special cooperation or revenue-sharing arrangements, state parties with 'economic superiority' are always the ones who give up more. In the Japan–South Korea case, most of the Joint Development Zone is located on the Japanese side of the hypothetical equidistant line. In the Norway–Iceland arrangement, most of the Joint Venture Area is located on the Norwegian side of the CSB line between Iceland and Jan Mayen. In the Saudi Arabia–Bahrain case, the

whole area of Fashtu bu Saafa Hexagon is on the side of Saudi Arabia.

## Options for Equitable Settlement

The maritime jurisdictional disputes in the three China Seas, especially the Spratlys' disputes in the South China Sea, indeed are thorny issues facing the Asian-Pacific countries in post-Cold War era. They are so sensitive that they can easily arouse national sentiments; each claimant insists on its stand with more or less parochial nationalism. They are explosive and potentially detrimental to peace and stability in the region. However, the conditions for seeking settlements are being matured now. Economic development has become the primary task of each nation in the region, and with the exhaustion of land-based resources the need to explore and exploit offshore resources and to settle maritime disputes is increasing. Moreover, the normalization of diplomatic relations among related claimants has achieved, and the improvement of political relations among them and the development of regional economic, political and security cooperation has provided great opportunities for accommodation in the settlement of disputes.

To present, not a single country has made any concession on its claims, but flexibility does exist. In the final analysis, the disputes have to be resolved in a spirit of mutual accommodation. At present each side is trying to strengthen its claims and presence to have a better bargaining position in the future negotiations. In November 1994, China reached an agreement with Vietnam to set up a joint working team for seeking a settlement on maritime disputes between them, which is a step forward in breaking the present deadlock.

Several proposals have now and then been put forth regarding the Spratlys' settlement. The prevalent one at present is the Indonesian proposal known as the 'Doughnut Formula'. The formula "would divide the South China Sea in the shape of an elongated doughnut by projecting 320-kilometer (equivalent to 172.8 nm) exclusive economic zones from the shores of the littoral states"; it would "put a large portion of China's claims on hold"; and "only the hole in the doughnut—the middle of South China Sea, including the main islands of the disputed Spratly chain—would be discussed by competing claimants as an area for potential joint

<sup>76</sup> Office of Geographer, "Limits in the Sea," No. 72, 4 Aug. 1976.

<sup>77</sup> *Ibid.*, No. 75, 2 Sept. 1977.



economic development.”<sup>78</sup>The rationale for the Indonesian proposal is that since the littoral states of the South China Sea would not agree to have joint development in their respective exclusive economic zones, the best area for starting joint development is the middle part of the South China Sea. That is how the Doughnut Formula came to be.

The problem is that the Indonesian proposal only considers the interests of the littoral states without taking into account the interests of China which holds a well-grounded historic title over the Spratly Islands. The proposal satisfies the claims of the other states, not only having their own EEZ, but also by participating in the joint development in the middle part. But where is China's share? Is it fair that China has nothing of its own and would only be one of the partners in the middle part? From China's perspective, this proposal is inequitable and thus is unfeasible.

Another proposal worth notice is the “allocation scheme” put forth by some scholars. Under the scheme, ‘the Philippines could get the northeast portion, extending from Marie Louise Bank in the north to Half Moon Shoal in the south and to Southampton Reefs in the west . . . Vietnam and China could get jointly the western cluster, extending from Trident Shoal in the north to Cay Marino in the south and eastward to Ladd Reef . . . This area could perhaps be further divided between Vietnam and China along a latitude north of Fiery Cross Reef. The southern part of the area where Philippine and Malaysian claims overlap could be allocated in several ways. Vietnam might get the western part, including Amboyna Cay and Stag Shoal. Alternatively, the entire area . . . could be allocated to Malaysia.”<sup>79</sup>

The problem is that this scheme is inequitable as well because it fails to take into full account the interests of all claimant states. Although under the scheme China has a portion around Itu Aba Island in the northern part of the island group, the portion is too small in comparison with Vietnam's portion in consideration of the much stronger historic title China has vis-à-vis Vietnam.

