Legal Considerations in the Delimitation of the East China Sea and Its Implications for Dispute Settlement

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# TABLE OF CONTENTS

I. Maritime Claims in the East China Sea and Challenges to Delimitation 4  
   A. Maritime Claims in the East China Sea ................................................................. 4  
   B. Challenges to Maritime Delimitation in the East China Sea ........................... 5  

II. Principles And Methodology of Delimitation under International Law 8  
   A. Equitable Principles or Equidistance? ................................................................. 8  
   B. Natural Prolongation and Geophysical Factors in Delimitation under International Law ...... 10  
   C. Relevant Circumstances and the Rise of Coastal Geography .............................. 14  

III. China and Japan’s Entitlements In The East China Sea 16  
   A. China’s Entitlement .............................................................................................. 16  
   B. Japan’s Entitlement ............................................................................................. 24  
   C. Overlapping Entitlements in the East China Sea ............................................. 24  

IV. No Overlapping Entitlement 25  
   A. Primacy of Continental Shelf .............................................................................. 25  
   B. Applicable Boundary ........................................................................................ 28  

V. Delimitation Of Overlapping EEZ Entitlements (Only) 28  
   A. Primacy of EEZ .................................................................................................. 28  
   B. Delimitation of Overlapping EEZ Entitlements ............................................... 30  

VI. Delimitation In Cases of Overlapping Entitlements to The EEZ And to the Continental Shelf 31  
   A. Overlapping Entitlement to Exclusive Economic Zones .................................... 31  
   B. Overlapping Entitlements to Outer Continental Shelf and Distance Based Continental Shelf ...... 32  
   C. Overlapping Entitlement between China’s Continental Shelf and Japan’s EEZ ............. 34  
   D. Applicable Principles for Delimitation in Cases of Overlapping Titles .................. 35  
   E. Single Maritime Boundary versus Separate Boundaries .................................... 35  
   F. Separate Boundaries for Fisheries and Continental Shelf .................................. 38  
   G. Single Maritime Boundary .................................................................................. 43  

VII. Implications for Dispute Settlement 45  
   A. The Commission on the Limits of the Continental Shelf .................................... 45  
   B. Binding Dispute Settlement Mechanisms .......................................................... 46  
   C. Compulsory Conciliation .................................................................................... 48  
   D. Provisional Arrangements of a Practical Nature ............................................... 48  
   E. Negotiation of Boundaries .................................................................................. 51
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).\(^1\) It is reportedly rich in both hydrocarbon\(^2\) and fishery resources,\(^3\) however, overlapping claims in the East China have hindered the effective exploitation and management of such resources, and the unilateral actions of the countries concerned have threatened to undermine peace and stability in the region.

Maritime delimitation between China and Japan in particular is complicated by several factors. This includes the fact that Japan is less than 400 nautical miles (nm) from China; the difference in the respective views of China and Japan on the applicable delimitation principles stemming from the divergent treatment of a significant geophysical feature known as the Okinawa Trough and the sovereignty dispute over the Senkaku/Diaoyutai Islands between these two countries.

This Paper will examine one aspect of the challenges confronting China and Japan in delimitation, namely the difference in the respective views of China and Japan on applicable delimitation principles. It will demonstrate that from a strictly legal point of view, current principles on maritime delimitation do not provide a clear-cut answer to the fact scenario presented by the East China Sea. Instead, there are a variety of outcomes which can be justified by existing legal doctrine. It will then argue that this unpredictability and uncertainty in outcome has implications for the method of dispute settlement chosen by China and Japan and that ultimately, it underscores the need for a negotiated boundary agreement that encompasses two separate boundaries, one for the water column and one for the seabed.

Part I will examine the respective claims of China and Japan in the East China Sea and give a brief overview of the challenges to maritime delimitation. Part II will give an overview of the law of maritime delimitation and the larger context which shapes the dispute between China and Japan. Part III will explain the legal arguments that China and Japan can use to justify their respective entitlements in the East China Sea. Parts IV, V and VI will each explore the different permutations of overlapping entitlements between China and Japan and the consequences for delimitation. Part VII will finally examine the implications on the suitability of the various dispute settlement mechanisms available to China and Japan and will demonstrate why the negotiations of two separate boundaries for the water column and seabed appears to be the most appropriate.

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\(^2\) However, estimates of proven and potential hydrocarbon resources vary considerably: Reinhard Drifte, “Territorial Conflicts in the East China Sea—From Missed Opportunities to Negotiation Stalemate” (paper presented at the Conference on Dokto, Yeungnam University Daegy, May 13–14, 2009), available at <http://www.japanfocus.org/-Reinhard-Drifte/3156>.

I. MARITIME CLAIMS IN THE EAST CHINA SEA AND CHALLENGES TO DELIMITATION

A. Maritime Claims in the East China Sea

The 1982 UN Convention on the Law of the Sea (UNCLOS)\(^4\) allows States to claim an exclusive economic zone (EEZ) up to 200 nm where it has sovereign rights over living and non-living resources in the seabed and subsoil as well as the superjacent waters.\(^5\) Under the continental shelf regime, a coastal State also has sovereign rights over the mineral and non-living resources of the seabed and subsoil up to a distance of 200 nm\(^6\) or if certain criteria are met, it can claim an extended or outer continental shelf.\(^7\)

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,\(^8\) essentially following the UNCLOS definition of the continental shelf in Article 76. In May 2009, China submitted preliminary information to the Commission on the Limits of the Continental Shelf (CLCS) which 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.\(^9\) China has not made a full submission on the outer limits of its continental shelf. With regards to the EEZ, China proclaimed a 200 nm EEZ in its 1998 Law.\(^10\) However, it has not deposited the co-ordinates of the outer limit lines of the EEZ pursuant to Article 75 of UNCLOS.

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.\(^11\) 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.”\(^12\)

\(^5\) See generally, Part V of UNCLOS as well as Article 56.
\(^6\) Article 76 (1), UNCLOS.
\(^7\) See Articles 76 (1) and (4), UNCLOS, Article 77, UNCLOS.
\(^10\) Article 2, China’s Exclusive Economic Zone and Continental Shelf Act (1998).
\(^12\) Article 2, Japan’s Law on the Exclusive Economic Zone and the Continental Shelf (1996).
Like China, it has also claimed a 200 nm EEZ\textsuperscript{13} but has not deposited the coordinates of the outer limits of the EEZ with the UN.

\textbf{B. Challenges to Maritime Delimitation in the East China Sea}

The fact that the East China Sea is less than 400 nm means that China and Japan have overlapping continental shelf and EEZ claims which will need to be delimited. There are two major legal issues that present a challenge to maritime delimitation between China and Japan.\textsuperscript{14} First, is a disagreement on the nature of entitlement in the East China Sea as well as applicable delimitation principles, stemming from a lack of agreement on the status of the Okinawa Trough. Second, is the sovereignty dispute over the Senkaku/Diau-yu-tai Islands. While the focus of this Paper is the first issue relating to entitlement and delimitation and not the sovereignty dispute, both issues will be briefly summarized below.

\textit{Difference in Entitlement and Delimitation Principles}

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.\textsuperscript{15}

Both China and Japan differ considerably on the role that the Okinawa Trough should play in establishing entitlement to the shelf and delimitation. China has consistently endorsed the concept of the continental shelf being “the natural prolongation” of the territory of the coastal State. While China’s statements and legislation have always endorsed the natural prolongation principle, “they have all avoided directly mentioning the Okinawa Trough.”\textsuperscript{16} 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.

\textsuperscript{13} Article 1, Japan’s Law on the Exclusive Economic Zone and the Continental Shelf (1996).
\textsuperscript{14} See 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,” \textit{Ocean Development and International Law} 42 (2011): 53 – 65, 54. It has also been noted by Sun Pyo Kim that there is an also an issue about the applicable baselines and the use of offshore features as base points and that China and Japan will also have to agree with Korea on a tri-junction of the boundaries in order for delimitation which will necessitate Korea and China and Korea and Japan to agree on maritime boundaries. For example, it is noted that there are 14 or small islands which might affect the delimitation of maritime boundaries between China and Japan: See Sun Pyo Kim, \textit{Maritime Delimitation and Interim Arrangements in Northeast Asia}, (Netherlands: Martinus Nijhoff Publishers, 2004), 215 – 218.
\textsuperscript{15} Zhao Lihai, \textit{Literature of the Law of the Sea} (Peking University Press, 1996), 80.
With regards to delimitation, China has to date, argued for the delimitation of only the continental shelf, instead of the EEZ.\(^{17}\) With regards to the continental shelf, China “emphasizes the principle of equitable solution through consultations” rather than the median or equidistant line.\(^{18}\) However, it should be noted that China has not publicly indicated where it believes the continental shelf boundary with Japan to be although China will likely argue that the Okinawa Trough should constitute the boundary between itself and Japan.\(^{19}\)

Japan, on the other hand, has argued that the Okinawa Trough is a mere dent in the continental shelf of these two countries 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.\(^{20}\) 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)\(^{21}\) and in both cases, the median line is the applicable boundary between China and Japan.\(^{22}\) 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.\(^{23}\)

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.”\(^{24}\) China would resultantly get a greater share of the supposedly hydrocarbon-rich continental shelf.


\(^{18}\) 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 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.


\(^{20}\) 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.


\(^{22}\) See Article 2 of Japan’s EEZ and Continental Shelf Law (1996).


\(^{24}\) 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.
Sovereignty Dispute over Senkaku/Diayutai Islands

The Diaoyutai / Senkaku Islands are located approximately midway between Taiwan and Yayeyama Retto, the southernmost island of the Japanese Ryukyu Islands and are located on the western side of the Okinawa Trough. 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. 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 the Diaoyu/Senkaku Islands. 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 baselines. This would depend on whether the Diaoyu/Senkaku Islands are considered islands under Article 121 (1) of UNCLOS or “rocks” incapable of sustaining human habitation or economic life and to the effect they would be given in delimitation.

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26 Park (1973) at 248
31 Article 121 (3), UNCLOS. It has been argued that out of the eight features that make up the Senkaku 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 island. It is generally admitted that the larger features in the Senkaku Islands, namely Tiaoju/Utshuri-shima (4.319 sq km) and Huangweiyu, 1.08 sq km) may arguably be considered an island, capable of sustaining human habitation and economic life of its own and thus entitled to an EEZ or continental shelf: See Charney, “The Diaoyu/Senkaku Islands Maritime and Territorial Dispute,” 133; Su, “The Tiaoju Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan,” 397.
It has 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.\(^{33}\)

II. Principles and Methodology of Delimitation under International Law

The delimitation dispute between China and Japan in the East China Sea epitomizes the competing imperatives of flexibility versus certainty that have characterised maritime delimitation from the time of the 1958 Continental Shelf Convention. Accordingly, the East China Sea dispute must be viewed in the larger context of the developments in maritime delimitation law and the quest by international courts to find a balance between these imperatives. The sections below will explore three major trends in the law relating to maritime delimitation, first, the shift from the “equitable principles/relevant circumstances” approach to the “equidistance/relevant circumstances approach; second, the decline of natural prolongation and related geophysical factors in delimitation; and third, the rise of coastal geography as the predominant factor in delimitation.

A. Equitable Principles or Equidistance?

Articles 74 (1) and 83 (1) of UNCLOS sets out the applicable principles for delimitation of the EEZ and continental shelf in identical terms:

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

This imprecise terminology has been attributed to the difficulty in obtaining agreement of States negotiating UNCLOS on the applicable principles on delimitation.\(^{34}\) Some States preferred the equidistance principle, taking into account “special circumstances” when necessary, as the main principle of delimitation whereas others wanted to emphasize equitable principles.\(^{35}\) Articles 74 and 83 contained language which gave precedence to neither argument. However, over the years, the decisions of international courts and tribunals have attempted to articulate what is meant by

\(^{33}\) Su, “The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan,” 391.


“equitable solution” and such jurisprudence is recognized to be relevant to the interpretation of Articles 74 and 83.\textsuperscript{36} 

There are two distinct phases in international jurisprudence. The first phase from 1969 to 1992\textsuperscript{37} has been characterised as the “equitable principles-relevant circumstances” phase.\textsuperscript{38} 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.”\textsuperscript{39} Under this approach, equitable principles gave no primacy to equidistance as a method of delimitation.\textsuperscript{40} Instead, the goal of achievement of equitable results was the most important in delimitation (as opposed to the method of delimitation).\textsuperscript{41} 

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”\textsuperscript{42} or “very similar”\textsuperscript{43} to the “equidistance/special circumstances” method applicable to the delimitation of the territorial sea.\textsuperscript{44} This has been described as the “corrective-equity” approach.\textsuperscript{45} 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 consider whether there are factors calling for the adjustment of that line in order to...

\textsuperscript{36} 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 paragraph 184. 
\textsuperscript{39} St. Pierre and Miquelon Case, paragraph 38. 
\textsuperscript{40} Tunisia/Libya Case, paragraph 110. 
\textsuperscript{42} Maritime Delimitation and Territorial Questions between Qatar and Bahrain [2001] ICJ Reports 40, paragraph 231. 
\textsuperscript{44} See Article 15, UNCLOS. 
achieve an equitable result.\textsuperscript{46} Most recently, this has been modified to three steps in 2009 \textit{Black Sea Case}:\textsuperscript{47}

1) First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in a particular case. So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts.

