COMMENT

THE EAST CHINA SEA: THE ROLE OF INTERNATIONAL LAW IN THE SETTLEMENT OF DISPUTES

In the peaceful settlement of disputes between nation-states, international law mandates that each nation enter negotiations with the intent of adhering to established principles of international law or submit the disputed issue to an international tribunal or a board of arbitration or conciliation.[1] Unfortunately, in circumstances where world opinion is not intense with respect to a particular issue, or when a dispute arises over a matter which is vital to a state's economic or political interests, a nation is frequently unwilling to accede to resolution of the conflict by a third party. Moreover, prospects for a negotiated settlement may be dimmed by the presence of sensitive political issues in a conflict. An additional limitation with respect to the viability of an international legal system of dispute resolution is that attempted reliance by a nation-state upon international law may prove futile in re-

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1. *See* J. BRIERLY, THE LAW OF NATIONS 71 (6th ed. 1963).

HEREINAFTER THE FOLLOWING CITATIONS WILL BE USED IN THIS COMMENT:

J. ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA (1970) [hereinafter cited as ANDRASSY];

J. BRIERLY, LAW OF NATIONS (6th ed. 1963) [hereinafter cited as BRIERLY];

H. CHIU, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES (1972) [hereinafter cited as CHIU];

L. LEE, CHINA AND INTERNATIONAL AGREEMENTS (1969) [hereinafter cited as LEE];

S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES (1963) [hereinafter cited as ODA];

S. ODA, THE INTERNATIONAL LAW OF THE OCEAN DEVELOPMENT: BASIC DOCUMENTS (1972) [hereinafter cited as DOCUMENTS];

G. WEISSBERG, RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND THE JAPANESE-KOREAN FISHERY DISPUTE (1966) [hereinafter cited as WEISSBERG];

M. WHITEMAN, II DIGEST OF INTERNATIONAL LAW (1963) [hereinafter cited as WHITEMAN];

Hearings on Ex. J. 92-1 (Okinawa Reversion Treaty) Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. (1971) [hereinafter cited as *Hearings*];

Okuhara, *The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf*, 15 JAPANESE ANNUAL OF INT'L L. 97 (1971) [hereinafter cited as Okuhara];

Zacklin, *The Sea*, ISSUES BEFORE THE 26TH GENERAL ASSEMBLY (1971) [hereinafter cited as Zacklin].

solving international conflicts when relevant legal principles have not been fully developed or when such principles fail to incorporate concrete guidelines necessary for the disposition of intricate legal questions.

These weaknesses of international law as a means of resolving disputes are manifested in the conflicts surrounding exploitation rights to the continental shelf of the East China Sea and the ownership of the Senkaku Islands in the East China Sea. The People's Republic of China (China), the Republic of China (Taiwan), the Republic of Korea (South Korea), and Japan have overlapping claims to the continental shelf beneath the East China Sea. Title to the Senkaku Islands, in turn, is claimed by Japan, China, and Taiwan and appears to be the immediate focal point of controversy in the East China Sea area.

Prior to 1968, limited governmental attention was accorded the fact that China, Taiwan, South Korea, and Japan shared a common continental shelf under the East China Sea.[2] However, a 1968 scientific survey of the East China Sea, conducted under the auspices of the United Nations, indicated that the sea's continental shelf may contain one of the richest oil reserves presently known.[3] Each nation naturally desires to exploit the vast petroleum reserves; hence a speedy settlement of the overlapping claims or an agreement to exploit the resources

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2. Before 1968 all disputes between these nation-states centered on fishing rights in contested waters. In each case resolution was largely accomplished through bilateral agreements:

> The seventh Japanese-Korean Conference, which convened on December 3, 1964, and resumed on January 18, 1965, resulted in a Treaty on Basic Relations, an Agreement Concerning Fisheries together with supplementary arrangements, and certain other agreements, such as those involving Property Claims and Economic Cooperation, the Legal Status and Treatment of Koreans Residing in Japan, and Cultural Assets and Cultural Cooperation. All of these agreements, as well as a number of related documents, were signed at Tokyo on June 22, 1965 and entered into force on December 18, 1965, the date on which the instruments of ratification were exchanged at Seoul. After more than half a century the parties thus agreed to establish diplomatic relations and after more than a decade of controversy decided to settle the fishery dispute, at least for a period of six years. WEISSBERG 86.
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> Among the most unique of all international agreements are the various Sino-Japanese fisheries agreement [sic] concluded since 1955. These agreements, although entered into by fisheries associations of the two countries, regulate matters traditionally reserved to sovereign states, such as the delineation of fishing zones, the fixing of the number of fishing vessels permitted to enter such zones by each party and the right to provisions and shelter in ports. LEE 59.

3. *See* N.Y. Times, Mar. 16, 1970, at 65, 67, col. 2. The survey which discovered these oil deposists was conducted by Dr. K.O. Emery of the Woods Hole Oceanographic Institute, and the resulting *Emery Report* was published under the auspices of the United Nations.

jointly would seem to be consistent with the national interests of all parties.[4] Despite the desirability of a settlement, principles of international law governing nation-states' rights to exploit natural resources adjacent to their respective coasts[5] are highly imprecise.[6] In addition, no effective method exists to insure reliance on international law for the resolution of conflicts even when the law is relatively well settled, as is the case with disputes concerning title to territories. The overriding complication in effecting any settlement of these divergent claims is the sensitive diplomatic issue of Taiwan's status in relation to China. The conflicting claims of sovereignty advanced by Peking and Taipei pose a political question of such magnitude that it is unlikely China would permit a *third party* to resolve any question where this issue is involved, as would necessarily be the case in the dispute concerning the East China Sea claims. In view of this specific obstacle to arbitration, conciliation, or adjudication by an international body, resort by the parties to direct negotiation remains a theoretical alternative, although

4. See notes 79-120 *infra*; notes 120-153 *infra* and accompanying text.

5. The potential wealth of the world's continental shelves has only recently been fully recognized, as new techniques in exploration and exploitation have been developed. As a result, the economic potential of the ocean's seabeds, especially the continental shelves, and man's ability to exploit these resources are no longer matters of conjecture. Virtually every mineral located on terrestrial surfaces can be found in more abundant quantities in the seabeds and subsoils of the oceans. *See* ANDRASSY 15-24.

The resource which seems to spark the greatest interest at present is oil. In 1969, of the $7.1 billion generated worldwide from the mineral resources of the sea, $6.1 billion came from oil and gas. Moreover, it is anticipated that the world seabed petroleum resources will eventually exceed those of the continents, and their value will exceed that of all other marine resources combined. *See* Zacklin 84.

It should also be noted that the major American and Western European oil companies are vitally interested in an expeditious peaceful settlement of these title disputes to the East China Sea. In 1970 South Korea granted Gulf, Texaco, Chevron, and Royal Dutch Petroleum rights to explore for oil off the coast of South Korea. The areas covered by the leases are jointly claimed by Japan in certain instances. *See* N.Y. Times, Mar. 16, 1970, at 67, col. 2. South Korea also granted Wendell Phillips Oil Company of Honolulu an oil exploration concession in the East China Sea in an area near the Island of Kyuyu, which is also claimed by Japan. *See* N.Y. Times, Sept. 27, 1970, § 3 at 28, col. 7. Gulf Oil has signed an agreement with the Teikoku Oil Company of Japan for a joint venture to explore for oil in off-shore areas aromd the Senkaku Islands southwest of Kyuyu Island. *See* N.Y. Times, June 30, 1970, at 68, col. 5. Taiwan granted oil exploration rights to Gulf Oil for the area around the Senkaku Islands, which are also claimed by China and Japan. *See* N.Y. Times, Apr. 14, 1971, at 9, col. 1.

The United States Government has advised all American oil companies conducting explorations in the areas contested by China that the enterprises, if they continue operations, risk seizure due to the controversies which have developed. The American government seems determined not to allow the oil dispute to disrupt the thaw in United States-People's Republic of China relations by protecting American oil interests against China's present claims. *See* N.Y. Times, Apr. 10, 1971, at 1, col. 4.

6. See notes 14-29 *infra* and accompanying text.

this approach appears somewhat improbable, since neither China nor Taiwan extends recognition to the other.

This Comment will focus on the conflicting legal claims in the East China Sea controversies, viewed in the context of the effectiveness of international legal principles and the established means of peaceful resolution of disputes. It will be demonstrated that regardless of whether the body of pertinent international law is imprecise, as with the law of the continental shelf and territorial sea, or refined, as with the settlement of title disputes,[7] economic and political interests may predominate and undermine prospects for settlement based solely on the principles of international law at issue. The conflicts surrounding sovereign control over the mineral resources beneath the East China Sea and title to the Senkaku Islands provide excellent case-studies of the role of international law in the settlement of disputes between Asian nations when the economic and political stakes are substantial.

THE LAW OF THE TERRITORIAL SEA AND THE CONTINENTAL SHELF

The extent of each nation-state's jurisdiction and exclusive sovereignty over the seas has been a source of considerable diplomatic and scholarly controversy for centuries.[8] A recent attempt to infuse order into this body of law was evidenced by the 1958 Geneva Conventions, produced at the United Nations Conference on the Law of the Sea.[9] Despite acceptance of the accords by numerous countries, the considerable ambiguity in specific provisions of the Geneva Conven-

7. See text accompanying notes 80-81 *infra*.

8. Over 300 years ago, Grotius, the Dutch legal scholar and theologian, espoused the theory of the free sea (*Mare Liberum*), and the English jurist Selden promoted the case for a closed sea (*Mare Clausum*). *Compare* H. GROTIUS, MARE LIBERUM (1604) *with* J. SELDEN, MARE CLAUSUM (1605). While technological advances have led to a revision of commonly held notions of the definition of the sea, the legal and political problems remain the same: determining the extent of a state's national jurisdiction. After a century of developing law by custom and practice, a relatively small number of nations developed the standard three-mile limitation on the exclusive sovereignty of any state over the sea contiguous to its shores. At present, the competing claims of the 127 member-nations of the United Nations have given rise to a political and legal problem of a magnitude never before experienced in this area. *See* Zacklin 79.

9. Convention on the Continental Shelf, U.N. Doc. A/CONF. 13/L.55 (1958). *See generally* Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607 (1958); Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234 (1959); Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AM. J. INT'L L. 629 (1958); Young, *The Geneva Convention on the Continental Shelf: A First Impression*, 52 AM. J. INT'L L. 733 (1958); Young, *Sedentary Fisheries and the Convention on the Continetal Shelf*, 55 AM. J. INT'L L. 359 (1961).

tions has encouraged the proliferation of contradictory claims asserted by nation-states under the rubric of international law—conflicts which have grown more intense with the discovery of new sources of needed minerals and resources in the seabeds and with the concurrent development of technological methods necessary to exploit such resources.

The traditional maritime states of Great Britain, the Netherlands, Japan, and the United States support the standard three-to-twelve-mile limits prescribed by customary international law for a state's territorial sea,[10] whereas the Latin and South American states, along with China, presently claim a 200-mile territorial sea and shelf area.[11] Predictions of vast economic wealth stored in the continental shelves have sparked increased national interest in these areas. This has served to reinforce the reluctance of many developing nations, already wary of the designs of more technologically advanced countries upon the seabed areas near their coasts, to submit disputes regarding the extent of their territorial seas to international solution—a solution which might be governed by

10. *See* Zacklin 80. The major maritime states, which commanded enough strength to limit each state's territorial sea to three miles prior to World War II, had already slipped into the minority position by the time of the 1958 Geneva Conference. At the Conference, the basic struggle was over the advisability of a six- or twelve-mile limit on the territorial sea. No compromise was reached at the Conference, however, and an outer boundary was not established. Nevertheless, Article 24 of the Convention on the Territorial Sea allowed each state to claim a contiguous zone which extended a *maximum* of twelve miles, thereby effectively limiting the extent of the territorial sea to twelve miles:

> Art. 24. 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured . . . . Convention on the Territorial Sea and the Contiguous Zone, art. 24, U.N. Doc. A/CONF. 13/L.52 (1958).

Also, the standard geologic definition of the continental shelf and that used in the 1958 Convention do not coincide. Geologists generally define the continental shelf as that shallow part of the sea bottom which is adjacent to the land mass up to the point where the gradient becomes steep, at which point the continental shelf ends and the continental slope begins. However, the definition utilized in the Convention speaks in terms of a continental shelf which extends to a point where the water measures 200 meters, regardless of whether the geologic continental shelf extends to a depth of more or less than 200 meters. ANDRASSY 3-14.

11. In 1952, Peru, Chile, and Ecuador signed the Declaration of Santiago on the Maritime Zone, which declared that each signatory possessed sole sovereignty over the sea adjacent to its coast and extending not less than 200 miles from such coast. At a conference in Lima, Peru in 1954, Honduras, El Salvador, and Costa Rica joined in claiming exclusive sovereignty over a 200-mile zone. *See* ANDRASSY 42-43. *See also* DOCUMENTS 345-55 (texts of the declarations).

definitions of the territorial sea established by the traditional maritime states.[12] In short, the 200-mile territorial sea limit, with concomitant control over that extent of the continental shelf, has been *unilaterally* adopted by developing nations in the hope of garnering an ample share of marine and shelf resources.[13] As a result of the cleavage in views between the traditional maritime states and emerging nation-states, the law of the sea has become a highly important and sensitive issue. More particularly, development of the requisite technology needed to exploit the resources of the seabeds has greatly enhanced the importance of the law pertaining to national sovereignty over the ocean floor.