In seeking an equitable solution to the Spratly disputes, the interests of all claimant countries, including those of China, must be taken into consideration, and all relevant factors such as historic title, island entitlements, continental shelf rights, proportionality, geomorphological features, and

economic interests balanced in the delimitation. The following might be taken as working parameters for settlement of disputes:

- Vietnam, the Philippines, Malaysia, and Brunei would have their own EEZ and continental shelf, though with necessary adjustments.
- China, in giving up its nine-dashed intermittent line and its “historic waters” claims in the South China Sea, would own the middle part of the South China Sea in a rectangular form (Thitu Island to the north, Amboyna Cay to the south, Nanshan Island and Commodore Reef to the east, and Spratley island to the west), and claim a continental shelf by taking these islands as base points for straight lines connecting them.
- In overlapping areas, the equidistant line method would be applied for delimitation. Where this solution was disagreeable bi-or tri-lateral development would be arranged.

International law requires that maritime delimitation between neighboring States must be effected by the application of equitable criteria practical methods capable of ensuring, with respect to the geographical configurations of the area and other relevant circumstances, an equitable solution . It is hoped that an equitable, objective and workable formula might be soon worked out.

Based on existing state practices, there are options for the settlement of maritime jurisdictional disputes in the three China Seas.

*Option one* is that each claimant makes due adjustments in its claims and negotiates with each other for an equitable solution on the boundary delimitation in a spirit of mutual understanding and mutual accommodation based on the UN Convention on the Law of the Sea. With the 1982 UN Convention on the Law of the Sea becoming effective now, at least all sides have a common and unified criterion, and they might make respective adjustments based on the Convention and might engage in friendly negotiations taking the related stipulations in the Convention as starting points.

First, they might reach a consensus on whether to adopt the equidistance principle for continental shelf demarcation, as well as on the criterion regarding the entitlements of islands in the three China Seas.

Second, as the sovereignty of the disputed islands will be difficult to tackle, they could let the disputes be shelved without affecting the overall relations, and go on to negotiate an agreement on the continental shelf demarcation. For example, in

<sup>78</sup> Far Eastern Economic Review, 11 August 1994, p. 18.

<sup>79</sup> Douglas M. Johnston and Mark J. Valencia, op. cit., p. 125–127.

the case of the Senkaku Islands, by agreeing that the islands are only entitled to have 12 nm territorial sea, China and Japan could enclose or enclave the islands with their 12 nm territorial sea, and leave the area unsettled without affecting their continental shelf demarcation in the East China Sea.

Third, they could start the negotiation process from cases easier to handle before proceeding to difficult cases. As the disputes in the Yellow Sea and the East China Sea are relatively simpler than those in the South China Sea, China, North Korea, South Korea and Japan might work together for the settlement there. Experiences gained and confidence built therein would be helpful in the settlement of the more complicated cases. Even in the South China Sea, the disputes in the Tonkin Gulf are much easier to handle than the disputes in the Spratly Islands. Once China and Vietnam settle their disputes in the Tonkin Gulf, it would for sure facilitate the process of settlement in the Spratlys, as China and Vietnam are the major claimants for the Spratlys.

*Option two* is to work for joint development in the disputed areas. Though this is not the permanent solution to the problem, but only an expedient measure in the transitional period towards the final equitable settlement, it is indeed a practical and feasible approach, and the preferred alternative to no action. All parties could reap the benefits from the resources pending the final boundary settlement. What is meant by joint development is that the contracting parties are prepared to shelve the disputes within a specified period by making certain concessions and that the establishment of the joint development area would not affect the stand adopted by any country on the permanent delimitation of their maritime boundaries. The countries could continue to negotiate the boundary during the period of joint development. Such an approach would reassure investors who would otherwise be discouraged from investing due to the risks of economic and political instability resulting from the jurisdictional disputes over the areas in question.

