BOUNDARY PROBLEMS RELATING TO THE DELIMITATION OF THE CONTINENTAL SHELVES OF THE TIAO YU TAI, NANSHA AND HSISHA ISLANDS

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Degree of Ph.D.
University of Edinburgh
1982

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EAST CHINA SEA: BOUNDARY PROBLEMS RELATING TO THE

TIAO YU TAI ISLANDS

1. Introduction

Writers on the China Sea disputes often confuse state claims by both the Republic of China (ROC) and the People's Republic of China (PRC) to the Tiao Yu Tai, Nansha and Hsisha Islands; they appear to think that the ROC and PRC each place separate claims to these disputed islands. In fact, there is one China which is split into two governments; each one of these claims the above-mentioned China Sea islands on behalf of China as a whole. The question concerning which government truly represents "China" remains formally unresolved. It would not be unreasonable, however, until this problem is settled, to regard mainland China and Taiwan as one geographic entity for the purposes of considering the China Sea boundary delimitations,\(^1\) as we shall do here, although if the final resolution of the ROC/PRC dispute should be in favour of a "Two Chinas" solution, further delimitation would have to take place.

The legal effect of islands in the determination of the determination of the continental shelf boundaries between

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\(^1\) Peking and Taipei have followed separate roads for over thirty years, but both insist that China is one and that Taiwan is a province of China. See Ralph N. Clough, "Taiwan's International Status", 1 Chinese YBILA (1981), pp. 18-22.
neighbouring states is a matter of increasing interest and concern in international relations. This chapter focuses attention both on the territorial dispute between China (ROC and PRC) and Japan over the Tiao Yu Tai (Senkaku) Islands and on their effect in the delimitation of continental shelf boundaries in the East China Sea.

To this end we shall first of all describe the geographical situation of the Tiao Yu Tai Islands. Secondly, in order to attain a deeper understanding of this dispute, the historical background of the Tiao Yu Tai Islands conflict is studied. The minutely detailed, chronological approach is to some extent sacrificed in order to emphasise the dominant factors, and to set forth their inter-relationships. Thirdly, an attempt is made to examine the special problems concerning delimitation of the Sino (ROC and PRC)-Japanese continental shelf boundaries in the East China Sea, with special reference to the Tiao Yu Tai Islands. It is hoped that an understanding of these problems may help in the resolution of other similar problems in the delimitation of continental shelf boundaries.

2. Geographical Situation of the Tiao Yu Tai Islands.²

The East China Sea covers an area of approximately 480,000 square miles and is bordered by mainland China to the

² Reference to these islands by their Chinese name, Tiao Yu Tai, rather than their Japanese name, Senkaku, in no way suggests the superiority of any state claim.
west, South Korea to the north, Japan and the Ryukyu (Liu Chiu) Island chain to the east, and the island of Taiwan to the south.

The sea-bed beneath the East China Sea has three distinct features: (a) a broad continental shelf area, ranging in width from 150 to 360 nautical miles, which stretches eastward from the coast of China; (b) the Okinawa Trough, to the east of this shelf area, which reaches a depth of 1,270 fathoms and shoals northeastward from Taiwan toward Japan; and (c) the Ryukyu Ridge, an elongated island-studded arc which falls away on its eastern edge toward the Ryukyu Trench. 3

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Figure 3: Chinese Continental Shelf

Source: Jan-Olaf Willums, 'Prospects for Offshore Oil and Gas Developments in the PRC', paper presented to the Sixth Annual Offshore Technology Conference, May 1974.
The Tiao Yu Tai (Senkaku) Islands are situated on the edge of the continental shelf in the East China Sea (25°40' to 26°00' N and 123°25' to 123°45' E) extending from mainland China, approximately ninety-five nautical miles north-east of Taiwan, and one hundred and eighty-seven nautical miles west of Okinawa. They comprise the Tiao Yu Tai (Hoa Pin Su), Huang Wei Yu (Hoan Oey Su), Pinnacle Islets - Nan Hsiao Island and Pei Hsiao Island, Feilai Island (Channel Rock), Nan Ta Hsiao Island, Pei Ta Hsiao Island and Chih Wei Yu (Sekbisan, Raleigh Rock or Tshe Oey Su).

Tiao Yu Tai (Hoa Pin Su) the biggest island, has an area of about five square kilometres. These islands are uninhabited because they lack fresh water. There is no vegetation on the Feilai, the Pei Hsiao and Nan Hsiao Islands. The Tiao Yu Tai Islands may actually be viewed as part of a short island chain, extending from Taiwan northeastwards along the seaward limit of the continental shelf, through the islands of Hua Ping, Mien Hau, Pen Chia (Chinese territory not in dispute), Tiao Yu, Huang Wei, and Chih Wei.

The geological characteristics of the Tiao Yu Tai Islands are similar to those of other islands belonging to Taiwan. Geographically they are adjacent to the coast of

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4. See Fig. 4, p.747.
5. The Empire of China with its Principal Divisions, Map drawn from the surveys made by The Jefuits, 1790.
Figure 4: Tiao Yu Tai (Senkaku) Islands and Danjo Gunto Islands.

Taiwan, but are separated by more than two hundred miles from the Ryukyu Islands by the Okinawa Trough, which is more than 2,000 metres in depth.

3. **Historical Background of the Territorial Dispute**

The Tiao Yu Tai Islands were under China's jurisdiction for several centuries. The sea area of the Tiao Yu Tai is one of the fishing grounds in the East China Sea. Since ancient times, Chinese fishermen from Fukien and Taiwan have always fished there. They put up huts for shelter against storms and sometimes lived on these islands for several months at a time. Camellias, palms, cacti, etc., many of which are valuable medicinal herbs, abound in the Tiao Yu Tai Islands; China's coastal inhabitants often go there to gather them.  

Historically, the Tiao Yu Tai Islands were mentioned in Chinese texts as early as 1403. During the fifteenth century, three of the Tiao Yu Islands, namely, Tiao Yu Tao, Huang Wei Yu and Chih Wei Yu, were specially mentioned in the Travel Accounts of the Chinese Envoys sent by the Ming Court.

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7. *Sheng Fung Hsiang Sung*, 1403 (a record of voyages between China proper and the Ryukyus) described a journey to the Tiao Yu Tai Islands.
to hold Investiture Ceremonies for the Kings of the Ryukyus (Liu Chiu). The Chinese envoys usually proceeded to the Ryukyus from Foochow via Taiwan and the islets to the northeast of Taiwan, including Pengchiapu, Tiao Yu Tao, Huang Wei Yu and Chih Wei Yu. The Tiao Yu Tai Islands were then considered as the boundary separating Taiwan from Ryukyus.

In his Record of a Mission to Liu Chiu, 1534, Chen named major islets of the Tiao Yu Tai Islands on his eastward voyage from China to Liu Chiu (Ryukyu) and recorded: '... in the evening of 11 May, we saw Kumi Island which belongs to Liu Chiu'.

In 1556, the Chinese Government appointed Tsung-hsien Hu commander of the punitive force in charge of military action against the Japanese invaders in the coastal provinces. The Tiao Yu Tai Islands were then within the scope of China's coastal defence. It was more specifically stated in the records of missions to the Ryukyu (Liu Chiu) Islands during China's Ming and Ching Dynasties, and in geographical and historical archives, that these islands belonged to China.

8. It is noteworthy that this book is not only a travel record of private individuals but an official archive of the Chinese envoys' mission. Kiyoshi Inoue, History and Disputes Concerning Sovereignty Over the Tiao Yu Tai (Hongkong: The Seventies, 1973), pp. 25-32.

9. Kan Chen, Record of a Mission to Liu Chiu, 1934. Kumi Island is Kume Jima, situated about 40 nautical miles west of Okinawa and about 150 nautical miles east of Tiao Yu Tao. Some of these records merely identified the major islets within the Tiao Yu Tai group, as they were spotted en route to the Ryukyu Islands from China, and indicated the points at which the Ryukyu (Liu Chiu) Islands began.

In his *A Mirror on Japan*, Cheng described the location of the major islands en route to Japan and specifically mentioned that 'Tiao Yu Tai belongs to China'.

In his *Record of a Mission to Liu Chiu*, 1562, Kou recorded: '... on 3 May of the leap year, we reach Chi Wei Island, which borders with Liu Chiu (Ryukyu)...'.

During the Ching Dynasty, in June 1683, Chi Wang, the Chinese Envoy, travelled by ship to Liu Chiu, during which he reached the Okinawa Trough. He asked the captain of the ship what the trough signified; the captain replied that it was the frontier between China and Liu Chiu.


In 1831, Huang Chou compiled the Official Edition of the Summary Record of Liu Chiu; he also recorded that the 'Trough' was the frontier between China and Liu Chiu.

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11. Hsin-kung Cheng, *A Mirror on Japan*, 1559. This is the author's report on his trip to, and three-year stay in, Japan.
The evidence provided in the early Chinese archives shows that the Tiao Yu Tai Islands did not constitute part of the Ryukyus, and that the Okinawa Trough was the natural boundary between China and Ryukyu (Liu Chiu). Consequently, in an official statement, the PRC pointed out that the demarcation line between China and the Ryukyu Islands lies between Chihwei Island and Kume Island [of the Tiao Yu Tai group].

Japan, however, argued that the casual references to the islets in the log-books cannot be taken to have implied their territorial status in favour of China.

In the Brazil-British Guiana Boundary Arbitration, the Arbitrator, after examination of the historical and legal claims by the parties, found that there was not sufficient evidence to decide the controversy over certain parts of the territory in litigation, and it was accepted as necessary that he should make a division, taking account of lines traced by nature and giving preference to the line which, being most defined throughout the entire course of the river, afforded the best equitable partition of the disputed area. The Arbitrator held that:

17. For contrast, see Inoue, op. cit., pp. 25-32.
Well-defined rights of sovereignty could only be determined in favour of either party in respect of 'certain portions' of the territory, the limits of which could not be fixed with precision. Neither party could prove sovereignty over the whole of the disputed territory and 'it cannot ... be decided with certainty whether the right of Brazil or of Great Britain is the stronger'.

With the geographical knowledge of the region at that time, it was not possible to divide the frontier into two equal parts as regards extent and value. The Tribunal therefore divided the dispute area 'in accordance with the lines traced by nature'. It seems to suggest that the natural line which followed the entire course of the river was regarded as affording the most equitable partition of the territory.

In connection with the principle quieta non movere, it may be remembered in the Case Concerning the Temple of Preah Vihear, the ICJ held:

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier.

In 1870, during the negotiations between China and Japan concerning the future statue of Ryukyu (Liu Chiu), the travaux préparatoires of the meetings had not even mentioned the

19. Ibid., p.23. For natural boundaries, see above, Ch. 1.
20. ICJ Reports, 1962, p.32. See above, Ch. 2.
names "Tiao Yu Tai" or "Senkaku". This indicates that the Japanese Government at that time either did not know that the Tiao Tai Islands existed or did not recognise these islands as belonging to the Ryukyus.

In 1879, when Li Hung-Chang, Minister Superintendent of Trade for the Northern parts of China, held negotiations with Japan over the title to the Ryukyus, both sides held that the Ryukyus comprised 36 islands but the Tiao Yu Tai Islands were not included among those 36 islands.

Sovereignty over the Tiao Yu Tai, Huang Wei and Chih Wei Islands was also claimed by a United States citizen of Chinese descent, who was in possession of the Imperial Edict issued in 1893 by Empress Dowager Tsu Shih of the former Ching dynasty, whereby the three major islets of the Tiao Yu Tai Islands were granted to one of her subjects. The relevant section of the Edict reads as follows:

> The three small islands of Tiao Yu Tai, Huang Wei Yu, Chih Yu are hereby ordered to be awarded to Shen Hsuan Hau as his property for the purpose of collecting medicinal herbs.

If this document issued in 1893 by the Empress Dowager of China is accepted as evidence that the major part of the Tiao Yu Tai Islands had been designated as private property under Chinese law, it constitutes a legal challenge to the Imperial Ordinance of Japan issued in 1896, based on the Cabinet decision of the previous year, as will be seen later, since a private appropriation could not be effected if the land were not part of the granter's territorial jurisdiction.

It is evident from the above that the Chinese people have maintained a relationship of continuous, continued contact with the Tiao Yu Tai Islands; they have established an economic dependency on the islands, and also have the earliest claim historically, which solidifies a well-established basis for the Chinese assertion of sovereignty.\textsuperscript{22} It may be recalled that in thinly populated areas little actual exercise of state authority is needed when there are no competing acts of authority of another state.\textsuperscript{23} Moreover, in the \textit{Minquiers and Ecrehos Case}, the ICJ relied for its decision on the broad range of connections of the disputed island with Jersey, manifested mainly in the activities of individuals - fishermen from Jersey.\textsuperscript{24}

The Japanese Government claimed that the Tiao Yu Tai (Senkaku) Islands were first discovered by a Japanese explorer, Tatsushiro Koga in 1884.\textsuperscript{25} This, however, was several centuries after the Chinese discovery. In 1970, during a newspaper interview, Koga's son denied that his father was the first discoverer; he accepted that his father had been to the islands but there had been someone before his father. There is

\begin{itemize}
  \item \textsuperscript{22} Thomas R. Ragland, 'The Senkaku Islands', 10 San Diego LR (1973), p.668.
  \item \textsuperscript{23} See, e.g., the Eastern Greenland Case, PCIJ Ser. A/B, No. 53. See above, Ch. 3.
  \item \textsuperscript{24} ICJ Reports, 1953, p.47. Acts of private individuals, however, in some cases, cannot be imputed to state. See above, Ch. 3.
  \item \textsuperscript{25} This was included as a 'fact' in the Ryukyu Government's statement of 10 September, 1971, and listed as one of the three grounds of its claim to the islands.
\end{itemize}
also a Ryukyu record of 1708 as well as two Japanese maps of 1783 and 1785 which indicate that the islands were not discovered by the Japanese in 1884, as was alleged by the Ryukyu Government in its statement of 10 September 1970.

