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NEGOTIATION OF CONTINENTAL SHELF
BOUNDARIES IN THE EAST CHINA SEA:
THE ROLE OF THE OKINAWA TROUGH

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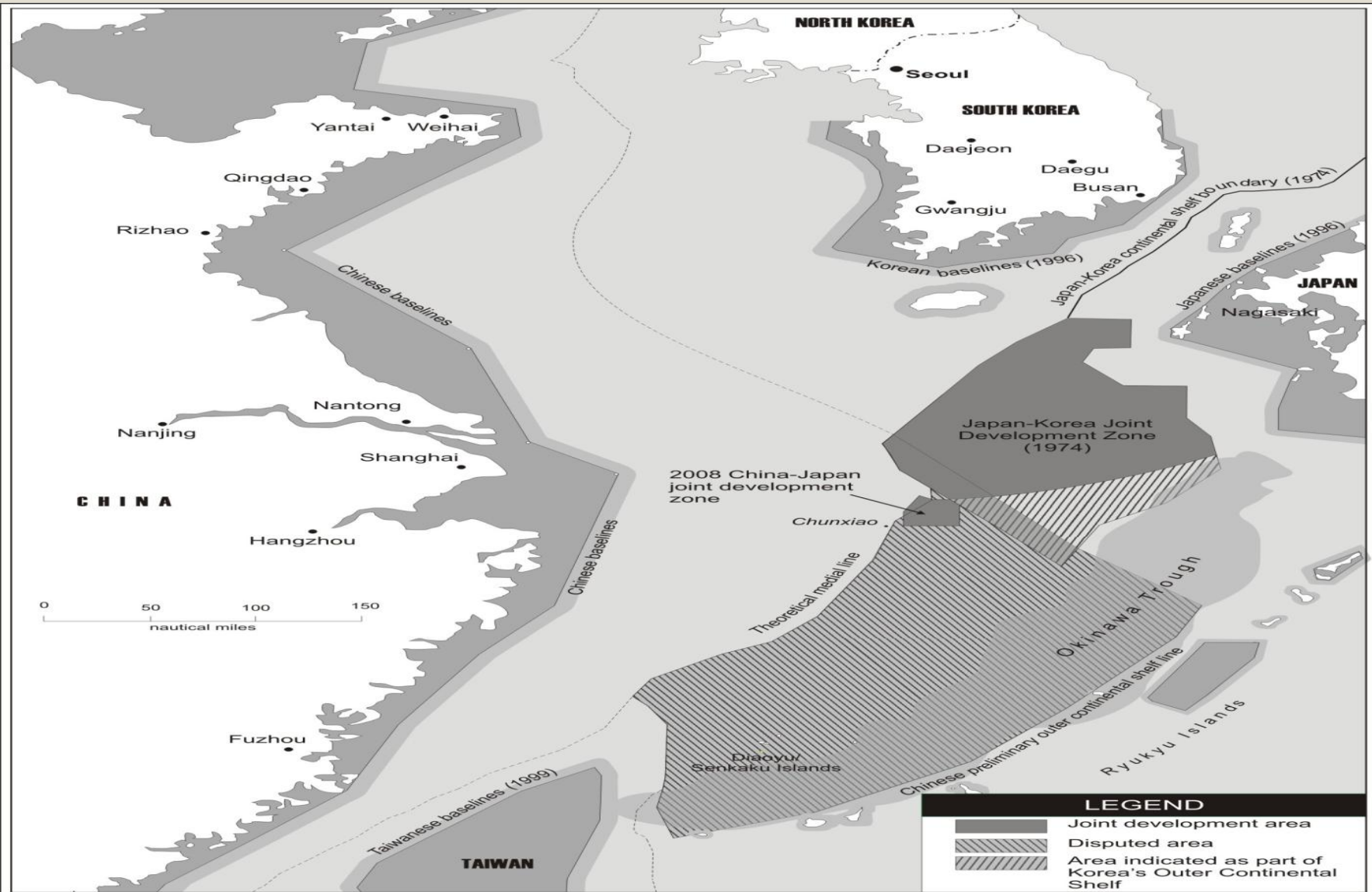
Outline

- 1. Overview of Continental Shelf Claims in the East China Sea between China and Japan**
- 2. The Role of Geophysical Factors in Boundary Delimitation**
- 3. Reasons why the Okinawa Trough should be considered in Continental Shelf Boundary Delimitation in the East China Sea**