In order to reach an agreement on joint development, related parties need to specify first their claims and their overlapping areas; and then work out arrangements for joint assessment of resources, joint development program, joint sharing of profits and losses, and joint scientific cooperation and environmental prevention in the overlapping areas. At the early stage, geological and geophysical research usually cannot be site-specific. It tends to be regional before acreage acquisition and exploratory drilling are recommended on the probability that

oil deposits are present in a specific geographic area.

The selection of areas as starting points on experimental zones for joint development is of importance to the confidence-building and to the improvement of atmosphere among claimants and to the final negotiated boundary settlement. Apart from joint exploitation of fishery resources, areas with promising recoverable oil and gas deposits should be given priority in consideration.

In the Yellow Sea, the central basin is surrounded by good prospective areas, and oil exploration has been going on both sides of the hypothetical equidistant line. The employment of a joint venture or joint development seems easier to be arranged here.

In the East China Sea, the South Korea-Japan Joint Development Zone is believed to have good petroleum resources. As China is reported to have drilled wells on its western end, a trilateral joint development might be arranged. In the southern East China Sea, the overlapping areas between China's and Japan's claims have good prospects for oil and gas in the northern two-thirds and in the southwestern corner, and the latter is just north of the Senkaku Islands. As China has drilled successful gas wells adjacent to an equidistant line, and Japan's block system extends beyond an equidistant line, joint development could be suitable and effective here. There is a precedent for joint oil undertakings by the two countries in the Bohai Bay.

In the Tonkin Gulf, both China and Vietnam have now refrained from exploratory activities in the neutral zone. If an agreement on the delimitation of the Gulf can not be reached between them in the near future, a joint development program could be easily worked out either in the neutral zone or in the area lying between the equidistant line and the 1987 meridian, both east and west of it.

While it will take time to solve the Spratly Islands sovereignty issue, efforts should be made on joint development arrangements by the claimant parties. In view of the fact that seabed areas near Reed Bank, Vanguard Bank, North and South Luconia Shoals are known to have extractable oil fields, these areas are desirable for joint development arrangements.

Insofar as China's Taiwan is concerned, since it maintains a on maritime boundary claims identical to China's, arrangements could be made between them. The issue of joint development in the South China Sea and in the East China Sea might be included in the talks between the two sides of

the Taiwan Strait. But world countries should make clear that its recognition of the PRC as the sole legitimate government of China carries with it recognition of the PRC as the sole legitimate representative of China's seabed claims.

High technology is needed for the exploration and exploitation of seabed oil and gas reserves, and at present this is beyond the reach of most of the claimant States. Thus joint development warrants the participation and cooperation of foreign oil companies, and the setting up of international consortia and administrative mechanism for managing joint development activities needs to taken into consideration. In the initial stage, the joint authority could be simply a liaison body for reconnaissance exploration. When renaissance exploration gives favorable indication, then an operator or a foreign oil company which may have agreements with the claimants could be chosen. The areas could be subdivided into blocks of agreed size and number, and lots could be drawn for exploration or exploitation rights in each area.

In the case of Vanguard Bank in the Spratlys, at present many U.S. and Western oil companies are involved in oil exploratory activities respectively with China and Vietnam. A U.S. Crestone oil drilling company signed in 1992 a contract with China for oil exploratory activities in 25,000 sq. km in the Wan'an Bei-21 area, which is just east of a prospecting concession awarded by Hanoi in 1994 to a consortium led by United States firm Mobil. In mid-1994 Vietnam delivered two economic-technological service stations to Vanguard Bank, and hired VietSovpetro to drill for oil in the Crestone concession. Vietnam has further signed a contract with some Western companies including a Norwegian oil company to conduct oil prospecting there. In addition, a consortium including Mobil Sekiyu ( a 100 percent owned Japanese subsidiary of Mobil Oil Corporation of the U.S.) and several Japanese oil companies have a financial stake in Blue Dragon—a highly prospective structure let by Vietnam but also claimed by China. Mobil has a three-well commitment for Blue Dragon and China's Ministry of Geology is itself planning to drill the Blue Dragon structure.<sup>80</sup> Actually, these foreign oil companies could play a positive role in encouraging and promoting China and Vietnam to reach an agreement on joint development in this area.