In 1885 and 1893 three requests were made by the Okinawa Prefecture to the central government of Japan regarding incorporation of part of the Tiao Yu Tai Islands into Japanese territory. The Government, fearing possible friction with China, rejected these proposals.

In a territorial dispute, as was established earlier, a state may trace its right of sovereignty to territory by showing root or origin of title by such means as a treaty of cession or proof of continuous and peaceful display of authority since ancient times.

In 1895, following the defeat of the Government of the Ching dynasty in the Sino-Japanese war of 1894–95 (which was principally concerned with control of Korea), the Treaty of Shimonoseki was signed under which 'Taiwan [Formosa], together with all islands appertaining to Taiwan' and the Penghui [Pescadores] Islands were ceded to Japan. In this context, the Tiao Yu Tai Islands were included in that part of the Chinese territory so ceded.

In 1896, after the First Sino-Japanese War, Taiwan was ceded to Japan by China. The Japanese Cabinet passed the

26. 1 Hertslets China Treaties (1908), p.363; 87 BFSP, p.799. See above, Ch. 4.
Here is a dispute between China and Japan concerning the interpretation of the 1895 Treaty of Shimonoseki. China contended that the Tiao Yu Tai Islands were included in that part of the Chinese territory so ceded. Since the renunciation of the Shimonoseki Treaty, the Tiao Yu Tai should therefore be returned to China. Japan, however, denied that the Tiao Yu Tai Islands were ceded to Japan by China in 1895, and claimed that these islands were discovered by the Japanese explorer in 1884. The main argument is whether or not the islands were in fact ceded to Japan in 1895. Three points have been made. First, it would not be fair to ignore the implications of the old writings and cartographic works with regard to the territorial status of the islands at the time. Second, the Japanese claim was the direct result of Japanese victory in the Sino-Japanese War. Japan hesitated to make this claim for ten years previously, in fear of possible friction with China, despite repeated requests from the Okinawa Prefecture. This hesitation only ended on the eve of China's defeat in the war: the Japanese Cabinet's decision for the incorporation was made in January 1895, by which time her victory was beyond doubt; the war ended in March, and the Shimonoseki Treaty was signed in April 1895. It is unlikely that there was no connection between the imminent defeat of China and the Japanese Cabinet decision. Third, private ownership of part of the islands has been claimed by reference to a document, issues in 1893 by the former Imperial court of the Ching dynasty. These three points together are in conflict with
the argument that the islands remained terra nullius up to 1895.27

From the foregoing, it is certain that the arguments of both parties are reduced to the crucial question of whether or not the Tiao Yu Tai Islands were ceded to Japan in 1895, together with Taiwan and all the islands appertaining or belonging to it. In the absence of a precise reference to the islands in the Shimonoseki Treaty, the term 'all the islands appertaining or belonging' to Taiwan is ambiguous enough for each party to interpret it favourably to its own interests. Ultimately, the whole controversy hinges on the question of whether the islands had been open to possession before 1895.

In June 1922, a Japanese official document on the Ryukyus recorded all the territories of the islands; the Tiao Yu Tai were not amongst them.

In 1939, the Japanese Geographical Society published a detailed Atlas and Dictionary of Places of Japan which recorded all of Japan: no mention of the Tiao Yu Tai Islands was made. Nor did these islands appear in other Japanese atlases or government reports.28 No Japanese authority mentioning this


island group can be found - apart from the 1895 claim - until after World War II, when the term 'Senkaku Gunto' began to appear in Japanese publications. In 1970 there were many Japanese maps but on them the Ryukyu group still did not include the Tiao Yu Tai. In this respect the Award of the Island of Palmas Arbitration may be recalled:  
Above all, then, official or semi-official maps ... would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.  

It is appropriate here to point out that the use of maps as evidence in the resolution of boundary disputes has always been fairly restricted. In the Clipperton Island Arbitration, evidence in the form of a map was rejected as

29. 24 Encyclopedia Britannica (1940), p.69.  
30. [1928] II RIAA, p.852. In the Island of Timor Arbitration, the Arbitrator said that 'the private map edited at Batavia could not be weighed in value with the two official maps signed by the commissioners or delegates of the two states in 1899 and 1904'. 'A reproduction of this map signed by the arbitrator is appended as annex VII to the present award of which it shall be an integral part'. 9 AJIL (1915), pp. 259, 267.  
inconclusive because the map was not clearly an official one. This followed the Delimitation of the Polish-Czecho-Slovakian Frontier (Question of Jaworzina) Case, in which the PCIJ said that 'the maps and their tables of explanatory signs cannot be regarded as conclusive proof independently of the text of the treaties and decision', and the Delimitation of the Serbo-Albanian Frontier (Question of the Monastery of Saint-Naoum) Case, in which the same court adhered to the view that as a map presented was unsigned, its authentic character had not been established. More recently in the Minquiers and Ecrehos Case, the Court referred to two charts and a note from the French Minister of Marine Affairs to the French Foreign Minister in 1820 (later communicated to the British Foreign Office) which supported that British contentions as evidence of the official French view at the time and therefore admissible. In the Case Concerning Sovereignty Over Certain Frontier Land (Belgium v. the Netherlands) Case, however, a map of a Delimitation Commission, which was incorporated by reference in a treaty but was inconsistent with its text, had still prevailed over the written article.

32. [1931] II RIAA, p.1105. See above, Ch. 3.
33. [1923] PCIJ Ser. B, No. 8, p.33. See above, Ch. 2.
34. [1924] PCIJ Ser. B, No. 9, p.21. See above, Ch. 2.
35. ICJ Reports, 1953, p.71. Judge Carneiro however said that maps were not a sufficiently important contribution to enable a decision to be based upon them, and accordingly did not take them into account in this case. Opinion of Judge Levi Carneiro, ibid., p.105.
36. ICJ Reports, 1959, p.209. See above, Ch. 2.
Vihear Case, after considering the principal issues of the Cambodia contention, the ICJ did not agree with Cambodia's allegations nor that the 1907 map was published on the authority of the Mixed Commission of Delimitation. The Court also rejected the Thai arguments, but nevertheless accepted that, at the outset, the map had no binding character, but even if there was no official determination by the principals, to accept the delimitation made 'unofficially' by the technical experts. On this point the Court held:

Being one of the series of maps of the frontier areas produced by French Government topographical experts in response to a request made by the Siamese authorities, printed and published by a Paris firm of repute, all of which was clear from the map itself, it was thus invested with no official standing; it had its own inherent technical authority; and its provenance was open and obvious.37

In the Argentina-Chile Frontier Arbitration, in which map evidence was constituted as relevant material to be analysed in the light of other factors, such as acts of sovereignty.38

In the Rann of Kutch Arbitration, India relied heavily on surveys and maps. Since maps published under the direction of the Surveyor-General of India began soon after 1905 to show with striking uniformity a boundary running along the northern

37. ICJ Reports, 1962, p.21. The Court concluded that, in its inception, and at the moment of its production, it had no binding character. McNair was of the view that an assent to a treaty based upon erroneous maps would be no assent at all. Arnold Duncan McNair, The Law of Treaties: British Practice and Opinions (Oxford: Clarendon Press, 1933), p.131.

edge of the Rann, and some of these were seen and approved by
the highest British authorities, the Tribunal held that the
statements and maps referred to constituted acts of competent
British authorities which must be regarded as a relinquishment
of potential British territorial rights in the territory rather
than an explicit acceptance of claimed rights. 39

In the Beagle Channel Arbitration, Argentina contended
that a distinction must be drawn between privately printed
and published maps and official or quasi-official maps, but the
Tribunal felt that it was only of relative importance whether
a map was "official" or not. The Tribunal said:

it cannot be the case that non-agreed maps, produced,
acted upon or adopted unilaterally by a Party, even
if they have no conclusive weight or effect of themselves,
must, merely on account of their unilateral provenance,
be regarded as devoid of all value. 40

Non-agreed maps might be of use in the same manner as officially
agreed maps. The Tribunal laid down a series of applicable
principles of evaluation, which constitute a classic statement
as to the probative value of maps of all kinds in boundary
questions. It was declared that where one state produced a
map showing certain territory as belonging to another state this

40. Award of Her Britannic Majesty's Government pursuant
to the Agreement for Arbitration (Compromiso) of a
Controversy between the Argentine Republic and the
Republic of Chile concerning the region of the Beagle
was of far greater evidential value than if the map had emanated from the latter state. A consistent or very general emission of maps from a state underlining its claim would at least demonstrate belief in the validity of the claim, which the opposite would show doubt or absence of concern or serious conviction. Independent maps produced in third countries may be of significance in manifesting the existence, or lack, of a general understanding as to the nature of the particular territorial settlement. The Tribunal particularly emphasised the temporal or chronological factor. Maps produced before any controversy over the settlement has arisen will tend to be more reliable than those coming afterwards. In this case the Tribunal took maps into account only for purposes of confirmation or corroboration.

In can be concluded that a map published by a state, or under its auspices, or purporting to reflect its position, and which had been disposed to be used as a means of publicly revealing its position, may be fairly accepted as establishing that, when issued, it represented what that state deemed to be the limits of its domain.

The domestic administration of the Japanese Government prior to 1945 placed the Tiao Yu Tai Islands under the Taipei

41. Ibid., pp. 85-86, para. 142; 88-89, paras. 146-47.
Prefecture, rather than the Okinawa Prefecture, as it was an infrequent occurrence for fishermen to cross the Okinawa Trough to work the waters around the islands.

In a diplomatic note to the US Secretary of State, the ROC stated that:

the Japanese Government did not include the Tiao Yu Tai Islands in the Okinawa Prefecture prior to 1894, and that the said inclusion occurred only in consequence of China's cession of Taiwan and the Pescadores to Japan after the first Sino-Japanese War.

Japan, however, argued in the first place that the ownership of the Tiao Yu Tai Islands had not been established by China, or any other state for that matter, up to 1894. The casual references to some of the islands in Chinese writings from the early 15th century cannot be taken as evidence of China's territorial right to them, since they merely specified, sometimes indirectly, the boundary of the Ryukyu Islands, not that of China, nor the territorial status of the islands situated between China and the Ryukyu Islands. These were only mentioned in the log-books, and subsequently in other records, because they happened to be situated en route to and from

42. The ROC insists that, in 1940, when Taiwan and the Ryukyu (Liu Chiu) Islands were both under Japanese rule, the fishermen of these two areas argued over the fishing rights around the islands and that, after a year-long investigation, the case was decided in favour of Taiwan by a Tokyo court in 1941. This incident has been intensely exploited by the ROC as a proof that Japan herself regarded the islands as part of Taiwan, not of the Ryukyu Islands.

43. The Chinese (ROC) Ambassador Chow Shu-Kai's Note to the US Assistant Secretary of State for East Asian and Pacific Affairs, Marshall Green, on 17 September 1970, concerning the legal status of the Tiao Yu Tai Islands.
China. There is no reason, therefore, to regard as Chinese all the islands that were not specifically designated otherwise in the records. It was not until 1895, when the Japanese Cabinet decided to incorporate part of Tiao Yu Tai Islands into Japanese territory under the jurisdiction of the Prefecture of Okinawa, that the ownership of the islands was first established.

Secondly, when the Ryukyu Islands were placed under the US military administration at the end of the Second World War in 1945 and subsequently under US trusteeship in accordance with the San Francisco Peace Treaty of 1951 the Tiao Yu Tai Islands were always included in the Ryukyu (Liu Chiu) Islands. Thirdly, the Okinawa Reversion Treaty signed between Japan and the United States in June 1971, scheduled to come into force on 15 May, 1972, also included the islands in the areas to be restored. Under this treaty Japan resumed 'full' - instead of the former 'residual' - sovereignty over the islands. The concept of 'residual' sovereignty over the Ryukyu Islands has always implied that the dominium of the Tiao Yu Tai Islands ultimately rests with Japan.

44. See Fig. 5, p.765. Art. 3 of the Treaty of Peace with Japan provided that Japan would concur in any proposal of the US to the UN to place the islands under its trusteeship with the US as the sole administering authority. The US would have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of the islands, including their territorial waters. 136 HMTS (1952), No. 1822, p.48. In Re Shimabukuro and Others [1966 & 1967] 54 ILR 214, Japanese Osaka District Court held that 'the Okinawa (Ryukyu) Islands were not within the territory of Japan as provided in the Japanese Penal Code'. 
Figure 5: The Location of the Ryukyu Islands.

The Government of the Republic of China took the view that in 1945, when Japan surrendered to the Allies, it accepted the terms as set forth in the Cairo and Potsdam Declarations of 1943 and 1945 respectively regarding the return of the Chinese territories, including the Tiao Yu Tai Islands, earlier ceded to her. This was reconfirmed in the San Francisco Peace Treaty of 1951 between Japan and the Allies and in the Taipei Peace Treaty of 1952 between Japan and Taiwan. Since then Taiwan, the Pescadores and other adjacent islands have been returned to the Republic of China following World War II, the only exception being the Tiao Yu Tai Islands.

In view of the expected termination of the US occupation of the Ryukyu [Liu Chiu] Islands in 1972, the Government of the United States is hereby requested to respect the sovereignty of the Republic of China over the Tiao Yu Tai Islands and to restore them to the Government of the Republic of China when the aforesaid termination should take place.

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46. 136 UNTS (1952), No. 1832, p.46. Dr. Chen observes that 'the restoration of Taiwan and the Penghu Islands involves the return of lost territories to their legitimate owner and not a cession of territories by one state to another'. Ti-Chiang Chen, 'Taiwan - A Chinese Territory', No. 5 Law in the Service of Peace (December 1956), p.38, at p.44.