Part 1: Overview of Continental Shelf Claims in the East China Sea

Legal Basis of Continental Shelf Claims

- The Okinawa Trough is a deep trench in the seabed about 900 km in length, 36 to 150 km in width, encompassing an area of more than 100,000 square km and has a maximum depth of 2322 m and lies within 200 nm of Japan's Ryukyu Islands
- East China Sea is less than 400 nm apart
- China argues that the natural prolongation of its territory extends up to the Okinawa Trough. It submitted preliminary information on the outer limits of its extended continental shelf which ended "on the axis of the Okinawa Trough"
- Japan argues that the Okinawa Trough is a mere dent in the continental shelf and that the median line is applicable in waters less than 400 nm apart



Source: Andi Arsana, Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong, Australia

Part 2: International Case Law on the Role of Geophysical Factors in Continental Shelf Delimitation

North Sea Continental Shelf Cases (1969)

- “What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually the territory over which the coastal State already has dominion – in the sense that, although covered with water, **they are a prolongation or a continuation of that territory, an extension of it under the sea**”
- From this, it would follow that **whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State**, even though that area may be closer to it than it is to the territory of any other State, **it cannot be regarded as appertaining to that State**
- The ICJ also found that there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures and gave “geological” factors as an example

Libya/Malta Continental Shelf Case (1985)

- The EEZ and continental shelf are linked under international law and hence the extent of the EEZ is a relevant circumstance to take into account in the delimitation of the continental shelf
- Since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding seabed and subsoil, *there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims*
- Since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as “the rift zone” cannot constitute a fundamental discontinuity between Libya and Malta

Libya/Malta Continental Shelf Case (1985)

- However, the ICJ did not completely close the door on natural prolongation completely:

This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation...is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. ***The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.***

Part 3: Reasons why the Okinawa Trough should be considered in Continental Shelf Boundary Delimitation in the East China Sea

Reasons why the Okinawa Trough should be considered

- A. The Okinawa Trough is a relevant circumstance which should be taken into account in delimitation of the continental shelf:**
 - i. Natural Prolongation is the basis of China's entitlement to the continental shelf and therefore, geophysical and geomorphological factors are relevant to delimitation;**
 - ii. Okinawa Trough constitutes a fundamental discontinuity in the seabed;**
 - iii. A Equitable Result would require consideration of the Okinawa Trough**
- B. Different boundaries can be used for both the EEZ and Continental Shelf**
- C. Negotiations Require a Conciliatory Approach between Parties**

Natural Prolongation as the Basis of Entitlement to the Continental Shelf

- The ICJ in Libya/Malta Case stated:
 - “that the question of **entitlement** and of **definition** of the continental shelf, on one hand, and of the **delimitation** of the continental shelf on the other, are not only distinct but are also complementary, is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to delimitation.”
- Accordingly, the relevance of geophysical factors in maritime delimitation will depend upon the status of the natural prolongation principle as a basis of entitlement to the continental shelf
- Libya/Malta seemed to suggest that within 200 nm, the only basis for title was distance but beyond 200 nm, natural prolongation is the basis of entitlement

Natural Prolongation as the Basis of Entitlement to the Continental Shelf

- This is arguably inconsistent with the plain reading and intent of Article 76 (1) of UNCLOS
- Article 76 (1) provides that the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea :
 - 1) throughout the natural prolongation of its land territory to the outer edge of the continental margin (Extended Continental Shelf), or
 - 2) to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
- Continental margin is the “submerged prolongation of the land mass of the coastal State and consists of the seabed and subsoil of the shelf, the slope and the rise” (Article 76 (3), UNCLOS)

Natural Prolongation as the Basis of Entitlement to the Continental Shelf

- “A logical analysis of these words will show what Article 76 thus offers, is not, as the [Libya/Malta] Judgment seems to suggest, two complimentary definitions of the (legal) continental shelf and hence two complimentary criteria for determining its appurtenance, but two *radically alternative definitions*.
- From the viewpoint of that Article, this would have been open to challenge, had the sea-bed in the present case featured, not a rift zone, **but the outer edge of a continental margin. The Court would then almost certainly have had to weigh the merits of two convincing claims** invoking the sense of Article 76, the one based on **geomorphology, the other relying on distance**. As it happens, the only real problem before the Court was actually that of discerning the rule for the division of a single maritime area homogeneous in terms of the 200-mile distance criterion” (Dissenting Opinion of Judge Oda, *Libya-Malta*)
- Article 76 (1) was a compromise between the *broad margin States* which wanted rights over the continental shelf up to the edge of the continental margin and the *narrow margin States* which wanted a limit of up to 200 nm