A good example of joint development is the Timor Gap, a zone of overlapping claims having turned into a zone of cooperation. The 250-km

Timor Gap was left undelimited in the 1971–72 Indonesia–Australia continental shelf boundary agreement as East Timor was then a Portuguese colony. Since Indonesia annexed it in 1975–76, Indonesia and Australia have faced the problem of the boundary delimitation in this 'gap'. Australia argues that two continental margins are involved: the broad Australian margin to the south and the narrow Timor margin to the north, each separated by the Timor Trough, which descends to a depth of 3,200 meters in places. Indonesia, on the other side, has refuted the existence of such a natural divide by counter-claiming that there is only one continental shelf connecting the two territories, and that the Timor Trough is a mere depression in this continuous feature. Indonesia has proposed the median line, equidistant from the two shores as the solution. If Australia accepts Indonesia's argument, it would lose thousands of square kilometers of promising recoverable oil and gas deposits.<sup>81</sup>

Both sides finally decided to sign the Timor Gap Zone of Cooperation Treaty in late 1990. The treaty establishes a long-term provisional regime for joint development in the zone. It divides the zone into three subzones: namely Area A in the middle, which will be jointly developed by Australia and Indonesia, Area B in the south by Australia and Area C in the north by Indonesia. Zone A is divided into 14 working contract areas each measuring around 2,500 square kilometers. "Any oil and gas production from Area A will be shared by the two nations on an equal basis. Indonesia will get 10 percent of Australia's gross resources rent tax on the oil and gas development in Area B, while Australia will receive 10 percent of the income tax collected by Indonesia from contractors operating in Area C."<sup>82</sup> In December 1991 they agreed to give a contract for exploring oil in Zone A to a consortium of 11 companies with a total investment of U.S. \$362.32 million.<sup>83</sup>

Another example is the Malaysian-Thai agreement to jointly explore and exploit oil and gas resources in the Gulf of Thailand signed on 22 April 1994 after 14 years of negotiations and talks. It has paved the way for the launching of oil explorations at the 7,250 square kilometer area, which both countries are claiming. The Malaysian-Thailand Joint Authority established by them is "to serve as a mechanism to explore and exploit petroleum resources in the area pending a final resolution of the claims."<sup>84</sup>

<sup>81</sup> Kriangsak Kittichaisaree, *op. cit.*, p. 80.

<sup>82</sup> Jakarta Post, 13 Dec. 1991.

<sup>83</sup> Indonesian Observer, 13 Dec. 1991.

<sup>84</sup> New Straits Times, 22 April 1994.

<sup>80</sup> *Offshore*, Vol. 54, No. 7, July 1994, p. 14.

*Option three* is to accept third-party assistance for the settlement of the disputes when the issues are deadlocked and when there is no hope of a compromise between the claimant States themselves. Third-party assistance may after all be accepted as one way of settlement and would be better than indefinite procrastination.

Third-party assistance in the settlement of the disputes is not the same as 'internationalization' of the disputes. They are two different concepts. 'Internationalization' of the disputes means intervention by foreign countries for their own interests; whereas third-party assistance means third-party involvement in seeking an equitable and peaceful settlement.

In the international community, third-party involvement in a dispute settlement may take several forms: the adjudication by the International Court of Justice; the arbitration by a tribunal or an arbitrator; and the mediation by a conciliation commission or a conciliator.