47. 138 UNTS (1952), No. 1858, p.38. See above, Ch. 4.

From the end of World War II the islands south of 29 degrees of northern latitude were placed under United States military occupation in accordance with Article 3 of the 1952 San Francisco Treaty; the Tiao Yu Tai Islands were included in the same area of US military occupation. The government of the ROC stated the reason that

Out of regional security considerations, the Government of the ROC has hitherto not challenged the area of US military occupation. It should not be construed as acquiescence on its part to the Tiao Yu Tai Islands being considered as part of the Ryukyu Islands. Furthermore, according to general principles of international law, temporary military occupation of an area does not affect the ultimate determination of its sovereignty.

On the map in the 1950 edition of the Encyclopedia Britannica the Senkakus are included within the bounds of China, not Japan.

Under the 1951 San Francisco Peace Treaty with Japan, the United States assumed the administration of the Ryukyu (Liu Chiu) Islands, with the understanding that Japan would be allowed to retain 'residual sovereignty' over them. During

49. 'Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands) Nampo Shoto south of Sofu Gan and Parece Vela and Marcus Island...' 136 UNTS (1952), No. 1832, pp. 48-49, Art. 3. See above, Ch. 4.

50. The Chinese (ROC) Ambassador Chow Shu-Kai's statement to the US Assistant Secretary of State for East Asian and Pacific Affairs, Marshall Green, on 17 September 1970, concerning the legal status of the Tiao Yu Tai Islands.
the following eighteen years, the US repeatedly reaffirmed that commitment and expected the Ryukyu Islands to be returned to Japan. China (ROC and PRC), however, insisted that the terms of the Cairo Declaration of 1943 and the Potsdam Proclamation of 1945 should be carried out and that the Japanese sovereignty should be limited to the Islands of Honshu, Hokkaido, Kyushu and Shikoku.

In answering a press inquiry on the ROC's position on the Ryukyu (Liu Chiu) Islands, Charles Shu-Chi King, the spokesman for the ROC's Ministry of Foreign Affairs, made the following remarks on 21 November 1979:

As regards the Liu Chiu Islands, the Government of the ROC has consistently held the position that the future status of the Liu Chiu Islands should be decided by the Principal Allied Powers of World War II, including the ROC, through joint consultations and in accordance with the Cairo Declaration of 1943 and the Potsdam Declaration of 1945.

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In a reply, the US Government said:

It is the firm policy of the United States to take no position on the merits of this dispute ... the United States presently administers these islands under Article 3 of its Treaty of Peace with Japan. The United States expects to return to Japan in 1972 all its remaining rights under Article 3 in accordance with the agreement announced by the President of the United States and the Prime Minister of Japan on November 21, 1969. The United States believes that a return of administrative rights to the party from which those rights were received can in no way prejudice the underlying claims of the Republic of China.

As has been shown, both the ROC and the PRC dispute Japan's claim to the Tiao Yu Tai. The Chinese position could be summed up as follows. First, that geologically the Tiao Yu Tai Islands are situated on the continental shelf which is contiguous to continental China and Taiwan, whereas they are separated from the Ryukyus by the Okinawa Trough, as we shall discuss later. Secondly, although the islands are uninhabited, they have long been used by Chinese fishermen. Thirdly, the earliest writings which mentioned these islands refer to them as part of China, not the Ryukyus (Liu Chiu). Fourthly, the Chinese Imperial Edict of Empress Dowager Tsu Shuih of 1893 shows that the Tiao Yu Tai belonged to China; otherwise, the Chinese Empress would not have had the power to give them to one of her subjects. Fifthly, that the Tiao Yu Tai Islands were ceded to Japan together with Taiwan as a result of the 1895

54. A Note of the US Department of State, Washington, 26 May 1971, to His Excellency the Chinese (ROC) Ambassador concerning the Legal Status of the Tiao Yu Tai Islands.
Treaty of Shimonoseki. Sixthly, following World War II, the Japanese territory was limited to the four main islands of Honshu, Hokkaido, Shikoku and Kyushu; therefore, the Tiao Yu Tai Islands are definitely not included. Eighthly, the Tiao Yu Tai Islands were placed under military occupation by the United States after the Second World War owing to regional security considerations; this should not be construed as acquiescence on the part of China to this group being considered as part of the Ryukyu Islands.

The Chinese claim to the Tiao Yu Tai Islands is based on historical documents, continued use, fishing ground use and private ownership. The Japanese claim, on the other hand, is based on a historical discovery, cession by the 1895 Sino-Japanese Treaty of Shimonoseki, and the post World War II US administration of the islands as one of Japan's territorial possessions. Yet Japan, in the 1952 Sino-Japanese Peace Treaty, renounced its title to the islands, yielding them to the ROC as their apparent owner. It appears that China has produced the more convincing proof of title to the Tiao Yu Tai Islands.

The 1968 United Nations Geophysical Survey concluded that the 'continental shelf between Taiwan and Japan may be one of the most prolific oil and gas reservoirs in the world'.

Figure 6: Prospective Oil and Gas Fields beneath the Yellow Sea and East China Sea. Based on CCOP/ECAFE 1 Tech. Bull. 17 (1969).

This was later buttressed by a Japanese survey which indicated significant oil-bearing sediments near the Tiao Yu Tai (Senkaku) Islands.56

The Tiao Yu Tai Islands are virtually uninhabited and of little intrinsic value. The reason that these islands are so important is that ownership of the group will have a significant effect on the delimitation of the continental shelf between China and Japan, and the consequent division of its natural resources.

As we have seen, a state's title to seabed resources rests upon other states' recognition of its claim, which can only be achieved by diplomatic means, not simply by the deployment of legal argument. Japan, on the one hand, seems to have concentrated on four objectives: (a) to press the US for returning Okinawa to her as soon as possible; (b) to prepare a strong legal basis for their claim by skillfully assembling and interpreting all the 'relevant' materials; (c) to have Okinawa local authorities remove certain conditions on and around the Tiao Yu Tai Islands which are regarded as detrimental to its claim, for example, to prevent the entry of Chinese fishermen and industrial workers into the area; and (d) to divide the disputed submarine areas 'unofficially' by allowing the filing of applications for exploration lots by

domestic companies affiliated with foreign oil companies. On the other hand, the ROC (a) hastily issued a continental shelf proclamation asserting her rights to natural resources in these disputed submarine areas; (b) ratified the 1958 Geneva Convention on the Continental Shelf (with reservations to Article 6); (c) prepared the legal basis of its claim; and (d) concluded concession agreements with US oil companies for exploration rights. 57

In May 1969 the Ryukyu local authority erected a stone tablet in the Tiao Yu Tai which had the name 'Senkaku' on it.

On 17 July 1969, the ROC announced that it would exercise sovereign rights over all the natural resources in the seabed and subsoil adjacent to its territorial sea. The announcement appeared not only to be an application of Article 2(1) of the 1958 Continental Shelf Convention, but also a warning to the other coastal states that the submarine areas of the East China Sea were not open for all states to explore and exploit.

In July 1970, the ROC and the Gulf Oil Corporation signed an oil concession agreement over a submarine area north-east of Taiwan. The Tiao Yu Tai (Senkaku) Islands were included in this concession area. Japan then protested against the ROC's action claiming that the islands came under the jurisdiction of Okinawa and had always been associated with the Ryukyu (Liu Chiu) Islands.

57. Tao Cheng, 'The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition', 14 Virginia JIL (1974), pp. 241-42. Western oil corporations such as Amoco Gulf and Shell have also been active in the submarine areas near Taiwan and Korea.
On 18 July 1970, the Japanese Embassy in Taipei advised the Ministry of Foreign Affairs of the ROC that the Japanese Government considered that the ROC's unilateral claim to the continental shelf area between Taiwan and Japan had no validity under international law and that therefore the claim would not affect Japanese continental shelf rights in that area. 58

On 19 August, the ROC Foreign Ministry made a statement addressed to the Japanese Embassy in Taipei, to the following effect: First, the Government of the ROC explored the continental shelf resources in its adjacent submarine areas in accordance with the principles of international law and the 1958 Geneva Convention on the Continental Shelf. Secondly, the Government of the ROC did not agree with Japan's territorial claim to the exposed rocks and islets on the northern part of the ROC's continental shelf, considering that the Chinese Government had the sole rights to the exploration and exploitation of those areas. 59

On 2 September 1970, the Japanese Embassy, in response to this statement, expressed its regret that the ROC's act would damage the traditionally friendly Sino-Japanese relations, since the 'exposed rocks and islets' located to the northwest of Japan were in fact part of the Senkaku Islands, which are indisputably part of Japanese territory. 60

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59. FM (ROC) File No. (F/59/1) 15163 (19 August 1970).

On 2 September 1970, the flag of the ROC was hoisted on one of the Tiao Yu Tai Islands by some Chinese pressmen and the crew of the S.S. Hai Hsien of the Taiwan Provincial Maritime Experimental Station. The Embassy of Japan, under the instruction of the Japanese Foreign Ministry, presented on 8 September its compliments to the Ministry of Foreign Affairs of the ROC, and advised that such acts would damage friendly relations between Japan and the Republic of China. Accordingly, it is kindly requested that the Ministry of Foreign Affairs of the Republic of China take due steps in this regard.

On 25 September 1970, ROC Premier Yen reported to the Legislative Yuan (the Parliament of the ROC) that his Government had replied to Japan and had rejected Japanese assertions regarding the status of the Tiao Yu Tai Islands and the exploitation of seabed resources in the East China Sea continental shelf. On the same occasion, Deputy Foreign Minister Shen made three specific points, all aimed at particular Japanese contentions: (a) the Chinese plan for the development of petroleum resources in the continental shelf is harmonious with the prevailing rules of international law and the principles of the Continental Shelf Convention; (b) the Chinese Government cannot agree to any Japanese claim to any small islands or rocks

rising from the continental shelf; and (c) the unilateral
decision of the United States to return the Ryukyu Islands
to Japan was regretful, and China reserved all her rights in
this matter.62

A diplomatic note from the Ministry of Foreign Affairs
of the ROC to the Japanese Embassy in Taipei stated that the
Government of the ROC considered that the Japanese Government
had no right to question such acts.63

Until 1970, Japan and the ROC had been disputing
sovereignty over the Tiao Yu Tai Islands, whilst the PRC had
watched events silently as a bystander.

In September 1970, the first overt territorial dispute
between Japan and the PRC was caused by Japan's assertion
of military control over the islands.64 This action was taken
by means of the Ryukyu Security Forces, a prefecture of Japan,
claiming the islands as part of the Ryukyu chain and driving
off the Chinese fishermen who used them as fishing grounds.

On 29 December 1970, an article in the People's Daily
noted that Japan, the ROC and South Korea were 'stepping up
their schemes to plunder, together with US imperialism, the

62. Gazette of the Legislative Yuan, Vol. 59, 25 September
1970. See also Central Daily News, 26 September 1970,
p.1.
64. Radio Peking announced the PRC claim to the Islands.
NCNA (New China News Agency), 3, 24 and 29 December
1970.
seabed and subsoil resources of China and Korea'. After
denouncing the joint development plans undertaken by Japan,
Korea and the ROC, the Commentator declared:

Taiwan Province and the islands appertaining thereto,
including the Taiwan Tiaoyu, Huangwei, Chihwei,
Nanhiao, Pichhiao and other islands, are China's
sacred territories. The resources of the seabed
and subsoil of the seas around these islands and
of the shallow seas adjacent to other parts of China
all belong to China, their owner, and we will never
permit others to lay their hands on them.

He then went on to warn those dealing with the ROC:

All agreements and contracts concerning the exploration
and exploitation of China's seabed and subsoil
resources [which the three governments mentioned above
may have] concluded with any country, international
organisation or foreign public or private enterprise
under the signboard of 'joint-development' or any other
name are illegal and null and void.

In consideration of such political sensitivity, the
United States government has reportedly decided to discourage
American oil companies from operating in the disputed waters.
As a result, the ROC-Gulf Oil concession agreement of 1970
has been suspended indefinitely, as have many other oil
concessions which the ROC signed with various American operators.

It is confirmed that unless concession rights are guaranteed
as being stable foreign companies will be reluctant to engage
in any offshore activities.

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65. People's Daily, 29 December 1970. 'Plunder of China's
Seabed and Subsoil Resources by US and Japanese
Reactionaries will never be allowed', Peking Review,
Vol. 14, No. 1, 1 January 1971, p.32.

66. Choon-ho Park, 'Offshore Oil Development in the China
Seas: Some Legal and Territorial Issues', in Elisabeth
Mann Borgese and Norton Ginburg (ed), 2 Ocean Yearbook
(Chicago & London: The University of Chicago Press, 1980),
p.313.

67. See above, Ch. 2.
On 23 February 1971, the Minister of Foreign Affairs of the ROC reiterated his government's position on the sovereignty of the Tiao Yu Tai, and expressed that, in accordance with history, geography and use, these islands belong to the ROC.

On 9 November 1971, the Japanese Prime Minister, Eisaku Sato, during a meeting of the Upper House Budget Committee, said that

The Senkaku [Tiao Yu Tai] Islands are under the administration of the United States as part of the Ryukyu [Liu Chiu] Islands. It is clearly stated in this [Japan-US Okinawa reversion] agreement that they will be returned to Japan.

