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Marine Non-Living Resources and Joint Development

Non-living Resources in Disputed Areas in the East China Sea: Law and Policy Issues concerning Provisional Arrangements under UNCLOS

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The East China Sea, reportedly rich in hydrocarbon resources, has been subject to overlapping maritime claims by China, Japan and Korea since the 1970s. Over the years, these overlapping maritime claims have hindered the effective management and exploitation of hydrocarbon resources, and even worse, have increased tensions amongst the Northeast Asian States and affected the long-term stability of the region. The agreement on maritime boundaries in the East China remains far-off, confronted by a myriad of challenges including vastly different positions on the applicable delimitation principles and sovereignty disputes over islands. Further, the likelihood of the concerned States resorting to third party dispute settlement mechanisms is also limited. The 1982 UN Convention on the Law of the Sea obliges State Parties to negotiate in good faith "provisional arrangements of a practical nature" pending final delimitation agreements. This Paper examines the extent to which such provisional arrangements can serve as a viable dispute settlement mechanism for the East China disputes, the challenges faced by Northeast Asian States in concluding such provisional arrangements and what steps can be taken by the Northeast Asian States to move forward to provisional arrangements.

Origin of the East China Sea Disputes

The East China Sea is bounded on the west by the People's Republic of China (China), on the north by the southern tip of the Republic of Korea (Korea), on the east by Japan and on the south by the Republic of China (Taiwan).[1] Following a 1968 survey which found that there was a "high probability" that there were vast oil reserves in the East China Sea and the Yellow Sea,[2] Japan, Taiwan and South Korea rushed to make unilateral claims over the continental shelf, in order to maximize their claims to the purportedly oil rich sea bed in these areas.[3] By September 1970, seventeen (17) seabed zones were established by these coastal States/ entities with their unilateral claims overlapping to such an extent that only four of the seventeen zones were uncontested.[4] Oil exploration and exploitation contracts had also been awarded to Western oil interests for many of the zones.[5]

In 1970, after the unilateral claims were made, a dispute erupted between Japan and Taiwan over ownership of the Senkaku / Diaoyutai Islands (eight uninhabited features situated west of Okinawa and

[1] Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy," *Harvard International Law Journal* 14 (1973): 212 at 212.

[2] In 1966, reports of potential oil deposits in Northeast Asia coupled with developments in technology in oil extraction led to the formation of the committee on Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) formed under the United Nations Economic Commission for Asia and the Far East (ECAFE): See Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy," 14 Harvard International Law Journal 212 (1973) at 212

[3] Japan, Taiwan and South Korea had all experienced a "debilitating shortage of oil" coupled with ever expanding national demand for oil in the 1960s: Choon-Ho Park, "Joint Development of Mineral Resources in Disputed Waters: The Case of Japan and South Korea in the East China Sea," 6 (11) Energy, 1135 (1981) at 1135

[4] The four uncontested zones were uncontested largely due to their marginal location: See Choon-Ho Park, "Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy," *Harvard International Law Journal* 14 (1973): 212 at 226.

[5] For example, Gulf Oil had signed contracts with Japan, Korea and Taiwan whereas Texaco and Shell had only signed contracts with Japan and Korea. "The fact that foreign oil companies have sought to protect their interests by signing concession agreements with, or investing in the oil industry of all or both coastal states claiming sovereignty over a given area of the sea-bed: See Choon-Ho Park (1973), above, at 226.

northeast of Taiwan).[6] China also joined the fray and objected to the claim of ownership by Japan over the Senkaku /Diayutai Islands and also claimed sovereign rights over the continental shelf of the Yellow Sea and the East China Sea.[7] All exploration activities except by those of non-US oil company, Royal Dutch Shell ceased in the middle of 1971. Since then, the East China Sea has been the arena for increasing conflict and a flashpoint for regional tension in Northeast Asia.[8]

Maritime Claims in the East China Sea

While the unilateral claims to the seabed in the East China Sea were made in the 1970s, all the Northeast Asian States[9] have since then become parties to the 1982 UN Convention on the Law of the Sea (UNCLOS)[10] and have passed maritime zone legislation pursuant to UNCLOS. Under UNCLOS, coastal States can claim a territorial sea up to 12 nm over which they have sovereignty as well as an exclusive economic zone (EEZ) up to 200 nm where they have sovereign rights (as opposed to sovereignty) over living and non-living resources in the seabed and subsoil as well as the superjacent waters.[11] Coastal States are also entitled to a continental shelf up to 200 nm,[12] or if certain criteria set out in Article 76 are met, it can claim what is known as an extended continental shelf.[13] The coastal State has sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources,[14] which include "mineral and other non-living resources of the seabed and subsoil." The EEZ regime and continental shelf regime within 200 nm will usually apply concurrently to the same geographical area.[15]

Japan, Korea and China have all claimed a territorial sea, EEZ and continental shelf in the East China Sea, which will be further discussed below.

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[6] Choon-Ho Park, "Joint Development of Mineral Resources in Disputed Waters: The Case of Japan and South Korea in the East China Sea," 6 (11) Energy, 1135 (1981) at 1135 at 1137.

[7] Choon-Ho Park (1973), *supra* note 4 at 230 - 234. US, due to the politics of the time, were reportedly very conscious of China's protests with the former advising American oil firms not to explore for oil in areas under dispute. Japan also apparently, consistent with US Policy, ceased all exploration activities to the consternation of Korea and Taiwan.

[8] See generally, Reinhard Drifte, "Territorial Conflicts in the East China Sea – From Missed Opportunities to Negotiation Stalemate," Asia-Pacific Journal, Japan Focus, Volume 22-3-09, 1 June 2009.

[9] China ratified UNCLOS on 7 June 1996, Japan ratified UNCLOS on 20 June 1996 and Korea ratified UNCLOS on 29 January 1996. Taiwan is not recognized as a State under international law and is therefore not a party to UNCLOS.

[10] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (entered into force 16 November 1994) [UNCLOS]

[11] See generally *ibid.*, Part V as well as art. 56.

[12] UNCLOS, *supra* note 10, art. 76 (1).

[13] UNCLOS, arts. 76 (1) and (4).

[14] UNCLOS, art. 77.

[15] The EEZ has a breadth of 200 nm and the minimum breadth of the continental shelf is 200 nm. It is said "had it not been for a strong desire on the part of many coastal States, now reflected in the provisions of [UNCLOS], to include within the legal continental shelf those parts of the continental margin extending beyond 200 miles, the legal regime of the continental shelf could have been subsumed within the EEZ (emphasis added)." R.R CHURCHILL and A.V LOWE, *The Law of the Sea*, 3rd ed. (United Kingdom: Manchester University Press, 1999) at 166.

EEZ and Continental Shelf Claims of China, Japan and Korea

China has claimed both a continental shelf and an EEZ in the East China Sea. In its 1998 Law on the Exclusive Economic Zone and Continental Shelf (1998 Law), China claimed a continental shelf which extends to the outer edge of the continental margin or to a distance of 200 nm where the continental margin does not extend up to that distance,[16] essentially following the UNCLOS definition of the continental shelf in Article 76. With regards to the EEZ, China proclaimed a 200 nm EEZ in its 1998 Law.[17]

Japan has also made claims to both continental shelf and an EEZ in the East China Sea. In 1996, Japan proclaimed an EEZ and a continental shelf in its Law on the Exclusive Economic Zone and the Continental Shelf.[18] With regards to its continental shelf, it has claimed sovereign rights over the seabed and subsoil in "the areas of the sea extending from the baseline of Japan to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan."[19] Like China, it has also claimed a 200 nm EEZ.[20]

Korea has also claimed rights over the continental shelf through its Submarine Resources Development Act (No. 2184) of 1 January 1970 and the subsequent Presidential Decree (No. 5020) of 30th May 1970.[21] Korea proclaimed a 200 nm EEZ with effect from 10 September 1996.[22]

Extended Continental Shelf Claims of Korea and China in the East China Sea

It should also be noted that both China and Korea have submitted preliminary information to the Commission on the Limits of the Continental Shelf (CLCS) in respect of their extended continental shelf claims beyond 200 nm. In May 2009, China's preliminary information stated that the outer limits of its extended continental shelf extends beyond 200 nm to a limit located on the axis of the Okinawa Trough.[23] China has not made a full submission on the outer limits of its continental shelf. Similarly, Korea also submitted preliminary information on 11 May 2009 stating that the outer limits of the continental shelf in the East China Sea beyond 200 nm are located in the Okinawa Trough.[24]

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[16] Article 2, China's Exclusive Economic Zone and Continental Shelf Act, Adopted at the Third Session of the Standing Committee of the Ninth National People's Congress, 26 June 1998, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf>.
[17] Article 2, China's Exclusive Economic Zone and Continental Shelf Act (1998).
[18] Japan's Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996), available at <http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE35.pdf>.
[19] Article 2, Japan's Law on the Exclusive Economic Zone and the Continental Shelf (1996).
[20] Article 1, Japan's Law on the Exclusive Economic Zone and the Continental Shelf (1996).
[21] Sun Pyo Kim, "Maritime Delimitation and Interim Arrangements in Northeast Asia" at 175
[22] Exclusive Economic Zone Act No. 5151, 8 August 1996
[23] Paragraph 6 of Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China available at http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf
[24] Preliminary Information Regarding the Outer Limits of the Continental Shelf of Korea available at http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/kor_2009preliminaryinformation.pdf

Japan submitted notes verbale in relation to the preliminary information submitted by China and Korea stating that:

> It is indisputable that the establishment of the outer limits of the continental shelf beyond 200 nautical miles in an area comprising less than 400 nautical miles and subject to the delimitation of the continental shelf between the States concerned cannot be accomplished under the provisions of the Convention.

It went on to state that Japan reserves its right to make additional comments on matters concerning the submission of preliminary information as well as its right to state its position when China and Korea makes its full submission to the CLCS.

Challenges to Maritime Delimitation in the East China Sea

The fact that the East China Sea is less than 400 nm means that China, Japan and Korea have overlapping continental shelf and EEZ claims which will need to be delimited. However, there are several challenges to maritime delimitation in the East China Sea, which will be dealt with below.

