





developing international law relating to the emergent institution of continental shelf.

Article 6 of the Geneva Convention on Continental Shelf, which was based on

preparatory work done by the ILC, provided for the equidistance/special circumstances



single maritime boundary, the Court stated as follows:

For the delimitation of the maritime zones beyond the 12-mile zone [the Court] will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.<sup>15</sup>

This method [“the so-called equitable principles/relevant circumstances method], which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result”.<sup>16</sup>

Since 1969 there were also other significant developments in the law of maritime delimitation such as “the clear trend towards single maritime boundaries”.<sup>17</sup> In the consideration of relevant circumstances, coastal geography enjoys a dominant position.<sup>18</sup> According to Charney, “the rejection of considerations other than coastal geography in maritime boundary delimitation is the preferable course. The introduction

of other considerations ... is ... likely to encourage greater conflict and uncertainty.”<sup>19</sup>

Under the circumstances, other factors such as economic considerations are likely to be of decreasing significance.<sup>20</sup>

in the next section.

## **Seabed Delimitation in East Asia**

### *Japan*

With respect to the principles and rules applicable to the delimitation of the continental shelf and the exclusive economic zone, the Japanese government has consistently relied on the principle of equidistance. Japan's adherence to the equidistance principle is reflected in the relevant domestic legislation. Thus, Article 1(2) of the 1996 Japanese Law on the Exclusive Economic Zone and the Continental Shelf defines the outer limit of the exclusive economic zone (hereinafter "EEZ") as "the equidistance line (if a different line is agreed on between Japan and a foreign state, that line)" when the 200 nautical mile line as measured from the baseline extends beyond







UNCLOS the Okinawa Trough could not be accorded any significance and that Japan is entitled to extend its continental shelf beyond the Trough.<sup>32</sup>

### *China*

In stark contrast to Japan, the Chinese government has been an ardent proponent of equitable principles and has persistently denied the customary law status of equidistance since the controversy over the seabed boundary broke out in the early 1970s. Shortly after the controversy occurred, the Chinese government consolidated its views on the territorial sea, EEZ and continental shelf into a working paper submitted to Subcommittee II of the Seabed Committee. This document, titled “Working Paper on Sea Area within the Limits of National Jurisdiction”, provided in the second section dealing with EEZs or exclusive fishery zones that “A coastal state may reasonably define an exclusive economic zone ... beyond and adjacent to its territorial sea in accordance with its geographical and *geological conditions*, the state of its natural resources and *its needs of national economic development*.”<sup>33</sup> It was apparent that the inclusion of the geological conditions was closely related to China’s characterization of the continental shelf as a natural prolongation of land territory.<sup>34</sup> In the same document, the importance of consultations in maritime delimitation was emphasized. In the section

dealing with the continental shelf, it is provided that “States adjacent or opposite to each other, the continental shelves of which connect together, shall jointly determine the delimitation of the limits of jurisdiction of the continental shelves through consultations on an equal footing”.<sup>35</sup>

The Chinese stance of emphasizing the principle of natural prolongation and the need for consultations was reconfirmed when the Chinese government leveled a sharp criticism against the Korean-Japanese agreement of 30 January 1974 on the joint development of the continental shelf in the East China Sea. While criticizing the agreement as “an infringement on China’s sovereignty, which the Chinese Government absolutely cannot accept”, the spokesman for the PRC Foreign Ministry issued a

factors concerned; the median line can be employed only when its use is in accordance with equitable principles.<sup>37</sup>

Now the question is how the Chinese position on the principles and rules of maritime delimitation is applied to the Yellow Sea and the East China Sea. In the former, the Chinese side tries to avoid the application of the equidistance principle by invoking various geological or geomorphological features of the sea. The official position of China is still not clear in this regard. However, various geological or topographical criteria have been suggested by a number of scholars and researchers. Thus, a description of the seabed topography, such as the fact that a smooth gentle slope (1:26,000) from the west meets the steep and less regular slope (1:6,000) from the east in an axial valley two-thirds across on the Korean side of the Yellow Sea, or the fact that the eastern third of the sea is floored by sand originating from the mountains of Korea while the rest (2/3) on the western side is floored by clay discharged by the two rivers of China, i.e., the Huanghe and the Yangtze,<sup>38</sup> is cited with approval as the basis of title.<sup>39</sup> Also, China may have hoped to argue that the continental shelf in the Yellow Sea is a prolongation of the Chinese landmass in an eastward direction and not a prolongation of the Korean peninsula westwards.<sup>40</sup>