At the same meeting, Japanese Foreign Minister Takeo Fukuda said that 'this archipelago is Japanese Territory' and 'the question of its defence will naturally be included in that of Japan'. 68

Commenting on the alleged Japanese designs on the Tiao Yu Tai Islands, an article in the People's Daily signed by the Commentator on 29 December 1970, declared that the resources of the seabed and subsoil of the seas around these islands, and of the shallow seas adjacent to other parts of China, all belonged to China. 69

On 30 December 1971, the PRC's Ministry of Foreign Affairs stated that 'the Japanese Sato Government, ignoring the historical facts and the strong opposition of the Chinese people, had annexed the Chinese Tiao Yu Tai Islands by using the Japan-US Okinawa 'Reversion' Agreement'. In this statement, the PRC declared that

The Tiao Yu Tai and other islands have been China's territory since ancient times. The US and Japan have made an illicit transfer between themselves of China's Tiao Yu Tai and other islands. The encroachment upon China's territorial integrity and sovereignty cannot but arouse the utmost indignation of the Chinese people.

The PRC has since reaffirmed its position in the United Nations. In his speech before the United Nations Seabed Committee on 3 March 1972, An Chin-yuan, the representative of the PRC, stated that the new law of the sea should be based on the principle of sovereign equality and that the super-powers should not impose on others an outdated regime based on hegemony. He expressed the following views:

China's Taiwan Province and all the islands appertaining to it, including Tiaoyu Island, Huangwei Island, Chihwei Island, Nanhsiao Island, Peihsiao Island, etc., are part of China's sacred territory. The seabed resources of the seas around these islands and of the shallow seas adjacent to other parts of China belong completely to China and it is absolutely impermissible for any foreign aggressor to poke his fingers into them. No one who[m]soever [may be] allowed to create any pretext to carve off China's territory and plunder the sea resources belonging to China.

In the same period, it was proposed by the Japanese-South Korean joint ministerial meeting that each state put aside its national claims and that they work together to develop the area where their claims overlapped.\textsuperscript{72} Concrete negotiations were held on that basis, resulting finally in the 1974 Agreement on Joint Development of the Continental Shelf adjacent to the two countries. The Joint Development Zone covers an area of 100,000 square kilometres bying southeast of the Korean peninsula and west of Kyushu (the southernmost point of the main islands of Japan).\textsuperscript{73}

\textsuperscript{72} In his separate opinion in the North Sea Continental Shelf Cases, Judge Jessup said: "Clearly, the principle of co-operation applies to the stage of exploration as well as to that of exploitation, and there is nothing to prevent the Parties in their negotiations, pending final delimitations, from agreeing upon, for example, joint licensing of a consortium which, under appropriate safeguards concerning future exploitation, might undertake the requisite wildcat operations'. \textit{The North Sea Continental Shelf Cases, ICJ Reports}, 1969, p.83. It is interesting to note that most bilateral agreements provide for joint exploitation where deposits overlap. Cf. Dissenting opinion of Judge Evensen, Case concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya), \textit{ICJ Reports}, 1982, pp. 278-323.

In the 1974 Japan-South Korea Agreement concerning the establishment of a boundary in the northern part of the continental shelf adjacent to the two countries, a submarine area north of the point 32°57' N and 127°41' E was agreed upon in a very simple manner. The boundary line begins at the above point and runs in a north-easterly direction through a total of 35 coordinates. It exactly traces the line equidistant from both shores. The Japanese islands of Tsushima and Iki — both a long way from the Japanese mainland — were used as the points from which the median line was measured. The disputed island of Takeshima, however, was ignored. In the northeastern section, the boundary line extends into the continental slope, where submarine areas are over 200 metres in depth.

On 30 December 1971, the Ministry of Foreign Affairs of the PRC declared:

Tiaoyu Island, Huangwei Island, Chihwei Island, Nanhsiao Island, Peihsiao Island, etc. are islands appertaining to Taiwan ... they have been an inalienable part of Chinese territory since ancient times. It is utterly illegal for the US and Japanese Governments to include China's Tiaoyu and other islands ... in the Okinawa 'reversion' agreement. Their act cannot in the least later the sovereignty of the PRC over her territory of Tiaoyu and other islands...

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75. Japan and the Republic of Korea have disputed for a number of years over the sovereignty of this island. It was therefore very realistic to exclude Takeshima from consideration in determining submarine boundaries.

In September 1972, Japanese Premier Tanaka visited the PRC. After a meeting with Chow En Lai, a joint communique was issued stating that the resolution of the Tiao Yu Tai dispute would be postponed for the time being.

It is interesting to observe that, in a working paper entitled Principles on the delimitation of the coastal seabed area submitted by Japan to the United Nations Seabed Committee, the 'coastal seabed area' is defined only in terms of the maximum surface distance from the coast, and not in terms of depth. It was further proposed that the existing bilateral or regional agreements relating to the delimitation should not be prejudiced. The PRC proposal, however, provided that states adjacent or opposite to each other should jointly determine the boundaries between their continental shelves 'through consultations on an equal footing'. It also stated that states adjacent to or opposite each other should conduct the 'necessary consultations to work out reasonable solutions for the exploitation' of the natural resources in the contiguous parts of their continental shelves. Although these proposals


were of little legal value, they nevertheless reflect the PRC's offshore policies. It seems Dr. Greenfield, while writing her doctoral dissertation, was not aware that this document existed. She claimed that the PRC's working paper on the 'Sea Area Within the Limits of National Jurisdiction' made no provision for any criteria of delimitation, and this is an important omission. Greenfield implied that the complicated geography of the area beneath and around the Ryukyu Islands, notably the Okinawa Trough, makes it difficult to arrive at an appropriate method of delimitation which would be acceptable to all parties, other than to ignore it. It is thus vital that the PRC should constantly maintain these essential criteria for the delimitation of the submarine boundaries.

In early 1973, *Glomar IV*, a seabed oil-drilling ship registered in Panama and chartered by United States oil companies, and several auxiliary vessels had been conducting intense drilling in the East China Sea with the consent of South Korea. On 15 March 1973, the PRC issued a statement asserting that:

The sea-bed resources along the coast of China belong to China. The areas of jurisdiction of China and her neighbours in the... East China Sea have not yet been delimited. Now the South Korean authorities have flagrantly and unilaterally brought foreign oil companies into the aforementioned region for drilling activities. The Chinese Government hereby reserves all rights in connection with the possible consequences arising therefrom.

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The 1974 Agreement between South Korea and Japan, on joint development in a large submarine area between the southern tip of Korea and Japan's southern island of Kyushu, became effective in 1978. This agreement has brought these countries into conflict with China.

On 2 April 1974, the PRC representative Huang Ming-ta at a meeting in Colombo of the 30th Session of the United Nations Economic Commission for Asia and the Far East (ECAFE) pointed out:

Division of jurisdiction of the continental shelf between China and countries bordering on or facing her should be decided by the countries concerned through consultations on the equal footing. To one-sidedly mark off a large area of the continental shelf as a so-called 'joint development zone' behind China's back is an infringement on China's sovereignty, which the Chinese Government absolutely cannot accept. Anyone who arbitrarily carries out development activities in this area must bear full responsibility for all the consequences arising therefrom.

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81. See Fig. 7, p.785. The Japan-South Korea Agreement Concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the two countries, signed at Seoul on 30 January 1974. Oda, The International Law of the Ocean Development: Basic Documents, Vol. II, op. cit., p.95. The agreement is effective for 50 years and will continue even beyond that time period until the parties terminate it. For details, see I. Huang, 'The Demarcation of Continental Shelf between Japan and Korea and the Measures of their Joint Exploitation', 25 China LJ (1980), pp. 75-85.

Figure 7: Korea-Japan-China Continental Shelf Median Lines

On 4 April 1974, the PRC again denounced the Japan-South Korea Agreement and stated that:

according to the principle that the continental shelf is the natural extension of the continent, it stands to reason that the question of how to divide the continental shelf in the East China Sea should be decided by China and other countries concerned through consultations. But ... the Japanese Government and the South Korean authorities have market off a so-called Japan-South Korea 'Joint Development Zone' on the continental shelf in the East China Sea behind China's back. This act is an infringement on China's sovereignty, which the Chinese Government absolutely cannot accept.

On 14 February 1974, the ROC's Foreign Ministry also made a statement declaring that the Chinese Government reserved all rights for the exploration and exploitation of the sea-bed resources in the East China Sea.

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83. 'Statement by Spokesman of Foreign Ministry', Peking Review, Vol. 17, No. 6, 8 February 1974, p.3 [italics added]. Dr. Park is of the opinion that in the case of the East China Seas, 'China has flatly ignored the sustained efforts of Japan and South Korea to seek boundary agreement. From its own standpoint, there has been no real need to hasten to do so'. Choon-Ho Park, The South China Sea Disputes: Who Owns the Islands and the Natural Resources? Harvard Law School, Studies in the East Asian Law, China: No. 26, p.53. In the North Sea Continental Shelf Cases, an attempt has been made to see in the treaties of 1964 and 1965, between the UK on the one side and the Netherlands and Denmark on the other, an acquiescence in the application of the equidistance rule. Judge Padilla Nervo in his separate opinion said that the principle of estoppel cannot in this case be applied against the Federal Republic. It cannot be proved that the two Kingdoms changed their position for the worse relying on such acts of the FRG as its Proclamation or its manifestation of its intention to ratify the 1958 Convention on the Continental Shelf. ICJ Reports, 1969, p.96.

On 13 June 1977, upon learning of the Japanese Diet's approval of the agreement, the PRC Foreign Ministry issued a further statement:

The East China Sea continental shelf is the natural extension of the Chinese continental territory. The PRC has inviolable sovereignty over the East China Sea continental shelf. Without the consent of the Chinese Government, no country or private persons may undertake development activities on the East China Sea continental shelf. Whoever does so must bear full responsibility for all the consequences arising therefrom.

This vague passage was by implication another confirmation of the principle of natural prolongation, which was decided by the international judicial and arbitral tribunals in the North Sea Continental Shelf Cases and the Anglo-French Continental Shelf Arbitration, although the critical question of the criteria for the delimitation of submarine boundaries in the above statement was left unanswered. The passage does however, indicate a willingness to negotiate the question of delimitation. There are fewer difficulties for the PRC to negotiate with Japan than with South Korea; since no diplomatic relations exist between the PRC and South Korea, to conduct negotiation between them might involve implied recognition.

85. Peking Review, Vol. 20, No. 25, 17 June 1977, pp. 16-17 [italics added]. An article by the 'Renmin Ribao' (People's Daily) Commentator stated that 'the development of the East China Sea continental shelf which involves state sovereignty should be decided in full consultation with the governments of China and the countries concerned'. ibid., p.17. On the same day the ROC's Foreign Ministry also stated that it regarded the agreement as null and void. Keesing's Contemporary Archives, 1978, p.28972.
It is clear now that Japan had delayed her ratification of the 1972 joint-development agreement (a) because she felt that it made too large a concession to Korea, since the joint-development zone was located closer to the Japanese side of the median line of the continental shelf; (b) because the equidistance-median line principle appeared to be gaining support against the natural prolongation theory at UNCLOS III; and (c) because of Japanese concern about the political implications of the PRC's protests.86

On 14 June 1977 the Japanese Government gave its approval to orders implementing the provisions of a bill on the extension of Japan's fishing zone to 200 nautical miles. In connection with the 200-mile zone, Japan followed the 'principle of reciprocity' by adopting a 'negative formula'. Under this formula, the PRC and South Korea would not be excluded from the 200 mile zone in the Sea of Japan waters, the Yellow Sea, the East China Sea and the southwest Pacific unless they themselves also set up similar zones. In this way

86. The opposition parties in the Japanese Diet, and a section of the ruling Liberal-Democratic Party, opposed its ratification as likely to embarrass Japan-PRC relations. Keesing's Contemporary Archives, 1978, p.28972. The PRC had protested on four different occasions: on 15 March 1973 when negotiations between Korea and Japan were still underway; on 4 February 1974, four days after the signing of the 1974 Korea-Japan Agreement; on 26 June 1978, four days after the agreement entered into force; and on 7 May 1980, after a decision was reached between South Korea and Japan in the exploration of their western joint-development zone. Cf. Choon-Ho Park, 'The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200-Mile Economic Zone', 16 Harvard ILJ (1975), pp. 44-45.
Japan would maintain the status quo under existing agreements, and so allow fishing operations by the PRC and South Korean vessels, other than within Japan's 12 mile territorial sea limit. 87

A decree adopted by the North Korean Government on 21 June 1977 stated that the North Korean economic zone extended 200 miles from the coast in the Sea of Japan and to the half-way line between North Korea and the PRC in the Yellow Sea, and that all foreign vessels were excluded from fishing and other economic activities in this zone except with previous permission. On 1 August 1977 the North Korean Supreme Command announced that its military boundary extended up to 50 miles from the shore in the Yellow Sea and up to 200 miles in the Sea of Japan; that foreign military vessels and aircraft were forbidden within this boundary; and that foreign civil shipping and aircraft, apart from fishing boats, might operate within it only by prior agreement. 88

On 12 April 1978, a fleet of the PRC fishing vessels operated in the territorial waters of Tiao Yu Tai (Senkaku) Islands, which the fishermen claimed to be in Chinese waters.


On 14 April 1978, the Japanese Embassy in Peking made a protest to the PRC Foreign Ministry. The protest was rejected by the Chinese Foreign Ministry, which reiterated its statement of 30 December 1971, that the Tiao Yu Tai and its neighbouring islets belonged to China. On 15 April, following Japanese representations to the PRC, King Piao, a PRC Deputy Premier, said that the incident was not intentional but 'an accidental affair'. At that date, however, a Spokesman for the ROC stated that China's sovereignty over the Tiao Yu Tai was indisputable. Nonetheless, on 16 April the PRC fishing vessels were withdrawn from the immediate vicinity of the islands.

On 27 April, Liao Cheng-Chi, a vice-chairman of the Standing Committee of the National People's Congress of the PRC, said that the Government would make all-out efforts to avoid a recurrence of any conflicts over the Tiao Yu Tai since the 1978 Japan-PRC Treaty of Peace and Friendship was soon to be signed. The treaty was indeed signed, on 12 August, 1978. On the same day, the ROC declared that the treaty was null and void because the Peking Government did not represent the people of China; and it added that the ROC's sovereignty over the Tiao Yu Tai was beyond dispute.