Different Views on Applicable Delimitation Principles and the Role of the Okinawa Trough

One of the major issues, which present a challenge to delimitation in the East China Sea, is the disagreement on the role of the Okinawa Trough. The Okinawa Trough is 1,200 km long, 26 – 120 km wide and the Trough's bottom has an average width of 104 km. The Trough is shallow in the northern part, and deep in the southern part; the water depth is 894 meters in the north; 1188 meters in the centre, and 2700 meters in the south.[25]

The Positions of the Northeast Asian States on Delimitation in the East China Sea

China has consistently endorsed the concept of the continental shelf being "the natural prolongation" of the territory of the coastal State vis-à-vis Japan. While China's statements and legislation have always endorsed the natural prolongation principle, "they have all avoided directly mentioning the Okinawa Trough."[26] It was only in 2009 in their Preliminary Information to the CLCS that China explicitly mentioned the Okinawa Trough as representing the extent of its outer continental shelf entitlement. With regards to the applicable principles for the delimitation of the continental shelf, China "emphasizes the principle of equitable solution through consultations" rather than the median or equidistant line.[27]

[25] Zhao Lihai, *Literature of the Law of the Sea* (Peking University Press, 1996), 80.
[26] Xinjun Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea has stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation," *Ocean Development and International Law* 42 (2011): 53 – 65, 56.
[27] During the negotiations of UNCLOS, China strongly supported "equitable principles" in relation to both EEZ and continental shelf principles and that the median line was only to be adopted when its use was in accordance with equitable principles: See Statement of PRC Delegate Shen Wei-Liang at the Plenary Meeting held on 25 August 1980, UN Press Release (Geneva) SEA/128. Also see Article 2 of China's 1998 Law of the Exclusive Economic

However, it should be noted that China has not publicly indicated where it believes the continental shelf boundary with Japan to be although China may argue that the Okinawa Trough should constitute the boundary between itself and Japan.[28] It should also be noted that China has to date argued for the delimitation of only the continental shelf, instead of the EEZ.[29]

Korea has also adopted a similar position vis-à-vis Japan. Korea argues that the natural prolongation of its continental shelf extends to the Okinawa Trough, and that delimitation should take place on the basis of equitable principles rather than equidistance.

Japan, on the other hand, has argued that the Okinawa Trough is a mere dent in the continental shelf in the East China Sea and should be ignored in delimitation. It appears to also argue that even if the Okinawa Trough does constitute the extent of China's continental shelf entitlement, it is irrelevant in areas less than 400 nautical miles apart.[30] With regards to delimitation, Japan argues that it is either delimitation of the EEZ or a single maritime boundary (i.e. for both the continental shelf and EEZ)[31] and in both cases, the median line is the applicable boundary between China and Japan.[32] However, Japan has maintained that the fact that the median line is the applicable boundary does not mean that Japan had given up its title to a 200 nm EEZ beyond the median line.[33]

If the Trough is considered in continental shelf delimitation, the Japanese Ryukyu Islands "would be attributed a maritime boundary in the East China Sea to the west that is relatively close to Japan and far from the opposite coastline of China."[34] China would resultantly get a greater share of the supposedly hydrocarbon-rich continental shelf

The Validity of the Arguments of China/Korea and Japan under International Law

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Zone and the Continental Shelf which states delimitation of the continental shelf shall be settled, on the basis of international law and in accordance *with the principle of equity*, by an agreement delimiting the areas so claimed.

[28] Gao Jianjun, "Joint Development in the East China Sea: Not an Easier Challenge than Delimitation," *International Journal of Marine and Coastal Law* 23 (2008): 39 – 75, 67.

[29] Gao Jianjun, "Joint Development in the East China Sea: Not an Easier Challenge than Delimitation," *International Journal of Marine and Coastal Law* 23 (2008): 39 – 75, 61.

[30] Article 2 (1) of the 1996 Japanese Law on the Exclusive Economic Zone and the Continental Shelf provides that, where any part of that line lies beyond the median line as measured from the baseline of Japan, the median line (or the line which may be agreed upon between Japan and a foreign country as a substitute for the median line, and the line to be drawn to connect with the said line, which shall be prescribed by Cabinet Order) shall be substituted for that part of the line.

[31] Gao Jianjun, "Joint Development in the East China Sea: Not an Easier Challenge than Delimitation," 61; Shigeki Sakamoto, "Searching for the Joint Development of the Natural Resources in the East China Sea- From the Sea of Conflict to the Sea of Co-operation," paper for the Conference on "Ocean Security in Northeast Asia: Issues and Prospects, co-sponsored by the School of International and Public Affairs. Shanghai Jiaotong University and Ocean Policy Research Foundation of Japan in Shanghai, 25 – 26 May 2006.

[32] See Article 2 of Japan's EEZ and Continental Shelf Law (1996).

[33] Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled," 56, citing the Japanese MOFA Statement on "Our Country's Legal Position Concerning Resource Exploration in the East China Sea," November 2006 available at www.mofa.go.jp/mofaj/area/china/higashi_shina/tachiba.html

[34] Jonathan Charney, "The Diaoyu/Senkaku Islands Maritime and Territorial Dispute," 126, presented at the International Law Conference on the Dispute Over Diaoyu/Senkaku, 1997 April, Taiwan, Edited by the Taiwan law Society and Taiwan Institute of International Law.

International law has developed both delimitation principles and methodology to assist States in the delimitation of their maritime claims. The validity of the above arguments by China/Korea and Japan under international law has important implications for the dispute resolution mechanism ultimately adopted by these States. It is therefore necessary to briefly examine whether the principles employed by these countries in support of their respective position has any basis in international law.

Articles 74 (1) and 83 (1) of UNCLOS provides that:

> The delimitation of the [continental shelf/exclusive economic zone] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Over the years, the decisions of international courts and tribunals have attempted to articulate what is meant by "equitable solution" and such jurisprudence is recognized to be relevant to the interpretation of Articles 74 and 83.[35]

There are two distinct phases in international jurisprudence. The first phase from 1969 to 1992[36] has been characterised as the "equitable principles-relevant circumstances" phase.[37] Delimitation was to "be effected in accordance with equitable principles or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method."[38] Under this approach, equitable principles gave no primacy to equidistance as a method of delimitation.[39] Instead, the goal of achievement of equitable results was the most important in delimitation (as opposed to the method of delimitation).[40]

However, this approach was modified in the later cases from 1993 onwards which found that the "equitable principles-relevant circumstances" rule as it had been adopted since 1958 is "closely interrelated"[41] or "very similar"[42] to the "*equidistance*/special circumstances" method applicable to the

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[35] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar),* Case No. 16, Judgment dated 14 March 2012, International Tribunal for the Law of the Sea (ITLOS), at paragraph184.

[36] *North Sea Continental Shelf Cases,* Judgment, [1969] I.C.J Reports 3; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US),* [1984] ICJ Reports. 246*; Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Reports 18; *Continental Shelf (Libya v. Malta),* [1985] ICJ Reports 13; *Guinea/Guinea-Bissau Maritime Delimitation Case,* Decision of 14 February 1985 25 ILM 252 (1986); *St. Pierre and Miquelon Case,* 31 ILM (1992).

[37] See, for example, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Equatorial Guinea intervening), [2002] ICJ Reports 303, at paragraph 288; Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World,* 2nd Edition, (The Netherlands: Martinus Nijhoff Publishers, 2005), 221.

[38] *St. Pierre and Miquelon Case,* paragraph 38.

[39] *Tunisia/Libya Case,* paragraph 110.

[40] Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the Nicaragua/Honduras Case," paper presented at the International Law Association British Branch, 5 March 2008 available at <http://www.zaoerv.de/68_2008/68_2008_4_a_903_938.pdf>.

[41] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* [2001] ICJ Reports 40, paragraph 231.

delimitation of the territorial sea.[43] This has been described as the "corrective-equity" approach.[44] While the need for an equitable solution is still the defining goal, the courts have now set out a definite methodology in order to achieve such an equitable solution. Initially, this methodology consisted of two steps whereby the courts first drew a provisional equidistance line and will then considered whether there were factors calling for the adjustment of that line in order to achieve an equitable result.[45] Most recently, this has been modified to three steps in 2009 *Black Sea Case*.[46] First, the court will establish a provisional equidistance line; second, it will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result; and third, it will verify that the line does not lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line.

As can be seen from the above, China/Korea's approach on "equitable principles" instead of "equidistance", while consistent with initial jurisprudence on delimitation, has been superseded by an approach which places an emphasis on equidistance, at least in the first stage of delimitation. It is fair to say that Japan has a strong argument that when carrying delimitation in the East China Sea, the provisional equidistance line should be drawn at the first stage.

However, the role that the Okinawa Trough would play in delimitation is far from clear. Japan relies on the 1985 case of *Libya/Malta* to argue that the Okinawa Trough should be ignored both as a basis of entitlement and in delimitation. That case found:

> At least in so far as those areas are situated at a distance of under 200 miles from the coast in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf and the geological or geomorphological characteristics of those areas [under 200 miles from the coasts in questions] are completely immaterial (*emphasis added).*[47]

It is a commonly held belief that China/Korea's arguments on entitlement to the continental shelf based on "natural prolongation" is no longer tenable in light of the above case and indeed, the trend of courts to look at coastal geography rather than geophysical features in the seabed.[48] However, it should also be remembered that China and Korea have submitted preliminary information to the CLCS on their outer continental shelf claim beyond 200 nm. The most recent case of *Bangladesh/Myanmar* also found that

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[42] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* [2002] ICJ Reports 303, paragraph 228.
[43] See Article 15, UNCLOS.
[44] See Tanaka, "Reflections on Maritime Delimitation in the Nicaragua/Honduras Case," 920 – 923.
[45] See for example, *Arbitration between Barbados and Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados/Trinidad and Tobago), Award* (2006) 45 ILM 798, paragraph 242.
[46] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, [2009] ICJ Reports 61, paragraphs 115 – 122.
[47] *Libya/Malta Case,* paragraph 39.
[48] Keith Highet, "The Use of Geophysical Factors in the Delimitation of Maritime Boundaries," in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries, Volume I,* (Netherlands, Martinus Nijhoff Publishers, 1987), 165

while the notion of "natural prolongation and that of continental margin under Articles 76 (1) and (4) are closely interrelated" and "refer to the same area,"[49] it was not a separate and independent criterion a coastal State must satisfy in order to be entitled to a continental shelf beyond 200 nm.[50] Instead, the notion of "the outer edge of the continental margin" is an essential element in determining the extent of the continental shelf.[51] Entitlement to continental shelf beyond 200 nm **"should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76 paragraph 4.**"[52] Accordingly, as China/Korea can argue, if they are able to meet the requirements in Article 76 (4) (as they will try and attempt to do when they make their full submission to the CLCS), then they have a valid entitlement to outer continental shelf. Arguably, this entitlement should be taken into account of in delimitation, if not at the first stage, then at least as a "relevant circumstance" necessitating the adjustment of a provisional equidistance line. The counter-argument to this is that in areas within 400 nm, there cannot be a claim to extended continental shelf beyond 200 nm.