2) At the second stage, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. During this stage the Court will consider factors such as the configuration of the coasts concerned and the presence of islands.

3) Finally, at the third stage, the Court will verify that the line does not, as it stands, 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. This final check for an equitable outcome entails a confirmation that no great disproportionality of the delimited maritime areas can be evident by comparison to the ratio of coastal lengths.

\textbf{B. Natural Prolongation and Geophysical Factors in Delimitation under International Law}

The nature of “natural prolongation” and its relationship with geology (the composition and structure of the seabed) and geomorphology (the shape and form of the seabed) come to the forefront in delimitation in the East China Sea. This is because China has argued that its entitlement to the continental shelf is based on natural prolongation and Chinese scholars have argued that “in terms of geography, topography, geomorphology, and geological structures, the Okinawa Trough has evident characteristics of separating the East China Sea continental shelf and slope from the [Ryukyu Islands of Japan].”\textsuperscript{48} It is therefore necessary to examine the role of these factors under international law.

\textsuperscript{46} See for example, \textit{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.
The prevailing view in the jurisprudence on continental shelf delimitation is that the relevance of natural prolongation and geophysical factors, such as geology and geomorphology in setting maritime boundaries, have dramatically diminished in importance. From 1969 to 1985, “the stated principles of law as perceived by international courts suffered a dramatic sea-change”\(^49\) that began with the *North Sea Continental Shelf Cases* and ended with the *Libya/Malta Decision*.

**North Sea Continental Shelf Cases**

In the seminal *North Sea Continental Shelf Cases*, the ICJ addressed the “nature of the legal institution of the continental shelf and thence proceeded to elaborate on the principles and rules that would apply to its delimitation.”\(^50\)

With regards to the legal nature of the continental shelf, the ICJ identified the concept of *natural prolongation* as the basis of legal title of the continental shelf:

> “What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually the territory over which the coastal State already has dominion – in the sense that, although covered with water, they are a *prolongation or a continuation of that territory*, an extension of it under the sea.

From this, it would follow that whenever a give submarine area does not constitute a natural or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; or at least it cannot be so regarded in the face of a competing claim by a State whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it (*emphasis added*).\(^51\)

While the ICJ did not expressly state that the concept of natural prolongation would automatically allow for the fixing of a continental shelf boundary,\(^52\) natural prolongation opened the door to geological and geomorphologic factors being applicable to delimitation.\(^53\)

First, the court said:

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\(^51\) *North Sea Continental Sea Cases*, paragraph 43. The ICJ’s formulation of the continental shelf was rooted in a “geological concept arguably a response to the uncertainty inherent in the definition of the continental shelf in the 1958 Continental Shelf Convention which set the limits of the continental shelf “to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas. The “exploitability criterion” had become increasingly untenable in light of technical advances made since 1958: See Malcolm Evans, *Relevant Circumstances and Maritime Delimitation* (Clarendon Press, Oxford, 1989), 47.


\(^53\) Highet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries,” 167
“The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation.”

The court’s concept of whether the continental shelf constituted a natural or the most natural extension of territory meant that “it was inevitable that parties must seek to demonstrate that the area subject to overlapping or competing claims was the most natural extension of its land mass”.

The court went on to say that “there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures” and gave examples of what elements it would take into account i.e. “some are related to the geological...aspect of the situation, others again to the unity of deposits...These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.”

Natural prolongation arguably “encouraged States to request international tribunals to determine continental shelf boundaries on the basis of geological and geomorphological features of the seabed.” As noted by Higet,

As used by the Court in 1969, the idea of “natural prolongation” was a descriptive attribute, designed to elaborate and describe basic elements to be considered by parties in the course of reaching a delimitation agreement. It was not a functional attribute, in the sense of being capable of providing a reason to find a boundary. Yet, this is how it came to be used in the subsequent cases.

In other words, natural prolongation was given “a fundamental character for both the entitlement and delimitation of the continental shelf.”

Indeed, natural prolongation, geological and geomorphologic arguments were frequently raised in subsequent cases such as in the 1977 Anglo-French Channel Arbitration, Tunisia/Libya

54 North Sea Continental Shelf Cases, paragraph 95.
56 North Sea Continental Shelf Cases, paragraph 93.
57 North Sea Continental Shelf Cases, paragraphs 94, 97 – 99.
58 Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation, 232.
61 Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (Decisions of the Court of Arbitration dated 30 June 1977 and 14 March 1978), Cdmg. 7438, Misc. No. 16 (1978) (Anglo-French Arbitration). UK argued that there existed in the English Channel a trough or trench called the “Hurd Deep” or Hurd Deep Fault Zone” along the axis of which the Tribunal was asked to find a boundary as an alternative to the equidistant line.
Continental Shelf Case\textsuperscript{62} and the Gulf of Maine Case.\textsuperscript{63} In all the cases, one party or both sought to argue that the area of shelf in dispute was a more natural prolongation of its own landmass. The courts, while never being convinced of these so-called natural prolongation arguments, implied that a geological or geomorphologic factor, could in certain circumstances, for example, if they were more pronounced or were more fundament, be used to indicate the natural or most natural extension of the land territory of a coastal State.\textsuperscript{64}

\textit{The Decision in Libya/Malta}

It is commonly asserted that the 1985 Libya/Malta Continental Shelf Case “finally disposed of natural prolongation” once and for all – at least up to a distance of 200 nm from the baseline. In this case, Malta and Libya were less than 200 nm apart and Malta argued that an equidistant boundary should be used. Libya argued that between Malta and Libya, there existed a fundamental geological and geomorphological discontinuity in the sea floor that should serve as a natural boundary which it called the Rift Zone. The ICJ essentially rejected this argument:

In view of the court, even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration. As the 1982 Convention demonstrates, the two institutions – continental shelf and exclusive economic zone – are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does, however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts.\textsuperscript{65}

The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding seabed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims...It follows that, since, the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as “the rift zone” cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese Shelf and the northward extension of the Libyan as if it were some natural boundary.\textsuperscript{66}

\textsuperscript{62} Both Tunisia and Libya sought to prove that the area of shelf in dispute was “more naturally” the appurtenance of its own landmass. Tunisia argued that its bathymetry to show the naturalness of its prolongation eastward. Libya argued that the continental shelf was more geologically akin to the southward lying Libyan coast than they were to the westward-lying Tunisian coast.

\textsuperscript{63} The US utilized, to a limited extent, a geological/geomorphologic argument. This was based on the separation between two banks, Brown’s Bank and Georges Bank, to the Northeast Channel and was said to constitute an equitable reflection of geographic reality and also confirmed by geological elements.

\textsuperscript{64} Highet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries,” 172.

\textsuperscript{65} Libya/Malta Case, paragraph 33.

\textsuperscript{66} Libya/Malta Case, paragraph 39.
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.\(^{67}\)

The Court acknowledged that its findings were in stark contrast to the relevance given to geological and geomorphologic features in previous cases. It dismissed this fact by stating:

...to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a regime of the title itself which used to allot those factors a place which now belongs in the past, in so far as sea-bed areas less than 200 miles from the coast are concerned.\(^{68}\)

However, the Libya-Malta judgment appears not to have closed the door on natural prolongation completely:

Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone, without a corresponding continental shelf. It follows that for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone; and this is quite apart from the provision as to distance in paragraph 76. This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.\(^{69}\)

This would seem to suggest that in the delimitation of continental shelves beyond 200 nm, natural prolongation (and hence geological and geomorphologic conditions) may still be relevant.\(^{70}\)

**C. Relevant Circumstances and the Rise of Coastal Geography**

*Libya/Malta* “was the end of the old law of maritime delimitation and the start of a new one” as it “radically altered the legal conception of the continental shelf” by substituting “distance from the coast in lieu of the continental shelf in the physical sense.”\(^{71}\) In doing so, it also changed the

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67 Libya/Malta Case, paragraph 39.

68 Libya/Malta Case, paragraph 40.

69 Libya/Malta Case, paragraph 34. Para 34.


factors that should be taken into account into delimitation. For example, in the North Sea Continental Shelf Cases, it was found that:

There is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not, it is the balancing up of all such considerations that will produce the result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.\(^{72}\)

The cases preceding Libya/Malta had focused on the “unicum” of each case without providing any normative principles that would provide coherence and predictability.\(^{73}\) This approach contributed to the view that “the law on the subject is whatever the tribunal wishes it to be, thereby further undermining the legitimacy of the law.”\(^{74}\) The judges in Libya/Malta intended to put back some certainty or “legal security” into the law of maritime delimitation by ensuring that relevant factors were to be mentioned in relation to a legal concept, the concept of title.\(^{75}\) It said that the “legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.”\(^{76}\) The Court went on to state:

> For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of the continental shelf could be fundamentally changed by the introduction of considerations strange to its nature.\(^{77}\)

By replacing natural prolongation with distance as the basis for title of the first 200 nm of the continental shelf, it rendered geophysical features irrelevant because they were not relevant to the issue of title over the continental shelf.\(^{78}\) The consequence was that “the criteria of delimitation were themselves oriented on this idea of distance, giving priority, as far as concerned methods, to geometric ones.”\(^{79}\) Libya/Malta paved the way for the rise of factors related to coastal geography.\(^{80}\) The decision hinted at this when it said:

\(^{72}\) North Sea Continental Shelf Cases, paragraph 93.
\(^{73}\) Kolb, Case Law on Equitable Maritime Delimitation, 317.
\(^{75}\) Kolb, Case Law on Equitable Maritime Delimitation, 333.
\(^{76}\) Libya/Malta Case, paragraph 27.
\(^{77}\) Libya/Malta Case, paragraph 48.
\(^{78}\) Kolb, Case Law on Equitable Maritime Delimitation, 331, 333.
\(^{79}\) Kolb, Case Law on Equitable Maritime Delimitation, 317 – 318.
\(^{80}\) Prescott and Schofield, The Maritime Political Boundaries of the World, 221.
The capacity to engender continental shelf rights derives not from the landmass but from the sovereignty over the landmass; and it is by means of the maritime front of this landmass, in other words, by its coastal opening, that this territorial sovereignty brings its continental shelf rights into effect.\textsuperscript{81}

Coastal geography and in particular, the configuration of the coasts of the parties has become a factor of primary importance in delimitation.\textsuperscript{82} Other factors related to coastal geography such as relative coastal length and “outstanding geographical features, notably islands” also now play a significant role,\textsuperscript{83} and this went hand-in-hand with the decline of geophysical factors in delimitation.

Having examined three discernible and interrelated trends in maritime delimitation law, the Paper will now examine the impact that these trends have had on the East China Sea dispute.

III. CHINA AND JAPAN’S ENTITLEMENTS IN THE EAST CHINA SEA

Delimitation “presupposes an area of overlapping entitlements.”\textsuperscript{84} The first step in delimitation is to determine whether there are entitlements and whether they overlap.\textsuperscript{85} This Part will examine what are the entitlements claimed by China and Japan in the East China Sea.

A. China’s Entitlement

China has claimed both a 200 nm EEZ and extended continental shelf in the East China Sea. Its claim to a 200 nm EEZ is uncontroversial, as it is allowed a 200 nm EEZ under UNCLOS.\textsuperscript{86} Its claim to continental shelf, however, is perceived as questionable and this will be examined below.

The definition of the continental shelf is set out in Article 76 (1) of UNCLOS:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measures where the outer edge of the continental margin does not extend up to that distance.

The “continental margin” comprises of the “submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, slope and rise.”\textsuperscript{87} Articles 76 (4

\textsuperscript{81} Libya/Malta Case, paragraph 49.
\textsuperscript{82} Prescott and Schofield, The Maritime Political Boundaries of the World, 221.
\textsuperscript{83} Prescott and Schofield, The Maritime Political Boundaries of the World, 222.
\textsuperscript{84} Bangladesh/Myanmar Case, Judgment, paragraph 397.
\textsuperscript{85} Bangladesh/Myanmar Case, Judgment, paragraph 397.
\textsuperscript{86} Articles 56 and 57, UNCLOS.
\textsuperscript{87} Article 76 (3), UNCLOS. As noted by Prescott and Schofield, the continental shelf as defined in UNCLOS is a technically imprecise term and that the continental shelf extends to the outer continental margin and is one part of
– (6) then provides how States can establish the limits of the outer continental margin based on specific criteria.

There are therefore two definitions of the continental shelf, one relating to the “outer continental shelf” beyond 200 nm and one relating to a “distance-based continental shelf” up to 200 nm. China argues that it is entitled to an outer continental shelf and that its continental shelf entitlement ends at the Okinawa Trough (or is located at the axis of the Okinawa Trough).  

China appears to be making two related legal arguments to justify this. First, inherent in its “natural prolongation” argument is the idea that natural prolongation can be interrupted by a geological or geomorphologic feature such as the Okinawa Trough i.e. that there is a break in the continental shelf which causes there to be two separate shelves. For example, one Chinese scholar and former ITLOS Judge has argued that “the Okinawa Trough is also the end of the respective natural prolongation of China’s continental shelf and Japan’s Liqiu (Okinawan) Islands’ continental shelf in the East China Sea. The Trough’s axis line is the natural dividing line of China and Japan.” This shall be referred to as “the natural prolongation” entitlement.