General Development and Status of the Law of the Continental Shelf

Unlike rules of law relating to a nation-state's territorial sea, principles of international law applicable to the continental shelf and the resources of the seabed are of relatively recent origin. Prior to the development of technological capabilities needed to exploit the seabed, international law was silent as to the proprietorship of the continental shelf, since, of course, no practical necessity for devising a rule of law existed. In view of the dearth of legal principles with respect to the continental shelf, it is generally argued that, after technology necessary for exploitation was developed, claims by nation-states of exclusive jurisdiction over shelf areas could not, in principle, be deemed illegal under international law.[14] When numerous states followed suit by claiming sovereign control over areas of the seabeds, the practice thereby established became customary international law.[15]

With respect to national rights to the continental shelf, President Truman established the basic international precedent, which was sub-

12. The optimistic forecasts of natural wealth in the seas led to a definite trend toward "creeping nationalism" among the developing nations. *See* Knight, *Law of the Seas Negotiations, 1971-1972—from Internationalism to Nationalism*, 9 SAN DIEGO L. REV. 383, 389 (1972).

13. Emerging nations suspect the imperialistic motives of proponents of the traditional limits of a state's area of exclusive jurisdiction, since the economic superpowers possess the economic and technological capabilities for exploiting these resources. *See* T. KOBAYASHI, THE ANGLO-NORWEGIAN FISHERIES CASE OF 1961 AND THE CHANGING LAW OF THE TERRITORIAL SEA 14 (1965). *See also* PEKING REV., Mar. 10, 1972, at 16.

14. *See* ANDRASSY 64. By 1950 nineteen states had claimed sovereign control over the adjacent submarine areas, and no protests had been lodged. By 1957 six more states had followed suit, including South Korea. By 1960 no more than thirty-five states had registered specific claims. Nevertheless, largely based on the assertions of the 1958 Geneva Conventions, it was generally accepted that no declaration was necessary and that the adjacent submarine areas belonged to the coastal state *ipso jure*. See Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF 26-27 (1968).

15. *See* ANDRASSY 64.

sequently followed by a majority of nations—albeit with numerous variations—when he declared by proclamation in 1945 that the United States,

> [h]aving concern for the urgency of conserving and prudently utilizing its natural resources . . . regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control . . . .[16]

Generally, a lengthy period of time is required for a rule of customary international law to develop; but as Professor Lauterpacht has argued, the absence of protests which accompanied the widespread claims to sovereignty over the continental shelf following President Truman's proclamation signaled the world community's general acquiescence, which, in turn, gave rise to a new rule of international law.[17] In addition, the view was soon accepted that an official governmental statement expressly claiming sovereign rights to exploit adjacent seabeds was not legally required to justify a state's claim.[18]

However, controversy soon arose with respect to the permissible *area* of the continental shelf over which a nation-state could exert sovereign control. As a result of international confusion over the extent of exclusive national control, the 1958 Convention on the Continental Shelf was promulgated in an effort to provide guidelines for signatory nations.[19] The Convention recognizes that all coastal states,

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16. DEP'T STATE BULL. No. 327, *Proclamation Concerning United States Jurisdiction over Natural Resources in Coastal Areas and the High Seas* 484, 485 (1945). The United States Proclamation dealt with the natural resources of the seabed and subsoil of the continental shelf beneath the high seas but contiguous to the United States. No claim to full sovereignty was made which affected the character of the high seas and the rights of free passage and navigation. *See* Exec. Order No. 9633, 10 Fed. Reg. 12,305 (1945).

Prior to the Truman Proclamation, various jurists and publicists had promoted similar theories. But it is generally conceded that the Proclamation was the beginning of the positive law on the subject. Thereafter, this concept of the coastal state's having a vested right in the continental shelf off its shores soon prevailed over all competing theories. According to the Trumau Proclamation, all disputes pertaining to overlapping claims were to be settled by mutual agreement according to principles of equity, and this basic pattern has prevailed subsequently in the proclamations of other states and in the settlement of disputes which have arisen. North Seas Continental Shelf Cases, [1969] I.C.J. 33. *See generally* Bingham, *The Continental Shelf and the Marginal Belt*, 40 AM. J. INT'L L. 173 (1946).

17. *See* Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L. L. 376, 393-95 (1950). *See also Meeting of June 26, 1953*, I Y.B. OF THE INT'L L. COMM'N 59, 63, 68, 122, 257, 261, 266 (1953).

18. *See* ODA 151.

19. The 1958 Conference on the Law of the Sea was called to deal with "the problems relating to the high seas, territorial waters, contiguous zones, the continental

with or without a specific proclamation, have sovereign rights over the contiguous continental shelf for purposes of exploring and exploiting the natural resources located therein.[20] In a critical provision, the Convention defines the continental shelf as

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres, *or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources* of the said areas . . . .[21]

Unfortunately, the Convention accomplished little with respect to settling controversies existing at the time of its promulgation because of the open-ended nature of the accord's definition of the continental shelf. Indeed, the Convention itself generated new disputes. With the development of improved techniques of seabed exploration to depths not envisioned when the Convention was written,[22] the "exploitability" clause contained in the definition of "continental shelf" opened the possibility of national claims of sovereignty to the deepest troughs of the ocean. Obviously, such extensive claims were not intended to be

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shelf and the adjacent waters" based upon the completion of comprehensive preliminary studies as directed by a General Assembly resolution. G.A. Res. 899 (IX), 6 U.N. GAOR Supp. 21, at 50, U.N. Doc. A/2890 (1954). *See* 1958 United Nations Conference on the Law of the Sea, Vol. 2, U.N. Doc. A/CONF. 13/38, at 1 (1958). The Convention on the Continental Shelf was adopted by a vote of 57 to 3, with 8 abstentions, on April 29, 1958. It came into force on June 10, 1964. *Id. See* DOCUMENTS 20 (text of the Convention).

20. Article 2 of the Convention on the Continental Shelf provides: "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation." U.N. Doc. A/CONF. 13/L.55 (1958).

21. Article 1, Convention on the Continental Shelf (emphasis added). *Id.*

Various interpretations have been accorded this section of the Convention. One school of thought is that the Conference intended the definition to cover only the geologic shelf, which normally ends at 200 meters, thereby allowing exploitation of only those areas relatively near the shore. Other observers contend that the intent of the Convention is to allow exploitation of whatever territory is exploitable, whether it is the shelf, slope, or continental rise. This latter view seems to be the most popular at present.

The United States has gone far beyond the 200-meter limit in continental shelf and slope exploitation. International mining activity in this regard has been aggressive, stretching out past the 200-meter mark wherever possible. *See* Krueger, *Background of the Doctrine of the Continental Shelf and Outer Continental Shelf Lands Act*, 10 NATURAL RESOURCE J. 442, 479 (1970).

22. At the time the Convention was written, undersea exploration and exploitation could not be conducted at a depth deeper than a maximum of 280 meters. Moreover, it was not anticipated that technology would develop as rapidly as it has in the reeent past. Presently, it is anticipated that by 1974 the petroleum industry will have a capacity to drill and produce in depths of approximately 1500 meters. By 1979 it should be possible to develop the technology needed to drill to 6000 meters. *See generally* Auburn, *The International Seabed Area*, 20 INT'L & COMP. L.Q. 173, 174-75 (1971).

legitimized by the signatories when the Convention was executed; but a literal reading of this provision of the accord would permit coastal states to extend their claims of sovereign control over seabed areas to the middle of the ocean, thereby potentially creating overlapping national claims as well as establishing vast areas of national monopolization.[23]

Difficulties resulting from the "exploitability" clause of article 1[24] of the Geneva Convention are multiplied in circumstances where *overlapping* claims to the continental shelf are made by adjacent or opposite neighbor-states. In such situations, article 6[25] of the Convention mandates that boundary lines of claims to the continental shelf shall be determined by agreement between the concerned nations.[26] However, in the absence of an agreement, the boundary of the continental shelf is to be the median line between the claimant states ("every point of which is *equidistant* from the nearest points of the baselines . . ."),

23. *See* ANDRASSY 84-90. The possibility that the 200-meter standard of the Convention, when coupled with the "exploitability" clause, might become inadequate was pointed out to the Conference when the standard was promulgated. However, the state of maritime technology at that time was relatively primitive; hence, there was a widespread refusal to believe that such technology would develop as rapidly as it did in the mid-sixties.

Certain delegates anticipated that the "exploitability" option would only be utilized in exceptional circumstances, but any standard legal construction of the section would not allow such a limitation. Therefore, with the present and future capabilities of exploration, a state's sovereign control over those areas of seabed adjacent to its coast may be extended to the middle of the ocean, as long as the area is exploitable with the technology which is then available. This development was certainly not anticipated by the drafters of the Convention. *See generally* C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 70 (1967).

24. See note 21 *supra* and accompanying text.

25. Article 6 of the Convention on the Continental Shelf provides:

> 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
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> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
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> 3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land. U.N. Doc. A/CONF. 13/L.55 (1958).

26. *See id.* (article 6, section 1 of the Convention on the Continental Shelf).

unless another boundary line is justified by "special circumstances."[27] Inherent in the basic standards of "median line" and "special circumstances" are numerous areas of confusion since no precise legal criteria were established to determine such basic points as the meaning of "opposite" or "adjacent" coasts.[28] The problem of inadequate and ambiguous guidelines becomes even more complicated when the disputants are not parties to the Geneva Convention.[29]

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27. *See id.* (article 6, sections 1 and 2 of the Convention on the Continental Shelf); Grisel, *The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Seas Continental Shelf Cases*, 64 AM. J. INT'L L. 562 (1970). Dr. Grisel maintains that

> this proviso was adopted because the framers of the convention felt that the application of the equidistance principle would not be satisfactory in all cases and that exceptions to the rule should therefore be provided. But the preparatory work gives little information upon the content of the concept of "special circumstances," the definition of which is absent in Article 6. Two extreme interpretations of the notion are conceivable. One accords with the *ratio legis* just mentioned: special circumstances may be said to exist in any case where the equidistance line has inappropriate effects. The other relies rather on the formulation of Article 6: since the "circumstances" must be "special" and "justify" a departure from the principle, in order to be taken into account, they may be regarded as present only in quite exceptional situations, where the drawing of an equidistance line would be infeasible. *Id.* at 581.

The International Court of Justice in the *North Seas Cases* did not expressly address this issue. However, the entire tenor of the opinion indicates that the court favors a broad interpretation of the clause. The international tribunal mandated the settlement of all disputes according to "equitable principles," a standard which is indeed vague. The valid test to establish the existence of a "special circumstance," according to the court, is whether the application of the equidistance principle would lead to inequitable results in the particular case at hand. Such a standard implies a liberal construction of the "escape clause." *Id.* at 582.

> Thus, the "special circumstances" clause covers a wide range of situations where the application of the equidistance principle would lead to inequitable results. It is therefore likely to have the following consequences: In almost every case, the country which does not find the equidistance line satisfactory will be entitled to allege that a departure from the rule is justified. There will then be only two ways to avoid conflicting claims. Either the parties reach an agreement on the delimitation of the boundary line or they submit their dispute to arbitration. Since no definite criteria apply in the matter, except the test of "equity" laid down by the International Court of Justice, the arbitrators will be in a position to adjudicate *ex aequo et bona*. *Id.* at 583-84.

See generally Ely, *Seabed Boundaries Between Coastal States: The Effect To Be Given Islets as "Special Circumstances,"* 6 INT'L LAW. 219 (1972).

28. *See* Grisel, *supra* note 27, at 577-84.

29. *Id.* at 563.

> Most countries have not yet ratified the Convention on the Continental Shelf, and the question thus arises as to what rules are applicable to the drawing of the lateral boundaries when one or both of the parties are not bound by that convention. Such was the situation in the *North Sea Continental Shelf Cases* between Germany on the one hand and Denmark and The Netherlands on the other, which were recently decided by the International Court of Justice. The waters of the North Sea are shallow, and the whole bottom may be regarded as continental shelf, the western part of which incontestably belongs to Great Britain. The eastern part must be divided between Norway, Denmark, the Federal Republic of Germany, The Netherlands, Belgium, and France. Germany concluded a convention with each of its neighbors (Denmark and The Netherlands), which delimited the boundary of the shelf in the immediate vicinity of the coast according to the principle of equidistance. Both Den-

The Geneva Accord and Customary Law: The Impact of the North Seas Cases

Notwithstanding the ambiguities in the 1958 accord, an issue emerges as to whether the provisions of the Convention have been so generally accepted by the community of nations as to be considered customary international law and therefore binding on nonsignatories. The International Court of Justice in the *North Seas Continental Shelf Cases*, a decision involving a controversy among West Germany, Denmark, and the Netherlands over claims to the continental shelf under the North Sea, determined that the principle of equidistance contained in the Convention had not become "an inescapable principle *a priori* accompaniment of basic continental shelf doctrine."[30] On the contrary, the court deemed the principle to be purely conventional; and, therefore, nonsignatory states are not bound by the standards of the Geneva accords.[31] In addition, while determining that the parties in the case were not required to apply either the 1958 Convention or the equidistance method, the international tribunal held that there are still principles of law to be applied in resolving disputes over the continental shelf, namely the application of "equitable principles."[32]

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mark and The Netherlands wished the prolongation of the frontier lines seaward to be made under the same rule. The Federal Republic disagreed with that view, since the lines thus drawn would meet at a relatively short distance from its coast and thereby considerably narrow its portion of the North Sea continental shelf. After unfruitful negotiations the parties decided to submit the dispute to the International Court of Justice. Germany concluded with each of its opponents a Special Agreement, Article 1 of which requested the Court to decide:

> What principles and rules of international law are applicable to the delimitations between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above mentioned Convention . . .? *Id.*

See North Seas Continental Shelf Cases, [1969] I.C.J. 4.