The International Court of Justice, a successor to the Permanent Court of International Justice since 1945, has played a significant role as a vehicle to promote international law of maritime delimitation. The disadvantage is that the parties are not wholly free to determine the composition of the Court, the judges being elected for nine-year terms by the UN General Assembly and Security Council. "However, each party to a dispute has a right to appoint a judge of its choosing if there is no judge of its nationality on the bench; and furthermore, the parties may agree to put the dispute before a chamber of the Court in which case, as was decided in the Gulf of Maine Case where such a procedure was used, the parties may choose which of the judges shall constitute the chamber."<sup>85</sup> The adjudications by the Court have binding force, and so far they have been equitable in general as shown in the North Sea Continental Shelf Cases in 1969, the Case Concerning the Continental Shelf (Tunisia/Libya) in 1982; the Case Concerning the Continental Shelf (Libya/Malta) in 1985. The States who voluntarily submit themselves to such a binding procedure will be bound regardless of their reaction to the result. This is an effective way of securing without dispute a right and entitlement which would not otherwise be forthcoming.

Asian countries are not accustomed to appeal to the International Court, and are usually deterred from resorting to judicial fora with binding decisions for fear of results which may be unpredict-

able or detrimental to their national interests. But with their growing international interactions, they might reconsider and change their stand.

For those not wishing to accept the International Court's adjudication, an ad hoc arbitral tribunal of their own choice might be a better option. In the procedure of arbitration, parties to the disputes are free to select the arbitrators and to jointly determine the tribunal's composition and terms of reference; and arbitration depends upon the willingness of related parties to agree to and participate in the arbitration.

Finally, the procedures of mediation and conciliation could serve as a most useful approach to assist the process of direct negotiation and to achieve the more equitable solution of boundary disputes. The conciliation commission (or single conciliator) may base its recommendations not only on legal principles and precedent for equitable boundary delimitation, but also on pragmatic, factual findings ensuring the equity of the resolution. For example, the famous Norway (Jan Mayen)—Iceland Continental Shelf Agreement was reached in accordance with the recommendation of a conciliation commission; and the disputes over the Beagle Channel between Argentina and Chile, which lasted for 150 years, were finally settled in 1984 through third-party mediation.

One suggestion worth considering is the formation of an Eminent Persons Group to take an active role in mediating a resolution to the Spratlys dispute. Such a group might consist of distinguished representatives who are friendly and acceptable to all claimants, and serve as high-level mediators to induce a peaceful settlement.

No matter which option is chosen by the claimants, on the way towards the settlement of the disputes, all parties should jointly be committed to maintain the status quo by refraining from any military and economic activities so as not to further complicate the situation, to renounce the use of force to avoid confrontation, and to guarantee the security and freedom of navigation in the sea-lanes in these seas.

It is hoped that with the atmosphere much improved and with the mutual confidence much increased, the parties in disputes over maritime jurisdiction in the three China Seas will soon join hands to negotiate equitable solutions to the disputes in a spirit of cooperation and mutual accommodation.



<sup>85</sup> R. R. Churchill and A. V. Lowe, "The Law of the Sea," Manchester University Press, 1988, p. 333-334.





## THE UNIVERSITY OF CALIFORNIA INSTITUTE ON GLOBAL CONFLICT AND COOPERATION



**T**he University of California Institute on Global Conflict and Cooperation (IGCC) was founded in 1983 as a multicampus research unit serving the entire University of California (UC) system. The institute's purpose is to study the causes of international conflict and the opportunities to resolve it through international cooperation. During IGCC's first five years, research focused largely on the issue of averting nuclear war through arms control and confidence-building measures between the super-powers. Since then the research program has diversified to encompass several broad areas of inquiry: regional relations, international environmental policy, international relations theory, and most recently, the domestic sources of foreign policy.

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Susan L. Shirk, a professor in UC San Diego's Graduate School of International Relations and Pacific Studies and in the UCSD Department of Political Science, was appointed director of IGCC in June 1992 after serving for a year as acting director. Former directors of the institute include John Gerard Ruggie (1989–1991), and Herbert F. York (1983–1989), who now serves as director emeritus.





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