What is clear from the above discussion is that there are no clear-cut answers. The present law of delimitation is unable to provide a definitive answer on the role of the Okinawa Trough in delimitation, and courts have not had the opportunity to decide on the effect of a geophysical feature such as the Okinawa Trough. Accordingly, China, Korea as well as Japan have some prima facie basis for their claims under international law.

Disputes Over Offshore Features

Sovereignty Dispute over Senkaku/Diayutai Islands

Maritime delimitation in the East China Sea will also not be able to take place until the sovereignty dispute over the Diaoyutai / Senkaku Islands has been resolved. As mentioned above, the Senkaku / Diayutai Islands are located approximately midway between Taiwan and Yayeyama Retto, the southernmost island of the Japanese Ryukyu Islands[53] and are on the western side of the Okinawa Trough.[54] The sovereignty dispute over the Diaoyutai/Senkaku Islands has been discussed at length elsewhere. However, a few words will be said on the potential impact the Islands may have on delimitation.

If the Islands are found to belong to China, and if China's natural prolongation argument based on the Okinawa Trough is accepted, it would push China's maritime claims beyond the Trough and will limit the eastern location of China's maritime boundary with Japan.[55] If, on the other hand, the islands belong to Japan, Japan could link the maritime zones from the Ryukyu Islands to the maritime zones generated by

[49] *Bangladesh/Myanmar Case, Judgment*, paragraph 434.
[50] *Bangladesh/Myanmar Case, Judgment*, paragraph 435.
[51] *Bangladesh/Myanmar Case, Judgment*, paragraph 437.
[52] *Bangladesh/Myanmar Case, Judgment*, paragraph 437.
[53] Steven Wei Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update," 36 *Ocean Development and International Law* 36 (2005): 45 – 61, 46.
[54] Park (1973) at 248
[55] Charney, "The Diaoyu/Senkaku Islands Maritime and Territorial Dispute," 126; Steven Wei Su, "The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan," *Chinese Journal of International Law* 3 (2004): 385 – 420, 391.

the Diaoyu/Senkaku Islands.[56] It is estimated that the Diaoyu/Senkaku Islands may bring to the State which owns them an additional maritime space of around 19,800 square nautical miles, on the assumption that equidistance lines are used in delimitation and taking the islands as basepoints.[57] This would depend on whether the Diaoyu/Senkaku Islands are considered islands under Article 121 (1) of UNCLOS which are entitled to an EEZ and continental shelf of their own or whether they fall within the exception in Article 121(3) which provides that "rocks" which cannot sustain human habitation or economic life[58] of their own shall have no EEZ or continental shelf.[59]

It has been claimed that out of the eight features that make up the Senkaku /Diayutai Islands, the majority of them are "geologically rocks, are uninhabited and are so small that they have never been nor could be inhabited to have an economic life of their own" or are "coral islands, not rocks, but for all functional purposes, are identical to rock islands."[60] Some have argued that the larger features in the Senkaku Islands, namely Tiaoyutai/Uotshuri-shima (4.319 sq km) and Huangweiyu, 1.08 sq km) may arguably be considered as islands capable of sustaining human habitation and economic life of its own which would be entitled to an EEZ or continental shelf under Article 121 of UNCLOS. However, they still may have a limited effect in delimitation, especially when considering their size in relation to China or Japan. Generally, under international case law, if there are overlapping claims between a maritime zone measured from a small remote island and a maritime zone from the mainland or from an archipelagic State, the practice of courts and tribunals is to give a significantly reduced effect to the island when delimiting the maritime boundary.[61] It is likely that a court or tribunal examining this issue would either enclave the Senkaku /Diayutai Islands or give it limited effect.

As a final point, it should been noted that:

> As far as seabed delimitation is concerned, the Islands seem to mean less to China than to Japan, if the natural prolongation principle helps China to push the boundary closer to Japan. For China, however, as its claim to the Tiaoyu Islands has great implications for its claim to the much more important territory of Taiwan, the Islands are deemed indispensable.[62]

Dispute over Ieodo / Socotra Rock

Korea and China have issues in delimitation in the northern part of the East China Sea due to the existence of a submerged feature known in Korean as Ieodo and in Chinese as Suyan. The Ieodo / Suyan

[56] Charney, "The Diaoyu/Senkaku Islands Maritime and Territorial Dispute," 126.
[57] Su, "The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan," 390.
[58] Article 121 (3), UNCLOS.
[59] Jonathan Charney, "Rocks that cannot sustain human habitation" *American Journal of International Law* 93 (1999), 876.
[60] Charney, "The Diaoyu/Senkaku Islands Maritime and Territorial Dispute," 133; Steven Wei Su, "The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan," *Chinese Journal of International Law* 3 (2004): 397.
[61] See Donald Rothwell and Tim Stephens, *The International Law of the Sea* (United Kingdom: Hart Publishing, 2010) at 407–408.
[62] Su, "The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan," 391.

Rocks lie 4.6 meters below the ocean's surface, about 90 nm from Korea's nearest territory Mara-do and 155 nautical miles from China's Yushandao. Essentially, Ieodo / Suyan is located within the overlapping EEZ claims of both countries. Ieodo / Suyan has been heavily developed a research station by Korea in an area which is also claimed as an EEZ by China. Both parties claim that they have jurisdiction over Ieodo by virtue of the fact that it falls within their EEZ. Disagreement on this has resulted on a great impasse in negotiations in their EEZ boundary.

Tri-Junction between Korea, Japan and China

For the maritime boundaries in the East China Sea to be complete, it would be necessary for the three Northeast Asian States to agree on a tri-junction where all the boundaries meet, or else there may be an area that is not delimited.[63] A tri-junction could either be negotiated through trilateral negotiations or bilateral negotiations between China and Japan, China and Korea and Korea and Japan, provided that there is prior co-ordination between the States. However, to date, negotiations on boundaries in the East China Sea have been exclusively bilateral and there has been no consideration of the need to consider the claims of the relevant third party.

Maritime Boundary Agreements in the East China Sea

It is clear from the above discussion that there are several issues that pose serious challenges to the Northeast Asian States reaching agreement on maritime boundaries. The legal uncertainty on the principles governing maritime delimitation means there is much room "for radically differing interpretations as to which factors and methods of delimitation are appropriate to a particular case, and therefore potential for dispute and deadlock in delimitation negotiations."[64]

Indeed, this is evidenced by the fact that there is only one boundary agreement in the East China Sea to date and that is the 1974 Continental Shelf Boundary between Japan and Korea.[65] The continental shelf boundary is based:

> On a median line which starts at the midpoint between Korea's Cheju Island and Japan's Goto Retto and then heads north, moving closer to the Korean coastline because of the Japanese Island of Tsushima in the Korean Strait and the veering back away from the Korean coast as it heads north. This line stops abruptly at a spot known as Point 35 because of the claims both countries have for sovereignty over Tok-Do/Takeshima and their disagreement over whether it should play a role in determining the boundary delimitation in that region.[66]

Apart from that, no other boundary has been agreed upon.

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[63] Sun Pyo Kim, Maritime Delimitation and Interim Arrangements in Northeast Asia at 216
[64] *Ibid.,* at 246.
[65] Agreement Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries of 30 January 1974
[66] Jon M. Van Dyke, "The Republic of Korea's Maritime Boundaries" 18 (4) International Journal of Marine and Coastal Law 509 (2003) at 523

The Use of Third Parties to Resolve the Maritime Disputes in the East China Sea

Apart from maritime delimitation agreements, UNCLOS and international law also provides several other options for the Northeast Asian States to resolve their maritime disputes in the East China Sea. This section will examine these options and evaluate their feasibility.

The Commission on the Limits of the Continental Shelf

Is there a role for the CLCS to resolve the dispute between China and Japan and between Korea and Japan? Both China and Korea have submitted preliminary information to the CLCS and will be making full submissions in the future. The recommendations of the CLCS with regard to the submissions of Korea and China will no doubt "contribute to the determination of the scientific character of the Okinawa Trough."[67] For example, if the CLCS does make a recommendation that the axis of the Okinawa Trough constitutes the outer limit of the continental shelf, this would arguably strengthen China's claim that it has an entitlement to the outer continental shelf and that it should be taken into consideration in delimitation.

However, the role of the CLCS in providing a final resolution to the disputes is likely to be limited.[68] First, the CLCS "shall not consider and qualify a submission made by any of the States concerned" in a land or maritime dispute, although they *may* consider the submission in an area under dispute with prior consent given by all parties to such a dispute.[69] Japan has already protested both Korea's and China's submission of preliminary information and will likely object to their actual full submission. Even if Japan does consent to the CLCS considering the submissions, the discretion still lies with the CLCS on whether to consider the submission. Further, there is already a backlog of submissions to the CLCS and consequently, it will take a considerable amount of time for a decision on the outer limits to be made. Again, even if the CLCS makes a decision, the submissions are without prejudice to the question of delimitation with Japan,[70] and a boundary will still have to be negotiated or decided upon.