30. North Seas Continental Shelf Cases, [1969] I.C.J. 32.

31. *Id.* at 41. The International Court of Justice reasoned that

> the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic. *Id.*

32. *Id.* at 46-47. It has been argued that it is inappropriate to require states to submit to arbitration when there are no specific controlling rules of international law available which would be dispositive of the controversy. Without any such guidelines, the arbitrators would be able to exercise a wide degree of discretion. While states might freely submit to such arbitration, most nations would undoubtedly be reluctant to arbitrate significant issues when the primary principles of law being applied were only vague concepts of equity. *See* Grisel, *supra* note 27, at 591.

In articulating these "equitable principles," the International Court established three exceedingly broad standards to aid in negotiating the settlement of a dispute. First, nation-states are obliged to enter negotiations with a view toward arriving at an agreement.[33] Second, all relevant circumstances are to be taken into account by the parties in effecting a settlement, which is to be based on equitable principles.[34] Third, and more concretely, the recognized continental shelf of any state must be the *natural prolongation* of its terrestrial body and must not infringe upon any similar prolongation of another state.[35]

Despite the International Court's formulation of three general principles with respect to settling disputes concerning the continental shelf, it is apparent that the "generality of practice" required to establish a rule of international law still has not been achieved. As of 1969, at least ninety-eight states had asserted widely divergent claims of jurisdiction over the offshore resources of the continental shelf, with thirty-seven of these countries having claimed sovereignty over areas going deeper than the two-hundred-meter standard established by the Geneva Convention.[36] Emerging nations, fearing increased domination by technologically advanced countries, have generally laid claim to very extensive areas of the seabed.[37] As justification for such expansive claims, the developing states have viewed the *North Seas Cases* as a declaration of independence from the 200-meter standard of the 1958 Convention.[38]

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33. North Seas Continental Shelf Cases, [1969] I.C.J. 47.

34. *Id.* at 47, 49-50. The court was careful to note that equity does not necessarily coincide with equality.

35. *Id.* at 47. The International Court found that in each case:

> (A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and
>
> (B) there being no other single method of delimitation the use of which is in all circumstances obligatory;
>
> (C) the principles and rules of international law applicable to the delimitatiou . . . of the areas of the continental shelf . . . are as follows:
>
> (1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
>
> (2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them . . . . *Id.* at 53.

36. *See* Krueger, *supra* note 21, at 479.

37. See notes 11-13 *supra* and accompanying text.

38. *See* T. KOBAYASHI, *supra* note 13, at 48-49. Mr. Kobayashi finds an almost total disregard for the "international aspect" of the problems of delimitation and territorial jurisdiction. Relying also on Justice Alvarez's concurring opinion in the *Anglo-*

As a result of widespread confusion and continuing disputes,[39] most countries have recognized the inadequacy of the Geneva Convention, largely due to the open-ended nature of the "exploitability" clause. Consequently, in 1970, the United Nations General Assembly decided to convene a Conference on the Law of the Sea in 1973 to be charged with the task of establishing international machinery to regulate equitably the exploitation of the resources of the ocean floor beyond what are determined to be the limits of national jurisdiction.[40] As a guideline for the Conference, the General Assembly adopted a "Declaration of Principles," which asserted that the seabed underlying the high seas is not subject to appropriation by individual states and, indeed, that exploitation should be regulated by an international organ.[41]

Norwegian Fisheries Cases, [1961] I.C.J. 114, 145, the smaller states have given their self-interest full expression by applying liberal criteria in the delimination of their area of sovereign jurisdiction. This situation is viewed as a reaction to the "colonial domination" imposed in the past by Great Britain, Japan, Germany, the United States, and other Western nations in the name of the freedom of the seas. *Id.*

39. The ensuing confusiou prompted Ambassador Prado of Malta to raise again before the United Nations—less than six years ago—the issue of the seabeds. Most of the Geneva Conventions promulgated in 1958 had just recently come into force wheu Ambassador Prado posed the issue of the law of the sea in the United Nations: the Convention on the Territorial Sea and Contiguous Zone came into force in 1964; the High Seas, in 1962; the Continental Shelf, in 1964; and the Fishing and the Conservation of the Living Resources of the High Seas, in 1962. Most observers still assumed that these Conventions would be dispositive of any conflicts which would arise. However, it had already become apparent to Ambassador Prado that a complete restructuring of these Conventions was needed to deal with the rapid advances in technology which had destroyed the efficacy of the 1958 Conveutions. *See* Zacklin 80.

40. *Id.* at 80-81. While the members of the United Nations seem to be anxious to establish an international regime to regulate the world's seabeds, private business is generally wary of this approach. In view of the desire for secure investments, business interests would prefer having some sort of national control so that there would be a more familiar method of recourse should disputes arise. In general, big business is uncertain of the stability of any regime of this sort under the auspices of the United Nations. *See* Auburn, *The Deep Seabed Hard Mineral Resources Bill,* 9 SAN DIEGO L. REV. 491, 494-95 (1972).

See generally Eichelberger, *The United Nations and the Bed of the Sea,* 6 SAN DIEGO L. REV. 339 (1969); Knight, *supra* note 12. *See also* G. MANGONE, THE UNITED NATIONS, INTERNATIONAL LAW, AND THE BED OF THE SEAS (1972).

41. G.A. Res. 2749, 25 U.N. GAOR Supp. No. 28, at 24, U.N. Doc. A/C.1/L.544 (1970). Resolution 2749 (XXV) provides in part:

> *The General Assembly,*
>
> *Recalling* its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,
>
> *Affirming* that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,
>
> *Recognizing* that the existing legal regime of the high seas does not pro-

Notwithstanding the general concurrence of member-states in the guidelines set forth in the "Declaration of Principles," there exist highly complicated issues to be settled by the eighty-six-member Sea-Bed Committee, established by the General Assembly to complete preliminary groundwork prior to the Conference itself. For example, the extent of a state's territorial sea, the extent of a country's exclusive jurisdiction over the continental shelf, and the issue of whether national economic control should be exclusive in nature or subject to international regulation are vigorously contested questions.[42] As indicated, developing states urge the existence of a 200-mile zone of exclusive control with respect to both the territorial sea and the continental shelf, but countries with sophisticated technological capabilities contend that the area of *exclusive* jurisdiction over the territorial sea should be restricted to a maximum limit of twelve miles and that control of the seabeds should be limited to that area geologically identifiable as the

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vide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international regime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

. . . .

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

. . . .

9. On the basis of the principles of this Declaration, an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, *inter alia*, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether landlocked or coastal.

See generally Gorove, *The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation?* 9 SAN DIEGO L. REV. 390 (1972); Sohn, *The Council of an International Sea-Bed Authority*, 9 SAN DIEGO L. REV. 404 (1972).

42. *See generally* Stevenson, *Who Is To Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference*, 6 INT'L LAW. 465 (1972).

continental shelf.[43] Moreover, the possible nature and authority of the international regulatory organ which is to be established varies greatly among the nations submitting proposals.[44] In short, the entire field of the law of the sea seems to be in disarray,[45] and the prospects for effecting an international consensus seem slight.[46]

THE LAW OF THE SEA: VIEWS OF STATES BORDERING THE EAST CHINA SEA

Considerable tension among nations bordering the East China Sea has resulted, at least in part, from the absence of authoritative principles of international law governing the extent of a nation-state's continental shelf and the dearth of standards to be applied in settling overlapping claims by states sharing the same shelf area. Of the four nation-states, only Taiwan has signed the 1958 Geneva Convention pertaining to the continental shelf.[47] In addition, while Japan has established diplomatic relations with China and South Korea, China does not recognize either Taiwan or South Korea. Therefore, initiation of four-party negotiations to settle the conflicting claims to the continental shelf is seemingly impossible under present circumstances. However, an examination of present policy positions of the four countries involved in the East China Sea disputes will aid in analyzing areas of potential agreement between these competing states should they eventually attempt to resolve their controversy through an established means of peacefully settling international disputes.

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43. *Id.* at 472.

44. *See* DOCUMENTS 73-231 (texts of the various proposals).

45. After viewing the dearth of progress reached by the preliminary planning sessions thus far, certain commentators have urged that the General Assembly should exercise its reserved option of postponing the 1973 Conference due to the unlikelihood of reaching any accord. *See* Butte, *The Law of the Sea—Breakers Ahead*, 6 INT'L LAW. 237, 240-41 (1972).

Not all commentators agree with Mr. Butte. While admitting that the unsolved problems are legion, and seemingly insurmountable, they insist that the Conference should be held as scheduled in order to force the various nation-states to make the difficult decisions and commitments at the present time. According to this view, delay would only increase the proliferation of unilateral claims; coastal states will grow anxious to begin to exploit their offshore resources; and the present exploitation by the more technologically advanced countries will increase rapidly—all of which will tend to complicate the issues further. *See* Stevenson, *supra* note 42, at 477.

46. The potential wealth of the seabeds has given rise to divergent claims. Many states, moreover, are simply unwilling to restrict the extent of their present claims for the benefit of their less geographically fortunate neighbors who have little or no coastline. *See* ANDRASSY 99-107.

47. See text accompanying notes 65-69 *infra*.

Japan: Freedom of Exploration and an International Regulatory Regime

Prior to technological breakthroughs permitting exploitation of the ocean floor, Japan's concern in regard to the law of the sea centered on curbing extensive national claims over territorial waters in order to enhance free mobility of Japanese fishing interests. Similarly, with the advent of technological means of seabed exploitation, the official position of Japan with respect to control of the *continental shelf* has been motivated by its intense desire to prevent national monopolization of vast areas of the ocean floor in order to maximize Japanese opportunities for worldwide exploitation of sea resources.[48] In this regard, Japan refused to support adoption of the 1958 Geneva Convention and favored instead the utilization of seabed resources for the benefit of mankind.[49] In particular, the "exploitability" criterion established by the Geneva accord was opposed by the Japanese due to the potential for extension of national claims beyond the depth of 200 meters and, consequently, over ever-increasing distances as new technology was developed.[50] As a substitute for the vague contours established by the Convention, Japan advocated the creation of an international regime for governing exploration and exploitation of marine resources.[51]

Japan's desire to prevent the proliferation of unilateral claims by nations over the ocean floor has been intensified by its expanding need for petroleum resources. Japan is presently dependent on oil for seventy percent of its energy needs, a factor which makes it the largest oil importer in the world.[52] As its energy requirements increase, Japan

48. *See* ODA 25-35. Initially, Japan's primary concern was the protection of its fishing industry. Japan's massive fishing fleet has been involved in conflicts with many states, including China, Indonesia, South Korea, and the Soviet Union. Japan's fishermen are highly aggressive, refusing to respect the extended areas claimed by these states past the three-mile limit acknowledged by Japan. As a result, several thousand Japanese ships have been seized in the waters held exclusively by these states. In each case, the Japanese government has had to negotiate an understanding or working agreement with the other country in order to insure the return of the Japanese ships and fishermen. *Id.*

49. *See* 6 U.N. GAOR, Conference on the Law of the Sea 14, 47 (1958).

50. *See* ODA 167.

51. *See* 6 U.N. GAOR, Conference on the Law of the Sea 14, 47, 56 (1958).

52. *See* N.Y. Times, Apr. 9, 1972, § 3, at 5, col. 1. Japan's pressing need for oil reserves is forcing her into the highly competitive field of oil exploration. While Japan normally prefers to trade in the world community without incurring any sort of political liabilities, it appears that the quest for oil is dragging Japan onto the world stage as it competes for the exploration rights to many of the large oil reserves presently known around the world. Former Premier Eisaku Sato aptly noted that "power is the

is anxious to find new petroleum sources, as well as to keep newly discovered deposits in the continental shelf open to exploitation by nations with adequate technological capabilities.[53]

While Japan's interest in maritime nations' rights has expanded from a singular desire to protect its fishing industry to encompass a policy to maximize the exploitation of mineral resources contained in the continental shelf, its policy position has remained consistent and has proved to be well designed to serve Japan's national interests. Thus, Dr. Shigeru Oda, Japan's foremost authority on the law of the sea, has consistently espoused a philosophy of *international control* of the seabeds:

> [T]he question of the *utilization* of the seas must be carefully distinguished from the question of the *jurisdiction* of the State. It has been overlooked by many scholars that denial of a regime of the continental shelf by the coastal State, as the author is proposing, does not necessarily mean the prohibition of the exploitation itself of submarine areas.[54]

Dr. Oda has also promoted the concept of an international regime regulating exploitation of the ocean floor of the deep sea, as distinct from the continental shelf (assuming the exploitability criterion in the Geneva Convention is eventually rejected), thereby releasing deep sea areas from the exclusive control of adjoining states.[55] However, Professor Oda acknowledges that it is presently useless to view seabeds as being "beyond" the continental shelf, within the meaning of the Geneva Convention, since *all* seabed areas can conceivably be included as part of the continental shelf under the exploitability clause of article 1.[56]

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key—oil and nuclear power—for the next 30 years"; and Japan is eyeing the oil reserves of the world reaching from the East China Sea and the Pacific Basin, from Peru and Ecuador to Alaska and the United States, Siberia, Indonesia, and the Straits of Malacca. *Id.*

53. Japan has the necessary capital to invest in developing new oil sites. In addition, Japan is independently developing the most modern technology which is needed, so that it will not have to rely in the future on the oil giants of America and Western Europe. *Id.* at 1, col. 1.