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89. This was reiterated by several officials of the PRC. Ming Pao, Hongkong, 16,17,22,24 April 1978. See also Ming Pao Monthly, Vol. 13, No. 5, May 1978, pp. 93-94.
On 22 June 1978, the 1974 Japan-Republic of Korea Agreement on Joint Development of the Continental Shelf was ratified. The PRC voiced a protest reiterating that

the continental shelf is the natural extension of the continent; the PRC has inviolable sovereignty over the continental shelf in the East China Sea, and ... the division of those parts of this continental shelf which involve other countries ought to be decided on through consultation by China and the countries concerned.

On 13 August 1978, following the signature of the Treaty of Peace and Friendship, Yasuhiro Nakasone, Chairman of the Executive Council of the ruling Japanese Liberal Democratic Party, stated that the PRC had practically recognised Japan's control over the islands, and that Teng Hsiao-ping had emphasised that no further incidents would take place in the area. 93

In May 1979 the Japanese asserted their sovereignty by building a helicopter pad on one of the Tiao Yu Tai Islands, simultaneously announcing plans for the establishment of other permanent facilities. The PRC initially protested strongly, but by September it had agreed to shelve the issue and to


93. It will be recalled that, following the ratification of the 1974 Japan-South Korea Agreement on the Joint Development of the Shared Continental Shelf Area on 22 June, the PRC declared in a strong protest to Japan that it had inviolable sovereignty over the continental shelf in the East China Sea, and would 'never agree' to the Japan-South Korea Agreement. Although the issue thus remained unresolved, it did not prevent the conclusion of the Peace and Friendship Treaty.
undertake joint oil-prospecting with Japan. The durability of this arrangement will presumably depend on the PRC's continued prosecution of policies based on its West-oriented modernisation drive, but the basic problems of sovereignty and delimitation will remain unchanged.

In June 1979, Li Xian-nian, a PRC Deputy Premier, publicly stated that the Government of the PRC was willing to negotiate a joint venture to exploit the natural resources of the Tiao Yu Tai area. On 29 June, a spokesman for the ROC Foreign Ministry pointed out that the Government of the ROC had repeatedly made clear its position concerning sovereignty over the Tiao Yu Tai Islands, i.e., that the ROC's sovereignty over these islands was absolute and in no way affected by decisions taken by anyone else involved. Communist China, being an insurgent group, had no right to represent China in Tiao Yu Tai matters, nor to conduct negotiations with Japan over these islands.94

In May 1980, a decision was reached by Japan and South Korea to start drilling and testing exploitation in the western part of their joint development zone in the East China Sea. The PRC again strongly reasserted the natural prolongation principle, and urged a negotiated delimitation. It stated that:

according to the basic principle that the continental shelf is the natural prolongation of the land territory, the PRC has inviolable sovereign rights to the continental shelf in the East China Sea ... Division

of parts of this continental shelf ... involving other countries should be decided through consultations between the Chinese Government and the other countries concerned... The 'Japan-ROK agreement on joint development of the continental shelf' that the Japanese Government signed with the South Korean authorities without consulting China is utterly illegal and null and void. The Chinese Government cannot ignore actions which infringe on China's sovereignty ... Should any countries or private persons arbitrarily undertake, or participate in, development activities in the so-called 'joint development zone' ... they must bear responsibility for all the consequences arising therefrom. The Chinese Government reserves all its legitimate rights in the said area.

In an article of the People's Daily News, the Commentator observed that:

The Japanese Government tries to justify its infringement on China's sovereignty by claiming that the so-called 'joint development zone' does not extend beyond the 'mid-line' [sic] of the East China Sea ... It is well-known that 'mid-line' [sic] is not a recognised principle under international law for demarcating the waters [sic] between the littoral states. On the contrary, international law requires that such demarcation, including temporary measures prior to reaching a formal agreement, must be made through consultation and agreement between the countries concerned. Moreover, the 'mid-line' [sic] referred to by the Japanese side is defined unilaterally and not based on any law whatsoever. The argument used by the Japanese Government cannot cover up the essence of its infringement on China's sovereignty.

Turning now to the issue before us, the question is whether the joint Japanese-South Korean exploration and exploitation of the East China Sea might be considered an

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infringement of the PRC's sovereign rights. In the light of the Aegean Continental Shelf Case, it is submitted that if any damage were done as a consequence of this exploration and exploitation, the PRC would be entitled to claim for compensation.97

In an article, Wu accused Japan of using the median line as a means to usurp Chinese sovereignty, and affirmed that the median line principle is not a rule of general international law. Since the continental shelf of the East China Sea is a natural prolongation of the Chinese land territory, and the Japan-South Korea joint development area mainly overlaps the Chinese continental shelf, applying the median line principle in this region would clearly result in an injustice. Since Japan and South Korea have deliberately selected specific basepoints for the median line, it is the equitable principle which should be employed.98

It would be of interest to compare this point with the Turkish argument in the Aegean Sea dispute, which asserted that the equidistance rule does not always correspond to the meaning of justice and equity. It is for this reason that...

97. The Court held that 'the alleged breach by Turkey of the exclusivity of the right claim by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means'. ICJ Reports, 1976, p.11, para. 33. Cf. Judge Elias expressed his separate opinion that legal rights can be, infringed so long as compensation is eventually paid. Ibid., p.30.

the ICJ in the North Sea Continental Shelf Cases did not presume a mandatory content in the relevant provisions of the Continental Shelf Convention even for those states which were party to the Convention. The Court demonstrated with great clarity, how, in certain cases, the line of equidistance could amputate a part of the natural prolongation of a state to give it to another. Consequently, the implementation of this provision as an absolute and automatic rule, in sea areas where special circumstances exist, as was the case in the Aegean Sea, would be improper and unrealistic.99

The international tribunals have adopted a juster and more realistic approach to the determination of sea boundaries in dispute. So in the Anglo-Norwegian Fisheries Case, the North Sea Continental Shelf Cases, the Anglo-French Continental Shelf Arbitration and the Tunisia-Libyan Continental Shelf Case the need for an equitable distribution of resources was emphasised. The principle of equitable delimitation of overlapping continental shelf boundary areas, as was indicated in Chapter 7, is a principle most imprecise in application which may explain its popularity. In the East China Sea, delimitation by equitable principles may best accommodate some of the unusual geographic features of the area.

In the Case concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriva), the Court said that the term 'equitable principles' could not be interpreted in the abstract; it referred

to the principles and rules which might be appropriate in order to achieve an equitable result. The Court considered that it was bound to decide the case on the basis of equitable principles as part of international law, and to balance up the various considerations which it regarded as relevant in order to produce an equitable result. While it was clear that no rigid rules existed as to the exact weight to be attached to each element of the case, it was very far from being an exercise of discretion or conciliation; nor was it an operation of distributive justice.

In achieving this equitable delimitation of the continental shelf boundary, the Court pointed out

the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal state and the length of the relevant part of its coast, measured in the general direction of the coastlines, account being taken for this purpose of effects, actual or prospective, of any other continental shelf delimitation between states in the same region.

100. ICJ Reports, 1982, p.59, para. 70.
101. Ibid., p.60, para. 71.
102. Ibid., p.93, para. 113 B(5). In the North Sea Continental Shelf Cases, the Court held that to ensure the application of equitable principles to the delimitation of the continental shelf, account had to be taken of 'the element of a reasonable degree of proportionality which a delimitation effected according to equidistance principles ought to bring about between the extent of the continental shelf appertaining to the states concerned and the length of their respective coastlines...'
The principles of delimitation of continental shelf boundaries never constitute more than one aspect of a wider problem to which a complete solution can only be found through either equidistance or 'equitable principles'. At UNCLOS III, states were divided into two opposed groups regarding these principles; the question was whether or not the Law of the Sea Convention should contain guiding principles in respect of seabed delimitations. One group favoured the equidistance line, which has the advantage of being a definite guide. Japan saw this as advantageous to its position, and supported this group. The other group favoured the equitable principles, which means taking into account all the relevant factors of each case and is, ipso facto, the same as having no guiding principles. The PRC took the opportunity and supported this group. The equidistance line is deemed to be the ultimate 'equity'. The equitable principles now incorporated into the Law of the Sea Convention, however, do not include any guidelines for the solution of problems in the absence of agreement among the states involved. It is clear that the Convention on the Law of the Sea contains no provisions which could be applied in the immediate settlement of the delimitation of Tiao Yu Tai, Nansha and Hsisha Islands' boundaries.

Summing up: the continental shelf problems in the East China Sea are underscored by the lack of broadly comparable coastlines between China (Mainland China and Taiwan) and Japan, in terms of coastal configuration and length. Thus, if the equidistance principle were applied in the East China Sea
submarine areas south of the 30°N latitude, the result would be an inequitable distribution of these areas. The proportionality principle - formulated by the ICJ in the North Sea Continental Shelf Cases and in the Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya)\textsuperscript{103} - on the other hand, provides a sensible alternative. It calls for a submarine boundary that reflects a reasonable degree of proportionality between the lengths of the coastal states' respective coastlines and their continental shelf entitlements in a given region.

Indeed, the ROC-PRC rivalry has injected an element of instability into the seabed discussion which has hitherto proceeded on the basis of a 'one China' situation. Whenever it is reported that negotiations have taken place between Japan and the PRC, the ROC has consistently reaffirmed its position over the Tiao Yu Tai Islands. Thus, on 29 August 1980, the spokesman of the ROC Foreign Ministry, Liu Ta-jen, said that the ROC Government has reiterated once again her sole sovereignty over the Tiao Yu Tai Islands. Today I confirm that the free Chinese Government's sovereignty over these islands and the continental shelf extending from the islands will never be affected by any others' decisions.\textsuperscript{104}

Currently, the Tiao Yu Tai Islands are not in the full control of either claimant, each side cautiously trying to avoid grating on the raw nerves of the other, while trying to change the status quo in its favour.

\textsuperscript{103} ICJ Reports, 1982, p.93, para. 133 B(5).

In the Red Sea one of the longest single offshore boundaries, that between Saudi Arabia and Sudan, has been settled by an agreement which provides, *inter alia*, for joint exploitation of part of the submarine areas involved.\(^{105}\) This agreement established a valuable precedent for the delimitation of other offshore boundaries. In the Tiao Yu Tai areas, a joint exploitation between China and Japan through an intergovernmental entity which administers and distributes the seabed resources is desirable. However, the ROC-PRC rivalry remains a major stumbling block in any pacific settlement of the Sino-Japanese seabed dispute in the East China Sea. Cooperation between the two Chinese governments on seabed issues *vis-a-vis* Japan will not come without an overall rapprochment between them in a much larger context.

4. **Special Problems of the Tiao Yu Tai Continental Shelf Delimitation**

4.1 **Applicable Law**

The concept of the continental shelf seems to have crystallised into customary international law; some of the provisions of the 1958 Continental Shelf Convention, however, evidently have not done so. In particular, Article 6 of the

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Convention, which relates to the submarine boundary delimitation, does not bind the non-contracting parties to the Convention, as has been indicated in earlier chapters.

One of the fundamental problems of submarine boundary delimitation between the P.R.C., Japan and Korea in the East China Sea is that none of these States is party to the Continental Shelf Convention. They have thus been unable to invoke Article 6 of this Convention to solve their boundary disputes. It seems that some American writers fail to distinguish between "customary international law" and "treaty law". The former is generally regarded as legally binding upon all States of the international community; the latter is binding only upon the contracting parties. Ragland is therefore misleading in stating that the Tiao Yu Tai (Senkaku) Islands lie on the edge of the continental shelf extending from mainland China. The latter is "unable to assert a claim" under Article 1 (b) of the 1958 Continental Shelf Convention, since she is not a signatory of it. Japan is in a similar position since it has not ratified the treaty.

However, it may be recalled from Chapter 6 that Article 1 of the Continental Shelf Convention is part of customary international law, and therefore it is binding on all states of the international community.


106. In the North Sea Continental Shelf Cases, the Court held that Article 6 of the Continental Shelf Convention has not yet crystallised into customary law, and therefore it was binding only upon the contracting parties. As to Articles 1 to 3, the Court found that they were regarded "as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf". ICJ Reports, 1969, pp. 38-39, para. 63.

on 29 April 1958 without any reservations. However, it took no action to assert its claims until the late 1960s. On 17 July 1969, the Executive Yuan (Cabinet) of the R.O.C. declared that "it may exercise its sovereign rights over all the natural resources of the seabed and subsoil adjacent to its coast outside its territorial sea". In late 1969 the Executive Yuan referred the Convention on the Continental Shelf to the Legislative Yuan (the parliament of the R.O.C.) for ratification.

The Legislative Yuan of the R.O.C. ratified the Continental Shelf Convention early in 1970, with two reservations. These were:

(a) that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to, or opposite, each other, shall be determined in accordance with the principle of the natural prolongation of their land territories;

(b) that in determining the boundary of the continental shelf of the R.O.C., exposed rocks and islets shall not be taken into account.

It is noteworthy that the United Kingdom, in the Anglo-French Continental Shelf Arbitration, alleged that the proposition that both mainlands and islands can have continental shelves as a natural appurtenance to the land territory is based both on the 1958 Continental

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108. 499 UNTS (1964), No. 7302, p. 311.