Binding Dispute Settlement Procedures

UNCLOS provides a range of compulsory dispute settlement mechanisms to State Parties in cases of a dispute in the interpretation or application of UNCLOS, which would include disputes concerning the interpretation or application of Articles 74 and 83 on delimitation.[71] However, it is unlikely that the Northeast Asian countries will resolve their delimitation disputes (or their sovereignty disputes) by third party binding dispute settlement mechanisms under UNCLOS or general international law. First, both China and Korea have exercised its option under Article 298 to opt out of the compulsory dispute settlement procedures for certain categories of dispute. These include "disputes concerning the

[67] Gao Jianjun, "The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea" *Chinese Journal of International Law* 9 (2010), 143 – 177, 155.
[68] Gao, "The Okinawa Trough Issue," 161.
[69] Annex 1, Paragraph 5 (a), Rules of Procedure of the Commission on the Limits of the Continental Shelf.
[70] Article 76 (10), UNCLOS.
[71] Article 286 of UNCLOS provides that all disputes concerning the interpretation or application of any provision in UNCLOS would be subject to compulsory dispute settlement. States Parties can elect the type of binding settlement forum it prefers, either at the time of ratifying UNCLOS or any time thereafter (Article 287 (1), UNCLOS). For maritime boundary disputes, three out of the four choices of forum are made available to States, namely the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and an Arbitral Tribunal constituted under Annex VII of UNCLOS.

interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles."[72] Similarly, while Japan has accepted the compulsory jurisdiction of the ICJ,[73] China and Korea have not.

Accordingly, there is little scope for either China, Korea or Japan to unilaterally bring the other to an international court or tribunal to resolve their maritime delimitation disputes. The only way to do so is by mutual consent and that consent is unlikely to be forthcoming for several reasons.

First, China and Korea have never used binding dispute settlement mechanisms to resolve their disputes with other countries.[74] Arguably, this reflects a cultural preference of Asian States who are perceived as having a "dislike of confrontational/adversarial litigation of disputes, particularly, third party dispute resolution before a court or tribunal"[75] and a preference for consultation and consensus-decision making.[76]

Second, despite the attempts of international courts and tribunals to insert some predictability and normativity into the law of maritime delimitation by developing the three-stage methodology and emphasizing the primacy of equidistance, there is still an inherent uncertainty in maritime delimitation principles. This partly due to the absence of *stare decisis*/binding precedents in international law and the fact that ultimately, each maritime delimitation presents a unique factual situation which can be used to advance different legal arguments. Arguably, international courts and tribunals have not had the opportunity to consider the effect of a serious geomorphological feature such as the Okinawa Trough on delimitation and hence, the outcome is unpredictable and too much of a risk.

Third, if China and Japan were to submit the sovereignty dispute over Senkaku / Diayutai Islands and also ask the court to delimit boundaries, there would likely be an outcry from the national populations of China and Japan that their Governments were "surrendering sovereignty" to a third party. The risk of political fall-out appears to be a great disincentive to the Northeast Asian States agreeing to binding dispute settlement procedures.

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[72] Article 298 (1) (a) (i), UNCLOS. Other categories of dispute for which States can opt out of are disputes concerning military activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. These categories of disputes were subject to the "opt out" because they reflect traditional sensitivities i.e. territorial sovereignty and military activities. Without these exceptions, the adoption of machinery for the binding settlement of disputes is an integral part of the Convention would not have been generally accepted: See J.G. Merrills, *International Dispute Settlement*, 5th Edition, (United Kingdom: Cambridge, 2011), 173 - 174.

[73] The only way in which the ICJ is competent to hear a dispute is if the States concerned have accepted the jurisdiction of the Court either by entering into a special agreement to submit the dispute to the Court, by virtue of a jurisdictional clause in a treaty or through the reciprocal effect of declarations made by them under Article 36 (2) of the Statute of the ICJ whereby each party has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration: See ICJ online < http://www.icj-cij.org/court/index.php?p1=1&p2=6>.

[74] Japan, on the other hand, has utilized ITLOS in two cases concerning the prompt release of its vessels.

[75] Gillian Triggs, "Confucius and Consensus: International Law in the Asian Pacific," Melbourne University Law Review 21 (1997): 650, 675.

[76] Triggs, "Confucius and Consensus: International Law in the Asian Pacific," 675.

Compulsory Conciliation

Even if a State makes a declaration under Article 298 to exclude disputes relating to maritime boundary delimitation and historic bays and titles from compulsory dispute settlement, it may still be subject to the compulsory conciliation procedures in Annex 5 of UNCLOS, if it meets certain conditions.[77] The commission has competence to "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.[78] The commission is obliged to issue a report on either the agreement achieved or its conclusions on all questions of fact or law relevant to the matter and any appropriate recommendations.[79] The parties are obliged to negotiate a settlement or an agreement on the basis of this report and if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit to compulsory binding dispute settlement under UNCLOS.[80]

The utility of such a mechanism is obvious, particularly for countries not interested in a binding result but wanting to move negotiations along. However, in the context of the East China Sea dispute, there may be several challenges for either Korea, China or Japan in unilaterally referring the dispute to compulsory conciliation. First, two of the threshold conditions for compulsory conciliation may not be met. First, one could argue that the dispute arose in the 1970, after China protested Japan's claim to the seabed, and not after 1994 (when UNCLOS came into force) as required under Article 298, although one could also argue that the dispute really came into play after each country passed their maritime zone legislation after UNCLOS came into force. Second, the dispute must not involve the consideration of any unsettled disputed on sovereignty or other rights over continental or insular land territory. The delimitation dispute does involve consideration of the sovereignty dispute over Senkaku/Diayutai Islands but, a conciliation commission could arguably ignore the Islands and only consider delimitation in the northern part of the East China Sea.[81]

The other challenge is that neither party may wish to unilaterally refer the dispute to compulsory conciliation for the same reasons mentioned above in relation to binding dispute settlement mechanisms. The outcome is too unpredictable and the risk of losing is too great. Even though the report is non-binding, the possibility of being compelled to compulsory dispute settlement still exists although purportedly only by "mutual consent," the meaning of which is ambiguous.

Provisional Arrangements of a Practical Nature As a Viable Option in the East China Sea

UNCLOS, in recognition of the fact that negotiations on maritime delimitation agreements can take time, contains a provision on other arrangements that States with overlapping claims may conclude pending final delimitation. Articles 74 (3) and 83 (3) provides that if delimitation cannot be effected by agreement:

> [T]he States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and during the transitional period,

[77] Article 298 (1) (i) (a), UNCLOS.
[78] Article 6, Annex V, UNCLOS.
[79] Article 7, Annex V, UNCLOS.
[80] Article 298 (1) (a) (ii), UNCLOS.
[81] Gao "Joint Development in the East China Sea: Not an Easier Challenge than Delimitation," 73.

> not to jeopardize or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation.

This provision is designed to "promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation" and "constitutes an implicit acknowledgement of the importance of avoiding the suspension of economic development in a disputed maritime area."[82]

As illustrated above, there is a great impasse between the Northeast Asian States on the applicable principles of delimitation, which may not be resolved in the near future. Provisional arrangements of a practical nature provide a valuable, functional tool to both manage natural resources and as a mechanism to diffuse tension between States with overlapping claims. The discussion in this section will summarize the principles related to provisional arrangements of a practical nature and will then explore a particular type of provisional arrangement relating to hydrocarbon resources, namely the joint development of hydrocarbons.

Meaning of 'Provisional Arrangements of a Practical Nature'

The use of the word "provisional" implies that the arrangements are interim measures pending the final delimitation of maritime boundaries.[83] It is commonly observed that the use of the term "arrangements" implies that the arrangement can include both informal documents such as *Notes Verbale*, Exchange of Notes, Agreed Minutes, Memorandum of Understanding etc,[84] as well as more formal agreements, such as treaties.[85] With regards to the meaning of "practical nature", the article itself does not give much guidance, but has been interpreted to mean that such arrangements "are to provide practical solutions to actual problems regarding the use of an area and are not to touch upon either the delimitation issue itself or the territorial questions underlying this issue."[86]

Nature of the Obligation in Articles 74 (3) and 83 (3)

It is clear that there are two aspects to the obligation in Articles 74 (3) and 83 (3). First, States concerned shall make every effort to enter into provisional arrangements of a practical nature. Second, States, in good faith, shall make every effort not to jeopardize or hamper the reaching of the final delimitation agreement.

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[82] *Guyana v. Suriname* (UN Law of the Sea Annex VII Arb.Trib. Sept. 17, 2007) at para 60 at http://www.pca-cpa.org

[83] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" 78 *American Journal of International Law* 345 (1984) at 356

[84] Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Netherlands: Martinus Nijhoff Publishers, 2004) at 47. Kim notes that "some States may prefer MOUs to formal agreements for provisional arrangements because these have some advantages in several aspects: no need to publish them as these are not treaties: no need for elaborate final clauses or the formalities surrounding treaty-making: easy amendment; and no need to be submitted for an approval of the parliament." See also Lagoni, *supra* note 85 at 358.

[85] See Kim, *ibid*.

[86] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" at 358.