Second, China also appears to be arguing that the axis of the Okinawa Trough constitutes the outer edge of continental margin. For example, the same Chinese scholar has also said that:

East China Sea continental shelf belongs to stable continental earth’s crust; whereas the Okinawa Trough belongs to a structural belt in the transition from continental earth’s crust, and is a basin in the edge of the continental margin and the outer limit of the East China Sea continental shelf.

As mentioned above, China has submitted preliminary information to the CLCS stating that the outer limits of China’s continental shelf extends beyond 200 nm in the East China Sea and is located on the axis of the Okinawa Trough. This shall be referred to as the “outer continental margin entitlement.”

Apart from the scientific validity of whether the Okinawa Trough can constitute both a separation of the continental shelves of Japan and China as well as the outer continental margin of China, the issue is whether the “natural prolongation” entitlement or the “outer continental

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88 Preliminary Information to the CLCS, paragraph 6.
90 This is the Chinese name for Ryukyu Islands.
91 Zhao Lihai, Literature of the Law of the Sea, 85.
92 Zhao Lihai, Literature of the Law of the Sea, 85.
93 While a detailed discussion of this is beyond the scope of this paper, briefly, the outer continental margin usually marks the limit between continental crust and oceanic crust or the transition between continental crust and oceanic crust. The continental margin consists of the shelf, slope and rise and the rise represents the link between continental
“margin” entitlement (or both) can be the basis for China’s claim to the continental shelf in the East China Sea.

Natural Prolongation Entitlement and Role of Fundamental Discontinuities

There is some confusion about the role of natural prolongation in international law. International courts and States have viewed “natural prolongation” as serving a variety of functions, including as “a basis of title, a means of delimitation, an equitable principle of delimitation, a criterion for delimitation and as a relevant circumstance.” However, natural prolongation has been most commonly been described as the basis of title to the extended continental shelf. The concept of natural prolongation first articulated in the North Sea Continental Shelf Cases “referred to the geological and physical facts of the seabed which comprised the object of the regime and which determined the extent of rights to the seabed where they evidenced that extent.” In Libya/Malta, the Court noted that “the concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.”

In modern law, there are now two fundamental criteria for entitlement to a continental shelf: distance and ‘natural prolongation.’ The criterion of natural prolongation is the same as that which stems from the Truman Proclamation, the Convention of 1958 and the North Sea Cases...however, the criterion now comes into play only where there exists a natural prolongation of the land territory of the coastal state into and under the sea beyond the distance of 200 nm as far as the point where the natural prolongation ends at the outer edge of the continental margin and the deep ocean floor begins.

That said, “while the reference to natural prolongation was first introduced as a fundamental notion underpinning the regime of the continental shelf in the North Sea Cases, it has never been defined.”

The implication of natural prolongation being the basis of entitlement to the extended continental shelf, is that “where the natural prolongation manifests itself in a suitably unambiguous form, it automatically defines the extent of continental shelf rights.” Indeed, the case law suggests that if

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slope and ocean basins/abyssal plan (See Prescott and Schofield, The Maritime Political Boundaries of the World, 184). China’s arguments imply that the Okinawa Trough is both the boundary between continental shelf and the ocean floor but also the boundary between two continental shelves (i.e. the continental shelf of China and Japan), or that there is a transitional belt of oceanic crust separating the physical continental shelves of China and Japan.

Evans, Relevant Circumstances and Maritime Delimitation, 100.

Evans, Relevant Circumstances and Maritime Delimitation, 103. Also see Lloyd, “Natural Prolongation: Have the Rumors of its Demise Been Greatly Exaggerated?” 558.

Libya/Malta Case, paragraph 34.


Bangladesh/Myanmar Case, Judgment, paragraph 432.

Evans, Relevant Circumstances and Maritime Delimitation, 107.
there was a feature sufficiently pronounced to constitute an interruption of the seabed and/or to constitute two separate continental shelves.\textsuperscript{100}

For example, in the \textit{Anglo-French Arbitration}, the UK argued that the Hurd Deep-Hurd Deep Fault Zone was a natural boundary. The Tribunal found that while these features were “geological faults” and “distinct features in the geomorphology of the shelf”, they were minor discontinuities that did not interrupt the essential unity of the continental shelf, particularly when compared to the deep Norwegian Trough in the North Sea.\textsuperscript{101}

In the \textit{Tunisia/Libya Case}, Tunisia argued, based on geomorphological and bathymetric considerations, that the Tripolitanian Furrow was an eastward natural prolongation of Tunisia and a continuum northward or north-eastward of Libya and hence “a true submarine frontier.”\textsuperscript{102} The Court however ignored the Tripolitanian Furrow, as “it is not such a significant feature that it interrupts the continuity of the Pelagian Block as the common natural prolongation of the territory of both parties.”\textsuperscript{103} It observed that even “so substantial a feature as the Hurd Deep was not attributed such a significance in the Franco-British Arbitration.”\textsuperscript{104}

In the \textit{Gulf of Maine Case}, the Chamber observed that the Northeast Channel:

\begin{quote}
Does not have the characteristics of a real trough marking the dividing-line between two geomorphologically distinct units…it might also be recalled that the presence of much more conspicuous accidents such as the Hurd Deep and the Hurd Deep Fault Zone in the Continental Shelf which was the subject of the Anglo-French arbitration did not prevent the Court of Arbitration from concluding that those faults did not interrupt the geological continuity of that shelf and did not constitute factors to be used to determine the method of delimitation.\textsuperscript{105}
\end{quote}

The Chamber stressed that there is “nothing in this single seabed lacking any marked elevations or depressions to distinguish…the natural prolongation of the US from the natural prolongation of Canada (emphasis added).”\textsuperscript{106} In \textit{Guinea/Guinea-Bissau}, the Tribunal held:

\begin{quote}
In any event, however, the rule of natural prolongation can be effectively invoked for purposes of delimitation, only where there is a separation of continental shelves. None of the physical characteristics invoked by Guinea-Bissau and which Guinea-Bissau itself has described as secondary, appear to the Tribunal to be sufficiently important to be taken as constituting a separation of the natural prolongation of the two States concerned.\textsuperscript{107}
\end{quote}

\textsuperscript{100} Evans, \textit{Relevant Circumstances and Maritime Delimitation}, 104.  
\textsuperscript{101} Evans, \textit{Relevant Circumstances and Maritime Delimitation}, 107; Gao, “The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea,” 168.  
\textsuperscript{102} \textit{Tunisia/Libya Case, Judgment}, paragraph 64.  
\textsuperscript{103} \textit{Tunisia/Libya Case, Judgment}, paragraph 80.  
\textsuperscript{104} \textit{Tunisia/Libya Case, Judgment}, paragraph 66.  
\textsuperscript{105} \textit{Gulf of Maine Case, Judgment}, paragraph 46.  
\textsuperscript{106} \textit{Gulf of Maine Case, Judgment}, paragraph 45.  
\textsuperscript{107} \textit{Guinea/Guinea-Bissau Case, Award}, paragraph 116.
In the *Libya/Malta Case*, Libya argued that a natural break in the shelf was found in the “rift zone”, which coincided with a plate boundary and introduced both geological and geomorphologic features as a means of demonstrating a division. While the ICJ rejected the relevance of the rift zone because it was within 200 nm of the coast, it stated that the rift zone “cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan shelf as if it were some natural boundary.” This would seem to imply that if there had been a fundamental discontinuity between Malta and Libya, then the court would have taken into account the Rift Zone in the delimitation.

In the *Bangladesh/Myanmar Case*, ITLOS appeared to reject similar arguments related to plate tectonic theory. Bangladesh argued that the Indian plate slides under the adjacent Burma plate, resulting in the Sunda Subduction Zone which represents the most fundamental geological discontinuity between Myanmar and Bangladesh i.e. two separate plates. ITLOS did not accept Bangladesh’s arguments that there was a significant geological discontinuity dividing the Burma plate from the Indian plate.

While *Libya/Malta* and *Bangladesh/Myanmar* suggest that courts are less likely to accept fundamental “geological” discontinuities, there is some room to argue that if the Okinawa Trough is a geomorphologic discontinuity, then it represents the extent of China’s continental shelf entitlement. For example, it has been said that “separate natural prolongations are more likely to be identifiable by reference to significant geomorphological features, rather than by the structure of the seabed.”

However, one of the major challenges that will be faced by China is the sheer difficulty of proving that the Okinawa Trough is a fundamental discontinuity. The fact that any proof will have the “implicit uncertainty and speculative quality” inherent in geophysical evidence is one of the reasons courts have been so disinclined to take into account geophysical factors in determining entitlement. For example, Libya’s scientists gave evidence that the Rift Zone constituted a fundamental discontinuity whereas Malta gave equally compelling evidence that

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108 *Libya/Malta*, *Judgment*, paragraph 39.
109 Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in Northeast Asia*, 219. However, note the observation of Lilje-Jensen and Thamsborg that in the case of *Libya/Malta*, “the Court was confronted with one of the most pronounced geophysical features (breaks) imaginable, namely a zone where originally separate crustal plates have collided.” See Jorgen Lilje-Jensen and Milan Thamsborg, “The Role of Natural Prolongation in Relation to Shelf Delimitation beyond 200 Nautical Miles,” 622.
110 *Bangladesh/Myanmar Case*, *Judgment*, paragraph 438.
111 Evans, *Relevant Circumstances and Maritime Delimitation*, 107. However, note that other scholars have opined that a fundamental discontinuity must be a geological feature - the “unity of a geological structure is only interrupted by a geological feature or structure which puts an end to that unity.” See Zahraa, “Natural Prolongation and Delimitation of Maritime Boundaries,” 394.
the data at present available were quite insufficient to prove or disprove the existence of a fundamental discontinuity.\textsuperscript{113} The Court said:

The Court is unable to accept the position in order to decide this case, it must first make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data; for a criterion that depends upon such a judgment or estimate having to be made by a court, or perhaps negotiating governments, it is clearly inapt to a general rule of delimitation.\textsuperscript{114}

As noted by Keith Hightet, “the argument can well be made that the failure of the massive geological and geomorphological cases and counter-cases advanced in various forms by Tunisia, Libya, Canada, the United States, Malta and again Libya was that there was no convincing discharge of the burden of proof – not to speak of a burden of persuasion.”\textsuperscript{115}

It has been argued that international courts or tribunals have overcome such difficulties in deciding between conflicting geophysical evidence by resorting to comparative analysis.\textsuperscript{116} In the 1977 \textit{Anglo-French Arbitration}, the arbitral tribunal rejected the UK’s arguments on the Hurd Deep-Hurd Deep Fault Zone as minor geological faults compared with the deep Norwegian Trough in the North Sea.\textsuperscript{117} Similarly, in \textit{Tunisia/Libya}, the Tripolitanian Furrow was considered not to be as substantial a feature as the Hurd Deep, which was not attributed much significance in the \textit{Anglo-French Arbitration}.\textsuperscript{118} The ICJ Chamber in the \textit{Gulf of Maine Case} made the same comparison between the Northeast Channel and the Hurd Deep and found the former not sufficient to interrupt the geological continuity of the shelf.\textsuperscript{119}

In the \textit{North Sea Continental Shelf Sea Cases}, the ICJ opined that the Norwegian Trough represented a break in the natural prolongation of the continental shelf between Norway and the UK, although it recognized that it had chosen to ignore this fact.\textsuperscript{120} This has been the only geomorphologic feature accepted by an international court as disrupting the unity of the continental shelf.\textsuperscript{121} The Trough “is a belt of water 200 – 650 metres deep and about 430 kilometres long, fringing the southern and south-western coasts of Norway to a width averaging about 80 – 110 kilometres.”\textsuperscript{122} The Okinawa Trough is 894 – 2,719 metres deep, 900 km in

\begin{flushright}
\footnotesize
\textsuperscript{113} Libya/Malta Case, paragraph 41.\\
\textsuperscript{114} Libya/Malta, Judgment, paragraph 41.\\
\textsuperscript{115} Hightet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries,” 182.\\
\textsuperscript{116} Gao Jianjun, “The Okinawa Trough Issue,” 168.\\
\textsuperscript{117} Anglo-French Arbitration, Award, paragraph 107.\\
\textsuperscript{118} Tunisia/Libya Case, Judgment, paragraph 66\\
\textsuperscript{119} Gulf of Maine Case, Judgment, paragraph 46.\\
\textsuperscript{120} North Sea Continental Shelf Cases, paragraph 45.\\
\textsuperscript{121} North Sea Continental Shelf Cases, paragraph 45. Interestingly, UN DOC. A/13/37, the preparatory documents for UNCLOS I (Off. Rec. Volume 1, page 39 at paragraph 20) the view is expressed that the Norwegian Trough does not mark the separation of the shelves.\\
\textsuperscript{122} Gao Jianjun, “The Okinawa Trough Issue,” 170.
\end{flushright}
length and with a width of 36 – 150 km.\textsuperscript{123} It has been argued that if a geomorphologic feature is more conspicuous than the Norwegian Trough, this feature disrupts the unity of the sea bed and hence, the shelf areas in the East China Sea separated from the Japanese coast by the Okinawa Trough cannot be said to be the natural prolongation of the Japanese land territory.\textsuperscript{124}

Interestingly, the separate opinion of Vice President Sette-Camara in the \textit{Libya/Malta Case} notes that the “regarding natural boundaries, Timor Trough seems to be the only indisputable example of a geomorphological phenomenon governing a line of delimitation.” Similarly, Charney also observes that the Timor Trough is a “substantially more significant feature than any other sea-bed on which natural prolongation arguments have been previously presented to a third-party tribunal” and that this “may present a direct challenge to the \textit{Libya/Malta} judgment since the case for a geologically based distinction is so strong.”\textsuperscript{125} The maximum depth of the Timor Trough is approximately 3,200 metres. Although the Timor Trough appears to be a more conspicuous feature than the Okinawa Trough which has a 2,700 metres maximum depth, it leaves room for arguing that the Okinawa Trough could be considered in determining the extent of continental shelf entitlement of China.