The R.O.C. issued an instrument of ratification, including the above reservations, on 23 September 1970; it was deposited with the United Nations Secretariat on 14 October 1970.
Shelf Convention and on customary international law, and so could not be affected by any reservations which parties to the Convention might make.\footnote{Miscellaneous No. 15 (1978), Cmnd. 7438, p. 84, para. 168.}

In an explanatory comment on the R.O.C.'s reservations, it was stated in debates in the Legislative Yuan that the principle of the coastal state's rights over the natural prolongation of its land territory had been established in the North Sea Continental Shelf Cases and that, significantly, exposed rocks and islets were part of the continental shelf on which they were situated. For this reason, it was claimed, no separate right could be asserted over the continental shelf surrounding them on the basis of independent insular status.\footnote{Gazette of the Legislative Yuan, Vol. 59, No. 64 (22 August 1970), p. 3. Legislor Li-hao Teng explained that exposed rocks or islets are themselves parts of the continental shelf and therefore should not be considered as a basis for asserting a claim over a continental shelf. Central Daily News, Taipei, 22 August 1970, p. 1.}

The reservation of the R.O.C. was chiefly aimed at the delimitation of the continental shelf of the Tiao Yu Tai (Senkaku) Islands in the East China Sea.

In practice, however, it is equally possible that these reservations could act as a double-edged sword, which might have adverse effects on the determination of the Chinese continental shelf in the vicinity of the Hsisha (Paracel) and Nansha (Spratly) Islands in the South China Sea;\footnote{For details, see D.W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 BYIL (1976-1977), pp. 67-92. See below, Ch. 9.} this problem will be dealt with in the next chapter.
4.2 Natural prolongation

The basic argument of the R.O.C. concerning the delimitation of the Tiao Yu Tai (Senkaku) Islands corresponds with that of the P.R.C., particularly in terms of the emphasis placed on the principle of natural prolongation. On the one hand, this notion may support the Chinese claim to its seaward limit of the continental shelf adjacent to mainland China. On the other hand, it may have an adverse effect on the claims of the R.O.C. and the P.R.C. to the sea-bed of the oceanic archipelagoes in the South China Sea, since the sea-bed there is not the natural prolongation of the Chinese mainland territory.

It will be remembered that the concept of natural prolongation, relevant to the delimitation of lateral submarine boundaries, is established in the judgment of the North Sea Continental Shelf Case.114 The judgment was based on customary international law, but the dicta in question have been widely considered to be relevant to the interpretation of Article 6 of the Continental Shelf Convention and have clearly influenced the language of Article 83 of the Convention on the Law of the Sea.

In the Anglo-French Continental Shelf Arbitration, as noted above, the Court of Arbitration concluded that 'the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State'.115 This conclusion follows directly from the fundamental rule itself and is, indeed, merely an application of that rule in the context of a single area of continental shelf upon which

114. ICJ Reports, 1969, pp. 22, para. 19; 31, para. 43. Professor Brown conceives natural prolongation as relevant only to establishing outer limits of the continental shelf not opposite/adjacent boundaries. E.D. Brown, "The Anglo-French Continental Shelf Case", 16 San Diego LR (1979), pp. 479-82. See above, Ch. 7.

the territories of two or more States abut.

As for the relevance of the concept of natural prolongation to lateral delimitation, the Court of Arbitration seems to have taken a very different view from that of the ICJ in the North Sea Continental Shelf Cases; it stated:

The problem of delimitation arises precisely because in situations where the territories of two or more States abut on a single continuous area of continental shelf, it may be said geographically to constitute a natural prolongation of the territory of each of the States concerned. Consequently, it is in the rules of customary law, discussed in the North Sea Continental Shelf cases, and which are specifically directed to delimitation, that guidance may be sought regarding the principles to be applied in determining the boundary of the continental shelf in such situations.\(^{116}\)

As was earlier examined, there are two established principles in dealing with the delimitation of the continental shelf boundary. The first, based on Article 6 of the 1958 Continental Shelf Convention, states that the boundary shall generally be the 'median line' between two adjacent states. The second, arising out of the ICJ's judgment in the North Sea Continental Shelf Cases, defines the shelf as a 'natural prolongation of its land territory into and under the sea' which does not necessarily have to be divided equally.\(^{117}\) The delimitation of the continental shelf boundary in the China Seas would vary greatly, depending on which of these two principles was employed. It seems clear that delimiting the continental shelves in the China Seas is going to prove just as controversial as was the case in the North Sea.

China (R.O.C. and P.R.C.), on several occasions, has asserted the

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117. ICJ Reports, 1969, p. 22, para. 19. This principle was again confirmed by the Court in the Aegean Sea Continental Shelf Case, ICJ Reports, 1978, p. 36, para. 86. See above, Ch. 7.
principle of 'natural prolongation'. Since the equidistance rule would give Japan sovereign rights over the mainland side of the Okinawa Trough, it is certain that China (R.O.C. & P.R.C.) will insist on the application of the natural prolongation principle which has been incorporated into the new Convention on the Law of the Sea. This would limit Japan to a smaller slice of the continental shelf on the eastern side of the trough.

Exactly what constitutes the continental shelf seems to present no difficulties for geologists, although deciding precisely where it ends does pose problems. It may be reasonably interpreted to include the whole of the continental margin, since it is there that the natural prolongation of the continent ends and the real ocean begins.

In the North Sea Continental Shelf Cases, as previously mentioned, the Court found that the use of the equidistance method of delimitation

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118. This principle asserts that the coastal states continental shelf is 'the natural prolongation of its land territory' which subordinates the consideration of small, offshore or dependent islands to that of the mainland, or of the major islands of an island or archipelago state, in any continental shelf delimitation. See above, Ch. 7.

of the continental shelf was not norm-creating because it must be postponed to an obligation to delimit by agreement, and because it was rendered vague by the special circumstances clause. Even if it had a norm-creating character, it would only become part of customary law through extensive and uniform practice in such a way as to show recognition that a rule of law was involved; no evidence of such practice was produced in that case. It may also be instructive to note that in the Rann of Kutch Arbitration, Judge Bebler declared that the median line principle, in application to lake and sea areas, was not a mandatory rule of international law.

Professor Okuhara has suggested, on the other hand, in contrast to Professor Brown, that the principle of natural prolongation is confined to disputes concerning adjacent, but not necessarily opposite, States, and that it is this principle which imposes disadvantages on island countries, thus being inappropriate to sea-bed delimitation between continental countries and island countries, as well as between islands. It is submitted that this proposal is without foundation in both law and fact. It will be recalled that, in the first place, the North Sea Continental Shelf Cases were not concerned with the seaward limit of the shelf, but with delimitation as between States, particularly the lateral delimitation of submarine boundaries adjacent to several countries, i.e. Germany/Denmark, Germany/Netherlands.

120. ICJ Reports, 1969, p. 53, para. 101 (A). See above, Ch. 7.
121. Dissenting opinion of Judge Ales Bebler, 50 ILR (1976), pp. 387 et seq.
The issue before the Court specifically concerned the problem of lateral delimitation, although it was part of a broader problem including delimitation between opposite States. It may be possible, nevertheless, to argue that the statement of the Court concerning delimitation as between opposite States was *obiter dictum*.

Secondly, the Anglo-French Continental Shelf Arbitration dealt primarily with a situation of opposite States, indeed, exclusively so in the Channel Islands sector, to which most of the court’s many references to natural prolongation were addressed. As previously stated, however, the principle of natural prolongation applies to both opposite and adjacent coast situations so long as the States in question abut upon one continuous continental shelf. The decision is therefore also relevant to the case of a lateral delimitation between adjacent States. Finally, the principle of natural prolongation may not be properly regarded as relevant to the delimitation of a single continental shelf between adjacent or opposite states,¹²³ except possibly in a situation where a major geological discontinuity runs laterally seaward from the vicinity of the coastal terminus of the land boundary of adjacent states or lies between the coasts of opposite states.

Since the Tiao Yu Tai (Senkaku) Islands are part of a natural (geographical/geological) extension of the Chinese continent under the sea, and the Okinawa Trough physically cuts off the land territory of the Ryukyu Islands, it is submitted that the principle of natural prolongation is relevant to the delimitation of the continental shelf boundary of the Tiao Yu Tai Islands.

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¹²³ In the *Case concerning the Continental Shelf* (Tunisia-Libyan Arab Jamahiriya), the Court held that ‘the area relevant for the delimitation constitutes a single continental shelf as the natural prolongation of the land territory of both Parties, so that in the present case, no criterion for delimitation of shelf areas can be derived from the principle of natural prolongation as such’. *ICJ Reports*, 1982, p. 92, para. 133 A (2). See above, Ch. 7.
4.3 The Okinawa Trough

In the East China Sea, the problem of the delimitation of the Chinese continental shelf boundary becomes one between China (either R.O.C. or P.R.C.) and Japan or the Japanese-administered Ryukyu (Liu Chiu) Islands,\(^\text{124}\) which form an island chain consisting of some 64 islands with a human population of 1 million. The most distant of the group is some 630 miles from Kyushu, and is geologically a continuation of the Japanese mainland, ending close to Taiwan.\(^\text{125}\)

The historic maritime boundary between China and Ryukyu (Liu Chiu) is the Okinawa Trough which lies between Chih Wei Island and Kume Island (a member of the Tiao Yu Tai group).\(^\text{126}\)

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125. A Report issued by the Committee for co-ordination of Joint Prospecting for Mineral Resources in Asian Off-Shore Areas (CCOP) of the UN Economic Commission for Asia and the Far East (ECAFE) now re-organised as ESCAP declared that the East China Sea region has a geological structure which promises to contain rich oil resources. The report concluded that the floor of shallow seas extending between Japan and R.O.C. was expected to become one of the major oil-producing regions of the world. 2 CCOP Technical Bulletin (May 1969), p. 9; see also Economic Commission for Asia and the Far East (ECAFE), Proceedings of the Seminar on Petroleum Legislation with Particular Reference to Offshore Operations. Mineral Resources Development Series No. 40 (Bangkok: U.N., 1973); Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP), The Offshore Hydrocarbon Potential of East Asia: A Review of Investigations, 1966-1972, pp. 4-5.

major issues in the delimitation of the continental shelf boundary in the East China Sea is the legal character of the Okinawa Trough. The sea-bed beneath the East China Sea comprises a broad continental shelf stretching eastwards from the coast of China to the Okinawa Trough. The Okinawa Trough is highly irregular and in places over 50 miles across. To the east of the above-mentioned shelf area, the trough extends from Taiwan to Kyushu along the western side of the Ryukyu (Liu Chiu) Islands. Much of it is over 1,000 metres deep, the maximum depth being 2,717 metres. The shelf is part of one of the largest shelves in the world, extending south from the Gulf of Pohai and the Yellow Sea, through the Taiwan Strait to the South China Sea shelf and the Gulf of Tonkin. The most favourable area for the future development of submarine oil and gas fields is a wide belt along the outer part of the continental shelf, to the west of the Ryukyu Islands.

The delimitation of the continental shelf boundaries is complicated by the Okinawa Trough, for it is not simply a question of whether - on a single, uniform and continuous shelf - the Ryukyu (Liu Chiu) Islands generate a shelf of equal standing to that of the Chinese continent (thus providing a median line boundary): there is also the consideration of whether the Okinawa Trough marks the "natural" (geographical/geological) boundary between the natural prolongation of the Chinese mainland and the natural prolongation of the Ryukyu

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Figure 8. General Pattern of Ridges, Troughs, Basins and Trenches in the China Seas. Based on CCOP/ECFAE 2 Tech. Bull. 40 (1969).

Islands. The alternative hypothesis would be that the Okinawa Trough is merely a depression in a continuous shelf, and that the shelf's natural termination or boundary is the Ryukyu Trench lying to the east of the Ryukyu Islands.

What legal effect does the Okinawa Trough have on delimiting sea-bed boundaries in the East China Sea? We shall first consider whether the Okinawa Trough is a natural demarcation line, or whether the Chinese continental shelf continues beyond the Ryukyu ridge to the Ryukyu Trench. If the Ryukyu (Liu Chiu) Islands were a part of the shelf, would the Okinawa Trough cut off any material influence of the Ryukyu Islands over the greater continental shelf land masses? The argument advanced by Japanese, and foreign oil companies with Japanese concessions in the East China Sea, is that the Okinawa Trough is a geomorphological depression in the shelf but not a geological breach, and that the shelf's "natural" termination or boundary is the Ryukyu Trench, lying to the east of the Ryukyu Islands; they infer from this that Japan is entitled to "jump over" the Okinawa Trough.

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This view has been adduced most forcibly by Ely, a legal adviser to the Gulf Oil Company which has a partnership arrangement with the Japanese Teikoku Oil Company. If the effect of the trough is 'to interrupt the continuity of the legal continental shelf', Ely has argued that:

Japan's seabed jurisdiction as generated by the Ryukyus terminates somewhere in the vicinity of the Trough. If, on the other hand, the Trough does not interrupt the prolongation of the continental land mass, the seabed between the Ryukyus and the mainland is the common prolongation of both, and Japan's jurisdiction extends past the Trough to the median line as against China.131

Ely was employed by the oil company to undertake the defence of its interests. He nevertheless maintained that in establishing submarine boundaries, the criteria used should be based on the topography of the sea-bed, rather than on its underlying geology:

Scientists point out that the seabed between the Ryukyu Islands and the Asian mainland, when viewed as a relief feature of the earth's surface, can reasonably be considered [to be] a physical prolongation of both the mainland and the Ryukyus. The Okinawa Trough is a depression in this prolongation, but does not terminate it.132

*Ex hypothesi*, Ely concluded, the eastern terminus of the continental shelf is the Ryukyu Trench to the east of the Ryukyu Islands in the Pacific, and Japan is thus entitled to "jump over" the Okinawa Trough,

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since the trough cannot properly be designated as the continental margin. However, it is interesting to note that Ely had advised the R.O.C. on Law of the Sea issues in 1970. He then asserted that the Tiao Yu Tai (Senkaku) Islands were "too insignificant" to be credibly used by Japan as base points in the demarcation of submarine boundaries, and that "on balance", the R.O.C. would probably be able to uphold its claims to areas up to the Okinawa Trough under existing international law.