54. ODA 151.

55. *See* W. BURKE, TOWARDS A BETTER USE OF THE OCEAN 198 (1969) (remarks of Dr. Shigeru Oda). This approach will allow Japan greater access to the seabeds of the world than would otherwise be possible if states were allowed to extend their exclusive jurisdiction beyond the continental shelf to the maximum extent existing technology would allow. Dr. Oda has explained:

> I do not suggest that as *lex ferenda*, the deep sea should be divided among the various coastal States. On the contrary, I am inclined to support the view that, as *lex ferenda*, the regime of the ocean floor of the deep sea should be distinct from that of the continental shelf, thus releasing deep sea areas from the exclusive control of the coastal States which they adjoin. In other words, coastal submarine areas should remain under the control of the coastal State as elements of the continental shelf, but the deep sea areas beneath the ocean should be treated differently. In order to realize this policy for deep

Pursuant to this fundamental policy of seeking the internationalization of the vast majority of ocean seabeds, Japan in 1971 submitted its "Outline of a Convention on the International Sea-Bed Regime and Machinery" for consideration by a United Nations committee.[57] While the Japanese proposal fails to define specifically the parameters of the international seabed, the measure does propose the establishment of an international body which would grant exploration and development licenses to petitioning states. According to the plan, the international organ would distribute revenues from exploitation of seabed resources among member-nations, with special consideration being given to developing nations.[58] Logically, as a state with severely limited natural resources but with financial and technological capabilities, Japan desires to limit to the greatest extent possible the area of the seabeds controlled by numerous coastal states through claims of exclusive sovereignty and thus to ensure opportunities for worldwide exploration by Japanese interests, subject to control by a proposed international regime.

China: Sanction of Extensive National Claims

Notwithstanding the fact that it has a coastline of 3500 miles, China controls a smaller share of the continental shelf than such small

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sea areas, it is essential that the Continental Shelf Convention be revised, thus leaving the way open to free the deep sea areas from the exclusive control of the coastal State. Careful thought must still be given to whether the 200-meters depth is an appropriate criterion for determining the line between the continental shelf under the control of the coastal State and other deep sea areas free from such control. *Id.* (remarks of Dr. Oda).

Japan is also promoting the idea that states should develop and exploit the natural resources of their adjoining seabeds through leases to technologically advanced states if the coastal state does not possess the needed technology or capital reserves. Naturally, Japan would be in an ideal position to "assist" such states. *Id.* at 197.

56. *See* 22 U.N. GAOR, at 42, U.N. Doc. A/C.1/PV 1515 (1967). If each state were allowed to extend its area of exclusive control even as much as 200 miles, which would be less than if each state could claim sovereign jurisdiction over the maximum exploitable area, the total seabed area of the world open for exploration and exploitation on a random basis would be reduced by thirty to fifty percent. Japan has the resources and technology to exploit these areas presently; but if such expanded claims are allowed to stand, Japan's potential for employment of these resources is severely reduced. Therefore, Japan stands to profit greatly if the area over which a state can claim exclusive jurisdiction is substantially limited. In the alternative, if the deep seabeds other than those included in the continental shelves are put under international control, Japan also stands to profit as one of the few states possessing the technology needed to develop these mineral reserves.

57. U.N. Comm. on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of Nat'l Jurisdiction, U.N. Doc. A/AC. 138/63 (1971), *reprinted in* DOCUMENTS 210.

58. U.N. Doc. A/AC. 138/63 (1971), *reprinted in* DOCUMENTS 210.

states as Ceylon, Madagascar, and Somalia under any of the competing standards of international law and the 1958 Convention.[59] This ironic result occurs because a large portion of China's coast is paralleled by island-states which jointly claim the intervening continental shelf.

Like Japan, China has an ever-increasing need to develop new petroleum supplies as its industry expands; hence the seabeds adjacent to its coast are viewed as a primary source of needed fuels.[60] Until recently China had been silent with respect to specific claims to the resources of the continental shelf. However, in order to bolster its newly announced claim to the resources of the East China Sea, China endorsed the claims of the Latin American states to a 200-mile territorial sea and to exclusive sovereignty over the resources of the ocean floor under the territorial sea as well.[61] In this regard, a Chinese representative recently stated before the United Nations Seabed Committee that, according to China's interpretation of international law, no recognized limit has traditionally been imposed by international law with respect to a state's territorial waters. Instead, according to the Chinese view, each country has been free to exercise its own sovereignty by unilaterally declaring the extent of its territorial waters and exclusive national control.[62] The Chinese representative also asserted that each state enjoys the exclusive right to dispose of the natural resources of its coastal seas and the seabeds beneath its territorial sea.[63]

Despite this deference to national claims, China has indicated that beyond the limits of the territorial sea and seabed over which a nation-state exercises exclusive sovereignty, namely up to 200 miles under the

59. *See* ANDRASSY 105-06.

60. *See* N.Y. Times, Apr. 9, 1972, § 3, at 5, col. 4. In the development of its natural resources, China subscribes to a policy of "maintaining independence and keeping the initiative in our own hands and relying on our own efforts." The People's Republic has undertaken a vast program of developing its natural resources, especially in the area of petroleum. Therefore, it is not surprising that China is greatly concerned about the Senkaku Islands and the reserves of oil located in the continental shelf. *See* PEKING REV., Jan. 21, 1972, at 3.

61. *See* PEKING REV., Mar. 10, 1972, at 16. This policy statement was made by An Chih-yuan, Representative of the People's Republic of China, on Mar. 3, 1972, at a meeting of the U.N. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. *Id.*

See also U.N. Doc. A/AC. 138/SR.72, at 17 (1972); PEKING REV., Dec. 22, 1972, at 13-14 (comments of Chen Chu at the U.N. on December 4, 1972); *id.*, Aug. 25, 1972, at 10-14 (summary of policy positions of the People's Republic); *id.*, Aug. 18, 1972, at 13-15 (comments of Shen Wei-liang at the U.N. on July 24, 1972); *id.*, Aug. 11, 1972, at 14-15 (comments of Chen Chih-fang at the U.N. on July 21, 1972); *id.*, Mar. 31, 1972, at 17-18 (comments of Shen Wei-liang at the U.N. on March 24, 1972).

62. *See* PEKING REV., Mar. 10, 1972, at 16.

63. *Id.*

present Chinese view, the natural resources of the seabed are the common heritage of mankind. As a result of this common interest, the Chinese consider that questions concerning use and exploitation of such resources should be settled by all nations.[64] Therefore, it appears that China has by no means refused to consider the allocation of a certain portion of marine resources to the control of an international organ. To that extent it would appear that the views of Japan and China are at least potentially in harmony, despite China's adherence to the more expansive 200-mile limit of exclusive national control over the territorial sea and continental shelf.

Taiwan: Modified Approval of the Geneva Conventions

Unlike China and Japan, Taiwan is a signatory to the 1958 Convention on the Continental Shelf, though the Nationalist Chinese failed to ratify the accord until August 21, 1970.[65] After the long delay, ratification was designed to bolster Taiwan's position in the dispute with China and Japan over control of the Senkaku Islands—the focal point of conflicting claims to the economic resources of the East China Sea.[66] In Taiwan's instrument of ratification, article 6 of the Convention was modified to include exposed rocks and islets as a "natural prolongation" of its land territories.[67] Taiwan presently asserts that under the third equitable principle enunciated in the *North Seas Cases*, such exposed rocks and islets are part of the continental shelf itself.[68] This modification of the Geneva Convention was based on the International Court's emphasis on the respect which must be paid to any *natural prolongation* of a state's territory in the delimitation of that state's continental shelf. Under this approach, no state may lawfully encroach upon areas constituting a natural prolongation of the territory of another state.[69]

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64. *Id.* It should be noted that China has been highly reserved in its references to an international regime:

> We maintain that the sea-bed and ocean floor beyond the limits of territorial seas and national jurisdiction should only be used for peaceful purposes in the interest of safeguarding international peace and security. They should not be used to serve the policy of military aggression of any country. *Id.*

Of course, since China subscribes to the 200-mile territorial sea principle, which is opposed by all major maritime nations, there is little hope that any viable, international regime can be established if China refuses to accept a more limited area for the exclusive control of the coastal state. *See also id.*, Aug. 25, 1972, at 11.

65. *See* Okuhara 103-04.

66. See notes 79, 86-119 *infra* and accompanying text.

67. *See* Okuhara 103-04.

68. *Id.* at 104.

69. The Japanese challenge the position of Taiwan on the following points:

South Korea: Negotiated Limits on 200-Mile Claims

In 1952, South Korea issued the Korean Continental Shelf Proclamation claiming complete control over the shelf area adjacent to its mainland, which extended as much as 200 miles out to sea. However, the sea and shelf area encompassed by South Korea's claim measured less than 200 miles where the coasts of South Korea and Japan were adjacent and their respective claims overlapped; at these places an arbitrary line was established as the boundary.[70]

The proclamation, establishing the so-called "Rhee Line," indicated that South Korea intended to exercise national sovereignty over these areas "to reserve, protect, conserve and utilize the resources and natural wealth of all kinds that may be found on, in, or under the . . . seas . . . ."[71] Like other small states, South Korea viewed demands

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Taiwan quotes the decisions of the North Sea Continental Shelf Cases in an attempt to claim that the principle of natural prolongation of the land is established in international law. The Cases, however, were quite different from the situation of the Senkaku Is.: the former was the dispute between the states whose coasts are adjacent each other, while the latter is between those whose coasts are opposite each other. Furthermore, in the above cases, particular geological features led the Court to conclude that the principle of equidistance is inequitable and thus to adopt the principle of natural prolongation of the land as its alternative. Even if the pirnciple [*sic*] has some importance, to apply it to the latter too strictly would mean imposition of unjustifiable disadvantage on the island countries, for this is the case of continental shelf delimitation between a continent country and islands, as well as between the islands.

Another allegation of Taiwan that exposed rocks and islets are part of the continental shelf itself can also be refuted as going beyond the provisions of Article 1 of the Continental Shelf Convention, spelling out the definition of the shelf. The "continental shelf" under the Article extends as far as the area which is 200 meters deep or where its depth permits exploitation, but in any case it is the *sea bed* or the *subsoil* with superjacent water and at no point includes exposed rocks and islets as is asserted by Taiwan. Thus it is clearly illogical to say that an island which allegedly belongs to a continental shelf does not have its own continental shelf around it. *Id.* at 104-05.

70. *See* ODA 26-27; WEISSBERG 8, 29.

71. U.N. Docs. ST/LEG/SER.B/6 (1957), ST/LEG/SER.B/8 (1959), *reprinted in* WEISSBERG 98. *See* Oda, *The Normalization of Relations Between Japan and the Republic of Korea*, 61 AM. J. INT'L L. 35, 51-52 (1967). The Korean Presidential Proclamation of Sovereignty over the Adjacent Seas of January 18, 1952, provides:

Supported by well-established international precedents and urged by the impelling need of safeguarding, once and for all, the interests of national welfare and defence, the President of the Republic of Korea hereby proclaims:

1. The Government of the Republic of Korea holds and exercises the national sovereignty over the shelf adjacent to the peninsular and insular coasts of the national territory, no matter how deep it may be, protecting, preserving and utilizing, therefore, to the best advantage of national interests, all the natural resources, mineral and marine, that exist over the said shelf, on it and beneath it, known, or which may be discovered in the future.

2. The Government of the Republic of Korea holds and exercises the national sovereignty over the seas adjacent to the coasts of the peninsula and islands of the national territory, no matter what their depths may be, throughout the extension, as here below delineated, deemed necessary to reserve, protect, conserve and utilize the resources and natural wealth of all kinds that may be found on, in, or under the said seas, placing under the Gov-

by economic superpowers for freedom of exploiting the high seas as a form of colonialism.[72] An additional reason for South Korea's general acceptance of the 200-mile limit of exclusive sovereignty over the shelf and seas was its desire to preserve both the mineral and fishing resources of the adjoining waters for its own people, especially since Japan presented major competition with the re-emergence of its massive fishing fleet.[73] Japan, in turn, steadfastly refused to accede to the extensive claims embodied in the Rhee Line and argued that South Korean claims were contrary to both the 1958 Geneva Conventions and customary international law—an argument made nothwithstanding the fact that Japan itself was not a signatory to the Geneva accord.[74]

The dispute between the two countries was at least temporarily settled by the Treaty on Basic Relations, which was signed in June, 1965.[75] While South Korea continued to insist after entering into the pact that the Rhee Line remained in effect, most restrictions on other nations' activities were removed; and South Korea's area of exclusive control was greatly reduced.[76] Each country now recoguizes that the

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ernment supervisions particularly the fishing aud marine hunting industries in order to prevent this exhaustible type of resources and natural wealth from being exploited to the disadvantage of the inhabitants of Korea, or decreased or destroyed to the detriment of the country.

. . . .