Natural Prolongation as the Basis of Entitlement to the Continental Shelf

- Distance Criterion of 200 nm can be used by narrow margin coastal States “when their continental margin does not extend up to that distance” and geophysical factors are therefore irrelevant
- But in cases where the coastal State is a wide margin State and whose seabed and subsoil is the “natural prolongation of its territory to the outer edge of the continental margin,” the basis of title/entitlement to the continental shelf is natural prolongation, so natural prolongation must also be relevant to delimitation
- References to “natural” and “submerged” prolongations in Article 76 can be considered references to both geomorphic and geological factors (Cook and Carleton, 2000 at 27) which supports the argument that these factors are relevant
- “Geologically and geomorphologically, the continental margin bounded by the Okinawa Trough is Chinese. It stretches seaward from the mainland coast of China and it has been formed mainly by the filling of marginal basins with sediment provided by Chinese rivers. The imperfect concept of natural prolongation fashioned in the North Sea by the International Court of Justice in 1969 is perfectly illustrated by the continental margin of the East China Sea” (Prescott and Schofield, 2005 at 439)

Okinawa Trough as a Fundamental Discontinuity

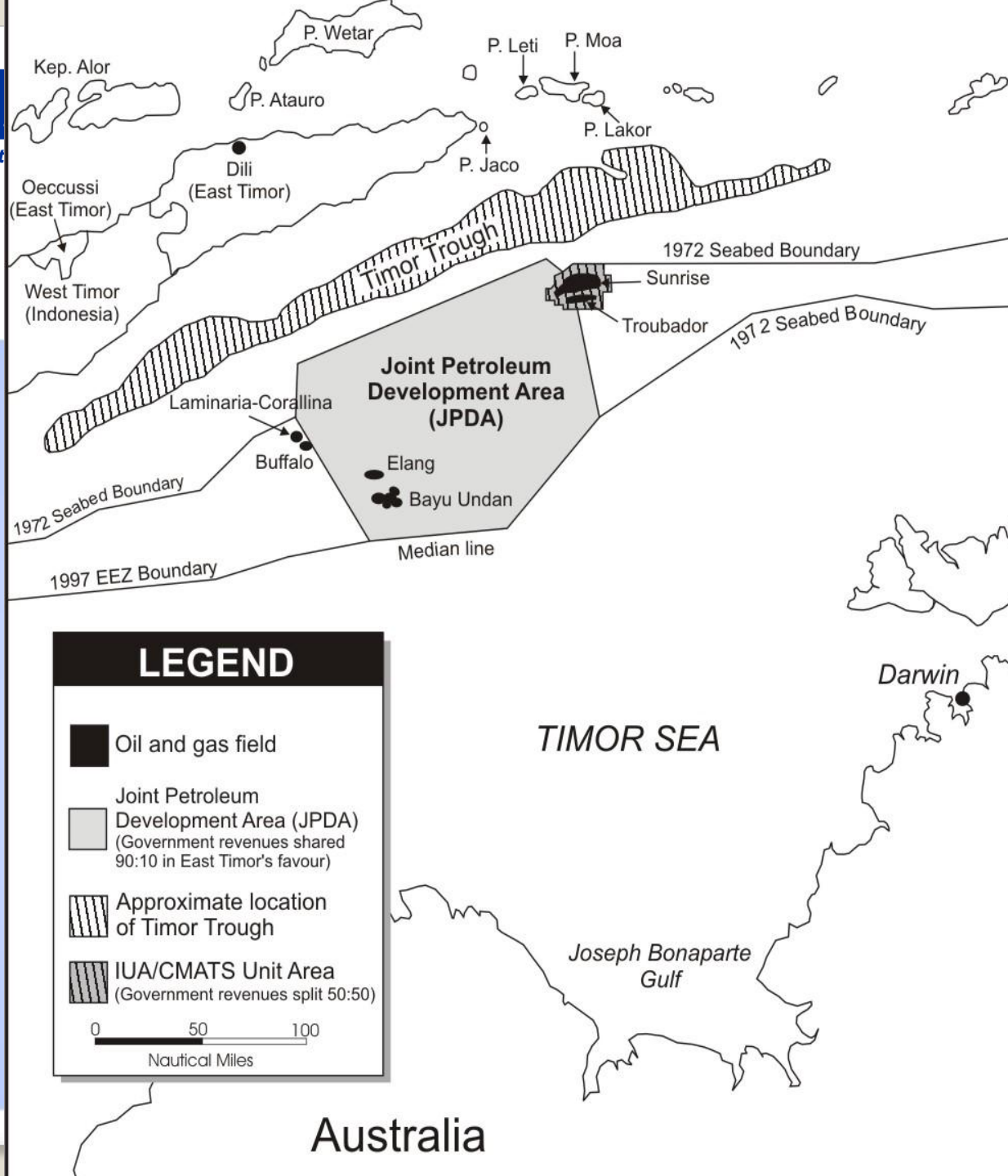
- Case law after the *North Sea Continental Shelf Cases* attributed limited importance to the geological and geomorphological factors arguably because there were no marked features in the seabed which could be considered a separation of continental shelves
- Accordingly, one could argue that discontinuities in the seabed which constitute a fundamental interruption of the continental shelf so as to reflect a separation of continental shelves would be a relevant circumstance in delimitation
- There are some features which international courts have considered to disrupt the unity of the continental shelf:
 - Norwegian Trough is a belt of water 200 – 650 m deep and about 430 km long, with a width averaging 80 – 100 km while the waters of the North Sea are shallow and at a depth of less than 200 m (*North Sea Continental Shelf Cases* at paragraph 45)
 - Timor Trough which has a maximum depth of 3,200 m and a width of 130 km (Separate Opinion of Vice-President Sette-Camara in *Libya/Malta*)
- The Okinawa Trough is 894 – 2322 m deep, 900 km long with a width between 36 – 150 km