However, there is another difficulty associated with using so-called natural boundaries such as the Okinawa Trough. The Okinawa Trough is reportedly 26 to 120 km long - how does one find an easily defined line that can serve as a boundary between Chinese continental shelf entitlement and Japanese continental shelf entitlement? China has indicated the axis of the Okinawa Trough is the end of its continental shelf entitlement but this illustrates a larger problem of using natural boundaries as political boundaries as noted by Highet that “even the most dramatic geological rifting (usually relatively invisible as such) or the most accentuated geomorphological feature does not serve the task with any useful degree of precision.”\textsuperscript{126}

\textit{Entitlement based on the Outer Edge of the Continental Margin}

China can also argue that the Okinawa Trough represents the extent of its continental shelf entitlement on the basis that the Okinawa Trough is the outer edge of its continental margin (as provided in Article 76 (1)) and that it meets the requirements in Article 76 (4).

In the \textit{Bangladesh/Myanmar} Case, ITLOS rejected Bangladesh’s arguments that the outer continental shelf is the natural prolongation of Bangladesh’s land territory by virtue of the uninterrupted seabed geology and geomorphology. It did not accept Bangladesh’s contention that Myanmar is not entitled to a continental shelf beyond 200 nm by reason of the significant

\textsuperscript{123} Gao Jianjun, “The Okinawa Trough Issue,” 170.
\textsuperscript{124} Gao Jianjun, “The Okinawa Trough Issue,” 169.
\textsuperscript{125} Jonathan Charney, “International Maritime Boundaries for the Continental Shelf: The Relevance of Natural Prolongation,” 1023.
\textsuperscript{126} Highet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries,” 180.
geological discontinuity dividing the Burma plate from the Indian plate i.e. the Sunda Subduction Zone.\(^{127}\) It found that 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,”\(^ {128}\) 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.\(^ {129}\) Instead, the notion of “the outer edge of the continental margin” is an essential element in determining the extent of the continental shelf.\(^ {130}\) 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.”\(^ {131}\) This is the first time an international tribunal has pronounced on entitlement beyond 200 nm. It has been observed that this is a “bold interpretation” that “has been stated more assertively than anything other courts and tribunals have said in previous cases.”\(^ {132}\)

There are some obvious merits to the Tribunal’s approach. First, arguably, the formula used to establish the outer limits of the continental shelf in paragraph 4 of Article 76 is an approximation of the end of the natural prolongation of the continental margin and/or the landmass of the coastal State (and consequently the extent of a coastal State’s entitlement). The continental margin consists of the shelf, the slope and the rise. The outer edge of the continental margin is theoretically the edge of the continental rise.\(^ {133}\) The continental rise is a “secondary feature that normally forms over the primary tectonic boundary or the transition zone that separates continental and oceanic crust”\(^ {134}\) or in other words, the continental rise is the link between continental slope and ocean basins or abyssal plain.\(^ {135}\) However, the geological natural prolongation of a landmass rarely extends to the edge of the rise and generally lies somewhere beneath the rise. The geologic change reflected in the continental rise is too ill-defined and uncertain in its position to be of help in drawing a political boundary.\(^ {136}\) Accordingly, the outer limits adopted in Articles 76 (4) use various formulas based on measurements from the foot of the continental slope, essentially employing geomorphic criteria.\(^ {137}\) These formulas will

\(^{127}\) *Bangladesh/Myanmar Case, Judgment*, paragraph 438.

\(^{128}\) *Bangladesh/Myanmar Case, Judgment*, paragraph 434.

\(^{129}\) *Bangladesh/Myanmar Case, Judgment*, paragraph 435.

\(^{130}\) *Bangladesh/Myanmar Case, Judgment*, paragraph 437.

\(^{131}\) *Bangladesh/Myanmar Case, Judgment*, paragraph 437.

\(^{132}\) Separate Opinion of Judge Gao, *Bangladesh Myanmar Case*, paragraph 87.


“generally result in a boundary that lies on the continental rise (particularly for mature, sediment-rich margins), and in the vicinity of the ‘true’ geologic limit of natural prolongation.”

A second advantage is the fact that using the precise criteria set out in Article 76 (4) allows courts an objective method to determine the extent of continental shelf entitlement. It avoids the difficulties faced by previous courts on deciding the meaning of natural prolongation or determining which is “the most natural prolongation” of a coastal State and the associated issues in evidence.

In its Preliminary Information, China states that the foot of the continental slope is located on the west slope of the Okinawa Trough and from which the point at a distance of 60 nm from the foot of the slope can also be identified (apparently relying on criteria in Article 76 (4) (a) (ii)). If China can adduce evidence in support of this assertion, it will be able to establish its entitlement to the continental shelf at the Okinawa Trough. The decision in Bangladesh/Myanmar suggests that there is no need for the CLCS to make final recommendations on the outer limits of the extended continental shelf for the Tribunal to decide whether the parties concerned had entitlement to the continental shelf and for the Tribunal to delimit the outer continental shelf.

Based on the above, there is some legal justification for arguing that, if China can prove that the Okinawa Trough represents either a fundamental discontinuity or the outer edge of its continental margin, it can establish its legal entitlement to the continental shelf up to the Okinawa Trough.  

B. Japan’s Entitlement

Japan has claimed a 200 nm EEZ as well as a 200 nm continental shelf in its national legislation. Japan is prima facie entitled to a 200 nm EEZ under Article 56 and 57 of UNCLOS and a distance-based continental shelf up to 200 nm under Article 76 (1) of UNCLOS.

C. Overlapping Entitlements in the East China Sea

There are several formulations of overlapping entitlements in the East China Sea, all of which are supported by prima facie legal arguments and which have different consequences for the applicable delimitation principles.

139 Bangladesh/Myanmar Case, Judgment, paragraphs 364 to 394.
140 China should bear in mind that courts and tribunals appear to have difficulty accepting arguments based on natural prolongation, both as a factual and legal basis of entitlement and that they may have more success basing their arguments on “outer continental margin” entitlement. Despite the finding in the Bangladesh/Myanmar Case that “outer continental margin” was now the basis of entitlement to shelf beyond 200 nm, natural prolongation was not completely excluded and was still acknowledged to be related to “outer continental margin.”
The possibilities are (a) no overlapping entitlement; (b) overlapping entitlement to EEZ only (c) separate overlapping entitlements to EEZ and continental shelf and (d) overlapping entitlement between EEZ and continental shelf. The legal basis for each of these overlapping entitlements along with the consequent implications for delimitation will be examined below.\textsuperscript{141}

Several points should be noted. First, as mentioned above, China appears to be claiming that both “natural prolongation” and “outer continental margin,” both mentioned in Article 76 (1), are the basis of its entitlement to continental shelf. As part of its legal strategy, China will likely mount an argument based on both natural prolongation and outer continental margin in any court case. Accordingly, the discussion on overlapping entitlements will be based on an assumption (for the most part) that China has overcome the first hurdle of establishing its entitlement to outer continental shelf up to the Okinawa Trough either on natural prolongation or outer continental margin entitlement.

Second, as will be explained below, the respective arguments on overlapping entitlement that can be made by China and Japan are intrinsically linked to arguments on the nature of the relationship between the continental shelf and the EEZ. Third, the discussion on overlapping entitlements is premised on arguments that China and/or Japan can make rather than arguments that they have made.

IV. \textbf{NO OVERLAPPING ENTITLEMENT}

If China can establish that it has an entitlement to the outer continental shelf that ends at the Okinawa Trough, it may be able to argue that (a) that there is no overlapping entitlement between its rights and Japan’s rights as the primacy of the outer continental shelf trumps entitlement to distance-based continental shelf and the EEZ and (b) that the applicable boundary between China and Japan for both the EEZ and continental shelf is the Okinawa Trough.

\textbf{A. Primacy of Continental Shelf}

For China to argue that there is no overlapping entitlement, it would have to argue that when a State has an entitlement to outer continental shelf, there is no entitlement to the distance-based shelf or EEZ. In other words, Japan, as a narrow margin State, would only be able to claim continental shelf up to a distance of 200 nm and an EEZ \textit{only when} there was no entitlement to outer continental shelf,\textsuperscript{142} which is not the case in the East China Sea. Inherent in this argument is the idea that the outer continental regime subsumes both the distance-based continental shelf and the EEZ.

\textsuperscript{141} For completeness, it should be noted that there is little possibility of a court finding that there is \textit{only} an overlapping continental shelf entitlement because both China and Japan have made claims to an EEZ in the East China Sea.

\textsuperscript{142} Evans, Relevant Circumstances and Maritime Delimitation, 54; Gao Jianjun, “The Okinawa Trough Issue,” 164.
There is arguably some legal basis to this argument. First, the outer continental regime developed separately and prior to both the distance-based continental shelf and the EEZ. The continental shelf regime had existed in international law from the Truman Proclamation in 1945, before the development of the EEZ. The concept of the EEZ was initially motivated by the increasing assertion of States to exclusive fishing zones (EFZs) from their coasts. The EFZ developed in tandem with the sea-bed claims of States and it was inevitable that there was an attempt to merge claims to the water column and claims to seabed resources into “one resource zone concept, combining the essential elements of both.” In 1971, during the negotiations of UNCLOS, Kenya proposed the concept of the EEZ to be a zone relating to all of the natural resources of adjacent seas, including the sea-bed and water column. The distance of 200 nm had “no general geographical, ecological or biological significance” and was accepted for pragmatic reasons that it represented the most extensive claims then in existence.

The fact that the EEZ also covered the seabed meant that States had to consider the impact on the continental shelf which also covered the seabed. Some States thought the continental shelf regime should be abandoned and its seabed jurisdiction absorbed by the EEZ, whereas most advocated its retention as a separate concept additional to the EEZ. Accordingly, after it was decided to retain the separate concept of the continental shelf, UNCLOS could either “harmonize the content of the legal interest – so that it did not matter which regime was operable within 200 nm of the coast or both regimes could have the same extent, with a priority given to one over the other.” The definition of the continental shelf in Article 76 was ultimately a compromise that incorporated both elements. The rights afforded to the coastal State over the seabed were essentially the same under the EEZ and continental shelf up to 200 nm, accommodating the views of States with narrow shelves through the recognition of the distance-based shelf. However, it also recognized the rights of the broad margin states by allowing them to claim beyond 200 nm when their physical shelf extended beyond that distance.

Accordingly, one could argue first, that Article 76 implies a hierarchy between the outer continental shelf and the distance-based continental shelf and this is reflected in the history and plain reading of Article 76 itself. Natural prolongation still remains the main criterion for continental shelf entitlement and the distance-based continental shelf was not motivated by a desire to redefine the conceptual basis of continental shelf jurisdiction but to “accommodate and

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144 Evans, Relevant Circumstances and Maritime Delimitation, 34.
148 Evans, Relevant Circumstances and Maritime Delimitation, 35 citing the examples of Switzerland, Congo, Egypt and Malta.
149 Evans, Relevant Circumstances and Maritime Delimitation, 35, note 18.
150 Evans, Relevant Circumstances and Maritime Delimitation, 36.
151 Evans, Relevant Circumstances and Maritime Delimitation, 53.
facilitate the emerging EEZ regime. The ICJ in *Tunisia/Libya* arguably supported this interpretation when it observed that the definition of the continental shelf in Article 76 contains two parts, and that natural prolongation of the land territory was the main criterion and that distance of 200 nm was, in certain circumstances, the basis of the title of a coastal State.

Libya/Malta also arguably recognized this when it stated that when “the continental margin does not extend as far as 200 nm from the shore, natural prolongation…is in part defined by distance from the shore.”

It could also be argued that there is an inherent hierarchy between the continental shelf and the EEZ under UNCLOS. First, under Article 56 (3), “rights set out in this Article with respect to the seabed and subsoil shall be exercised in accordance with Part VI (on the continental shelf).” This implies that EEZ rights are governed by the continental regime or that “the EEZ is derivative from the continental shelf and thus subordinate to it.” Further, it is argued that the crucial distinction between the continental shelf and the EEZ, which underscores the former’s superiority, is the fact that continental shelf rights are inherent while EEZ rights must be claimed. Article 77 states:

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

As put by Evans:

…a continental shelf automatically appertains to a State by operation of law. The 1982 Convention makes this clear by repeating the corresponding provisions of the 1958 Convention, which was described by the Court as enshrining the most fundamental rule concerning the continental shelf – that the rights in the natural prolongation of a State exist ‘ipso facto and ab initio’. On the other hand, not all States possess EEZs and they do not automatically appertain to coastal States. International law allows states to claim EEZs but they do not exist ipso facto and ab initio.