In the East China Sea, China is taking almost the same position as it takes

toward Korea. In relation to Japan, it puts forth the principle of natural prolongation of land territory which the ICJ endorsed in its 1969 *North Sea Continental Shelf* cases. In this connection, the existence and legal significance of the Okinawa Trough looms large. Basing itself on the principle of natural prolongation, China contends that this geomorphological feature constitutes the natural frontier between the continental shelves of China and Japan.<sup>41</sup>

It was pointed out above that the adoption of the 1982 UNCLOS has brought about a substantial change to the international jurisprudence relating to the EEZ/continental shelf delimitation. How has China responded to this important development which impinges directly on its claims in the Yellow Sea and the East China Sea? Of course, in China a keen attention has been paid to the evolution of the jurisprudence of the ICJ and other arbitral tribunals. Faced with the increasing erosion of the principle of natural prolongation and equity in international jurisprudence, a strenuous effort has been made to preserve the tenability of its original position.<sup>42</sup>

Let me first summarize the Chinese position and, in so doing, point out its methodological approach and strategy. First, China still adheres faithfully to the international law of maritime delimitation as articulated in the 1969 *North Sea Continental Shelf* cases, which “could have hardly have been more timely to China”.<sup>43</sup>

This position is also consistent with the stance taken by the Chinese government in the UNCLOS III negotiations.

Secondly, in its interpretation of the customary international law of maritime delimitation as embodied in the 1969 ICJ cases and the relevant articles (in particular, 74(1) and 83(1) of the 1982), China emphasizes the principle of equitable solution through consultations. This principle is concretized by taking into account and giving

persistent objector and thereby exempt itself from the binding force of the international jurisprudence.

Fourthly, in trying to confine the normative reach of the international





Under the circumstances, China and Japan should strive to devise cooperative arrangements for the exploration and exploita

series of bilateral fisheries agreements that combine to establish a provisional regional fishing regime in East Asia: the 1997 Agreement on Fisheries between Japan and the People's Republic of China,<sup>44</sup> the 1998 Agreement on Fisheries between the Republic of Korea and Japan<sup>45</sup> and the 2000 Agreement on Fisheries between the Republic of Korea and the People's Republic of China.<sup>46</sup> (Map 1).<sup>47</sup>

This result reflects a meeting of minds among the three governments that the final and definitive delimitation of exclusive economic zones of the states concerned is not feasible at the present stage due to a variety of factors, *inter alia*, the disagreement over the principles and rules of maritime delimitation and territorial disputes. The three governments instead adopted fisheries agreements of a provisional nature, focusing their attention on the question of how to delimit various zones of an interim character in the Sea of Japan (known as "East Sea" in Korea) and the East China Sea.

As shown in Map 1, in the fisheries agreement between ROK and Japan two polygons of a rather strange shape were adopted as "intermediate zones"<sup>48</sup> or "provisional measures zones"<sup>49</sup> where fishing ships of the two countries can engage in harvesting subject to the recommendation or decision of the ROK-Japan Joint Fisheries Committee (Article 9).