The obligation of States to make every effort to enter into provisional arrangements of a practical nature has been has been succinctly summarized by scholars, based on judicial precedents such as the *North Sea Continental Shelf Cases*:

> The States concerned are obliged to "enter into negotiations with a view to arriving at an agreement" to establish provisional arrangements of a practical nature 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." However, the obligation to negotiate does not imply an obligation to reach agreement…[87]

This view was endorsed in a recent arbitration between Guyana and Suriname by an Arbitral Tribunal constituted under Annex VII of UNCLOS. While it was acknowledged that the language "every effort" leaves "some room for interpretation by the States concerned, or by any dispute settlement body," it imposes on the Parties "a duty to negotiate in good faith." This requires the parties to take "a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement."[88] Further, the obligation to negotiate in good faith "is not merely a nonbinding recommendation or encouragement but a mandatory rule whose breach would represent a violation of international law."[89]

However, it is clear that States are under no obligation to enter into any provisional arrangement but must only "make every effort" to negotiate in good faith. Articles 74 (3) and 83 (3) also leave States with significant discretion on the type of provisional arrangements which should be adopted.[90]

The obligation to negotiate in good faith appears to include an obligation to consult with each other if carrying out unilateral activities in the disputed area and to continue to negotiate even after such unilateral activities take place. In the *Guyana v. Suriname* Arbitration, it was found that the Parties had breached their obligation to negotiate provisional arrangements of a practical nature pending maritime delimitation of its territorial sea, EEZ and continental shelf boundary. This stemmed from an incident in 2000 where an oil rig and drill ship engaged in seismic testing under a Guyanese concession was ordered to leave the disputed area by two Surinamese vessels. It was found that Guyana had violated its obligation under Article 83 (3) as it should have, in a spirit of co-operation, informed Suriname of its exploratory plans, given Suriname official and detailed notice of the planned activities, offered to share the results of the exploration, given Suriname an opportunity to observe the activities, and offered to share all the financial benefits received from the exploratory activities.[91] Similarly, the Tribunal found that when Suriname became aware of Guyana's exploratory efforts in disputed waters, "instead of attempting to engage it in a dialogue which may have lead to a satisfactory solution for both Parties, Suriname resorted to self-help in threatening the oil rig and drill ship in violation of [UNLCOS]."[92]

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[87] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," at 356.
[88] *Guyana v. Suriname*, at para 461.
[89] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements, at 354.
[90] Natalie Klein, "Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes" 21 (4) *International Journal of Marine and Coastal Law* 423 (2006) at 466.
[91] *Guyana v. Suriname*, at para 478.
[92] *Guyana v. Suriname*, at para 476.

The second part of the obligation provides that during this transitional period States are obliged not to jeopardize or hamper the reaching of a final agreement on delimitation. It is said that a court or tribunal's interpretation of this obligation must reflect the delicate balance between preventing unilateral activities that affect the other party's rights in a permanent manner but at the same time, not stifling the parties' ability to pursue economic development in a disputed area during a time-consuming boundary dispute.[93]

International courts and tribunals have found that "any activity which represents an irreparable prejudice to the final delimitation agreement"[94] is a breach of this obligation and that "a distinction is to be made between activities of the kind that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration."[95] For example, in the *Guyana v. Suriname* Arbitration it was found that allowing exploratory drilling in disputed waters was a breach of the obligation to make every effort not to hamper or jeopardize the reaching of a final agreement as this could result in a physical change to the marine environment and engender a "perceived change to the status quo."[96] This was in contrast to seismic testing, which did not cause a physical change to the marine environment.

Notably, it was also found that Suriname's actions in using the threat of force in getting the Guyana-licensed vessel to leave was not only a breach of its obligation not to jeopardize the final agreement, but also a breach of its obligation not to use force under UNCLOS, the UN Charter and general international law.[97]

Without Prejudice to the Final Delimitation

The key aspect of provisional arrangements of a practical nature is that they are "without prejudice" to the final delimitation." The effect of such a feature is that:[98]

- Nothing in the arrangement can be interpreted as a unilateral renunciation of the claim of either party or as mutual recognition of either party's claim;
- The arrangement itself does not create any legal basis for either party to claim title over the area and its resources;
- The States concerned cannot claim any acquired rights from the interim arrangement;
- Final delimitation does not have to take into account either any such preceding arrangement or any activities undertaken pursuant to such arrangement

[93] *Guyana v. Suriname*, *ibid* at para 470.
[94] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements at 366.
[95] *Guyana v. Suriname*, *supra* note 84 at para 467.
[96] *Guyana v. Suriname*, *ibid* at para 480.
[97] Guyana v. Suriname, *ibid* at para 445.
[98] As succinctly summarized by Dr. Gao Zhiguo in Gao Zhiguo, "Legal Aspects of Joint Development in International Law," in M. Kusuma-Atmadja, TA Mensah, BH Oxman (eds.), Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21 (Honolulu, Law of the Sea Institute, 1997), 625 at 639 (Gao [1997]).

Essentially, parties are preserving their claims either to sovereignty over disputed territory or to sovereign rights over the waters surrounding such territory, and at the same time, shelving the sovereignty disputes and the final boundary delimitation.[99]

The Area to Which Provisional Arrangements Apply

Articles 74 (3) and 83 (4) do not specify the area to which the provisional arrangements apply, although some suggestions and proposals at the negotiations of UNCLOS contained references to specific geographical lines or areas.[100] Ranier Lagoni opines that the obligation to negotiate provisional arrangements has a geographical connotation:

> In accordance with the above-mentioned object and purpose of paragraph 3, the obligation applies only to those areas about which the governments hold opposing views. These views must be expressed formally, for example by declarations, or may be implied, for example through protests filed against the acts of other states or foreign nationals, by acts of the national legislator or by the granting of licenses and concessions.[101]

However, this is not to say that States can make unilateral claims without any legal basis. When making claims to maritime space under UNCLOS, States are constrained by the obligation to make such claims in "good faith"[102] under both customary international law[103] and UNCLOS. Article 300 of UNCLOS explicitly requires States to "fulfill in good faith the obligations assumed under this Convention"…and "exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." A "good faith" claim is one that is "permissible under international law in the sense that they have a prima facie basis in law."[104] Just as delimitation "presupposes an area of overlapping entitlements,"[105] the area in which provisional arrangements applies must be in an area of overlapping "entitlements" based on claims that were made in good faith with a prima facie basis in law.

This requirement is especially important in light of the nature of the obligation to enter into provisional arrangements and not to jeopardize or hamper the reaching of a final delimitation agreement outlined above. Under Articles 74 (3) and 83 (3), States are constrained in the unilateral exploration and exploitation of their resources. If one State makes an extreme claim (i.e. one which has little basis in international law), which overlaps with another State's claim, the former would be able to argue that the latter cannot exploit its resources in the area of overlapping claim. This would be particularly unfair and inequitable if the former's claim has no basis under international law.

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[99] Hazel Fox, Paul McDade, Derek Rankin Reid, Anastasia Strati, Peter Huey, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*, (Great Britain: British Institute of International and Comparative Law, 1989) at 378

[100] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" at 356.

[101] Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" at 356.

[102]Ranier Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" at 356

[103] For an overview of the concept of "good faith" in international law, see Markus Kotzer, "Good Faith (Bona Fides)" in Max Planck Encyclopedia of Public International Law, Volume IV at 508 – 516.

[104] Xinjun Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea has stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation," *Ocean Development and International Law* 42 (2011): 53 – 65, 58.

[105] *Bangladesh/Myanmar Case*, Judgment, paragraph 397.

The problem of course is how to determine whether a claim has a prima facie basis under international law, or rather, how does one party convince the other party that its claim has some basis in international law? This is particularly a problem in the East China Sea where Japan appears to disregard the idea (officially at least) that China/Korea can have an extended continental shelf claim in areas less than 400 nm. Ultimately only a court can definitively decide what is valid under international law, and if States genuinely object to the invalidity of an entitlement (to be differentiated from disagreeing with delimitation principles), then they must be prepared to litigate the matter. Until then, parties to a dispute can only rely on the other party's "own good faith interpretation of relevant legal principles and their application to the factual circumstances of a dispute"[106] and with all the down sides that entails.

Types of Provisional Arrangements

As discussed above, Articles 74 (3) and 83 (3) do not mandate the type of provisional arrangements States can enter into, but leave it to the discretion of the States concerned. State practice shows that provisional arrangements can include a wide variety of arrangements such as mutually agreed moratoriums on all activities in overlapping areas, joint development or cooperation on fisheries, joint development of hydrocarbon resources, agreements on environmental cooperation, and agreements on allocation of criminal and civil jurisdiction. The next section will explore one type of provisional arrangement, namely, the joint development of hydrocarbon resources.

Joint Development of Hydrocarbon Resources as a Type of Provisional Arrangement

The concept of joint development of hydrocarbon resources appears to have emerged in the 1950s.[107] However, despite considerable state practice since then, there is no common or uniform definition of joint development of hydrocarbon resources.[108] It is usually used as a "generic term" [109] and extends from *unitization* of a single resource straddling an international boundary to joint development of a shared resource where boundary delimitation is shelved because it is not feasible or possible to reach an agreed boundary at the time.

The most comprehensive and inclusive definition of joint development is said to be given by Ranier Lagoni as Rapporteur to the Exclusive Economic Zone Committee of the International Law Association:

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[106] Xinjun Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea has stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation," *Ocean Development and International Law* 42 (2011): 53 – 65, 59.

[107] Fox et al, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*, (Great Britain: British Institute of International and Comparative Law, 1989) at 54.

[108] Thomas Mensah, "Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation" in Ranier Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff Publishers, The Netherlands, 2006) 143 – 153 at 146. For example, Mensah states that "some scholars seek to distinguish between, on the one hand, 'unitization of shared resources' which they describe as an arrangement under which 'a single resource straddling an international boundary is developed subsequent to agreement without reference to such boundary' and on the other , joint development properly so called which they define as 'a regime under which the entire boundary dispute is set aside, thus creating an ambient development of political cooperation from the outset."

[109] Fox et al, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*, (Great Britain: British Institute of International and Comparative Law, 1989) at 43

> The co-operation between states with regard to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims. [110]

The British Institute of International and Comparative Law (BIICL) in their seminal book on joint development also gave a comprehensive definition of joint development:

> [A]n agreement between two States to develop so as to share jointly in agreed proportions by inter-state cooperation and national measures the offshore oil and gas in a designated zone of seabed and subsoil of the continental shelf to which both or either of the participating States are entitled in international law."[111]

Joint development of hydrocarbon resources appears to be one of the preferred types of "provisional arrangements of a practical nature" adopted by States. In recent years, a question has arisen as to whether there is a rule of international law requiring co-operation in relation to common hydrocarbon resources found in overlapping claim areas.[112] It is generally accepted under international law that States have an obligation to co-operate in relation to common or shared resources. While it is agreed that there is no specific international convention or well-established customary international law obligation to cooperate in relation to common or shared resources, other sources of international law,[113] such as international conventions, international case law and General Assembly Resolutions, point to the existence of a general obligation to cooperate in relation to such resources.[114]

While the existence of a general duty of cooperation under international law in relation to shared resources (including hydrocarbon resources in overlapping claim areas) is evident, the nature and extent of this duty is far from well-established. It would arguably entail consultation, notification, exchange of information, etc., and an obligation to refrain from activities which would irreparably damage the shared resource to the detriment of the other party.