While there is an element of fusion between the EEZ and distance-based continental shelf, this only applies when the geological shelf does not extend to 200 nm. However, when the geological shelf does extend beyond 200 nm, a State cannot claim an EEZ in an area over which another

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152 Evans, Relevant Circumstances and Maritime Delimitation, 53.
153 *Tunisia/Libya Case, Judgment*, paragraph 47.
154 *Libya/Malta Case, Judgment*, paragraph 34.
156 Evans, Relevant Circumstances and Maritime Delimitation, 55.
157 Evans, Relevant Circumstances and Maritime Delimitation, 32 – 39.
State already has a continental shelf which exists *ipso facto* and *ab initio*. Because the EEZ covers both the seabed and water and its “unitary nature makes a ‘split’ line boundary (i.e. a non-vertical line dividing the seabed and water column differently) contrary to the EEZ concept,” if a State does make an EEZ claim, the EEZ boundary must follow the continental shelf boundary.

**B. Applicable Boundary**

If the court accepts the argument that outer continental shelf entitlement trumps both the distance-based continental shelf and the EEZ, there is strong argument that the applicable boundary would be the Okinawa Trough which represents the break between two separate shelves. There would be no need for delimitation per se. Issues in delimitation only arise where the continental shelf was, geographically, the natural prolongation of each of the States concerned and not when there is a clear break between two continental shelves. There is only a dispute on maritime delimitation in cases where both parties have an equally legitimate claim to an overlapping area. If China’s outer continental shelf entitlement is superior to Japan’s entitlement to the EEZ and distance-based shelf, then Japan does not have a legitimate claim beyond the Okinawa Trough, and the axis of the Okinawa Trough is the boundary between China and Japan.

**V. Delimitation of Overlapping EEZ Entitlements (Only)**

Japan can counter-argue that there is an overlapping entitlement and it is only to an EEZ, by demonstrating that the EEZ within 200 nm has absorbed the continental shelf regime, such that a claim to the outer continental shelf cannot be made in areas within 400 nm.

**A. Primacy of EEZ**

If Japan can show factually that the Okinawa Trough is a casual dent in the seabed not amounting to a fundamental discontinuity of the continental shelf. In such a case, there is very strong argument that the Okinawa Trough is irrelevant in establishing title to continental shelf and there is only overlapping entitlement to EEZ.

If it is accepted that the Okinawa Trough is the outer continental shelf entitlement of China, can Japan still also argue that the overlapping entitlement is *only* to the EEZ because the distance

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158 Evans, Relevant Circumstances and Maritime Delimitation, 55.
159 Evans, Relevant Circumstances and Maritime Delimitation, 55.
160 Anglo-French Arbitration, Award, paragraph 79.
161 See, for example, Barbados/Trinidad and Tobago, Award, paragraph 224.
between coasts is less than 400 nm? Such an argument would depend on whether within 200 nm, the EEZ has absorbed the continental shelf.¹⁶²

Advocates of the argument that the EEZ has had “the effect of eclipsing the continental shelf to the extent that there is, in reality, only one zone”¹⁶³ argue that under UNCLOS the continental shelf regime and the EEZ regime essentially give the coastal State the same “sovereign rights” over the seabed and subsoil up to 200 nm.¹⁶⁴ They also point to the fact that there are crucial differences between the “inner” continental shelf within 200 nm and the outer continental shelf beyond 200 nm which “speaks in favour of the homogeneity of regimes within the 200-mile zone.”¹⁶⁵ In the outer continental shelf, State Parties to UNCLOS are obliged to make payments or contributions in kind in respect of the exploitation of the non-living resources¹⁶⁶ and the waters above are high seas.¹⁶⁷

Further, there is also some judicial support in separate or dissenting opinions for the idea that the continental regime has been subsumed by the EEZ regime.¹⁶⁸ For example, in Tunisia/Libya, Judge Arechaga, in a separate opinion, noted that, at least in the case of continental shelves not extending beyond 200 nm, the notion of the continental shelf was in the process of being incorporated in that of the EEZ.¹⁶⁹ Judge Oda in his dissenting opinion noted that this “trend towards the absorption of the continental regime into that of the exclusive economic zone is too pronounced to be ignored.”¹⁷⁰

Of course, Japan can also argue that even if the courts have not said it outright, they have essentially implied it by finding that for areas situated at a distance of under 200 nm from the coasts in questions, title solely depends on the distance from the coast and any “areas of sea-bed claimed by way of continental shelf and the geological or geomorphological characteristics of those are areas are completely immaterial.”¹⁷¹ As noted by Robert Kolb, “despite the Court’s denials, its reasoning was on the primacy of the exclusive economic zone over the continental shelf. The former not only absorbed the latter but impressed its own criterion – distance- upon it. In a sense, the water triumphed over the soil and subsoil.”¹⁷²

¹⁶² Japanese scholars have made this argument: See Miyoshi Masahiro, “Some thoughts of Maritime Boundary Delimitation,” in Seoung-Yong Hong and Jon Van Dyke (eds), Maritime Boundary Disputes, Settlement Processes and the Law of the Sea (Martinus Nijhoff, Netherlands, 2009).
¹⁶⁶ Article 82, UNCLOS.
¹⁶⁷ Articles 77 and 78, UNCLOS.
¹⁶⁹ Tunisia/Libya Case, Separate Opinion of Judge Arechaga, paragraphs 55 and 56.
¹⁷⁰ Tunisia/Libya Case, Dissenting Opinion of Judge Oda, paragraph 129.
¹⁷¹ Libya/Malta Case, Judgment, paragraph 39.
¹⁷² Kolb, Case Law on Equitable Maritime Delimitation, at 331.
B. Delimitation of Overlapping EEZ Entitlements

Article 74 on the delimitation of the EEZ would be the applicable law in cases of overlapping EEZ entitlement. Courts and tribunals have not had much opportunity to carry out purely EEZ delimitation. Earlier cases of delimitation were focused on continental shelf boundaries and more recent cases have been for single maritime boundaries for both the EEZ and continental shelf. However, there is no reason for a delimitation of an EEZ not to follow the three-stage delimitation methodology set out in the Black Sea Case, which will be examined below.

Provisional Median Line

China has not publicly indicated where it believes the EEZ boundary should be drawn, although it has claimed an EEZ. However, it has been reported by Chinese scholars that China will agree to the median line for EEZ delimitation,\(^{173}\) and in this respect, its position coincides with that of Japan. There appear to be no reason why the provisional equidistance line should be drawn.

Factors calling for the Adjustment of the Provisional Equidistance Line

There is some support for the argument that when drawing an EEZ boundary, a court can take into account equities and relevant circumstances appropriate to the EEZ such as fisheries resources,\(^ {174}\) apart from the usual relevant circumstances relating to coastal geography. For example, in the Jan Mayen Case, one of the few cases where the ICJ had to consider the delimitation of a fisheries zone separately from continental shelf delimitation, the applicable law for the boundary of the fishing zone was determined by the law governing the boundary of the exclusive economic zone.\(^ {175}\) The ICJ drew a provisional median line and then adjusted the median line to ensure equitable access to the capelin fishery resources for the vulnerable communities concerned.\(^ {176}\) However, while both States have extensive fishing interests in the East China Sea, it is not clear whether there are any factors either relating to fisheries or to coastal geography (subject to the comments on coastal length below) which would require an adjustment of the provisional equidistance line.

Proportionality

At this final stage, a court will now turn to check that that the envisaged delimitation line does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue.


\(^{174}\)Kolb, Case Law on Equitable Maritime Delimitation, 447.

\(^{175}\)Maritime Delimitation in Area between Greenland and Jan Mayen (Denmark/Norway), Judgment, [1993] ICJ Reports 38, paragraph 47.

\(^{176}\)Jan Mayen Case, Judgment, paragraphs 75 and 76.
It should be noted that the relevance of the disparity in coastal lengths has sometimes been raised as relevant to delimitation in the second stage i.e. as a relevant factor requiring adjustment of the provisional equidistance line. In the *Black Sea Case*, the ICJ held that “where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.” However, generally coastal length is used in the third stage of delimitation, not to determine a line but to confirm, *ex post facto*, that it is essentially equitable by ensuring that there is no significant disproportionality by reference to respective coastal lengths and apportionment of areas.

Regardless of whether it should be considered in the second or third stage, Chinese scholars have argued that “the large disparity in the lengths of the coasts facing each other in the East China Sea …requires the median line proposed by Japan to be adjusted in favour of China, that is moved eastwards to reflect a reasonable degree of proportionality between the lengths of their coastlines.” Accordingly, there are some legal grounds for China to argue for an adjustment of equidistant EEZ boundary.

VI. DELIMITATION IN CASES OF OVERLAPPING ENTITLEMENTS TO THE EEZ AND TO THE CONTINENTAL SHELF

There are two other possibilities of overlapping entitlements, which will be dealt with together below. First, it can be argued that there are two separate overlapping entitlements to the EEZ of China and Japan, and the continental shelf of China and Japan (Japan’s entitlement to its distance-based shelf versus China’s entitlement to the outer continental shelf). Second, it can be argued that it is an overlapping entitlement between China’s continental shelf and Japan’s EEZ.

A. Overlapping Entitlement to Exclusive Economic Zones

Both China and Japan have claimed 200 nm EEZs in their national legislations although they have not deposited the outer limits of their claims with the UN. Accordingly, there is an overlapping entitlement to the EEZ in the East China Sea.

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177 *Black Sea Case, Judgment*, paragraph 164.
179 It has been argued that a two-step procedure would have sufficed, as the second and third stages of delimitation can be combined. Considerations on proportionality should be integrated into the considerations leading to the adjustment of the equidistant line and their separation seems artificial: See generally *Bangladesh/Myanmar*, Declaration of Judge Wolfrum.
180 Gao, “Joint Development in the East China Sea: Not an Easier Challenge than Delimitation,” 65. According to Professor Zhao Lihai, the ration between the lengths of the coast lines of these two countries in the disputed area is approximately 1.8:1 in favour of China: Zhao Lihai, *Literature of the Law of the Sea*, 78.
B. Overlapping Entitlements to Outer Continental Shelf and Distance Based Continental Shelf

For a court to find that there is an overlapping entitlement to distance-based continental shelf and outer continental shelf, it must find that there are two definitions of continental shelf and neither of them have precedence or priority over each other.

There are ample grounds to justify this. As mentioned above, Article 76 (1) contains two definitions of the continental shelf i.e. to the outer edge of the continental margin OR “to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” UNCLOS intended to provide two definitions of the continental shelf to accommodate the views of the States with a broad continental margin and States with a narrow continental margin. The States with a broad continental margin, using the North Sea Continental Shelf Cases, expressed a preference for two limits, one based on distance of up to 200 nm and another based on the outer limit of the continental margin. They argued that under existing law at the time, the entire continental margin was subject to their exclusive rights and “any diminution of the rights of the coastal State over the continental shelf would be inequitable.” On the other hand, the narrow margin States expressed a preference for a limit up to 200 nm to accommodate the EEZ and to ensure that not all States could claim a continental shelf beyond 200 nm at the expense of the deep seabed area which was the common heritage of mankind. Accordingly, Article 76 was a compromise intended to accommodate the views of both the broad margin States and the narrow margin States. The Virginia Commentary also provides that “a coastal State may apply either a

16th Meeting, (26th July 1974) – 20th Meeting (30 July 1974) of the Second Session; Third United Nations Conference on the Law of the Sea, Official Records, Volume II, at 147 – 165. Those delegations supporting the idea of two alternative limits included Australia, the Republic of Korea, Spain, El Salvador, Argentina, Ecuador, Vietnam, Norway, Cuba and the Federal Republic of Germany. Alex Oude Elferink notes that “it is unlikely that before the negotiations on what was to become Article 76 started, the legal continental shelf extended to the outer edge of the continental margin, as was submitted by the group of broad margin States. At the same time, the legal continental shelf did extend well beyond the 200 nm limit in certain parts of the word”: See Alex G. Oude Elferink, “Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective,” International Journal of Marine and Coastal Law, 21 (2006) 269 – 285, 274.