4. This declaration of sovereignty over the adjacent seas does not interfere with the rights of free navigation on the high seas. U.N. Docs. ST/LEG/SER.B/6 (1957), ST/LEG/SER.B/8 (1959), *reprinted in* WEISSBERG 98-99.

72. *See* WEISSBERG 8. Soon after the issuance of the Korean Proclamation, the Japanese Ministry of Foreign Affairs issued a formal protest. Japan charged that the Rhee Line violated the "principles of the freedom of the high seas." The Korean Foreign Ministry countered by argning that the Proclamation was supported by such precedents as the Truman Proclamation and the similar statements which had already been issued by Mexico, Argentina, Chile, Peru, and Costa Rica. South Korea contended that the International Law Commission and other international bodies recognized the "special status of adjacent seas" and that those who still claimed "absolute" rights of fishing in seas adjacent to others states' boundaries but outside their three-mile territorial sea were unaware of the evolution of international law. *Id.* See notes 11, 13 *supra* and accompanying text.

73. *See* Oda, *supra* note 71, at 51.

74. *See* WEISSBERG 67-78. *See also id.* 9-14, 86-97.

Japan's reliance on the 1958 Convention to buttress its claim would seem to be an acknowledgement that the Convention at least represents customary international law. However, Japan's official position before the U.N. Subcommittee on the Law of the Sea belies this assumption.

75. *See* WEISSBERG at 86.

76. *See* Oda, *supra* note 71, at 53. Professor Oda asserts:

The question of whether the Rhee Line still exists, notwithstanding the provisions of the Agreement on Fisheries, is answered in the negative by the Government of Japan. The Prime Minister and the Minister for Foreign Affairs have repeatedly stated that there could be no room for the continued existence of the Rhee Line and that the Line has been completely abolished. In answer to the question why the Agreement on Fisheries did not contain any explicit

other has a right to establish a twelve-mile exclusive fishing zone, except around Cheju Island where South Korea's claim extends beyond the twelve-mile limit.[77] However, South Korea recently granted oil-exploration licenses to exploit the continental shelf to several international oil companies in areas claimed by Japan.[78] Therefore, it would appear that the 1965 Basic Treaty was not as definitive a settlement of disputed claims as had been hoped by the Japanese.

Although prior to the Basic Agreement South Korea's position on the extent of the territorial sea and the seabed's resources over which a nation-state may exercise control closely paralleled that of China, resolution of their overlapping claims to the East China Sea is nonetheless difficult due to China's active support of North Korea and the absence of diplomatic relations between Peking and Seoul. With respect to Japan, however, the current misunderstanding between South Korea and Japan over oil rights to certain areas of their intervening continental shelf should not be insurmountable since the two countries have an established pattern of peacefully resolving disputes.

It is readily apparent that each of the four concerned states bordering the East China Sea has adopted definitions of the continental shelf and territorial sea which best serve its particular economic and political interests. In the absence of a generally accepted rule of international law on the delimitation and control of a state's continental shelf, it appears that if a peaceful settlement of the dispute is to be achieved, resort must be made to negotiation, arbitration, conciliation, or some type of international regime.

The unsettled nature of international law pertaining to the continental shelf at least marginally affects the separate dispute over the

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provision concerning the abolition of the Rhee Line, the Director General of the Cabinet Legislative Bureau explained that since the Rhee Line, which was in itself illegal under international law, had never been recognized by Japan, there would be no reason explicitly to abolish it. He stated that any provision in the municipal law of the [Republic of Korea] which was in conflict with the Agreement on Fisheries should be considered to have become invalid. The Minister for Foreign Affairs has declared that, even if the ROK did not amend its legislation, fishing by Japanese trawlers on the high seas should not be hindered by illegal interference from Korean authorities, since this international fisheries agreement superseded relevant Korean legislation. The Korean view, on the other hand, was that the Rhee Line, now called the "peace line," would continue to exist for purposes of national security and the preservation of continental shelf resources. While maintaining a position of non-recognition of the Rhee Line, the Government of Japan nevertheless abandoned all claims for illegal seizures of Japanese trawlers within the Rhee Line which had occurred over a period of more than ten years. The Government of Japan is now preparing to award certain compensation payments to fishermen who suffered from the seizure of trawlers. *Id.* at 53-54.

77. *Id.* at 52-53.

78. See note 5 *supra.*

ownership of the oil-rich Senkaku Islands in the East China Sea. Taiwan claims that the Senkakus are a natural prolongation of the Island of Taiwan and are therefore covered by the 1958 Geneva Convention as ratified by Taiwan. However, the question of legal title to these islands under international law is distinct from the question of overlapping claims to the continental shelf. Yet, examination of this dispute further demonstrates the weakuess of international law in the pacific settlement of disputes when strong economic and political interests are involved.

THE DISPUTE OVER LEGAL TITLE TO THE SENKAKU ISLANDS

The competing claims of states bordering the East China Sea in regard to the natural resources of the area have, with the exception of those of South Korea, become most intense with respect to claims of ownership of the Senkaku Islands[79] ("Tiao-yu Tai" in Chinese), the continental shelf of which appears to be particularly rich in petroleum reserves. Although claims to the continental shelf of the East China Sea are overlapping, the competing national claims to the shelf surrounding the Senkakus involve a distinct legal issue—the question of ownership of a particular territory. Establishing the legitimacy of a state's title to a coastal territory entails, of course, the right to exploit the continental shelf of that territory. Hence, interest by the three states in gaining and legitimizing access to the resources of the shelf area surrounding the Senkakus necessitates the establishment of title to the islands themselves.

Two traditional methods by which nation-states may acquire or claim new territory under international law are occupation and prescription. The principles of law with regard to occupation are fairly well settled. Under this method of establishing a claim of right, more than an historical claim to sovereignty is required. The claimant must demonstrate not only an intent or will to act as sovereign but also some exercise or display of authority—that is, a claim of title must be buttressed by action in order to be effective. A mere claim of discovery is not sufficient. The absence of competing claims, administrative acts with reference to the territory, and active efforts to develop the claimed

79. The Senkaku Islands are also called Senkaku Retto or the Pinnacle Islands. They consist of five islands (Kuba, Taisho, Uotsuri, Minami Kojima, and Kita Kojima Islands) and the three rock islands (Okono Minamiiwa, Okino Kitaiwa, and Tobise) which are scattered between 120° 20′ and 123° 45′ east longitude and 25° 40′ and 26° north latitude.

territory would be significant factors in determining ownership by occupation. It should be noted, however, that effective physical occupation is not always a mandatory prerequisite, depending upon the nature of the terrain, as with barren or uninhabitable areas.[80] As to prescription as a means of establishing title, it is generally accepted that long, overt possession for a prescribed period of at least fifty years may serve either to confirm a title the precise origin of which cannot be demonstrated or to extinguish the prior title of another nation-state. In this regard, the continuous, peaceful, and uncontested display of sovereignty is generally acknowledged as establishing good title. The uncontested nature of a claim is important under a theory of ownership by prescription since absence of any active challenge to the claimant's assertion of sovereignty adds support to its claim of title.[81]

Title to the eight oil-rich islets and exposed rocks which constitute the Senkakus is claimed, under competing theories, by China, Taiwan, and Japan. Taiwan's claim to the islands is based on an historical theory of having title by virtue of use and occupation for a long period of time and/or the fact that the islands constitute a natural prolongation of the main island of Taiwan itself.[82] China asserts sovereignty over the islands as part of Taiwan, which China claims is an "inalienable" part of the mainland.[83] In turn, the Japanese argument supporting Tokyo's claim to legal title is based on its interpretation of the 1952 Peace Treaty with the United States and the Okinawa Reversion Treaty, the latter purporting to return the islands to Japan.[84]

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80. *See* BRIERLY 163-67. *See also* G. HACKWORTH, I DIGEST OF INTERNATIONAL LAW 401-09 (1940); WHITEMAN 1030-62.

81. *See* BRIERLY 167-71. *See also* G. HACKWORTH, *supra* note 80, at 432-42; WHITEMAN 1062-84.

82. See notes 96-109 *infra* and accompanying text.

83. See notes 110-14 *infra* and accompanying text.

84. See notes 116-17 *infra* and accompanying text. *See also* Reversion to Japan of the Ryukyu and Daito Islands, June 17, 1971, T.I.A.S. No. 7314.

The Agreement between the United States and Japan reads:

> Considering that the United States of America desires, with respect to the Ryukyu Islands and the Daito Islands, to relinquish in favor of Japan all rights and interest under Article 3 of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, and thereby to have relinquished all its rights and interests in all territories under the said Article . . . .
>
> [Article 1] . . . 2. For the purpose of this Agreement, the term "the Ryukyu Islands and the Daito Islands" means all the territories and their territorial waters with respect to which the right to exercise all and any powers of administration, legislation and jurisdiction was accorded to the United States of America under Article 3 of the Treaty of Peace with Japan other than those with respect to which such right has already been returned to Japan in accordance with the Agreement concerning the Amami Islands and the Agreement concerning Nanpo Shoto and Other Islands signed between the United States of America and Japan, respectively on December 24, 1953 and April 5, 1968.

Id. at 3-5.

Traditionally, territorial title disputes between countries have been among the most difficult and sensitive issues to settle,[85] even where the land involved had less economic value than the Senkakus. Moreover, when states involved in the conflict have not established diplomatic relations with each other and consequently each refuses to negotiate with the unrecognized state either directly or indirectly, attempts to apply maxims of international law are even more futile.

Historical Background

References to the Senkaku Islands appeared in Chinese voyage and navigation records as "Tiao-yu Tai" in 1403.[86] As to Japanese records, the islands were not registered in the official land book until 1895.[87] However, the Senkakus were officially obtained by Japan as a result of the Sino-Japanese War in an annexation which was legalized by the Treaty of Shimonoseki in May, 1895.[88] Thereafter, Japan remained in exclusive supervisory possession of the islands until the United States took administrative control at the end of World War II.[89]

Certain international accords are relevant to the Japanese and Chinese claims. The 1943 Cairo Declaration determined that Japan should be stripped of all territories in the Pacific region seized *after 1914* and that all territory stolen from China would be restored.[90] Ar-

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Japan and South Korea are also in conflict over a potentially oil-rich island in the Japan Sea called "Takeshima" in Japanese, or "Dokdo" in Korean. Both claims also have an historical basis. See note 120 *infra*.

85. *See generally* BRIERLY 162-211.

86. *See Hearings* 146. Taiwan's position with respect to the basis of her historical claims was preseuted in great detail before the Senate Foreign Relations Committee by several interested professors and lobbying groups: Shien-Biau Woo, University of Delaware; Thomas C. Dunn, Wilmington, Delaware; John Fincher, Johns Hopkins University; and the Coordinators for the Tiao-yu Tai Open Letters (a pressure group of concerned Americau-Chinese and China-scholars). *See id.* at 92, 110, 115, 144-54.

87. Okuhara 97-98.

88. *Hearings* 146-47.

89. *See* Okuhara 99-100.

90. *See* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT CAIRO AND TEHRAN 1943, at 448 (1961).

It is important to remember that the islands in question were ceded to Japan by China in 1895 by the Treaty of Shimouoseki, *before* the 1914 date mentioned in the Declarations.

The pertinent part of the Cairo Declaration provides that

> Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. *Id.*

ticle 8 of the 1945 Potsdam Declaration mandated that the Cairo Declaration be implemented and that Japan be limited to ownership of the four main islands of Hokkaido, Honshu, Shikoku, and Kyushu as well as "such minor islands as [the Allied Powers] determine."[91] Formosa (Taiwan) and the Pescadores were specifically mentioned, but no reference was made to the Senkakus.[92] Under the 1952 San Francisco Peace Treaty with the United States, however, the area assigned to the United States for administration expressly included the Senkaku Islands.[93] In 1951 Secretary of State John Foster Dulles had asserted that Japan retained residual sovereignty over the Senkakus;[94] and subsequent to Mr. Dulles' statement, the United States consistently maintained this position until the present dispute with respect to ownership arose.[95]

Taiwan's Claims

Neither Taiwan nor China demanded the "return" of these islands

91. SENATE SUBCOMM. ON FOREIGN RELATIONS, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941-49, S. Doc. No. 123, 81st Cong., 1st Sess. 49 (1950).

92. *Id.* at 22.

93. *See* Okuhara 100. The islands were placed under American administrative control by article 3 of the San Francisco Peace Treaty. This article did not specifically include the islands, but Proclamation No. 27 and the Ryukyu Government Charter, as amended by the U.S. Civil Administration, expressly mentioned the islands as being in the area controlled by the U.S. Furthermore, the U.S. exercised actual administrative control over the Senkaku Islands. The Ryukyu government has also shared in the control of these islands. Landmarks were erected on the islands in 1968 by the Ryukyu government (after the *Emery Report* revealed the presence of valuable oil deposits).

Some Chinese from Taiwan raised the flag of the Republic of China on Uotsuri Island, one of the Senkakus, in September, 1970. The U.S. State Department responded:

> The term ['Nansei Shoto'], as used in that [Peace] Treaty, refers to all islands south of 29th degrees north latitude under Japanese administration at the end of the Second World War [and] not otherwise specifically referred to in the Treaty. The term, as used in the Treaty, was intended to include the Senkaku Islands. U.S. Dep't of State Release (Sept. 10, 1970), *reprinted in* Okuhara 100 n.15.