However, it is fair to say that the general duty of cooperation has *not* evolved to impose a specific duty on States concerned to enter into joint development arrangements for common hydrocarbon resources. First, there is no international convention which specifies this obligation. Articles 74 (3) and 83 (3) leave it to the discretion of the States as to what type of provisional arrangement States may enter into, and again, it is merely an obligation to negotiate in good faith. Article 123 provides that States bordering an enclosed

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[110] Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?" 21 (4) International Journal of Marine and Coastal Law 489 (2006) at 495

[111] Fox et al, *Joint development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary*, (Great Britain: British Institute of International and Comparative Law, 1989) at 45

[112] David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?" 93 (4) *American Journal of International Law* 771 (1999) at 780

[113] Under Article 38 (1) of the Statute of the International Court of Justice, the traditional sources of international law are (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (2) international custom as evidence of a general practice accepted as law, (3) general principles of law recognized by civilized nations, (4) subject to Article 59 of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

[114] David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?" 93 (4) American Journal of International Law 771 (1999) at 780.

or semi-enclosed sea should co-operate with each other, but it imposes no "specific and legally enforceable" obligation on these States, as its language is more "exhortatory than obligatory."[115] Also, the call for cooperation in the article is limited to conservation of marine living resources, protection of the marine environment and coordination of marine scientific research. It does not include the joint development of hydrocarbon resources.[116]

Second, while international courts and tribunals have endorsed joint development agreements as an alternative to maritime delimitation,[117] they have not gone as far to say that States have an obligation to enter into them. For example, in the *North Sea Continental Shelf Cases,* the ICJ held that joint exploration agreements were "particularly appropriate when it is a question of preserving the unity of a deposit" in areas of overlapping claims.[118] The separate opinion of Judge Jessup also noted that "even if it is not yet considered to reveal an emerging rule of international law, the principle of co-operation may at least be regarded as an elaboration of factors to be taken into account in the negotiations now to be undertaken by the parties."[119] In his dissenting opinion in the 1982 continental shelf delimitation case between *Tunisia and Libya,* Judge *ad hoc* Evensen proposed a system of joint exploration of petroleum resources based on his view that joint development represented an alternative equitable solution to the maritime boundary dispute which was eventually adopted by the parties.[120] In the *Eritrea/Yemen* arbitration, the arbitral tribunal stated that the parties should give every consideration to the shared or joint or unitized exploitation of any such resources.[121]

Third, there is also no customary international law obligation to enter into joint development agreements, despite their being considerable doctrinal debate on the existence of such an obligation.[122] Customary international law consists of state practice, which must be both constant and uniform and common to a significant number of States, particularly those States whose interests are specially affected, and there must be *opinio juris* in that States must recognize that this practice constitutes law binding on them.[123] While there is arguably widespread state practice on joint development in many areas of the world, it does not appear to be constant or uniform. Nor does it appear to be a result of the fact that States believe they are under a legal obligation to enter into such agreements.[124]

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[115] Ong, *ibid.*
[116] Ong, *ibid* at 782.
[117] *Guyana v. Suriname*, at 463
[118] *North Sea Continental Shelf Sea Case* [1969] ICJ Rep 51 at para 99.
[119] *Ibid* at 83.
[120] Ong, at 787.
[121] Eritrea/Yemen II, 119 I.L.R p 417 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 and 1999* online http://www.pca-cpa.org
[122] For a summary of the two opposing schools of thought, see Okafor, *supra* note 111 at 506 – 509.
[123] See Martin Dixon, *Textbook on International Law,* 6th Ed. (Oxford University Press: United States, 2007) at 30 – 37.
[124] Ian Townsend-Gault and William Stormont, "Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?" in Gerald Blake, William Hildesley, Martin Pratt, Rebecca Ridley and Clive Schofield (eds), *The Peaceful Management of Transboundary Resources* (Great Britain, Graham & Trotman Ltd and Kluwer Publishers Group, 1995) at 53.

Existing Provisional Arrangements on Hydrocarbon Resources in the East China Sea

To date, there are two provisional arrangements relating to hydrocarbon resources in the East China Sea, the 1974 Japan-South Korea Joint Development Agreement[125] and the Principled Consensus on the East China Sea Issue between China and Japan. Each will be examined in greater detail below.

1974 Japan-South Korea Joint Development Agreement

As mentioned above, Japan and South Korea had made unilateral claims to the seabed in the early 1970s (along with Taiwan and China), and by 1971, all oil exploration activities by foreign oil companies in the East China Sea, except by those of non-US company, Royal Dutch Shell, had ceased. However, spurred on by the oil crisis of 1973,[126] Japan and Korea concluded the joint development agreement in 1974. Korea ratified the agreement in 1974 but Japan only ratified it in 1978 after it had made changes to its oil exploration laws.[127]

Joint Development Zone (JDZ)

The Agreement established a joint development zone which consisted of the overlapping continental shelf claims of the two countries. It covered an area of 24,092 square nautical miles enclosed by the outer limits of each party's claims to the continental shelf (with Korea measuring its CS boundary through natural prolongation and Japan measuring through the median line). It accommodated both countries delimitation arguments.[128] The Zone was initially divided into nine subzones although but reduced to six after surveys were carried out indicating limited hydrocarbon resources.[129]

Without Prejudice Clause

The Parties agreed that:

> Nothing in this Agreement shall be regarded as determining the question of sovereign rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective parties with respect to the delimitation of the continental shelf.[130]

[125] *Agreement Concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the two countries, signed in Seoul on 30 January 1974*

[126] The 1973 oil crisis was caused by the embargo on oil supply imposed by the Organization of Arab Petroleum Exporting Countries in response to the US to supply Israeli military during the 1973 Arab-Israeli war.

[127] Japan's 1950 mining law only covered land-based exploitation and had several provisions which made it difficult to apply to the exploration and exploitation for the development of oil in the sea. Its Ad Hoc Law on sea bed mining came into force in 1977. For a more detailed discussion, see Masahiro Miyoshi, "The Japan-South Korea Agreement on Joint Development of the Continental Shelf" 10 (3/4) Energy 545 (1985)

[128] Gao Jianjun, "A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea" 40 (3) Ocean Development and International Law 291 (2009) at 293.

[129] Schofield (2009), *supra* note 44.

[130] Article XVIII, Japan South Korea JDA 1974.

Both parties agreed to shelve their respective claims for fifty years. If the parties agree to terminate the Agreement before its expiration on the ground that natural resources are no longer economically exploitable, this shelving will come to an end. The Agreement has no provision that parties undertake to continue negotiations for boundary delimitation.[131]

Management of Resources

The Agreement established an innovative mechanism for the management of resources. Each State appoints one or more concessionaires in each subzone[132] who have rights of exploration and exploitation[133]. If a Party authorizes more than one concessionaire with respect to one subzone, all shall such concessionaires shall have an undivided interest.[134] Each party is entitled to one half of the proceeds recovered from each subzone and is also obligated to meet one half of the expenses for the recovery.[135] The method of selection of concessionaires is left to individual States, although the States have an obligation to notify each other of selected concessionaires.

Concessionaires of both Parties are required to enter into an operating agreement to carry out joint exploration and exploitation in the JDZ[136]. Such joint operating agreements shall provide details relating to the sharing of natural resources and expenses, designation of the operator, treatment of sole risk operations[137], adjustment of fisheries interests, and settlement of disputes.

The duration of the exploration right is 8 years from the date of entry into force from the operating agreement unless commercial discovery is made on which the exploration right explores. When commercial discovery of natural resources is made during the period of the exploration right, concessionaires of both Parties may apply to the respective Parties for the establishment of the exploitation right. When the Parties receive such application, they shall promptly hold consultations and shall without delay approve such application. The duration of the exploitation right shall be thirty years from the establishment of such right.

The parties established a Joint Commission[138] comprised of Foreign Office and Ministry of Trade and Industry officials from each State which meet twice a year under co-chairman.[139] The role of the Commission is as a "forum for enquiry and implementing cooperation"[140] It is a "consultative body rather

[131] Masahiro Miyoshi "The Joint Development if Offshore Gas and Gas in Relation to Maritime Boundary Delimitation" 2 (5) in *Maritime Briefing, International Boundaries Research Unit* (1999) edited by Clive Schofield.
[132] Article IV (1), Japan South Korea JDA 1974.
[133] Article X, Japan South Korea JDA 1974.
[134] Article IV (1), Japan South Korea JDA 1974.
[135] Article IX, Japan South Korea JDA 1974.
[136] Article V, Japan South Korea JDA 1974.
[137] The idea behind them is to allow one or members of a consortium who cannot get the required majority to agreement with them on drilling of certain weeks to undertake such drilling alone and at their sole risk.
[138] Article XXIV, Japan South Korea JDA 1974.
[139] Fox et al, at 117.
[140] *Ibid.*

than a powerful joint authority" and therefore the Joint Commission has set up a joint subcommittee of experts for practical discussion of technical matters.[141]

Applicable Law

The Agreement also adopted an applicable law provision which negated the usual contentious debate about whose law should apply in the joint development zone. It states that "the laws and regulations of one Party shall apply with respect to matters relating to exploration or exploitation of natural resources in the subzones with respect to which that Party has authorized concessionaires designated and acting as operators." Accordingly, Japanese law will apply in the sub-zone where a Japanese concessionaire works as the operator whereas Korean law will apply in a sub-zone where a Korean concessionaire works as the operator. However, the law will shift from Japanese to Korean depending on whose concessionaire is operating in the subzone,[142] thereby making operations subject to differing requirements in respect of health, safety, construction, control of pollution etc.[143]

China's Objections

The Chinese Government objected to the Japan-South Korea Joint Development Agreement on the basis that the "question of how to divide the continental shelf in the East China Sea should be decided by China and the other countries concerned through consultations" and the Japan-South Korea JD Agreement was "an infringement on China's sovereignty."[144]

China also protested strongly when exploratory work began. China also claims part of the JDZ and refuses to recognize its creation.[145] However, in 2008, both China and Japan reportedly shelved their plans to develop the Asunaro gas field as the site could potentially straddle the China-South Korea median line and stretch into the Japan-South Korean joint development area and they did not want to trigger a dispute with South Korea.[146]

Has the Japan-South Korea Joint Development Agreement been effective?