183 Elferink notes that Article 76 “to a very considerable extent accommodates the views of the broad margin States” but they made some concessions such as Article 82 which provides that coastal State shall make payments and contributions with respect to the exploitation of the continental shelf beyond 200 nm to the international community and the detailed provisions on the establishment of the outer limits may in certain cases result in an outer limit considerably landward of the outer edge of the continental margin: See Elferink, “Article 76 of the LOSC on the Definition of the Continental Shelf,” 274.
geomorphologic criterion or a distance criterion in determining the outer limit of its continental shelf.\textsuperscript{186}

On this reasoning, the finding in \textit{Libya/Malta} that distance is the sole title of continental shelf within 200 nm is incorrect. As argued by Judge Oda in his dissenting opinion in the \textit{Libya/Malta} case, “a logical analysis of these words will show that Article 76 thus offers is not, as the Judgment seems to suggest, two complementary definitions of the (legal) continental shelf – hence two complementary criteria for determining its appurtenance, but two radically \textit{alternative} definitions.”\textsuperscript{187} He goes on to state that the Court’s finding that distance was the sole basis of title within 400 nm “would have been open to challenge had the sea-bed in the present case featured, not a rift-zone, but the outer edge of a continental margin.”\textsuperscript{188}

The Court would then almost certainly have had to weigh the merits of two convincing claims invoking the sense of Article 76, the one based on geomorphology, the other relying on distance. As it happens, the only real problem before the Court was actually that of discerning the rule for the division of a single maritime area homogeneous in terms of the 200-mile distance criterion.\textsuperscript{189}

Accordingly, a better interpretation of Article 76 (1) is that there are two definitions of continental shelf, which coastal States can apply depending on the extent of their continental margin. A coastal State is entitled to a 200 nm continental shelf only when the continental margin of that coastal States does not extend up to that distance,\textsuperscript{190} i.e. the geological shelf is less than 200 nm. Distance is clearly the basis of entitlement in such cases. However, a coastal State whose continental shelf extends beyond its territorial sea “through the natural prolongation of its territory to the outer edge of the continental margin,” it is natural prolongation/outer continental margin and not distance that forms the basis of entitlement.

Accordingly, the distance criteria and the natural prolongation/outer continental margin criteria are two distinct bases for entitlement for both wide margin States and narrow margin States separately. Distance is the basis for title when the physical continental margin does not extend up to 200 nm whereas natural prolongation is the basis of title when the continental margin does extend beyond 200 nm.

On this reasoning, Japan has distance-based entitlement up to 200 nm of legal shelf regardless of the Okinawa Trough. However, China has an equally valid claim to its shelf based on natural prolongation/outer continental margin entitlement. There is an overlapping entitlement to continental shelf i.e. between the geological shelf and the legal shelf. As said by the arbitral


\textsuperscript{187} \textit{Libya/Malta Case}, Dissenting Opinion of Judge Oda, paragraph 61.

\textsuperscript{188} \textit{Libya/Malta Case}, Dissenting Opinion of Judge Oda, paragraph 61.

\textsuperscript{189} \textit{Libya/Malta Case}, Dissenting Opinion of Judge Oda, paragraph 61.

\textsuperscript{190} Nordquist et al., Commentary on UNCLOS, 841. Gao, “The Okinawa Trough Issue,” 165.
tribunal in the Guinea/Guinea-Bissau Case, the rule of distance reduced the scope of the rule of natural prolongation “by substituting it in certain circumstances” and there is “neither priority nor precedence” between them.

C. Overlapping Entitlement between China’s Continental Shelf and Japan’s EEZ

To find that there is an overlapping entitlement between China’s outer continental shelf and Japan’s EEZ, a court would also have to find that both the continental shelf regime and the EEZ regime are separate and neither is superior or subsumes the other. There is much to suggest that the regimes are separate. Both regimes have different origins and different bases in international law. As mentioned above, the continental regime was promulgated earlier than the EEZ regime and developed separately. Further arguments in favour of two separate regimes can be found in the actual provisions of UNCLOS itself. Under Article 56 (1) of UNCLOS, the coastal State has sovereign rights in the EEZ for the purpose of “exploring and exploiting, conserving and managing the natural resources, whether living or non-living.” Under Article 77 (1), the coastal State has “sovereign rights over the continental shelf for the purpose of “exploring it and exploiting its natural resources,” with the conservation and management rights being omitted. Moreover, the EEZ gives jurisdiction to coastal States with regard to both marine scientific research and the protection and preservation of the marine environment. So while the coastal State had the same economic rights over the seabed and the continental shelf in both the EEZ and continental shelf, the former gave the coastal State “opportunities and obligations in the sphere of ocean management.” Another difference is, as mentioned above, the fact that an EEZ has to be claimed whereas a State’s claim to continental shelf is inherent and does not depend on express proclamation. International courts have also adopted the view that the continental shelf and the EEZ regime remained separate. The conclusion that the regime is separate lends support to the idea that there is no superiority between the two regimes. There are two separate regimes which co-exist and can provide title to the same jurisdictional rights. While “there is no inherent conflict between the regimes, there is

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191 Guinea/Guinea-Bissau Case, Award, paragraph 115.
192 Guinea/Guinea-Bissau Case, Award, paragraph 116.
195 For example, as pointed out by Judge Gros in his dissenting opinion in the Gulf of Maine Case that in 1958, there were two conventions dealing with the continental shelf and fishing and in 1945, the US Government made two proclamations regarding the continental shelf and fishing on the high seas: See Gulf of Maine Case, Dissenting Opinion, Judge Gros, paragraph 12.
197 Evans, “Delimitation and the Common Maritime Boundary,” 313.
neither reason for seeking, nor pressure towards, some form of doctrinal accommodation or amalgamation.”

Essentially, an overlap between entitlement to outer continental shelf and distance-based shelf (as argued in Section B above) is equivalent to an overlap between entitlement to outer continental shelf and EEZ. As explained in Part V (A), the distance-based shelf was negotiated to take into account of the 200 nm EEZ. UNCLOS intended for there to be a degree of harmonization or fusion between the EEZ and the distance-based shelf recognized under Article 76 (1). The basis of title for both the EEZ and distance-based shelf is distance from the shore. Accordingly, there is symmetry in an overlap between entitlement to outer continental shelf and distance-based shelf and an overlap between entitlement to outer continental shelf and EEZ as both essentially involve an overlap between title based on natural prolongation/outer continental margin and title based on distance.

D. Applicable Principles for Delimitation in Cases of Overlapping Titles

Finding that there is an overlap of title between distance and natural prolongation/outer continental margin is not terribly illuminating when it comes to delimitation. If indeed title influences delimitation, which basis of title should be taken into account when effecting an ‘equitable’ delimitation – natural prolongation or distance? Is there any merit to Judge Oda’s statement in the Jan Mayen Case that “there in fact no rules of law for effecting a maritime delimitation in the presence of overlapping titles…and that the court could only decide a case ex aequo et bono”?

The remaining sections will argue that the applicable law will be articles 74 and 83 of UNCLOS and that the applicable methodology will be the “equidistance/relevant circumstances” methodology unless it can be shown to be inequitable. However, because the “relevant circumstances” taken into consideration will depend on the type of boundary that is being delimited, the next section will explore the legal validity of delimiting two boundaries versus a single maritime boundary (for both the EEZ and continental shelf). The last two sections will then examine the applicable delimitation principles and methodology for the delimitation of separate boundaries and then those applicable for a single maritime boundary.

E. Single Maritime Boundary versus Separate Boundaries

To date, it appears as if China has argued for only a continental shelf boundary. However, it is certainly in China’s interests to request a court to draw two separate boundaries for the EEZ and continental shelf, or more accurately for two separate boundaries for the water column/fisheries

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199 Evans, Relevant Circumstances and Maritime Delimitation, 32 – 39.
200 Jan Mayen Case, Dissenting Opinion of Judge Oda, paragraph 72.
resources and the seabed/shelf resources. Japan has argued for a single maritime boundary delimiting both the EEZ and continental shelf.

There is no legal impediment to having two separate boundaries. While there is certainly a preference for a single maritime encompassing both the EEZ and continental shelf, as reflected in maritime delimitation agreements and the requests by States to courts and tribunals in delimitation cases, UNCLOS “does not indicate that the boundaries delimiting the continental shelf and the EEZ ought to be combined in a single line.”

International courts have also not answered the question on whether there is a legal obligation to delimit a single maritime boundary. In the majority of the cases, they have either been asked by the parties to delimit a continental shelf boundary or a single maritime boundary. In the latter cases, they have never established or addressed whether it was possible as a matter of law for the court/tribunal to delimit a single maritime boundary for two different maritime zones.

For example, in the Gulf of Maine Case, which was the first time Court was asked to delimit the course of a single maritime boundary for the continental shelves and the exclusive fishing zones of Canada and the United States. The Chamber of the ICJ noted that the Parties had “taken it for granted that it would be possible, both legally and materially, to draw a single boundary for two different jurisdictions.” The Chamber observed that “as international law did not say this could not be done, and that, since it was a practical possibility to do so in this case, it was willing to continue with the exercise.” This was echoed in the St Pierre and Miquelon Decision where the tribunal was asked to establish a single delimitation. The tribunal did not question the legality of drawing a single maritime boundary but found that “in the present case, there is no material obstacle to the Court’s drawing a single delimitation line as required by the Agreement.”

Judicial and State support for a single maritime boundary appears to be motivated by considerations of simplicity, certainty and convenience. As noted by Judge Oda in Tunisia/Libya:

It is congruous or conceivable that the same marine/submarine column should be placed under different national jurisdictions for the same purpose of resource exploitation, however different the resources may be

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201 It will not possible to have separate EEZ and continental shelf boundary where the EEZ boundary also includes the seabed. However, in the 1997 Indonesia-Australia Agreement, Indonesia and Australia agreed on separate EEZ and seabed boundaries on the basis that EEZ sovereign rights and jurisdiction were limited to the water column and that continental shelf rights and jurisdiction are applicable to the seabed.


203 Kaye, “The Use of Multiple Boundaries in Maritime Boundary Delimitation and Practice,” at 58.

204 Kaye, “The Use of Multiple Boundaries in Maritime Boundary Delimitation and Practice,” at 59.


207 Evans, “Delimitation and the Common Maritime Boundary,” 305.

208 St Pierre and Miquelon Case, Award, paragraph 37.

209 Kaye, “The Use of Multiple Boundaries in Maritime Boundary Delimitation and Practice,” at 58.
and that the same area of ocean be consequently policed by two different States. One is entitled to enquire whether superimposition of two different boundaries is tolerable as a matter of international \textit{ordre public}.\footnote{Tunisia/Libya Case, Judgment, paragraph 288 and 296.} Similarly, Judge Evensen, in the same case, noted that he thought it “hardly conceivable” there could be in that case a different line of delimitation” and that the lines of the EEZ should coincide with those laid down for continental shelf purposes.\footnote{Tunisia/Libya Case, Judgment, paragraph 232.} It was also noted in \textit{Qatar v. Bahrain} that “the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them.”\footnote{Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment [2001] ICJ Reports 40, paragraph 173.}

Interestingly, in the \textit{Jan Mayen Case} between Denmark and Norway, Denmark asked for a single line of delimitation of the fishing zone and continental shelf at a distance of 200 nm from Greenland’s baselines whereas Norway argued that the median line constitutes the boundary for purposes of the continental and the fishery zone. While in effect Norway was asking for the same boundary to be drawn for the continental shelf and the EEZ, the case was different in that the Court considered itself not empowered or constrained by any such agreement for a single dual-purpose line.\footnote{Jan Mayen Case, Judgment, paragraph 43.} The fact that the Court could have found two separate boundaries but did not is “a powerful indicator that a single line was its preferred outcome,”\footnote{Evans, “Delimitation and the Common Maritime Boundary,” 329.} thereby strengthening argument in favour of a single maritime boundary.

The upshot of the cases appears to be that while there are practical advantages to having a common line, this does not stem from any legal or doctrinal necessity but simply from the decision of the parties to seek a single line.\footnote{Evans, “Delimitation and the Common Maritime Boundary,” 327.} This compliance with the requests of the parties should not be misunderstood as the court’s endorsement of the concept.\footnote{Evans, “Delimitation and the Common Maritime Boundary,” 319.}

However, there are examples of State practice that demonstrate that two boundaries can work.\footnote{See generally Kaye, “The Use of Multiple Boundaries in Maritime Boundary Delimitation and Practice.”} The 1978 Australia-Papua New Guinea Delimitation (Torres Strait) establishes two separate boundaries\footnote{There is also a Protected Zone enclosure which straddles the seabed jurisdiction line and surrounds several islands of Australia and Papua New Guinea which is established to protect the “traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement” and also to protect and preserve the marine environment.} between Australia and Papua New Guinea in the Torres Strait, namely a ‘seabed
jurisdiction line’ which delimits the sovereign rights of each State over the continental shelf and a fisheries jurisdiction line which delimits the sovereign rights of each State ‘for the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary species’. In the Timor Sea, there are also separate boundaries established between Australia and Indonesia for the EEZ, restricted to fisheries, and one for the seabed.

The question is what would a court decide if Japan requested for a single maritime boundary and China requested for two separate boundaries? The position is not entirely clear although it would appear that the Court would have the discretion to choose the procedure which best suited the circumstances of the case and applicable law. Interestingly, there is some precedent that in a situation where there is no agreement on the type of boundary to be delimitated, that a court should proceed to a separate delimitation of the areas concerned (although it could find that the lines coincide). As mentioned above, in the Jan Mayen Case, there was no agreement that a single maritime boundary be delimited for both the continental shelf and fisheries zone and the Court proceeded to delimit both boundaries separately. Conversely, in the Eritrea/Yemen Arbitration, the Tribunal found a single maritime boundary although it was asked, in general terms, to determine “the line of delimitation in respect of all maritime areas between the parties, including the continental shelf and superjacent waters” and made no mention of a single line, neither asking for one or excluding one.