94. *See Hearings* 4-5. Secretary of State William Rogers has indicated that the "residual sovereignty" concept referred to by Mr. Dulles was intended as a declaration of United States policy that the U.S. administration was to be temporary and that all territory which had previously belonged to Japan would be returned intact. *Id. See generally* N.Y. Times, Apr. 23, 1972, at 17, col. 1.

95. In order to avoid any conflict with China after the invitation to President Nixon to visit, the United States announced in opportune fashion that its official position is simply that the parties involved should settle the dispute and that the United States will remain neutral. Prior to this time, the U.S. had given full support to Japan's claim of residual sovereignty over the islands. *See* N.Y. Times, Apr. 12, 1971, at 36, col. 2.

Secretary of State Rogers, reiterating this new U.S. position before the Senate Foreign Relations Committee in 1971, stated that "we have made it clear that this treaty

from Japan until recently.[96] Indeed, no demands were tendered by Taiwan when the bilateral Sino-Japan Peace Treaty was signed in 1952.[97] Moreover, as late as 1968 Taiwan had never included the islands in any official listing of its territory.[98] Taiwan's official denunciation of Japan's claim of sovereignty over the disputed islands was not made until August 16, 1970, when a resolution claiming title was submitted to the Jincha Yuan (House of Inspection).[99] China, in turn, publicly claimed the Senkakus for the first time on December 4, 1970, through the official press.[100]

The claims of the Government of Taiwan, and consequently the claims of China, are based on various arguments with respect to geography, history, and interpretation of international agreements. Geographically, the islands are only 120 miles from Taipei;[101] but it should be noted that the islands are also only 100 miles from the southern-

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does not affect the legal status of those islands at all. Whatever the legal situation was prior to the treaty is going to be the legal situation after the treaty comes into effect." *Hearings* 11.

96. *See* Okuhara 97.

97. It is presently Taiwan's position that the Senkaku Islands were restored to Chinese (Republic of China) sovereignty, along with Taiwan and the Pescadores, by the 1952 Peace Treaty. The islands were originally taken by Japan as a part of Taiwan and were not specifically mentioned in the Treaty of Shimonoseki. Therefore, when Taiwan was returned after World War II, it is argued that the islands which were taken with Taiwan in 1895 were likewise returned. And, as a result, it is further argued that it was not incumbent upon Taiwan to mention the Senkakus specifically when the 1952 Sino-Japanese Peace Treaty was negotiated. Taiwan also contends that the U.S. administration of the islands was invalid and of no legal effect since the Senkakus did not belong to Japan (and that therefore the U.S. had no right to be administering them). Naturally, it follows from this interpretation that the islands could not be returned to Japan by the Okinawa Reversion Treaty. *See generally Hearings* 151-52.

98. *See* Okuhara 102.

99. *See id.* at 97.

100. *See* N.Y. Times, Dec. 6, 1970, at 32, col. 3. In June, 1971, the Ministry of Foreign Affairs of the Republic of China issued a statement claiming title to the Tiao-yu Tai Islands:

> Having learned that the United States Government and the Japanese Government are going to sign in the immediate future formal instruments for the transfer of the Ryukyu Islands, and together therewith, the Tiao-Yu Tai Islets, over which the Republic of China exercises its territorial sovereignty, the Chinese government considers it necessary to emphasize once again its position, and make its views known to the world. . . .
>
> These islets belong to the Chinese Province of Taiwan and thus constitute part of the territory of the Republic of China. They are closely linked to the latter by reason of geographical location, geological structure, historical associations, and, above all, by reason of the long and continued use which the inhabitants of Taiwan have made of these islets. *Bound by the sacred duty to defend its national territory, the Chinese government will never relinquish any particle of its territorial sovereignty under any circumstances.* *Hearings* 148.

101. *See Hearings* 110 (statement of Mr. Thomas Dunn).

most island of the Ryukyu Chain, title to which is vested in Japan.[102] In addition to their physical proximity to Taiwan, the Senkakus are part of the continental shelf surrounding Taiwan, inasmuch as the channel between Taiwan and the islands is never deeper than 200 meters, while the water plunges to a depth of over 1000 meters between the Senkakus and the Japanese-controlled Ryukyu Islands.[103] This fact seemingly establishes a closer physical bond between the Senkakus and Taiwan than between the Senkakus and the Ryukyu Islands. In this regard, Taiwan now claims the Senkakus as a natural prolongation of its mainland because of Taiwan's ratification of the 1958 Convention on the Continental Shelf, with the specific reservation incorporating the *North Seas Cases* doctrine.[104]

Taiwan's historical argument is premised on China's allegedly exclusive use of the Senkakus as a storm shelter from 1403 until 1884, when the Japanese claim to have discovered the Senkakus.[105] Moreover, Taiwan insists that before World War II Japan considered the islands a part of the Taiwan Prefecture[106] and not a part of the Ryukyu

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102. *See* Okuhara 105.

103. *Hearings* 150.

104. See notes 65-69 *supra* and accompanying text.

105. The relevant historical dates in this controversy are as follows:

1403—The first documented Chinese recording of the Tiao-yu Tai Islands . . . .
1534—All the major islands in that group had been properly identified and named by China . . . .
1783—The first Japanese mention of Tiao-yu Tai . . . .
1879—Japan incorporated the Ryukyu Islands . . . into its Empire . . . .
1884—The "discovery" of the Tiao-yu Tai Islands by a Japanese, named . . . KOGA.
1885—The Japanese government rejected application from Mr. KOGA for permission for acquisition of the right of lease, on the grounds that "It is not clear whether the Senkaku Islands belong to Japan or China . . . ."
1894—Sino-Japanese war of 1894, beginning in August and ending in March, 1895, with the defeat of China . . . .
1895—The Japanese Cabinet annexed Tiao-Yu Tai into her territory in January. . . . The Treaty of Shimonoseki was concluded between China and Japan in May, whereupon China ceded Taiwan, all islands appertaining or belonging to Taiwan, and the Pescadores Islands to Japan . . . .
Dec. 1943—Cairo Declaration stated that: ". . . all the territories Japan has stolen from the Chinese . . . shall be returned to the Republic of China . . . ."
July 1945—Potsdam Declaration, article 8 stated that: ". . . The terms of the Cairo Declaration shall be carried out . . . ."
Sept. 1945—The formal Instrument of Surrender was signed at Tokyo Bay. It reads: "We . . . hereby accept the provisions set forth in the declaration issued . . . at Potsdam . . . ."
1951—The Treaty of Peace with Japan, signed by Japan and the Allied Powers (except . . . China) . . . . Article 2.(b) reads: "Japan renounces all right, title and claim to Formosa and the Pescadores . . . ."
1952—Sino-Japanese Peace Treaty was concluded. Article 4 reads: "It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of that war." *Hearings* 151-52.

106. A prefecture in the Japanese system of political subdivisions corresponds to

Islands, so that title to both Taiwan and the accompanying islands was renounced by Japan in 1952 through the Sino-Japanese accord.[107] Furthermore, the Cairo Declaration of 1943 stated that all territories stolen from China after 1914 would be returned by Japan, and Taiwan now claims that the specific reference to Formosa (Taiwan) in the 1952 Peace Treaty impliedly included the Senkaku Islands.[108] Taiwan further contends that the United States' administrative control, intended only as a temporary expedient, is without contemporary legal significance.[109]

China's Claims

Basing its claim to the Senkakus upon its assertion of sovereignty over Taiwan itself, China verbally challenged Japan's claim of sovereignty over the islands after oil was discovered in 1968 and after the United States announced that the islands would be returned to Japan as part of the Okinawa Reversion.[110] In its official newspaper, China claimed that it had always maintained that Okinawa should be returned to the Japanese people, but at the same time proclaimed that it would

> never permit the U.S. and the Japanese reactionaries to annex China's sacred territory Tiaoyu Tai and other islands by making use of the Okinawa Reversion swindle . . . and make it a fait accompli. The Chinese Government and people will absolutely not tolerate these crimes of encroachment upon China's sovereignty.[111]

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a state in the United States. Each political unit has a defined territory and a government which handles local matters.

107. See note 97 *supra.*

108. *See Hearings* 152. See note 97 *supra.* While both the Nationalist Chinese and the Communist Chinese were in substantial agreement at the time of the Cairo Declaration, the Cairo and Potsdam Declarations are generally discounted as to their binding legal authority. When the Declarations were promulgated, the Allies were not yet victorious over Japan, so the statements contained therein were largely made for political effect. Also, since Japan was not a party to these agreements, it is at best dubious to assert that she is bound by them without her concurrence. Regardless of the validity of these agreements, no specific reference was made to the Senkaku Islands.

109. *See Hearings* 111.

110. *See* Okuhara 97.

111. *Hearings* 93 (Chinese newspaper editorial).

The People's Republic has utilized the same historical approach to buttress its argument as Taiwan; indeed, the chronology of events is almost identical to the Taiwan version. In addition, China argues that in the Treaty of Shimonoseki, "Taiwan, together with all islands appertaining to Taiwan" were ceded to Japan. Therefore, when Taiwan was returned to China via the 1952 Peace Treaty, the islands should have been included just as they were when Japan gained control over Taiwan. *See* PEKING REV., Jan. 7, 1972, at 13. China further contends that American assumption of administrative control was a unilateral act never recoguized by China. Also, it is argued that it

Since 1970 China has periodically continued to lay claim to the Senkaku Islands as well as to the resources of the continental shelf surrounding them.[112] In addition, official protests against Japan's claim to the islands were included in a letter by Huang Hua of the Chinese United Nations delegation to Secretary-General Kurt Waldheim in May, 1972,[113] and were registered in several speeches before the U.N. subcommittees preparing for the 1973 Conference on the Law of the Sea.[114]

Japan's Claims

In defending its claim to the Senkakus, Japan relies upon the fact of its uncontested use of the islands after they were ceded to Japan as a result of the 1895 Peace Treaty with China, a contention which basically invokes the theory of prescriptive ownership.[115] In this regard, Japan utilized the islands under various arrangements, including a long-term lease to a Japanese citizen for possible settlement and development.[116] The primary thrust of Japan's claim to title, however, is based upon the effects of American administration of the islands and the subsequent inclusion of the Senkakus in the Reversion Treaty. Thus, Japan's Foreign Minister Aichi claimed that the Reversion Treaty settled the question of ownership as far as Japan and the United States are concerned.[117] This position is based on an interpretation

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"is all the more impermissible for the Japanese and U.S. Governments to make an illicit transfer of China's Tiao-yu and other islands between themselves while perpetrating the Okinawa 'reversion' fraud." *Id.*, Apr. 7, 1972, at 18.

112. *See* N.Y. Times, Dec. 30, 1970, at 5, col. 1. *See also* PEKING REV., May 12, 1972, at 18; *id.*, Apr. 7, 1972, at 18; *id.*, Jan. 7, 1972, at 13.

113. The Huang Hua letter protested the inclusion of the Tiao-yu Tai Islands with the property being returned to Japan by the United States in the Okinawa Reversion Treaty:

> It should be pointed out in particular that in their agreement concerning the Ryukyu Islands . . ., the U.S. and Japanese Governments openly included China's territory the Tiaoyu and other islands in the "reversion zone," which is a serious violation of the territory and sovereignty of the People's Republic of China . . . . It is entirely illegal and null and void for the U.S. and Japanese Governments to make an illicit transfer between themselves of China's territory. The Chinese Government and people will never accept it. PEKING REV., May 26, 1972, at 15.

114. *See, e.g., id.*, Mar. 17, 1972, at 10; *id.*, Mar. 10, 1972, at 14.

115. See text accompanying note 81 *supra* and note 118 *infra.*

116. *See* Okuhara 99.

117. Wash. Post, June 19, 1971, at A9, col. 5 reports: "Japanese Foreign Minister Kiichi Aichi rejected the Taiwan government's latest claim to the disputed Senkaku Islands yesterday . . . . Aichi said the Okinawa Agreement had settled the matter [of Tiao-yu Tai] completely as far as the United States and Japan were concerned."

The Japanese Government has not officially published its position with respect to

of the Cairo Declaration, Potsdam Declaration, and the 1952 Peace Treaty to the effect that these agreements do not deprive Japan of its residual sovereignty over these islands. For example, the Cairo Declaration expressly referred to all territory seized from China *after 1914*; Japan, however, obtained title to the islands in 1895.[118] Finally, Japan presently purports to exercise sovereign control over the Senkakus and has deployed military units to patrol the area.

Regardless of the validity of these arguments with respect to ownership of the Senkakus, Japanese legal commentators have asserted that Japan's position is soundly based on international law; accordingly, they have suggested settling the title dispute by referral to the International Court of Justice or by arbitration in compliance with standards established by general principles of international law and by the International Court in the *North Seas Cases*.[119] However, to date, the Government of Japan has not moved to settle the dispute within the ambit of international law.

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the Senkaku Islands. However, several Japanese newspapers have published very similar statements in support of the government position:

(1) It is claimed that the islands were discovered by Koga, a Japanese citizen, and were thereafter utilized exclusively by the Japanese.

(2) They point to Imperial Ordinance No. 13 which declared in 1896 (after the Treaty of Shimonoseki) that the islands belonged to Japan.

(3) United States Command Administrative Ruling Ordinance No. 27 issued by the U.S. occupation forces in 1953 is cited as including the islands as part of Japan to be administered by the U.S. *See Hearings* 149.

118. *See generally* Okuhara 97-103.