Arguably, the workability of the Japan-South Korea joint development arrangements has not been tested as there have been no discoveries of commercially viable oil and gas reserves to date.[147] Both Japan and South Korea launched drilling seven times in three districts of the joint development zone between 1980

[141] Masahiro Miyoshi "The Joint Development if Offshore Gas and Gas in Relation to Maritime Boundary Delimitation" 2 (5) in *Maritime Briefing, International Boundaries Research Unit* (1999).
[142] Miyoshi (1999), at 13.
[143] Fox et al, at 129.
[144] Choon-Ho Park (1975), at 44.
[145] Clive Schofield, "Blurring the Lines? Maritime Joint Development and the Cooperative Management of Ocean Resources," *Issues in Legal Scholarship: Volume 8 (1)(Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries and the Law of the Sea), Article 3* (2009) at 13.
[146] "Japan, China drop Asunaro gas field plan – fear of conflict with ROK seen behind move" The Daily Yomiui, 21 June 2008
[147] Schofield, "Blurring the Lines?" 13.

and 1986, but saw no results suggesting the presence of oil or gas.[148] In 2006, South Korea reportedly proposed that Japan and South Korea conduct a joint field assessment of oil and gas in the JDZ as preliminary surveys had raised the possibility of undersea geographical features that could contain oil and gas.[149]

However, it has been said that "despite the absence of commercial discoveries, the [Japan-South Korea JDA] performs a useful independent function in the removal of tension between the two States."[150] Indeed, if discoveries are eventually made, there is at least a proper and relatively comprehensive framework for the joint development of these resources.

The 2008 China-Japan Principled Consensus in the East China Sea

In 2004, Japan and China embarked on negotiations on the development of oil and gas resources in the East China Sea pursuant to its "Consultations on the Issues of the East China Sea." A few factors appear to have played a part in pushing negotiations. First, was Chinese exploration of Chunxiao fields near the median line claimed by Japan. While the Chunxiao fields fell within the Chinese side of the boundary, Japan claimed that it was tapping into gas reserves which straddle the median line, a claim which was later substantiated.[151] Second, the increasing patrols by Chinese military forces in the area of territorial disputes, particularly in areas where there were oil rigs or oil fields,[152] made Japan realize that a solution needed to be found. Third, the improvement in general bilateral ties between the countries prompted by changes in Japanese leadership (namely the resignation of Junichiro Koizumi who was famously nationalistic) also moved negotiations along.[153] In June 2008, after three and a half years of negotiations, China and Japan reached a "Principled Consensus on the East China Sea Issue," which included provision for joint development in the East China Sea.

The 2008 Consensus consists of three parts, first, cooperation between China and Japan in the East China Sea, second, the understanding between China and Japan on joint development of the East China Sea and third, the understanding on the participation of the Japanese in the development of the Chunxiao oil field.

<u>Cooperation between China and Japan</u>

The first part states that both countries have agreed to co-operate in order to change it into a "Sea of Peace, Cooperation and Friendship". The co-operation is without prejudice to the legal position of either party.

[148] "Korea, Japan to Resume Exploration of Continental Shelf," *Asia Pulse*, August 1, 2002.

[149] "South Korea to Propose Joint Oil Exploration with Japan," *BBC*, May 26, 2006.

[150] Fox, McDade, Reid, Strati, and Huey, *Joint Development*, 117.

[151] Drifte, *supra* note 142.
[152] *Ibid.*
[153] Petersen, *supra* note 189 at 460.

Joint Development in the East China Sea

With regards to joint development, the two sides agree to joint development, in area established by the China-Japan 1997 Fisheries Agreement. [154] During negotiations, China proposed joint development in the area surrounding Senkaku, but this was rejected by Japan.[155] The joint development zone established in the Consensus consists of only part of the overlapping claim areas of China and Japan. The joint development area consists of a small block which sits astride the median line between Japan and China. It includes only part of the overlapping claim on the eastern side of the median line as well as an area that is not subject to overlapping claims in the western side of the median line.[156] The vast majority of the proposed zone is located on the Japanese side of the median line with only the northwestern corner of the joint area on the Chinese side of the line.[157]

The Consensus does not spell out detailed provisions on joint development and merely states that the two sides "through joint exploration, will select by mutual agreement areas for joint development" and that the "two sides have agreed to continue consultations for the early realization of joint development in other parts of the East China".[158]

Chunxiao Oil Field

The third aspect of the agreement provides that Chinese enterprises welcome the participation of Japanese in the existing oil and gas field in Chunxiao in accordance with the relevant laws of China governing co-operation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. Agreement on this will be reached through an exchange of notes.

Issues in the 2008 Principled Consensus

The 2008 Principled Consensus faced immediate problems. First, there were criticisms that China implicitly recognized the median line claim of Japan in the Principled Consensus. Chinese ministers had to publicly state that China never recognized the median line claim of Japan and that the joint development area was not defined by the median line.[159]

Second, differing interpretations with regards to the development of the Chunxiao fields also arose. Japan claimed that China and Japan were carrying out joint development of the Chunxiao Field whereas China argued that all they had allowed was capital participation of the Chinese and that Japan had acknowledged China's sovereign rights over Chunxiao.[160]

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[154] Gao Jianjun (2009), *supra* note 158 at 293.
[155] *Ibid.*
[156] *Ibid.*
[157] Schofield (2009), *supra* note 44 at 24.
[158] Gao Jianjun (2009), *supra* note 158 at 293.
[159] Xinjun Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea has stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation," *Ocean Development and International Law* 42 (2011): 53 – 65, 57.
[160] Gao Jianjun, "A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea" 40 (3) Ocean Development and International Law 291 (2009) at 296.

Third, there is also a potential for disagreement on what is meant by the agreement between the two States to "continue consultations for the early realization of joint development in other parts of the East China Sea." As noted by Gao Jianjun[161], while it is clear that the defined block is not intended to be the only area of joint development, this did not subject the whole of the East China Sea to joint development. For example, when China continued the development of its Tianwaitian field within China's 200 nm EEZ but near the median line, Japan objected. It argued that under the Consensus, China is required to consult Japan in the development of the Tianwaitian Field as it falls within the definition of "other parts of the East China Sea." China, on the other hand, claimed that "other parts of the East China Sea" does not include China's undisputed waters and Japan's view is a misinterpretation of the Consensus.

Fourth, there is also some debate on the legal nature of the Consensus. Japan has argued that it cannot be considered a binding agreement. While the Chinese government has yet to take an official position on this, but there are Chinese scholars who argue that it is indeed a binding agreement.[162]

Moving Forward on Provisional Arrangements in the East China Sea

It is clear from the above discussion that the Northeast Asian States have experienced varying degrees of success with provisional arrangements relation to hydrocarbon resources. Arguably, the area of overlapping claims between Japan and South Korea has been resolved in that there exists a framework for joint development, although the workability of the agreement has not been tested. The more pressing area in which there is a need for a resolution is to define the area of overlapping claims between China and Japan. This section will first examine the challenges to concluding a meaningful provisional arrangement of a practical nature and will then recommend steps that can be taken by China and Japan to move forward on provisional arrangements relating to hydrocarbon resources.

Challenges in Concluding Provisional Arrangements in the East China Sea

There are several factors which mitigate against the successful conclusion and implementation of provisional arrangements in areas of overlapping claim between China and Japan.

First, the existence of the sovereignty dispute over the Senkaku/Diayutai Islands greatly complicates efforts to conclude provisional arrangements. Even though provisional arrangements are without prejudice to each party's claims and can be adopted in an area which does not affect the claim to the Senkakus, they are intrinsically associated with the East China Sea in the mind of the Japanese and Chinese public. Any provisional arrangement in the East China Sea runs the risk of being perceived as a surrender of sovereignty of the Senkaku/Diayutai Islands as well as the resources in the East China Sea. Even the possibility of national electorates objecting to the sharing of resources can pose a genuine obstacle to negotiations of provisional arrangements. For example, as mentioned above, even though the 2008 Principled Consensus intentionally did not include an area near the Senkakus (despite Chinese

[161] Ibid at 296.
[162] Zhang, at 57.

proposals to this effect),[163] it still was mired in controversy after its conclusion stemming for different interpretations of the Consensus portrayed in the Chinese and Japanese media.[164]

Second, the overlapping claims in the East China Sea between China and Japan cover a relatively large area and this makes it infinitely more difficult to conclude any meaningful provisional arrangements. However, from the point of view of legal certainty, maximum advantage would be achieved if the provisional arrangement were to involve all and not just simply part of the disputed area.[165] As illustrated by the reaction to the Principled Consensus, adopting arrangements which only cover part of the overlapping claim, may be problematic.