It is evident that this American writer has expressed his view on different occasions in a contradictory manner. It has been conceded, by certain writers, that the geological position of the Okinawa Trough would have effects detrimental to Japan in the delimitation of submarine boundaries between Japan and China. Indeed, it has been assumed that Japan would be left with nothing if the Chinese continental shelf claims were honoured. This assumption is further supported by the defensive


attitude taken by some Japanese writers. In this vein, Professor Okuhara observed:

In our case of the Senkaku Islands, there is a trench more than 2,000 metres deep between the islands and the Ryukyu Islands, thus dividing the geological continental shelf into two. With such special circumstances, Japan would not gain inequitable advantage even if the delimitation of the continental shelf with Taiwan and China is made with the Senkaku Islands as Japan's baseline.

As we have seen, the Continental Shelf Convention, when read together with the principle of natural prolongation as laid down by the ICJ in the North Sea Continental Shelf Cases, requires that consideration should be given to the geological facts. The concept of natural prolongation can be considered from two different standpoints: morphological and geological. Geologically, the Tiao Yu Tai (Senkaku) can be considered as pertaining to the continental shelf of China (P.R.C. and R.O.C.). Morphologically, they can be considered as a natural extension of the land territory of China (P.R.C. & R.O.C.).


138. In the North Sea Continental Shelf Cases, the Court referred to certain relevant circumstances, namely, natural prolongation, the general configuration of coastlines, physical and geological structure and natural resources so far as known or readily ascertainable, the unity of deposits, an element of a reasonable degree of proportionality of respective coastlines, the presence of any special or unusual features, and the effect, actual or prospective, of any other delimitation between adjacent states in the same region. ICJ Reports, 1969, pp. 53-54, para. 101 (D). See above, Chs. 6, 7.

Aegean Sea Continental Shelf Case, the disputants relied on the geological argument of "natural prolongation" to justify the coastal states' inherent rights to the continental margin, even beyond the 200-mile limit of the outer edge of the continental margin.

At the UNCLOS III, Japan has opposed the efforts made by the P.R.C., South Korea and others, to define the limits of national jurisdiction over the sea-bed using geological features (i.e. the physical edge of the continental margin as opposed to some fixed distance, or depth, since such an approach - if the features in question were used as natural boundaries - might result in nearly all the shelf areas underlying the East China Sea going to China owing to the Okinawa Trough.

Goldie has said that the geological unity of the North Sea bed distinguishes the case of the Norwegian Trough in the North Sea from that of the Okinawa Trough in the East China Sea, which separates the Japanese islands from the continental shelf under the East China Sea. The geomorphological formation of the shelf differs from that of the

140. ICJ Reports, 1978, p. 3. See above, Ch. 7.
Okinawa Trough in that the two provinces are separated by the Taiwan-Sinzi Folded Zone, a tectonic dam (formed by geological uplift on an upwelling of lava) which marks the "natural" (geographical/geological) boundary between the natural prolongation of the Chinese mainland and the natural prolongation of the Ryukyu Islands. It could not be right to treat the Okinawa Trough in the same way as the Norwegian Trough, which the ICJ in the North Sea Continental Shelf Cases was prepared to ignore, since geographical features of the Okinawa Trough are very different in nature from those of the Norwegian Trough: the latter may be perhaps, similar to the Hurd Deep in the English Channel, or the Hurd Deep Fault Zone in the Atlantic region which is a very minor depression in the shelf. The Okinawa Trough, however, is much deeper; does not follow the Japanese coast closely, but leaves a fairly wide belt of continental shelf along the irregular coasts of Kyushu. It is highly irregular: it is steeply banked on the seaward side, with a chain of volcanic elevations which form a bumpy ridge cut across by grooves far exceeding 200 metres in depth at many points; it is fronted by one of the deepest oceanic trenches in the world,

144. ICJ Reports, 1969, p. 32, para. 45. See above, Ch. 7.
145. It may be recalled that the Norwegian Trough is not a fault, nor a feature with any structural or geological significance; it is an erosional feature with a purely topographical significance. See above, Ch. 5. The Okinawa Trough is not simply a narrow channel deeper than 200 metres cutting across an area of the continental shelf like the Norwegian Trough. See Francis P. Shepard, Geological Oceanography (London: Heinemann, 1978), pp. 14-15.
immediately beyond. Such differences would be strongly antagonistic to any argument in favour of disregarding the legal effect of the Okinawa Trough as a limiting factor in the delimitation of the submarine boundary.

In the Anglo-French Continental Shelf Arbitration, the Court of Arbitration seems to have echoed the view that the legal effect of troughs is that, if there is "a major and persistent structural discontinuity of the sea-bed and subsoil of such a kind as to interrupt the essential geological continuity of the continental shelf", then, in a sense, the trough could be relevant to the question of delimitation.

It is submitted that there is certain support for this proposition in state practice and in international adjudications.

Since the Okinawa Trough terminates the natural prolongation of the East China Sea continental shelf, an application of Art. 76 (1) of the Draft Convention on the Law of the Sea, viz. "the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance", would disallow Japanese claims to the south-

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148. Miscellaneous No. 15 (1978), Cmnd. 7438, p. 61, para. 104. See above, Ch. 7.

eastern edge of the shelf, are based on proximity to the Ryukyu (Liu Chiu) Island chain. As the Okinawa Trough is closer to the outward edge of the East China Sea shelf than to its landward edge (the coast of continental Chinese territory), it has been regarded as constituting the edge of the geological shelf. There seems to be no foundation for any view that the legal effect of such a trough should depend on its location.

Proximity to the island of Kyushu may be insufficient to support a Japanese claim to the North-eastern edge of the East China Sea continental shelf; this claim, however, rests in practice on a firmer basis owing to the presence of the Japanese Danjo Gunto and their maritime exploitability at the north-western extremity of the Okinawa Trough. On the other hand, it might be argued that the Japanese mainland is physically continuous with the continental shelf at the north end of the Trough.

The northern tip of the Okinawa Trough, on the continental side of the Ryukyu chain, extends up to the western edge of Kyushu, dividing the Goto Retto Islands from the shelf extending out from the Chinese mainland, although it leaves the Danjo Gunto and Torishima Islands on the Chinese side. The view held by the Republic of Korea is that the Japanese continental shelf extending into the East China Sea should end at the Okinawa Trough, with the remaining portion of the

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150. Danjo Gunto, Goto Retto, Tori Shima lying to the West of Kyushu and opposite the Korean island of Cheju Do. The Danjo Gunto lie 35 miles from Gott Retto and 75 miles from the large Japanese island of Kyushu: they are not inhabited except for the purpose of manning the lighthouse and weather station. See D.W. Bowett, *Legal Regime of Islands in International Law* (Dobbs Ferry, New York: Oceana, 1979), pp. 294, 306 n. 46.

continental shelf to be divided between the Republic of Korea and China. Japan, however, holds that the Okinawa Trough is not necessarily a decisive factor in relation to submarine boundaries, and that the line should be drawn in conformity with the principle of equidistance, as provided in Article 6 of the 1958 Continental Shelf Convention. In other words, the Republic of Korea relies on "natural prolongation" rather than the "median line". Since the Danjo Gunto Islands are separated from the Japanese mainland by the Okinawa Trough, it might be argued that the shelf area to the south of these islands could still be regarded as part of the natural prolongation of the Korean land-mass rather than the natural prolongation of the Japanese land-mass. It will be apparent that this argument bases the shelf claim on the geological affinity between shelf areas and mainland land-mass, giving virtually no effect, beyond a territorial sea, to islands.

4.4 Adjacency

It will be remembered from Chapter 6 that Article 1 of the 1958 Continental Shelf Convention explicitly utilises the concept of adjacency in describing the continental shelf as 'submarine areas adjacent to the coast'.

The Tiao Yu Tai (Senkaku) Islands stand on the Chinese continental shelf, in the sense that current charts and surveys show no channels or troughs of more than 200 metres in depth separating them from the shelf area, which is uniformly less than 200 metres in depth. On the other

152. See above, Ch. 7.


hand, they are far closer to the Japanese-administered Ryukyu (Liu Chiu) Islands, although separated from this substantial island chain by the Okinawa Trough of a depth considerably greater than 200 metres.

The problem of the Tiao Yu Tai Islands' shelf area has been considered by some writers from the point of view of their "closeness" to the Japanese administered Ryukyu (Liu Chiu) Islands, as against the Chinese mainland. This argument has then been enunciated in such terms as 'absent any agreement between the parties, ... what should govern delimitation ... the criterion of depth or that of adjacency, - assuming the Senkakus Tiao Yu Tai Islands to be judged more adjacent to the Ryukyu Islands than to mainland China?' Because of the Okinawa Trough, the question is posed: 'does adjacency become the principal factor in this situation or does depth continue to prevail?'

It is submitted that this statement of the problem places undue stress on proximity alone. The argument of these writers implies the possibility of using 'depth' or 'adjacency' as alternative criteria. There is, however, no justification for assuming this. All authority points to the view that the continental shelf must always be adjacent, and that the depth criterion was one of the methods in determining a possible seaward limit of the continental shelf.

In the North Sea Continental Shelf Cases, as previously explained,


156. In the North Sea Continental Shelf Cases, the Court denied any necessary identity between "adjacency" and proximity and decided to minimise the significance of the concept of proximity as compared with the fundamental notion of prolongation of land territory under the sea. ICJ Reports, 1969, pp. 29-30, para. 40. See above, Chs. 5, 6.

157. See, e.g., natural (geographical/geological), depth, distance, exploitability criterion. See above, Chs. 5, 6.
the Court said that there was no necessary link (not to mention identity) between the notions of adjacency and proximity. More fundamental than the above notions was 'the principle of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State'.

The idea of an extension of something already possessed was the determinative factor.

In the Anglo-French Continental Shelf Arbitration, dealing with the definition of "adjacent states", the U.K. asserted that the natural meaning of the term "two adjacent state" in Article 6 (2) of the Continental Shelf Convention was "two states whose territories are alongside one another and who have a common land frontier at the sea coast"; as France and the U.K. are separated in the Atlantic region by the broad area of sea constituted by the south-western approaches to the English Channel, they are scarcely to be regarded as "adjacent".

As has been explained in connection with the concept of natural prolongation, the coast of the territory of a State is the decisive factor in the establishment of title to the submarine areas adjacent to it. The considerations to be taken into account in determining the coastal boundaries of a state have been fully examined in Part I of this dissertation. In the Case concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya), the Court said:

"Adjacency of the sea-bed to the territory of the coastal states has been the paramount criterion for determining the legal status of the submerged areas."
Additionally, reference to the "adjacency" of the Tiao Yu Tai (Senkaku) Islands themselves distracts from the basic principle that adjacency relates to the geological shelf, and not to exposed land areas, i.e. islands that, in geological terms, form merely another part of the shelf area. By no means does this imply that 'adjacent to the coast' necessarily means 'adjacent to the mainland coast'. The Tiao Yu Tai Islands may generate a continental shelf of their own, but it is not their adjacency to the main body of islands which will affect delimitation. Thus the question should be whether the geological shelf, of which these islands are a surface feature, is "adjacent" or not. The Continental Shelf Convention, as has been shown, refers to the 'seabed and subsoil of the submarine areas adjacent to the coast ...' The emphasis should therefore be on considering the underlying geological continuity of the submarine area.

The continental slope and rise are physically one with the geological continental shelf, so that the whole continental margin might be considered as part of the natural prolongation of the land territory. Should this be so, for the purposes of ascertaining the shelf area for the mainland territories away from which the shelf slopes, it may equally apply to those projections which find themselves lying at the seaward limit of what still constitutes shelf area de jure. The Tiao Yu Tai (Senkaku) Islands, as noted earlier, lie on the edge of the continental shelf extending from the Chinese continental land territory; therefore,

161. Art. 1 (b), the 1958 Geneva Convention on the Continental Shelf. See above, Ch. 6.

162. Art. 1. See above, Ch. 6.

163. See, e.g., Art. 76 (3) of the Draft Convention on the Law of the Sea which stipulates that 'the continental margin comprises the submerged prolongation of the land mass of the coastal state, and consists of the sea-bed and subsoil of the shelf, the slope and the rise'. UN Doc. A/CONF. 62/L. 78 (28 August 1981). See above, Ch. 6.
the question is whether the Ryukyu (Liu Chiu) Islands are in fact on
the slope of the main islands - although in reality, using a depth
criterion, they have no geomorphological shelf. It may be argued
on behalf of Japan that, on the basis of its location on the same
geological seabed entity, Japan is also entitled to a fair share of
the shelf area.

4.5 The Equitable Equidistant Line and the Problem of Small Islands

Examination of the Tiao Yu Tai (Senkaku) Islands, introduces the
vexed question of the treatment of small islands in determining continental
shelf boundaries. During the debate leading to the Continental Shelf
Convention many delegates referred to the problem of small islands
which, unimportant in themselves, give states claims to large submarine
areas. Owing to the diversity of size amongst islands, and the
variability of their geographical location (in terms of adjoining
mainlands), it did not prove possible to establish any general rule for
dealing with this problem. There seems to be no other solution than
for states to treat each case on its merits. There are, as has already
been examined, at least four basic actions which states can take to solve
problems which arise in drawing continental shelf boundaries involving
small islands. First, that each island, no matter how small, forms a
point on one of the baselines between which the line of equidistance is
to be drawn. This would give full effect to islands in the delimitation
of the continental shelf. Second, states may decide to ignore the
existence of very small islands, and so fix the line of equidistance
between mainland shores. Such a solution would give no effect to claims
based on the existence of islands. Third, some continental shelf
boundary other than a line of equidistance can be negotiated or arbitrated.
would give partial effect to the extance of islands. Fourth,
states can select one of the preceding three lines and agree that they
will share the development and benefits of any natural resources that are divided by the boundary.  