An Equitable Result Requires Consideration of the Okinawa Trough

- To use the median line as the applicable continental shelf boundary between China and Japan would be giving equal treatment to States with unequal natural situations
- To use the median line would deny China the right to claim a continental shelf beyond 200 nm, a claim which it is inherently entitled to under UNCLOS
- Using the median line would mean that entitlement based on distance is superior to entitlement to the outer continental shelf based on natural prolongation when there is no priority nor precedence between either
- While delimitation between a wide margin State (such as China) and a narrow margin State (such as Japan) would probably mean that the wide margin State cannot get its full entitlement, it should not mean that China can not obtain any continental shelf beyond 200 nm
- Therefore, it is equitable to take into consideration the geophysical circumstances represented by the Okinawa Trough

Different Boundaries should be negotiated for the EEZ and the Continental Shelf

- State practice and international case law has indicated a preference for a single maritime boundary for both EEZ boundaries and continental shelf boundaries
- However, it is completely open to Japan and China to negotiate two boundaries in the East China Sea, a median line for the EEZ boundary and an adjustment of the median line to take into account the Okinawa Trough for the continental shelf boundary
- Two examples in State practice
 - The Torres Strait Treaty between Australia and Papua New Guinea 1978
 - Australia-Indonesia Maritime Boundary Treaty, 1997
- These agreements separate jurisdiction over the continental shelf and over the water column and allocation of rights and jurisdiction are arguably complicated
- 2 boundaries have been described as a “useful technique in the delimitation of maritime boundaries” as it gives negotiators significantly greater flexibility in bargaining and allows for a greater number of areas where concession might be made to increase the likelihood of resolution.” (Stuart Kaye, 1998 at 72).



Negotiations of the Boundaries

- The dispute is unlikely to go to dispute resolution because of China's exercise of the opt out in Article 298 for maritime boundary delimitation
- Both China and Japan must agree on the role of the Okinawa Trough before negotiations on maritime delimitation can take place
- The States concerned are obliged to “enter into negotiations with a view to arriving at an agreement and...not merely to go through a formal process of negotiation. The negotiations are to be meaningful, which will not be the case when either [state] insists upon its own position without contemplating any modification of it.” (North Sea Continental Shelf Cases)
- In maritime boundary negotiations, States may use international jurisprudence to guide them, but are free to use all factors they wish

Negotiations of the Boundaries

- Japan and China should therefore seriously consider negotiating 2 boundaries:
 - The EEZ boundary should be the median line
 - The seabed boundary does not have to fall at the axis of the Okinawa Trough. It could also be between the median line and the axis of the Okinawa Trough (Prescott and Schofield, 2005 at 439)
- However, if Japan continues to insist that the median line should be the applicable boundary for both the EEZ and continental shelf, and does not recognize the relevance of geophysical factors, then negotiations will go nowhere