F. Separate Boundaries for Fisheries and Continental Shelf

In cases of separate entitlements to the EEZ and the continental shelf, it is likely that a court will proceed to delimit the boundaries separately. This section will now examine the applicable principles for delimitation of separate boundaries.

_Fisheries/Water Column Boundary Along the Median Line_

It is not possible to have separate EEZ and continental shelf boundary where the EEZ boundary also includes the seabed. It is therefore more accurate to describe it as a fisheries boundary or a water column boundary. However, in the 1997 Indonesia-Australia EEZ Agreement, Indonesia

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220 Torres Strait Treaty, Article 4(2) and 1(1)(b).
222 Case of the Maritime Boundary Delimitation Between Eritrea and Yemen (Eritrea v. Republic of Yemen), Award of 17 December 1999
223 Kolb, Case Law on Equitable Maritime Delimitation, 500.
and Australia agreed on separate EEZ and seabed boundaries on the basis that EEZ sovereign rights and jurisdiction were limited to the water column and that continental shelf rights and jurisdiction were applicable to the seabed.

Article 74 on EEZ delimitation is applicable to fisheries boundaries.\(^{224}\) There is also some legal support in UNCLOS which suggests that the sovereign rights given in UNCLOS can be divided between the water column and the seabed and subsoil. Article 56 (3) states that “rights set out in this Article with respect to the seabed and subsoil shall be exercised in accordance with Part VI (on the continental shelf),” which suggests that for seabed rights, the continental shelf regime would apply.

As mentioned in Part V (B), the starting point for delimitation of the EEZ would be article 74 of UNCLOS and the three-stage delimitation methodology. There would appear to be no reasons for a court to find (and for China and Japan to argue) that the EEZ boundary should be something other than the median line although there may be some argument from China that it should be adjusted to take into account the disparity between the relevant coastal lengths.

*Continental Shelf Boundary: Drawing the Provisional Equidistant Line*

A court is likely to find that Article 83 is the applicable law in cases of overlapping entitlement to outer continental shelf and distance-based continental shelf. The issue of which *method* should be followed in drawing the boundary line should be considered in light of the circumstances of each case\(^ {225}\) and China and Japan are likely to mount different arguments to support positions that are most beneficial to them. Japan will argue that the three-stage delimitation methodology is the most suitable method for the continental shelf boundary as it supports its position that the median line is the applicable continental shelf boundary. China will argue that the delimitation methodology is not appropriate or will not be equitable. Arguments for and against the appropriateness of the three-stage delimitation method are essentially based on the suitability of “equidistance” as a means of delimitation, both on a provisional basis or otherwise. Essentially, it is a rehash of the consistent debate that has plagued delimitation from the 1958 Convention, namely whether it should be “equity” or “equidistance” determining delimitation?

As Japanese scholars have argued,\(^ {226}\) there is no doubt as to the primacy of “equidistance” as a means of delimitation, both in drawing a provisional or final boundary. In the majority of cases, international courts and tribunals have adopted the “equidistance/relevant circumstances” methodology.\(^ {227}\) Equidistance as a method of delimitation, particularly in cases where relevant

\(^{224}\) See *Jan Mayen* Case where the court found that the applicable law for the boundary of the fishing zone was determined by the law governing the boundary of the exclusive economic zone.

\(^{225}\) *Bangladesh/Myanmar Case*, paragraph 235.


\(^{227}\) *Bangladesh/Myanmar Case*, paragraph 76.
coastlines are of similar length and there are no exceptional features, such as islands, will usually result in an equal division of maritime space and thus an equitable delimitation.\textsuperscript{228} The value and ease by which it is applied has been consistently recognized by courts and tribunals\textsuperscript{229} and is reflected in State practice with many States employing the equidistance or adjusted equidistance line in their delimitation agreements.\textsuperscript{230} In particular, it has also been recognized that equidistance is particularly appropriate in cases of “opposite coasts” as expressed by the ICJ in the \textit{North Sea Continental Shelf Cases}:

These [natural] prolongations [between opposite states] meet and overlap and can therefore only be delimited by means of a median line; and ignoring the presence of islets, rocks and minor coastal projections, the disproportional effect distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved.\textsuperscript{231}

Similarly, in the \textit{Black Sea Case}, there is some argument that for cases of opposite coasts, the equidistance line must be provisionally drawn at the first stage of delimitation without exception. While the court acknowledged that for adjacent coasts an equidistance line will be drawn “unless there are compelling reasons that make this unfeasible in a particular case,” the Court did not make the same qualification for opposite coasts. This implies that for opposite coasts, there are no exceptions or compelling reasons which would justify \textit{not} drawing a provisional equidistance line.

China, however, also has some grounds for arguing that “the equidistance method is just one among many and that there is no obligation to use it or give it priority,”\textsuperscript{232} a finding which has been oft repeated in delimitation jurisprudence.\textsuperscript{233} The acknowledgement that the applicable method will depend on the circumstances of the case implies that there will be circumstances where the equidistance method is not appropriate. There is also judicial precedent for not using the equidistance method. In \textit{Nicaragua v. Honduras}, the court found that an equidistance line could not produce an equitable outcome in light of the particular circumstances of the case and applied what is known as the angle bisector method.

\textsuperscript{228} Prescott and Schofield, Maritime Political Boundaries of the World, 225 – 226.
\textsuperscript{229} See for example, \textit{Nicaragua v. Honduras, Judgment}, [2007] ICJ Reports 659, paragraph 272; \textit{Barbados/Trinidad and Tobago}, paragraph 242 and 306.
\textsuperscript{230} Jonathan Charney stated in 1993 that “it appears from the practice that the equidistant line has played a major role in boundary delimitation agreements, regardless of whether they concern boundaries between opposite or adjacent States.” See Jonathan Charney, “Introduction” in Charney and Alexander (eds), \textit{International Maritime Boundaries, Volume I} (American Society of International Law, Martinus Nijhoff, 1993) at xlii.
\textsuperscript{231} \textit{North Sea Continental Shelf Cases}, paragraph 37.
\textsuperscript{232} \textit{Guinea-Guinea Bissau Case}, Award, paragraph 102.
If indeed the Okinawa Trough represents the extent of China’s continental shelf entitlement, China has good reason to argue that a provisional equidistance line may not be equitable. To apply equidistance, even on a provisional basis, would completely deny China the whole of its entitlement to outer continental shelf which exists *ipso facto and ab initio*. While the exercise of delimitation may necessarily involve a result whereby China is unable to claim some of its entitlement, using equidistance would involve China giving up its entire continental shelf entitlement which it is entitled to under law. It would amount to finding that the distance principle is superior to the “natural prolongation/outer continental margin” or that the EEZ has subsumed the continental shelf, which cannot be the case. China argues that:

…equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline.

However, it should also be noted that a continental shelf boundary along the axis of the Okinawa Trough (which Chinese scholars have argued is the applicable boundary) is also not equitable in cases of overlapping entitlement between distance-based and outer continental shelf. This would deny most of Japan’s distance-based continental shelf claim.

From the above, there would be appear to be a prima facie argument for and against a provisional equidistance line, although it is very unlikely that a court will depart from drawing a provisional equidistance line given the resounding judicial precedent in favour of such a line. In the view of the court, it could be said that the debate between equity and equidistance has already been resolved. The three-stage delimitation methodology incorporates elements of both “equity” and “equidistance” and in the second and third stages, factors are taking into account to ameliorate any inequities resulting from the adoption of the provisional equidistance line in the first stage.

Arguably, China’s arguments on the inequity of equidistance should not be made in the first stage of delimitation but instead, should be made at the second stage. In other words, China should not be arguing against the provisional equidistance line but should be arguing for an adjustment of the provisional equidistance line.

*Factors Requiring the Adjustment of the Provisional Equidistance Line in Respect of the Continental Shelf Boundary*

Japan will argue that at the second stage of delimitation, after the provisional median line is drawn, there are no factors calling for the adjustment or shifting of the provisional equidistance line.
line. Japan can rely on Libya/Malta to argue that for continental shelf boundaries within 200 nm, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to delimitation as between their claims. As mentioned above, this view has been widely entrenched such that if a tribunal were take into consideration natural prolongation of the seabed within the 200 nm zones, “it would be acting contrary to a long list of international decisions by the ICJ and courts of arbitration and consequently, contrary to international law.”

Notwithstanding the above, there are several arguments that China can use to counter this. First, and as mentioned above, is the fact that an equidistance line does not achieve an equitable result as it will deny China the whole of its legitimate entitlement to outer continental shelf. Accordingly, the line should be adjusted in order to achieve an equitable result. Second, Libya/Malta can be distinguished from the facts in the present situation in that China has an entitlement to the outer continental shelf based on natural prolongation/outer continental margin. Both “natural prolongation” and “outer continental margin” (i.e. basis of the title to continental shelf) have been described as geological and geomorphologic concepts. Article 76 (4), which establishes the limit of outer continental shelf entitlement, also employs both geologic (depth of sediment test) and geomorphic (foot of slope) criteria. On the basis that factors that play a part in the establishment of title should be taken into account as relevant circumstances in delimitation, one cannot exclude geophysical factors from consideration.

Third, it has been consistently recognized by scholars that in cases of overlapping outer continental shelves (i.e. both shelves are beyond 200 nm), that geophysical factors will play a role in delimitation. Chris Carleton states that “the fact that geophysical evidence was excluded in the Libya/Malta case…would not necessarily inhibit the use of geophysical and geological features in a continental shelf boundary issue beyond 200 nm, particularly as any extension beyond 200 nm must be in accordance with Article 76, which relies heavily on these parameters.” David Colson has observed that “geological and geomorphological factors will re-emerge in the law of maritime delimitation of the outer continental shelf.” If such geophysical factors are relevant for the delimitation of overlapping outer continental shelves beyond 200, there appears to be no good legal reason to ignore them in a delimitation of the outer continental shelf and inner continental shelf less just because the former is located beyond 200 nm of one State but within 200 nm of another. This is especially so when one considers that the 200 nm

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236 Charney, “International Maritime Boundaries for the Continental Shelf: The Relevance of Natural Prolongation” 1029.
238 Libya/Malta Case, paragraph 40.
limit established under UNCLOS was based on political compromise and has no legal justification.

Extent of Adjustment

There are “various adjustments that could be made within the relevant legal constraints to produce an equitable result.” China’s best scenario would be an adjustment to the axis of the Okinawa Trough where it claims its outer continental shelf ends. However, a court is unlikely to make such a holding because it would deny Japan its legitimate entitlement to distance-based shelf.

An equidistant line that lies between the axis of the Okinawa Trough and the 200 nm limit from the coast of Japan is an equitable continental shelf boundary. As noted by Gao Jianjun, this divides “the area of overlapping entitlements.” There is judicial support for such an approach. In the North Sea Cases, stated that as far as an overlapping area is concerned, such a situation must be resolved by agreement or failing that by an equal division of overlapping areas. In the Gulf of Maine Case, the Chamber stated that “while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the State between which delimitation is to be effected converge and overlap.”

As mentioned above, arguments based on proportionality and disparity in coastal length may also require an adjustment of a provisional equidistant line.

G. Single Maritime Boundary

As mentioned above, there is no legal imperative for a single maritime boundary although a court may find it most suitable in cases of an entitlement to an EEZ which overlaps with an entitlement to the continental shelf. It is in Japan’s interests to ask for a single maritime boundary for both the fisheries and seabed as there is arguably less scope for adjusting the median line to take into account geophysical factors. For example, even if China can establish that geophysical factors are relevant factors for the continental shelf boundary, Japan can still argue that when delimiting a single maritime boundary for both the continental shelf and EEZ, the courts only take into account so-called “neutral factors” which are of relevance or common to both regimes. For example, in the Gulf of Maine Case, it was said:

In reality, a delimitation by a single line...can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them. In that regard, moreover, it can be foreseen that with the gradual adoption by the majority if maritime States

243 Gulf of Maine Case, Judgment, paragraphs 195 – 196.
244 Kaye, “The Use of Multiple Boundaries in Maritime Boundary Delimitation and Practice,” 60
of an exclusive economic zone and, consequently, an increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for multi-purpose delimitation.\textsuperscript{245}

Under this reasoning, the Chamber ignored the impact on Canadian fisheries, and American arguments based on geomorphology. In \textit{St Pierre and Miquelon}, the Tribunal also adopted this “neutral criteria” approach in that geographic factors dominated i.e. coastal lengths, non-encroachment and proportionality and precluded other factors such as natural prolongation and geology, which would only be relevant to continental shelf delimitation.\textsuperscript{246} Similarly, in \textit{Bangladesh/Myanmar}, ITLOS found that:

the location and direction of the \textit{single maritime boundary applicable both to the seabed and subsoil and to the superjacent waters within the 200 nm limit} are to be determined on the \textit{basis of geography of the coasts of the Parties in relation to each other and not on the geology or geomorphology of the seabed} of the delimitation area.\textsuperscript{247}

This so-called neutral or common criteria ostensibly allows the Court to avoid deciding which zone (EEZ or continental shelf) has the superior right in delimitation. In light of this, Japan can argue that if it is a single maritime boundary delimiting both the continental shelf and EEZ, only neutral factors common to both regimes can be taken into account. The Okinawa Trough is a geological and/or geomorphologic circumstance and is only relevant to continental shelf delimitation and should therefore not be considered in the delimitation of a single maritime boundary.