In the agreement between ROK and China, two kinds of zones, i.e., a

provisional measures zone and transitional zones, are adopted. The latter zones are to be incorporated into the EEZs of both contracting parties after a four-year period following the entry into force of the agreement, i.e., in June 2005. A provisional measures zone, located approximately 52 nautical miles from the coasts of each state is also established between Japan and China. The three agreements all contain a clause confirming the character of these agreements as provisional arrangements of a practical nature without prejudice to the position of each state relating to issues on the law of the sea or issues in international law other than matters on fisheries.<sup>50</sup>

## **Conclusion**

The experiences and lessons from the fisheries agreements could be productively applied to a provisional agreement for joint development in the Diaoyutai/Senkaku islets. Negotiators for the ROK and Japan had to navigate their way around the thorny question of territorial sovereignty over the Tokdo/Takeshima dispute. Both parties agreed to put aside this thorny question in a two-pronged way. First, both sides consented to limit the geographical scope of the agreement to the exclusive economic zones of Japan and the ROK, thereby excluding the 12 nautical mile belt of territorial waters surrounding the Takeshima/Tokdo from the application of the





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<sup>1</sup> *Washington Post*, 27 March 2004.

<sup>2</sup> *New York Times*, 26 February 2004.

<sup>3</sup> S1066.02Times

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6 *Seoul International Law Journal* (1999), p. 5.

<sup>26</sup> Choon-ho Park, "Oil under Troubled Waters: The Northeast Asia Sea-Bed Controversy", in *Ibid.*, *East Asia and the Law of the Sea* (Seoul: Seoul National University Press, 1983), p. 30. This article originally appeared under the same title in 14 *Harvard Journal of International Law* (Spring 1973), pp. 212-60.

<sup>27</sup> Park, *supra* note 29, p. 22. According to him, "since the Korean claims in the Korean-Japanese dispute rely on the different principle based on the natural prolongation of the land territory, it may be necessary for Korea to explain to China why the median principle applied in one situation and the natural prolongation principle in the other". *Ibid.* See also Yuan Gujie, *Guoji haiyang huajiede lilun yu shijian* [The Theory and Practice of the International Maritime Delimitation] (Beijing: Faluchubanshe, 2001), p. 182.

<sup>28</sup> Paul C. Yuan, "China's Jurisdiction over its Offshore Petroleum Resources", 12 *Ocean Development and International Law* (1982), p. 200; Seo-hang Lee, "South Korea and the Continental Shelf Issue: Agreements and Disagreements between South Korea, Japan and China", 10 *Korea and World Affairs* (1986), p. 68.

<sup>29</sup> Greg Austin, *China's Ocean Frontier: International Law, Military Force and National Development* (St. Leonards, Australia: Allen and Unwin, 1998), p. 192.

<sup>30</sup> Kuen-Chen Fu, *Equitable Ocean Boundary Delimitation: On Equitable Principles and Ocean Boundary Delimitation* (Taipei: 123 Information Company, 1989), p.305.

<sup>31</sup> Maurice Mendelson, "On the Quasi-Normative Effect of maritime Boundary Agreements", in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague/London/New York: Kluwer Law International, 2002) (hereinafter, "FS Oda"), p. 1071.

<sup>32</sup> Jin-Hyun Paik, "Haeyang gyeonggye hoekjeong wonchikeui hyeoncheongwa hanbando jubyeon haeyeokeui gyeonggye munje"[The Evolution of the Principles of Maritime Delimitation]L

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<sup>47</sup> For detailed discussions of these agreements, see Park Hee Kwon, *The Law of the Sea and Northeast Asia* (The Hague/London/Boston: Kluwer Law International, 2000), pp. 49-75; Nobukatsu Kanehara and Yutaka Arima, “New Fishing Order – Japan’s New Agreements on Fisheries with the Republic of Korea and with the People’s Republic of China”, 42 *Japanese Annual of International Law* (1999), pp. 1-31.

<sup>48</sup> Park, *supra* note 45, p. 61.

<sup>49</sup> Kanehara and Arima, *supra* note 79, p. 12. In the agreement itself, there is no official appellation given to these zones. Scholars and practitioners from Japan and Korea call this zone differently.

<sup>50</sup> Article 12 of the 1997 Sino-Japanese Agreement; Article 15 of the 1999 Korea-Japanese Agreement; and Article 14 of the 2000 Sino-Korean Agreement.





<Map 1> from Sun Pyo Kim, *Maritime Delimitation and Provisional Arrangements in North East Asia* (The Hague/London/Boston: Kluwer Law International, 2004), p. 226.