Also, a strong argument can be made that Japan has acquired legal title to the islands by prescription, irrespective of the interpretatious given the above arguments, since the United States officially maintained that Japan retained residual sovereignty over the Senkakus while they were administered by the United States. Prescriptive title to lands is acquired when a state has exercised its exclusive authority over a territory in a continuous, uninterrupted, and peaceful manner for a "sufficient period of time." WHITEMAN 1062-82. In the *British Guiana Boundary Arbitration* between Great Britain and Venezuela, it was decided that adverse holding or prescription for a period of fifty years constituted a "sufficient period of time" and gave good title where the land was under the exclusive political control of the aggressor. BRIERLY 169-70. Such title is only good if the affected states have acquiesced to this exercise of dominion. Protest must be made within a reasonable time and a mere statement of protest through notes or the press is insufficient: referral to an appropriate international organization or proof that every effort has been made to induce a peaceful settlement is required. *See* WHITEMAN 1062-82. Japan has exercised either exclusive sovereignty over the islands or has retained residual sovereignty over them for over seventy-five years, and neither Taiwan nor China ever made any effort to regain control until after 1968.

119. *See* Okuhara 105. Whereas Japan offered to submit the Takeshima Island dispute with South Korea to the International Court of Justice, see note 120 *infra*, it has shown no signs of following this pattern in the controversy over the Senkakus.

DISPOSITION OF CONFLICTING NATIONAL CLAIMS: THE ALTERNATIVES FOR SETTLEMENT

Clearly, the conflicting claims over the East China Sea continental shelf and the ownership of the Senkaku Islands must be satisfactorily settled before the vast economic potential of this area can be effectively developed. Although the natural resources are vitally important to the contenders, the uncertain condition of the controlling body of international law and the delicacy of the political questions at issue seem to militate against prompt agreement.[120] While Japan, Taiwan, and South Korea have demonstrated a willingness to negotiate and cooperate with each other in the development of the continental shelf's re-

120. See notes 8-46 *supra* and accompanying text.

The conflict over the ownership of the Senkaku Islands is not the only title dispute plaguing Japan at the present. South Korea claims sovereignty over a small island called "Takeshima" in Japanese and "Dokdo" in Korean which is roughly equidistant from South Korea's Ulneungdo Island and Japan's Okinoshima Island in the Japan Sea. The area surrounding the island is thought to be oil-rich. The legal questions at issue are almost identical with those surrounding the Senkaku dispute, and the facts vary only slightly. The South Korean claim dates from the fifteenth and sixteenth centuries, when the island was used as a base for fishing; and it was left unoccupied until around 1850, when it was taken over by the Japanese as a fishing area which was inhabited at various times. The rights of exploitation were turned over to private Japanese citizens. The island of Takeshima was officially registered in the land-book of Japan in 1905, the title being disputed at that time by Korea. *See* Taijudo, *The Dispute Between Japan and Korea Respecting Sovereignty over Takeshima,* 12 JAPANESE ANNUAL OF INT'L L. 2, 4, 7, 9 (1968). When the U.S. occupation began in Japan, Takeshima was included in the area to be administered along with the main islands of Japan.

South Korea, like China and Taiwan with respect to the Senkaku Islands, claims that title to the island was vested in it at the end of World War II due to the Cairo and Potsdam Declarations, which mandated the return to the rightful owners of all territories "stolen" by the Japanese in their period of "greed." *Id.* at 13. The Japanese counter by arguing that they recognized in 1952 the independence of Korea only as it existed before being annexed to Japan, at which time Takeshima was already a part of Japan and under its control. The peace agreement specifically mentioned the other islands which were returned, and Takeshima was not included. *Id.* at 13-14. The 1928 *Palmas Islands Award* by Judge Huber is relied upon by Japan to claim title: the standard for claims of title to uninhabited islands was to be "'grounded on the peaceful and continuous display of State authority over the islands.'" *Id.* at 8.

South Korea originally gained control of the islands and established police patrols when the Rhee Line was established in 1952 after the U.S. returned administrative control of the main islands to the Japanese. Desiring to avoid armed conflict, Japan has not attempted to oust South Korea. Consequently, the Japanese, with confidence in their position, have proposed sending the dispute to the International Court of Justice; but South Korea absolutely refuses to consider this alternative at present. *Id.* at 14-15. While the fact situation involved in this dispute closely parallels that surrounding the Senkaku Islands, the political questions do not seem to be as difficult since South Korea and Japan do have established diplomatic relations and since there is a tradition of negotiation and peaceful settlement of disputes.

sources, China has criticized this liaison as a capitalistic plot.[121]

The probable key to an investigation into viable alternatives for settlement is China's historical practice with respect to international law and its recent membership in the United Nations, as well as its aspirations, conflicting with those of Japan, to establish hegemony in Asia.[122] Traditionally, China has recognized treaties and customs as basic sources of international law;[123] moreover, China is *presently* known for meticulous observance of treaty obligations.[124] However,

121. *See* N.Y. Times, Dec. 6, 1970, at 32, col. 3. *See also* PEKING REV., Jan. 7, 1972, at 13.

122. These conflicting aspirations of Japan and China to establish hegemony in regard to the newly emerging bloc of Asian countries will undoubtedly influence the nature of any accord. In this regard, the Chinese and Japanese are so sensitive to charges of power politics in Asia that they specifically disclaimed any designs on Asian hegemony in the Joint Communique issued by Prime Minister Tanaka and Premier Chou En-lai. Their obvious intent was to allay the fears of their smaller Asian neighbors who question the motives of the Asian giants who have been arch-enemies for generations and who have suddenly embraced each other so warmly. *See generally* PEKING REV., Oct. 6, 1972, at 12. The conflicting political aims will, of course, be counterbalanced to some extent by the economic desirability of cooperation between Japan and China.

123. *See* CHIU 2.

In practice, China generally includes the five principles of coexistence in treaties it negotiates: (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual nonaggression; (3) mutual noninterference in each other's internal affairs; (4) equality and mutual benefit; (5) peaceful coexistence. *Id.* at 3 n.12. Communist Chinese writers assert that the increasing number of treaties including these principles indicates that they have become part of the customary international law. However, it can be argued that these principles are not novel at all and had been generally accepted in international law before China started promoting them as part of its international policy. *Id.* at 3-4.

124. *See* LEE 79, 119. Historically, however, China had a record of poor performance in abiding by treaty obligations. This phenomenon has been attributed to the fact that the treaties not honored were "unequal" treaties which were originally accepted by China under duress. While under the Western approach coercion exercised against a state in the signing of an agreement does not vitiate the resulting treaty, the Chinese have condemned numerous treaties concluded under duress and have declared them void. *See* CHIU 29-30. However, when the Communist Chinese took control in 1949, they did not follow the pattern established by the Bolsheviks of abrogating all treaty obligations incurred by the previous regime. In China it was declared that " 'the Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and recognize, or abrogate or revise or renew them according to their respective contents.' " LEE 21 (quoting a translation of Article 55 of the Common Program adopted in 1949 at the Chinese People's Political Consultative Conference). As a result, many "unequal treaties" were rejected, but most treaties dealing with boundaries were maintained. *See id.*; CHIU 92.

An alternative explanation accounting for China's new responsibility in meeting its treaty obligations is offered by Professor Lee. He views the Confucian concept of *li* as a major determinative factor in China's present international relations and com-

China purports to abide only by its own treaties resulting from direct, bilateral negotiations, thereby avoiding imposition upon China of "bourgeois" mandates which have been incorporated into multinational conventions and general international agreements.[125] As is traditional in international law, agreements to which China is not a party—such as the Geneva Conventions of 1958—are not considered binding.[126] In addition, China has never been willing to participate in any international conference where Taiwan has been represented and has refused to recognize any claims made by Taiwan.[127]

Obviously, no extensive exploitation of this area can realistically

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mitments. *Li* is primarily concerned with sincerity (*ch'eng*) and trustworthiness (*hsin*), the Western equivalents being "good faith" and "pacta sunt servanda." These concepts are controlling in the Confucian system in relations between friends. As such, *li* establishes the moral rules of good conduct and good manners between individuals on all levels of contact. These concepts are not too different from the Western concept of "natural law" which is primarily concerned with how actuality is related to normative order. When these Confucian concepts are applied to international agreements, it means that the parties deal with each other on the basis of equality, and that each has an obligation to maintain the agreements on a basis of good faith. Abiding by one's obligations is a matter of honor. While this sort of rationalization may seem tenuous to the Western mind, it must be remembered that ideology has traditionally been a more controlling factor in Eastern societies than elsewhere in the world. *See* LEE 26-28, 128-30. *See generally* Lee, *Chinese Communist Law: Its Background and Development*, 60 MICH. L. REV. 439 (1962).

125. *See* LEE 79; CHIU 75-78.

126. China adheres to the basic principle of international law of *pacta tertiis nec nocent nec prosunt*, whereby a treaty does not impose obligations or confer rights on any third party. *See* CHIU 48.

127. *Id.* at 45. The official claims of China to sovereignty over Taiwan were voiced by Shao Chin-fu:

> After the Sino-Japanese War of 1894, the government of the Ch'ing Dynasty, by signing the Treaty of Shimonoseki, ceded Taiwan and Penghu to Japan. With the outbreak of China's War of Resistance against Japan in 1937, *in accordance with international law, the treaties between the countries became null and void. The Treaty of Shimonoseki was no exception.* In 1945, after China's victory in the Anti-Japanese War, China recovered these two places from Japan . . . . Since Taiwan has always been Chinese territory, it is a matter of course for China to take it back like a thing restored to its original owner. *It is not a case of China taking a new territory from Japan which must be affirmed by a peace treaty.* *Id.* at 118.

Western scholars generally maintain that Taiwan legally became part of Japan with the 1895 Treaty and that it was "restored" to China with the surrender of Japan in 1945. Therefore, by legal norms China has acquired a new territory which must be confirmed by a peace treaty or other principles of international law.

However, since the Chinese deem the Treaty of Shomonoseki to be an "unjust treaty," the agreement was automatically abrogated with the advent of the war and the territory ceded in 1895 was automatically transferred back to China. *See id.*

Seemingly, both Western and Chinese legal scholars should be satisfied that the People's Republic now has "legal" title to Taiwan, especially in light of the Joint Communique of China and Japan wherein Japan acknowledged that it "understands and respects" the position of China with respect to Taiwan.

proceed without regard to China's claims; hence, attention must be focused on the likelihood of resort by the parties to armed conflict, negotiated settlement, conciliation, referral to an international body for arbitration, or creation of an international regime—the classical modes of settling international disputes.

Resort to Armed Force

The most extreme possibility for disposition of the title dispute over the Senkaku Islands and for settlement of the overlapping claims to the continental shelf would be resort to armed conflict. In this regard, it is instructive to note that China risked war with the Soviet Union over the small, uninhabited island of Chen Pao Tao (Damansk) in the Ussuri River between China and Russia, even though the economic and strategic value of the island appeared minimal at best.[128] Moreover, China has vigorously protested that Japan's claims in the East China Sea are part of a capitalistic plot.

Nonetheless, China's recent actions specifically belie the possibility of resort to force. In particular, China's recent entry into the United Nations and the spirit of detente which Peking has actively promoted tend to diminish possibilities for China's use of armed force. In fact, Peking's stern langnage with respect to Japanese designs in the East China Sea has consistently been coupled with references to the countries' new "friendship," a fact which seems to indicate that resort to force is not anticipated.[129] As to Taiwan, use of military force by China also seems remote with regard to the respective claims to the continental shelf and the Senkakus.

Negotiation, Conciliation and Arbitration

Three firmly established modes of settlement of international disputes are negotiation, conciliation, and arbitration. However, utiliza-

128. *See Hearings* 94. While it does not seem that China will resort to armed conflict at this juncture, the potential for conflict is still present due to Japan's newly adopted practice of patrolling the islands by air and sea patrols to insure that no other state will be able to seize physical control of the islands and to prevent oil companies not authorized by the Japanese from exploring for oil. China has consistently stated that it will not tolerate Japan's exercise of sovereignty over the Senkaku Islands, and any attempt on Japan's part to begin exploiting the oil reserves without a settlement with China could potentially lead to armed conflict. To date, China has not specifically threatened to retaliate with force. *See, e.g.*, PEKING REV., Apr. 7, 1972, at 23; *id.*, Jan. 7, 1972, at 13-14.

129. This hypothesis as to China's attitude toward Japan since the establishing of diplomatic relations in October, 1972, is grounded on the dearth of harsh invective

tion of such methods is hampered when countries involved in a dispute refuse to extend diplomatic recognition to each other. As a result, despite the fact that modes of dispute resolution are available under the international legal system, the inability of an authoritative legal order to require utilization of available means exacerbates the difficulty of achieving a peaceful settlement. Nevertheless, at least with respect to China, it should be noted that Peking has frequently demonstrated a pragmatic willingness to settle disputed issues by *negotiating* with quasi-official groups, referred to as "private parties," from *unrecognized states*.[130] Prior to September, 1972, China did not recognize Japan, yet China included in its official treaty series various agreements reached by "private parties" of Japan and China establishing fishing and trade arrangements, thereby imbuing such accords with the force of law.[131] For example, the 1958 Geneva Convention with respect to fishing and conservation provides that nations fishing in the same areas are obligated to negotiate conservation programs.[132] Since China was neither a member of the United Nations nor a signatory of the Convention, no binding obligation was imposed upon China to negotiate such a treaty with Japan. Notwithstanding the absence of a legal commitment, workable agreements were reached between private associations representing the two countries.[133] In addition, the few disputes which have arisen subsequent to these agreements have been promptly settled by negotiation or conciliation, although not by arbitration.[134] Not only has China demonstrated a pragmatic approach in protecting its own economic interests,[135] but the People's Republic has

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which was previously so pronounced in the Chinese press with reference to Japan's economic and political activities in Asia. A survey of the *Peking Review* before this meeting in Peking demonstrates a surprising change of attitude on the part of the Chinese.