Third, the fact that the parties have employed such different delimitation principles to define the area of their claim means that agreeing on a suitable area within the overlapping claims that can be subject to provisional arrangements may be fraught with difficulty. Japan, for example, does not accept that China has any legal basis whatsoever in claiming an extended continental shelf in areas less than 400 nm. This means that it may never accept an area for joint development lying on China's extended shelf claim. For example, it has been pointed out the proposed joint development zone in the Consensus is located on the Japanese side of the median line, with only the north-western corner of the joint area on the Chinese side of the line.[166] As pointed out by Zhang Xinjun, this is a lack of "reciprocity" as it ignores China's claim to the outer continental shelf and is hence perceived as unfair.[167]

Fourth, and perhaps most importantly, the most important factor for both the successful conclusion and continuation of any provisional arrangement, especially those relating to resources, is arguably the political will of the states parties.[168] Such political will must be sufficient "to withstand domestic upheavals such as change in government or internal strife between both states."[169] There does not appear to be political will present at the moment in China-Japan relations, either to conclude a joint development agreement or ensure its successful implementation. Indeed, relations between China and Japan have also been tempestuous[170] and both Governments have not hesitated to use popular opinion against the other to boost national approval ratings.[171] It is argued that the breakthrough in negotiations represented by the 2008 Consensus was largely prompted by changes in Japanese leadership (namely the resignation of the

[163] Gao "A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea," 293
[164] Gao "A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea," 296.
[165] Hazel Fox, Paul McDade, Derek Rankin Reid, Anastasia Strati, and Peter Huey, *Joint Development of Offshore Oil and Gas: A Model Agreement for States with Explanatory Commentary* (London: British Institute of International and Comparative Law, 1989), 316.
[166] Gao, "A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea," 293.
[167] See generally, Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled," 53.
[168] Most scholars have made this assertion. See Ian Townsend-Gault and William Stormont, "Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?" in Gerald Blake, William Hildesley, Martin Pratt, Rebecca Ridley, and Clive Schofield (eds.) in *The Peaceful Management of Transboundary Resources*, (London: Graham & Trotman Ltd and Kluwer Publishers Group, 1995), 53; Clive Schofield, "Unlocking the Seabed Resources of the Gulf of Thailand," *Contemporary Southeast Asia* 29, no. 2 (August 2007).
[169] Chidinma Bernadine Okafor, "Joint Development: An Alternative Legal Approach to Oil and Gas Exploitation in the Nigeria-Cameroon Maritime Boundary Dispute?" *International Journal of Marine and Coastal Law* 21, no. 4 (December 2006): 489, 510.
[170] Kent E. Calder, "China and Japan's Simmering Rivalry," *Foreign Affairs*, March – April 2006.
[171] See for example, Richard Bush, "China-Japan Security Relations," Policy Brief No. 177, Brookings Institute, available at <http://www.brookings.edu/papers/2010/10_china_japan_bush.aspx>.

famously nationalistic Junichiro Koizumi)[172] but again have stalled because of the successive changes in Japanese leadership. Provisional arrangements relating to resources require a large degree of co-operation both leading up to the conclusion of any agreement but also to ensure that such agreements are sustainable. China and Japan may not be capable of such long-term co-operation, and indeed, such arrangements may prove to be an irritant to bilateral relations instead of helpful.[173]

Provisional Arrangements as the Only Viable Solution (For Now)

Notwithstanding the above challenges, there are several reasons why provisional arrangements may be the only viable solution at least in the immediate future.

First, the limited nature of other dispute settlement options in the East China Sea underscores the importance of provisional arrangements. As explained above, the parties are too far apart on the applicable delimitation principles and compromise on this will take a long time to reach. The possibility of parties agreeing to use third party mechanisms such as the CLCS, binding dispute settlement procedures and compulsory conciliation is also limited. However, this situation could change if there were decision by an international court or tribunal in another case which supports the position of one side or the other on the applicable principles of delimitation.

Second, the status quo that presently exists can be extremely volatile. There have been numerous incidents at sea between Chinese vessels and Japanese vessels in areas where there are overlapping claims. These incidents threaten peace and stability in the region and pose constant irritants in bilateral relations. As illustrated by the Japan-South Korea Joint Development Agreement, provisional arrangements are a useful mechanism to diffuse tensions. Therefore, even a provisional arrangement to prevent incidents at sea in the areas of overlapping claims could diffuse tensions.

Third, adopting provisional arrangements which allow the shared exploration and exploitation of hydrocarbon resources will be of benefit to both Japan and China. China in particular is facing pressing energy needs with the increasing needs of its population. To unilaterally exploit resources in areas of overlapping claims would not only be contrary to international law (as explained in the *Guyana v. Suriname* Arbitration mentioned above), it would escalate tensions in the area.

Fourth, and perhaps the most persuasive argument in favour of provisional arrangements, is the fact that China and Japan have already committed to joint development in the 2008 Principled Consensus, albeit in a vague and arguably non-binding manner. Out of all the dispute resolution mechanisms available to the parties, they have shown a distinct willingness to consider such arrangements. It will be very difficult for either party to backtrack from this "in principle" commitment and the seeds for co-operation on resources have already been sown.

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[172] Alexander M. Petersen, "Sino-Japanese Cooperation in the East China Sea: A Lasting Arrangement?" *Cornell International Law Journal* 42 (2009): 460.

[173] Clive Schofield "No Panacea: Challenges in the Applications of Provisional Arrangements of a Practical Nature" (Presentation at the 35th Center for Ocean Law and Policy Conference on *Maritime Border Diplomacy,* Bali, June 22–24, 2011).

Steps that China and Japan Can Take to Move Forward on Provisional Arrangements

In light of this, there are several steps that China and Japan can take to move forward on their initial commitment to jointly develop hydrocarbon resources in the East China Sea.

1) Agreement on a Suitable Area for Provisional Arrangements

The most important issue is for both States to agree on the area in which provisional arrangements apply. The first step would be to agree on the area of overlapping entitlements and then decide on areas within that area suitable for provisional arrangements. Of course, the area already established by the 2008 Principled Consensus is a good starting point at least for the joint development of resources. The area for provisional arrangements does not have to cover the entire overlapping entitlement (although admittedly, there are advantages if it does cover the whole area, as illustrated in the problems arising with the Principled Consensus). A clear-cut "area in dispute" would be the 12 nm territorial sea around the disputed Senkaku / Diayutai Islands. As both China and Japan claim the Islands, and given that they are certainly "rocks" entitled to a territorial sea under UNCLOS, this area provides a possible area for provisional arrangements including joint development.

2) Comply with the Obligations under Articles 74 (3) and 83 (3) of UNCLOS

Both China and Japan should make a concerted effort to comply with their obligations under Articles 74 (3) and 83 (3). They should enter into negotiations on provisional arrangements in good faith and should take a "conciliatory approach to negotiations, pursuant to which they [should] be prepared to make concessions in the pursuit of a provisional arrangement."[174] This obligation means that China and Japan will also have to notify and consult with each other if carrying out unilateral exploratory activities in areas of overlapping claims, and that neither can carry out unilateral drilling activities in such areas. This obligation, while meant to preserve the rights of parties pending final delimitation, is also useful in that it significantly reduces the risk of incidents between Chinese and Japanese vessels.

3) Consider Other Types of Provisional Arrangements to Foster Trust and Confidence

As a first step, before considering joint development arrangements, which require a large degree of co-operation and political will, China and Japan (and Korea for that matter) may wish to adopt other types of provisional arrangements entailing co-operation on non-controversial matters such as search and rescue, marine environmental protection and the safety of navigation. They may also wish to adopt arrangements akin to incidents at sea agreements where each party either agrees not to arrest vessels in certain defined overlapping areas or have established procedures when such incidents at sea occur. These are arguably less contentious than joint development of hydrocarbon resources and hence, may be easier to reach agreement on. Such small incremental steps such as these will help foster the good will and trust necessary for discussions on joint development. Further, such arrangements can be carried out on a

[174] *Guyana v. Suriname*, *supra* note 84 at para 461.

"without prejudice" basis with a clear stipulation that none of these arrangements should be considered a recognition of the other side's claim.

4) Managing Public Perceptions and Nationalistic Rhetoric

The East China Sea has become a potent symbol of nationalism for the populations of China and Japan, particularly because it contains the disputed Senkaku / Diayutai Islands. There is a natural tendency for governments to take actions and make decisions based on the prevailing domestic politics or sentiments. This is dangerous, as not only does it further inflame national sentiments and emotions, it makes it difficult for them to make a reasonable compromise on the international stage without being accused of surrendering sovereignty. This is a major obstacle to any joint development agreement in the East China Sea (and any peaceful settlement of the disputes for that matter).

Accordingly, the Governments of the Claimants and the media have a significant role in managing domestic politics and nationalistic rhetoric associated with the East China Sea. First, governments and the media should refrain from stoking national sentiments when incidents which are perceived as a threat to national sovereignty occur. Second, the governments should avoid taking extreme positions which are difficult to back down from. Third, the governments should educate the public on the benefits and importance of joint development and the fact that it does not involve a surrender of sovereignty. Last, the governments should be as transparent as possible or at the very least, give the appearance of transparency in any negotiations relating to joint development.

5) Joint Seismic Surveys

Joint seismic surveys could also be a suitable "provisional arrangement" for the East China Sea. While the East China Sea is often referred to as "oil rich," estimates of hydrocarbon resources differ widely.[175] While actual knowledge of hydrocarbon resources has the potential to make compromise more difficult, actual discoveries of resources can also add an impetus to enter into joint development. Significant reserves would "create a commercial rationale to set aside political differences and start making money."[176] Such knowledge will enable the parties to know what is at stake. More practically, it will also enable the parties to know where the hydrocarbons are and hence, assist in identifying an area that could be suitable for joint development. Such seismic surveys could be done on a without a prejudice basis and indeed, do not have to be "joint" but could be carried out by one party who could share the results with the other party.

[175] See Chris Acheson, "An Interview with James Manicom on the Disputed Claims in the East China Sea," The National Bureau of Asian Research, 25 July 2011. According James Manicom, the hydrocarbon reserves in the East China Sea are not significant at all when considered against Chinese and Japanese oil consumptions. Little evidence has been found substantiating Chinese estimates of gas and oil reserves.

[176] See Chris Acheson, "An Interview with James Manicom on the Disputed Claims in the East China Sea," The National Bureau of Asian Research, 25 July 2011.

6) Conclude Joint Development Arrangements between National Oil Companies

Given the turbulent relationship between China and Japan, it would be better to have any joint development arrangement be between the national oil companies of the respective States rather than create a supra-national authority to manage the resources. This would reduce the need for lengthy negotiations on how to manage the resources, and keep co-operation on a functional, practical level rather than a political level.