However, there is some scope (arguably limited) for China to counter this. It should be recalled that the court in \textit{Libya/Malta} was in actual fact delimiting a continental shelf boundary, but considered factors (such as distance and difference in coastal lengths) which were arguably only relevant to EEZ delimitations. Similarly, in the \textit{Jan Mayen Case}, the Court considered the distribution to access to fisheries, a consideration only relevant to the EEZ boundary in what was essentially the delimitation of the boundary for both zones. This could also suggest that “the law permits the consideration of non-geographic considerations” in single dual-purpose boundaries.\textsuperscript{248} On this reasoning, if factors only relevant to EEZ delimitation are considered in pure continental shelf boundaries and/or single dual-purpose boundaries, there appears to be no reason why factors only relevant to continental shelf boundaries should be excluded for single maritime boundaries.

\textsuperscript{245} \textit{Gulf of Maine Case}, paragraph 194.
\textsuperscript{246} St Pierre and Miquelon, paragraph 47. 47, St. Pierre and Miquelon
\textsuperscript{247} Para 322. It is not clear whether the Tribunal was holding that geology/geomorphology were irrelevant because it was a single maritime boundary or because it was a boundary within 200 nm.
\textsuperscript{248} Charney (2002) at 1025
VII. IMPLICATIONS FOR DISPUTE SETTLEMENT

It is clear from the above discussion that both China and Japan can employ valid legal arguments, of varying strengths, to support their positions. China can validly and in good faith assert that the extent of its continental shelf entitlement ends at the Okinawa Trough and hence, this should be taken into consideration in delimitation either as determining the continental shelf boundary or as a relevant circumstance, along with other relevant circumstances to be taken into consideration. Similarly, Japan’s arguments in favour of distance as the basis for title for continental shelves within 200 nm, the irrelevance of geophysical factors such as the Okinawa Trough within 200 nm and the boundary being a single boundary based on the median line are also equally valid “good faith” claims in that they have some basis under international law

This has important implications for the mechanisms chosen by China and Japan to resolve their dispute relating to delimitation in the East China Sea. This section will explore the various dispute resolution mechanisms available under UNCLOS and international law and the impact of the equally legitimate claims of China and Japan on the choice of mechanism.

A. The Commission on the Limits of the Continental Shelf

Is there a role for the CLCS to resolve the dispute between China and Japan? China has submitted preliminary information to the CLCS and will be making a full submission in the future. The recommendations of the CLCS with regard to China’s submissions will no doubt “contribute to the determination of the scientific character of the Okinawa Trough.” 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 dispute between China and Japan is likely to be limited. 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. Japan has already protested China’s submission of preliminary information and will likely object to China’s actual full submission. Even if it does consent, 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

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249 A “good faith” claim is one which has “prima facie basis in international law.” See Zhang, “Why the 2008 Sino-Japanese Conesus on the East China Sea has stalled,” 59.
252 Annex 1, Paragraph 5 (a), Rules of Procedure of the Commission on the Limits of the Continental Shelf.
decision on the outer limits to be made. Again, even if CLCS makes a decision, China’s submission is without prejudice to the question of delimitation with Japan, and a boundary will still have to be negotiated or decided upon.

B. Binding Dispute Settlement Mechanisms

It is also unlikely that China and Japan will resolve their delimitation dispute (or their sovereignty dispute for that matter) by third party binding dispute settlement mechanisms under UNCLOS or general international law. First, while UNCLOS provides a range of compulsory dispute settlement mechanisms to State Parties in cases of a dispute in the interpretation or application of UNCLOS, China has 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 interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.” Similarly, while Japan has accepted the compulsory jurisdiction of the ICJ, China has not.

Accordingly, there is little scope for either China 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 Japan have never used binding dispute settlement mechanisms to resolve their disputes with other countries. Arguably, this reflects a cultural preference of Asian States who are perceived as having a “dislike of confrontational/adversarial litigation of disputes,

253 Article 76 (10), UNCLOS.
254 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. This includes disputes concerning the interpretation or application of Articles 15, 74 and 83 on maritime delimitation. 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.
255 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.
256 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>. 
particularly, third party dispute resolution before a court or tribunal257 and a preference for consultation and consensus-decision making.258

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. Courts have not had the opportunity to consider delimitation between outer continental shelf and distance-based shelf/EEZ yet and hence, the outcome is unpredictable and too much of a risk.

Third, adjudication is “attractive in situations where there is broad agreement about the relevant law and the resolution of the dispute is a matter of establishing who has the better case.”259 Conversely, it is unsuitable for disputes in which there is a fundamental disagreement about what the law is or should be.260 This is the case for the East China Sea disputes evidenced by the conflict between China and Japan in the applicable delimitation principles i.e. equity versus equidistance, natural prolongation versus distance, separate boundaries versus single maritime boundaries.

Fourth, there may be a perception, at least on the part of China, that its case involves the consideration of technical arguments and scientific evidence to do with the establishment of the outer continental shelf. There is a belief (unsubstantiated or not) that international courts often lack the technical expertise to make determinations on technical matters, and apart from one case,261 it has never formally appointed a technical expert to sit with it in delimitation cases262 despite having the option of doing so.263 This is evidenced by the reluctance and/or inability of the courts in the cases where arguments on “fundamental discontinuities” were raised to decide on the probity of such evidence.264

259 Merrills, International Dispute Settlement, 294.
260 Merrills, International Dispute Settlement, 294.
261 This was in the Gulf of Maine Case where the parties demanded that a jointly appointed and paid-for expert support the Chamber.
263 Article 67 of the Rules of the International Court of Justice; also see Article 289 of UNCLOS
264 However, this may not be true today. Technology and mindsets have developed and States are more familiar with the science necessary to prove the outer limits of their continental shelves. Since the first submission to the Commission on the Limits of the Continental Shelf (CLCS) by Russia in 2001, there have been fifty-nine (59) submissions as of 18 January 2012. The CLCS has made fourteen (14) recommendations as of 25 May 2011. Because States may now be more adept at presenting evidence and Articles 76 (4) provides objective criteria.
C. 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.\textsuperscript{265} 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.”\textsuperscript{266} 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.\textsuperscript{267} 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.\textsuperscript{268}

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 China or Japan unilaterally referring the dispute to compulsory conciliation. First, two of the threshold conditions for compulsory conciliation may not be met. First, the dispute arose in the 1970s, after China protested Japan’s claim to the seabed, and not after 1994 (when UNCLOS came into force) as required under Article 298. 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/Diaoyutai Islands but arguably, a conciliation commission can ignore the Islands and only consider delimitation in the northern part of the East China Sea.\textsuperscript{269}

The other challenge is that neither party may wish to unilaterally refer the dispute to compulsory conciliation for the same reasons mentioned in Part B 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.

D. Provisional Arrangements of a Practical Nature

Articles 74 (3) and 83 (3) provide that if delimitation cannot be effected by agreement:

\textsuperscript{265} Article 298 (1) (i) (a), UNCLOS.
\textsuperscript{266} Article 6, Annex V, UNCLOS.
\textsuperscript{267} Article 7, Annex V, UNCLOS.
\textsuperscript{268} Article 298 (1) (a) (ii), UNCLOS.
\textsuperscript{269} Gao “Joint Development in the East China Sea: Not an Easier Challenge than Delimitation,” 73.
[The States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and during the transitional period, not to jeopardize or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation.

There are presently two provisional arrangements in the East China Sea. First is the 1997 Sino-Japanese Fisheries Agreement, which came into force on 1 June 2000, which intended to regulate fisheries relation between them pending the ultimate delimitation of an EEZ boundary between. The second is the 2008 Principled Consensus on the East China Sea, which merely asserts 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 Sea.”

The current effectiveness of both arrangements is debatable. The 1997 Fisheries Agreement has been criticized for not being able to prevent the frequent conflicts between Chinese fishermen and the Japanese coast guard and both countries have been described as not respecting the Agreement. Similarly, the 2008 Principled Consensus, which was in essence, just an agreement to agree, have seen “no steps to concretize the Principled Consensus” and turn it into a binding agreement.

While these arrangements are certainly positive steps and may result in substantial co-operation in the future, the East China Sea may not be a conducive environment for provisional arrangements, particularly those relating to resources for several reasons. First, the existence of the sovereignty dispute over the Senkaku/Diaoyutai 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/Diaoyutai 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, even though the 2008 Principled Consensus intentionally did not include an area near the

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270 Gao Jianjun, “A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea,” Ocean Development and International Law 40, no. 3 (2009): 291–92. The consensus also states that Chinese enterprises welcome the participation of the Japanese in the existing oil and gas field in Chunxiao, in accordance with the relevant Chinese laws governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources.


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Senkakus (despite Chinese proposals to this effect),

it still was mired in controversy after its conclusion stemming for different interpretations of the Consensus portrayed in the Chinese and Japanese media.

Second, the overlapping claims in the East China Sea between China and Japan cover a relatively large area which makes it infinitely more difficult to conclude any meaningful provisional arrangements. However, because maximum political advantage would be achieved if the provisional arrangement were to involve all and not just simply part of the disputed area, adopting arrangements which only cover part of the overlapping claim, may be problematic. Further, it also runs the risk of a lack of reciprocity, which can happen when there is a fundamental divide on the applicable legal considerations. 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. As pointed out by Xhang Xinjun, it ignores China’s claim to the outer continental shelf and is hence perceived as unfair.

Third 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. Such political will must be sufficient “to withstand domestic upheavals such as change in government or internal strife between both states.” There does not appear to be political will present at the moment in China-Japan relations, either to conclude a JDA or ensure its successful implementation. Indeed, relations between China and Japan have also been tempestuous and both Governments have not hesitated to use popular opinion against the other to boost national approval ratings. It is argued that the breakthrough in negotiations on joint development represented by the 2008 Consensus was largely prompted by changes in Japanese leadership (namely the resignation of

273 Gao “A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea,” 293
the famously nationalistic Junichiro Koizumi) 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.

**E. Negotiation of Boundaries**

The above considerations point to the negotiation of boundaries being a promising dispute settlement mechanism in the East China Sea. First, a boundary is ultimately a division of rights and jurisdiction and does not require the “sharing” of resources or the degree of co-operation such sharing entails. Because there is more certainty in a boundary and there is less chance for interaction or conflict between China and Japan and their respective agencies (as compared to a joint development arrangement for example), it is much clearer and is less likely to involve disputes down line.

Second, negotiating a boundary will not involve as much as commitment, both politically and resource-wise, as a joint development arrangement will. There will be no need to create infrastructure or institutional frameworks to manage resources and will require less time and effort on the part of China and Japan.

Third, it may be politically easier to justify a division of resources rather than sharing resources with regards to the national electorates of China and Japan. This is because “sharing” can be perceived as giving up something that initially and rightfully belongs to the respective countries whereas “division” can easily be portrayed as an allocation of resources.

Fourth, while international law will inevitably play a role in negotiations, States are not bound by the rules and principles articulated by international courts and tribunals. As noted by Prescott and Schofield, “states are free to agree to any boundary they want provided that the rights and interests of third States, or of the international community are not prejudiced.” Accordingly, in disputes such as this, where the legal outcome is not clear-cut, it appears to be more advantageous for States to set aside strict legal principles and negotiate an agreement that is equitable to both, rather than risk all by third party dispute settlement. This would involve them negotiating in good faith, whereby, as put by the ICJ:

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284 Of course, even if a boundary is negotiated, China and Japan may also have to come to some arrangement on resources which straddle the boundary line.
…the parties are under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when one of them insists upon its own position without contemplating any modification of it.287

Accordingly, both Japan and China should of course use the fact that both their positions can be legally justified (albeit to varying degrees) and the fact that the reasoning of a court decision is not predictable or assured to push for a negotiated settlement. However, both should be willing to retract from hard-line and extreme positions to try and find some middle ground.

This middle ground is arguably the negotiation of two separate boundaries for the water column and for the seabed referred to in Part VI (F), with the former following the median line and the latter being an equidistant line between the axis of the Okinawa Trough and the 200 nm limit from the coast of Japan (i.e. representing an equal division of overlapping entitlement to the continental shelf). This gives some recognition to both the legal positions of China and Japan. It allows both China and Japan to have a share of seabed resources which is really the critical issue.

The perennial problem is the time that it takes to negotiate such boundaries, with the risk that increasing conflict and tension can irreparably harm bilateral ties. In this regard, because much of the strength of China’s legal claim to the shelf rests on it being able to prove that the Okinawa Trough is its outer continental margin, both parties may wish to agree that the CLCS or another technical committee of experts established for this purpose, give their opinion on China’s outer continental shelf entitlement. This agreement could be with the caveat that negotiations of a boundary settlement must be concluded prior to the verdict of the CLCS/technical committee. This may provide an additional and necessary impetus for both China and Japan to agree on an equitable maritime boundary arrangement.

287 North Sea Continental Shelf Cases, Judgment, paragraph 86.