130. *See* LEE 59, 71.

131. *Id.* It can be assumed that these agreements had prior governmental approval, if in fact they were not actually formulated by the respective governments. The Japanese Government does not officially recognize these agreemeuts, but as noted, the Chinese accord them official standing. *Id.*

132. *Id.* 59-60. The official title of the accord is the "Convention on Fishing and Conservation of the Living Resources of the High Seas."

133. This agreemeut was reached between the Japanese-Chinese Friendship Society and the Chinese Peoples' Foreign Cultural Association. *Id.* 65. Japan desired to obtain the return of her many fishing vessels which had been seized in Chinese waters and to regularize fishing practices in the disputed waters. For its part, China desired to develop and modernize its fishing industry, so it extracted promises of economic and technical assistance from the Japanese in return for concessions on areas where Japanese fishermen could fish. The agreement is generally viewed as being most favorable to Japan. *See id.* 61-63.

134. *See generally id.* 66-68, 79.

135. Thus, even though Japan continued to recognize Taiwan until recently, trade

also been highly dependable in honoring obligations arising out of "private party" transactions.[136]

With respect to boundary disputes,[137] the Chinese have expressly stated that negotiation with a view to a just settlement is the appropriate method of resolving disputed issues. Thus, Chou En-lai stated in 1957 with reference to the Sino-Burmese border question that the consistent policy of the Chinese government was to resolve all issues with other countries by peaceful negotiation on the basis of justice and reasonableness.[138] The ensuing negotiations with the Burmese government were highly sensitive and protracted, but the final resolution was deemed fair by both sides.[139] Since the establishment of the China-Burma border, China has consistently respected it.[140] Therefore, in light of past incidents[141] such as the Burma border dispute, it is clearly

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between Japan and China increased steadily over the years. In 1966 Japan's trade with China increased by thirty-two percent to $621 million, making China Japan's second largest customer after the United States. While there have been fluctuations since 1966 in the level of trade, it is anticipated that there will be a steady increase over the years largely due to Japan's great need for natural resources which China possesses and China's need for new technology and heavy industrial equipment which Japan can readily supply. In each case, it is much cheaper for these Asian nations to trade than to rely on Western manufacturers whose labor and transportation costs greatly inflate their prices. *See id.* 69-71.

As a condition of recognizing China, Japan had to break all diplomatic contacts with Taiwan. However, this diplomatic move has not lessened appreciably the economic contacts between Taiwan and Japan. Each state has established permanent trade missions in the other state, and trade is progressing at a high level. The complete severance of all economic ties with Taiwan was not made a precondition to establishing diplomatic relations by the People's Republic of China. This fact can be viewed as another example of China's pragmatic approach to states dealing with Taiwan and with which it would be advantageous for China to establish diplomatic relations. *See generally* PEKING REV., Oct. 6, 1972, at 12-13.

136. *See* LEE 79.

137. In negotiating boundary disputes, China has consistently invoked the doctrine of *rebus sic stantibus*, a principle of international law which notes historical changes giving rise to present claims. *See* CHIU 107. Such an approach to the settlement of territorial disputes could arguably be employed in Japan's favor since that country has had at least nominal, unchallenged control over the Senkaku Islands since 1895.

Professor Lee asserts that the theory of *rebus sic stantibus* is paralleled by the concept of *li* in Chinese ideology. See note 124 *supra* and accompanying text.

138. *See* LEE 31.

139. *See id.* 34-35.

140. *Id.* 35.

141. It is generally acknowledged that with the exception of boundary disputes with India and Russia, China has always settled its boundary quarrels peacefully and has done so generally in a manner favorable to her neighbors. *Id.* 31-39. It can generally be asserted that China has settled its boundary disputes through meticulous negotiation and surveying which resulted in agreements based on historical boundaries, custom, and particular needs of the concerned parties. China has concluded bor-

possible that China and Japan could *negotiate* a lasting settlement of their conflicting claims to the Senkaku Islands and to the continental shelf.

However, Taiwan presents a major obstacle to any viable solution of the dispute. China bases its claim to the Senkakus and the surrounding continental shelf on its assertion of sovereignty over Taiwan, a claim which Japan indicates that it "understands and respects."[142] In view of this "understanding," it is possible that Japan and China could negotiate an agreement to jointly exploit the islands and the shelf area, leaving the question of title unresolved and thereby presenting Taiwan with a *fait accompli.*

Also, negotiated settlement of the controversies involving South Korea—unlike the dispute among China, Japan, and Taiwan—would not seem to be insurmountable. Japan and South Korea have demonstrated a willingness to negotiate their differences, although the question of sovereignty over another disputed island, Takeshima, was intentionally omitted from the 1965 Basic Treaty; and South Korea has steadfastly refused to submit the issue to the International Court of Justice. Moreover, an agreement between China and South Korea concerning claims to the continental shelf is not a completely unreasonable prospect, given China's previous precedent of dealing with "private parties" and the fact that China has never insisted upon formal diplomatic relations as a prerequisite for concluding an agreement. While China's close relationship and support of North Korea could militate against such a settlement, China has looked with favor upon the recent efforts towards rapprochement between North and South Korea.[143] In either case, the economic desirability of exploiting the continental shelf immediately and the economic pressure Japan could bring to bear on South Korea to negotiate a settlement could be the decisive elements in this arena of disputes and overlapping claims.

As to the possibility of third-party participation in the form of arbitration or conciliation, two other classical modes of settling inter-

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der agreements with Nepal, Pakistan, Afghanistan, and Mongolia. *Id.* 35-36. However, areas of contention still remain between India and Russia on the one side and China on the other. *Id.* 36-37. There are also some minor disagreements which have never been settled with Hong Kong, Macao, and Kowloon. *Id.* 38 n.26.

142. PEKING REV., Oct. 6, 1972, at 12. The joint declaration of Japan and China specifically states:

> (3) The Government of the People's Republic of China reaffirms that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the Government of China and adheres to its stand of complying with Article 8 of the Potsdam Proclamation. *Id.*

143. *See generally id.*, Nov. 10, 1972, at 21; *id.*, July 14, 1972, at 8.

national disputes, China is adamantly opposed to submitting the question of sovereign control over the Senkaku Islands to a third party for resolution, since the validity of Peking's claims to Taiwan would naturally arise. It seems quite clear that China will not allow a third party to sit in judgment on this sensitive issue.[144]

An International Regime

Because of military and political considerations, the options of armed force, negotiation, conciliation, and arbitration are, at best, questionable alternatives in disputes involving both China and Taiwan; consequently, reliance on an international regime to regulate exploitation of the resources of the Senkakus and the continental shelf emerges as a theoretical possibility. As has been noted, a growing body of world opinion supports establishing some form of international machinery under United Nations auspices to control exploitation of the resources of the beds of the high seas.[145] Prior to 1958, Japan actively promoted this idea,[146] and China has indicated its general support of the concept.[147] However, since Peking claims *exclusive sovereignty* over a territorial sea and shelf of 200 miles, any agreed-upon international regime would seemingly be forced to limit the exercise of its control to areas outside of this limit.[148]

Obviously, if a 200-mile territorial sea and continental shelf were to be acknowledged by the world community generally, the provision for an international regime would be useless in the East China Sea, since the entire area would be claimed by bordering states; and negotiation, conciliation, or arbitration would again be the only possible recourse. However, if China could be prevailed upon to accept a territorial sea and shelf of less than 200 miles, it would appear that an international organ could be established to develop the resources of the East China Sea.[149] Participation by Japan and China in such an

144. It is interesting to note that no mention was made of the Senkaku Islands in the Joint Statement issued by China and Japan although this matter had loomed as such a major issue prior to the meeting. *See id.*, Oct 6, 1972, at 12-13. Also, the Chinese press has been strangely silent on this issue since the date of that agreement. This silence would seem to indicate that an understanding as to either the future disposition of these islands or the negotiability of the dispute was reached.

145. See note 41 *supra* and accompanying text.

146. See notes 51, 55, 57-58 *supra* and accompanying text.

147. See note 64 *supra* and accompanying text.

148. See note 61 *supra* and accompanying text.

149. China has been actively involved in the United Nations preparatory committees which have been producing drafts of conventions to be presented at the 1973 Conference on the Law of the Sea. The People's Republic has consistently cham-

international organ would allow both countries to avoid the stigma which might accompany a joint Japan-China development project which ignored Taiwan. However, any such international body would undoubtedly be required to deal with Taiwan's claims, a development which would necessitate either participation in the international regime by Taiwan or would require the organ to deal with China's claim of sovereignty over Taiwan. Obviously, China would be unlikely to tolerate either alternative.

The difficulties in gaining acceptance by these Asian countries of an authoritative international organ may be limited in significance, however, since it seems unlikely that the proposed 1973 Conference on the Law of the Sea will be able to effect a general consensus either with respect to the limit of a state's territorial sea and continental shelf or with respect to the structure of international machinery to exploit the resources of the high seas. The present proposals are widely divergent and seemingly irreconcilable, largely because of the fundamental disagreement over the extent of a state's territorial sea and underlying shelf.[150] Given the unlikelihood that an international regime will be established in the immediate future, the states bordering the East China Sea might rely on a directly negotiated, joint-development program. It appears, however, that this alternative could be politically hazardous for both China and Japan in light of both general world opinion and the apprehensions of the smaller Asian nations who are already wary of the economic designs of the two larger Asian countries.[151]

CONCLUSION

In the final analysis, the economic desirability of immediately developing the natural resources of the East China Sea and the continental shelf surrounding the Senkakus must be balanced by the respective countries against delicate political considerations. China could decide to expand its pragmatic dealings with unrecognized states to include Taiwan, but this course of action seems improbable. A possibility remains that China will reach an accord with Taiwan after the demise of Chiang Kai-shek, whereby Taiwan would become a locally

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pioned the rights and proposals of the developing nations and has scored the superpowers for their attempts to limit the control of the proposed international regime. The proposal for two more preparatory sessions prior to the beginning of the Conference received China's unqualified approval. *See, e.g.*, PEKING REV., Dec. 22, 1972, at 13; *id.*, Aug. 25, 1972, at 13.

150. See notes 42-44 *supra* and accompanying text.

151. *See generally* N.Y. Times, Jan. 21, 1972, § 2, at 44, cols. 1, 2.

autonomous province similar to Tibet and would share in the oil-development proceeds.[152] The probability of any such settlement is, of course, completely speculative.

Japan, South Korea, and Taiwan, in turn, are unlikely to continue with their current plan of jointly exploiting the resources of the East China Sea, impervious to China's claims, especially after Japan's recent recognition of China. China, Japan, and South Korea, therefore, could agree to develop jointly the mutually shared continental shelf, ignoring the claims of Taiwan and assuming that Taiwan would recognize the futility of successfully challenging such an alliance.

In any event, settlement of these disputes is not likely to be reached by direct reliance upon the application of the customarily accepted principles of international law, nor by the use of at least one of the more conventional modes of peacefully settling international disputes. As is readily apparent, the law itself at present is too unrefined to provide the generally accepted guidelines needed for a settlement of conflicting claims to the continental shelf. Referral of national claims to an international tribunal or board of arbitration, as mandated by international law when an issue cannot be peacefully resolved by the parties themselves, is a practical impossibility because of the political question of China's sovereignty over Taiwan.

Despite these fundamental barriers, the parties to the dispute, including the People's Republic, have frequently utilized the rhetoric of international law to buttress their respective claims to the continental shelf and the various islands in question. The irony of this invocation of international law is evident in the fact that there is apparently no viable possibility of settlement through any of the standard procedures of international law, other than through negotiations via the fiction of "private parties." Nevertheless, it is significant that even the rhetoric of international law is being employed. This conduct by the parties indicates at least a recognition of the moral force of international law

152. *See generally* LEE 129. Tibet, along with the other locally autonomous provinces such as Inner Mongolia, Sinkiang, and Manchuria, actually enjoys little significant autonomy other than maintaining some of its traditional customs and social structure. However, should Taiwan and Hong Kong be returned to China's control, it is likely that they will be accorded a greater degree of freedom to exploit the economic capacities they presently maintain. China appears to be eminently pragmatic in its economic dealings; and it would be unwise, to say the least, to dismantle the powerful economic machines which presently exist in Taiwan and Hong Kong. Therefore, it is probably safe to assume that these two areas would be accorded a greater degree of economic freedom than any other area controlled by China.

and the need for demonstrating the legitimacy and propriety of national claims.[153]

153. China's tradition of pragmatic dealings with unrecognized states cannot be ignored, especially since China has often successfully dealt with "private parties" to accomplish desired ends when the economic and practical realities so dictated. Therefore, it does not seem too unreasonable to anticipate that when China balances the economic desirability of jointly exploiting the natural resources of the East China Sea continental shelf against the political questions surrounding the status of Taiwan, the pragmatic route of a joint venture controlled by "private parties," either with or without Taiwan's participation, will be selected.