The Japanese have proposed the use of an equidistance line in the delimitation of the Japan-P.R.C. continental shelf boundary in the East China Sea. The P.R.C., however, insists on the use of equitable principles in the delimitation of its continental shelf boundaries. In the light of the lex lata and lex ferenda explained in section 3 of this chapter, it is submitted that there seems to be no justification for a rigid application of the equidistance principle as asserted by Japan.

The Sino-Japanese sea boundary dispute has two components: a territorial dispute over the Tiao Yu Tai (Senkaku) Islands, and the problem of delimiting the continental shelf boundaries in the East China Sea. Many writers take the view that these issues are inseparable; settlement of the first is seen by them as a conditio sine quo non for the resolution of the second. It is submitted that this position is untenable in view of recent legal developments on the régime of islands in state practice, international adjudications and the Convention on the Law of the Sea. International judicial and arbitral tribunals cannot render judgment sub specie legis ferendae, but lex ferenda indicates, as established in this dissertation, that islands of size, location, economic utility and legal status similar to those of the Tiao Yu Tai invariably have been ignored in submarine boundary delimitations between opposite states. This signifies that, regardless of their ultimate

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164. See above, Chs. 5, 6, 7.

165. Equidistance does not always furnish an equitable or acceptable solution because of circumstances which are particular to a particular case or situation. In such cases, if one of the parties has not ratified Article 6 of the Continental Shelf Convention, delimitation must be effected by agreement based on equitable principles, taking into account factors agreeable to the parties concerned, the choice of which is influenced by political as much as legal considerations. See Birnie and Mason, "Oil and Gas: the International Regime", in C.M. Mason (ed.), The Effective Management of Resources (London: Frances Pinter, 1979), pp. 19 et seq.
owner, the Tiao Yu Tai Islands will generate only a 12-mile territorial sea. They should not be allowed to have their own continental shelves or exclusive economic zones beyond that limit. In other words, the Tiao Yu Tai Islands would have only "a partial-effect" in determining the boundaries of the continental shelf, in the same way as the Channel Islands in the Anglo-French Continental Shelf Arbitration and as the Kerkennnah Islands in the Case Concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya) a median line would be drawn without reference to the Tiao Yu Tai; following this, a territorial sea boundary around the islands would be delimited at a distance of twelve nautical miles from the baselines of the Tiao Yu Tai. With these considerations in mind, it becomes clear that the territorial dispute of the Tiao Yu Tai and the delimitation of the continental shelf boundary are in fact separable: the latter may be dealt with before the former is finally settled, making the resolution of the dispute more manageable, if not easier.

Additionally, in the Red Sea one of the longest single offshore boundaries, that between Saudi Arabia and Sudan, has been settled by an agreement which provides, inter alia, for joint exploitation of part of the submarine area involved. This agreement established a valuable precedent for the delimitation of other offshore boundaries. However, the R.O.C.-P.R.C. rivalry remains a major stumbling block to any peaceful settlement of the Sino-Japanese sea-bed dispute in the East China Sea.

166. *ICJ Reports*, 1982, pp. 92-93, para. 133. 'In the area which extends seawards beyond the parallel of the most westerly point of the Gulf of Gabes', the Court declared, 'the line of delimitation of the two continental shelves is to veer to the east in such a way as to take account of the Kerkennah Islands.' p. 94, para. 133C (3).

Co-operation between the two Chinese governments on sea-bed issues vis-a-vis Japan will not come without an overall rapprochement between them in a much larger context.

In the next chapter attention will be given to the South China Sea islands disputes.
CHAPTER 9

South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands

1. Introduction

This chapter deals mainly with the territorial dispute over the Nansha (Spratly) and Hsisha (Paracel) Islands. The conflicting claims are analysed and discussed in an attempt to understand the legal status of these South China Sea islands and which state has a better legal claim to them. The effect of these islands on the delimitation of the continental shelf boundaries is also examined. The following account is necessarily very detailed, as events relating to these islands are extremely complex and have taken place over a long period of time, involving claims and counter-claims by several countries on a variety of bases, so that it is often difficult to disentangle the sequence of events relevant to claims to territorial sovereignty and to rights over the seabed.

2. Geographical Situation of the Nansha and Hsisha Islands

2.1. South China Sea Archipelagoes

In the South China Sea there are approximately 200 islands, many of them coral outcrops without vegetation or fresh water. They are grouped into four archipelagoes, namely, the Tungsha (Pratas), Hsisha (Paracel), Chungsha
(MacClesfield) and Nansha (Spratly). They are as follows:

(i) The Tungsha Chun-tao (East Sandy Islands): Also known as Pratas Islands, centered at $20^\circ 42'N$ and $16^\circ 43'C$. It comprises Tung-sha Tao, which has deposits of guano, and two coral reefs lying south-east of Hong Kong. Chinese possession of these islands is uncontested.

(ii) Hsisha Chun-tao (West Sandy Islands): Also known as the Paracel Islands. A group of islands, islets, reefs and shoals scattered between $15^\circ 46'N$ to $17^\circ 08'N$ and $111^\circ 11'E$ to $112^\circ 54'E$, at about the latitude of San Fernando, La Unional about equally distant; roughly 250 miles from the large Chinese island of Hainan and the coast of Vietnam, at about the latitude of Hue. The Chinese claim sovereignty over these islands since Ming times, although they are also claimed by South Vietnam, to which they were ceded by France. The main islands are Yung-hsing Tao, Shih Tao, Chao-shu Tao and Tung Tao. The group is a source of phosphates, guano and fish, and there are suspected deposits of oil.

(iii) Chungsha Chun-tao (Middle Sandy Islands): Also known as McClasfield Bank. A group of coral reefs, scattered between $15^\circ 24'N$ to $16^\circ 15'N$ and $113^\circ 40'N$ to $114^\circ 57'E$, lying to the east of the Hsisha Islands.

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1. See Fig. 9, p.829. For details, see Tze-yueh Cheng, The Geography of the South Sea Islands (Shanghai, 1948); Kiun-heng Wang, Precis de Geographie de Chine (Peking, 1959); Tung-kang Chen (ed.), Our Country’s South Sea Islands (Peking, 1962); Yu-ti Jen, A Concise Geography of China (Peking, 1964); Hua Li, China’s South Sea Islands (Hong Kong 1974); The Times Atlas of China (Times Books, 1974), p.116; Dieter Heinzig, Disputed Islands in the South China Sea: Paracels - Spratly - Pratas - MacClesfield Bank (Wiesbaden: Institute of Asian Affairs in Hamburgh, 1976).
Figure 9: South China Sea Islands

(iv) Nansha Chun-tao (South Sandy Islands); the Northern reach is Shuang-tzu Chia (North Danger, 11°28' N and 114°20'E); the southern reach is Tseng-mu An Sha (James Shoal, 4°N and 112°15'E); the eastern reach is Hai-ma Tan (Seahorse or Routh Bank, 10°50'N and 117°50'E); the western reach is Wan-an Tam (Vanguard Bank, 7°30'N and 109°55'E).

Chinese (ROC and PRC) sovereignty over the Tungsha (Pratas) and Chungsha (Macclesfield) has not been contested. The Hsisha (Paracel) and Nansha (Spratly) Island groups, however, are claimed in toto by both China (the ROC and PRC) and Vietnam; the Nansha (Spratly) Island groups are also claimed by the Philippines.

2.2. Nansha Chun-tao group

The Nansha (Spratly) Island Group's geographical position is between 4° and 11°30'N. Lat. and 109°30' and 117°50'E. Long. The island group lies south of the Hsishas outside the territorial limits of the Philippines, Vietnam, Indonesia and Malaysia. It is situated some 1,100 kilometres off Yu lin Harbour of Hainan Island; 1,700 kilometres off Koahsiung harbour of Taiwan; 900 kilometres off Manila; 1,400 kilometres off Hongkong; 1,500 kilometres off Singapore; 500 kilometres off Borneo; 400 kilometres off Palawan; and 800 kilometres off Saigon (now Ho Chi Minh city).

The Nansha Island Group comprises numerous (about 122) scattered islands, isles, shoals, banks, atolls, cays and reefs, and has an elevation of from 2 to 6 metres.
In mapped land area, it totals approximately 360,000 square metres. Some of the land area is arable but there is neither river nor pond. The mapped islands of the Nansha archipelago, including its shallow territorial waters, has an area of approximately 70,000 square miles.

There are twelve regions with islands, reefs and cays in the Nansha (Spratly) Island group. They are as follows:

(a) Shuang Tzu Chiao (North Danger Islands):
   (i) Pei-tzu tao (North-East Cay), about 1 km long and 400 metres wide.
   (ii) Nan-tzu tao (South-West Cay), about 0.5 km long and 300 metres wide. According to official Peking sources it was occupied by South Vietnam early in 1974.

(b) Chung Yeh Tao (Thi Tu Island and Reefs):
   (i) Chung Yeh Island (Thitu Island, or Tuitu Imperial Capital) lies some 180 miles north-east of Nanwei Island. It is one of the largest islands and lies between 11°03'N and 114°17'E. It is also known as the "Island Triangle" to the Japanese. Triangular in shape, its elevation is 3.4 metres. It is 42 nautical miles from Tai Ping Island. It has an area of approximately 32.6 hectares, equivalent to two square miles in area or 326,280 square metres.

   (ii) Ding Chien Sha Chou (Sandy Cay) is a name
given as a memorial to a former Chinese navy captain, Mr Li Ding Chien, of Chinese Naval Ship Chung Yeh. Formerly known as Sha Tao, meaning: sandy island. It is now known as North Islet in Japanese. The island sits on a much larger coral platform, eleven kilometres from the east of Tai Ping Island between 10°23'N and 114°29'E. It is oval in shape, 400 metres long and 250 metres wide.

(c) Hsi Yueh (West York) Island. Cloma renamed it "Carlos" Island. As the third largest island among the Nansha Island Group, it is approximately 600 metres long and 300 metres wide and has an area of 138,400 square metres, centered at 119°05'N and 115°03'E.

(d) Tao Ming Gun Chiao (Loaita Bank and Reefs), formerly known as Laiteh Reefs, is a horn-shaped area, stretching both northeastward and southwestward. It is forty-one kilometres long, and thirteen kilometres wide. There are

3. When a Chinese vessel named La Fu Min visited the region in 1869, the island was only a pile of sand with 3-metre-high wild growth, but in 1888, when another vessel, The Rambler, visited it, vegetation had grown up to five metres high.

4. There are on this island also relics of a stone Chinese temple, as well as Chinese graves, a well and an obsolete cannon used by the Chinese garrison troops in the 19th century. There are also several scattered coconut trees, but there is no safe anchorage.
two islands sitting on the same platform as follows:

(i) Nan Yao Island (South Key) also known as Loaita Island or Horsburg Island or South Island or Turtle-dove Island and in Japanese as "Middle Island", is located at $10^\circ 50'N$ and $114^\circ 25'E$. It has a land area of 62,700 square metres, is oval in shape, 450 metres long and 200 metres wide. It is a pure sandy islet surrounded by rocky reefs, 900 metres from its sea shore. Its elevation, 2.5 metres, is the lowest of all the islands of the Nansha Island Group. Its bush is just as abundant as on the Knan Cyih Island, and it is very hard for people to live on it, but there is a stone-built Chinese temple.

(ii) Yang Hsin Sha Chou, also known as Lankiam Cay, 6.75 kilometres northwest of Nan Yao Island.

(e) Irving Cay.

(f) There are two islands:

(i) Ma Huan Tao (Hashan Island). Occupied by the Philippines.

(ii) Fei Hsin Tao (Flat Island).

(g) Cheng Ho Gun Chiao or Tsingho Gun Chiao (Tizard Bank and Reefs) is named in memory of a South China Sea explorer and exploiter Cheng Ho during the Ming Dynasty early in the fifteenth century.

It is between $10^\circ 15'N$ and $114^\circ 20'E$; thirty nautical miles long from east to west and eight nautical miles wide, on average. Lying south of Tao Ming Gun Chiao, it consists of a lagoon bordered
by reefs that are dry at low water. Some of the most populous islands such as Tai Ping Island, Knan Cyih Island, and Ding Chien Sha Chou, are all within this area. In Chinese history, its original name was Ti Cha Tan but it was also Tuan Sha Gun Chiao. The Japanese once renamed it as the "Thousand Mile Wedge".

(i) Taiping (Itu Aba) Island - Tai-ping or T'ai-P'ing, is also known as "Long Island" to the Japanese. This is the biggest and the principal island of the Nansha Island Group. It has a girth of 2.8 km and an area of 43.2 hectares, equivalent to 360,000 square metres. It is 1,470 metres long and 350 metres wide, and ribbon-shaped. Its elevation is 2.8 metres; it is topped with papaya, banana, coconut and palms, and is inhabited.  

(ii) Knan Cyih Island - is named in memory of a Chinese naval commander, Yang Knan Cyih, who served as an executive officer on the Chinese Naval Ship, Chung Yeh. This island is also known as Nam Yit Island and known to the Japanese as "South Islet". Cloma renamed it as "Nacionalista Island". Located 22 kilometres

5. During the Second World War, the Japanese built a garrison on it and made good use of it as a depot and submarine base. American planes bombed the supply site whose ruins can still be seen. There is also a collapsed causeway thrown up by Japanese troops during the war. Naval installations, including a power plant, meteorological station, weather observation tower, and radio station which contacted Nanking, then Taipei, have been maintained by the Chinese garrison force on the island. During the fishery season (November to April) Chinese fishermen often come. They use the island's supply of fresh water and repair their vessels.
south of Tai Ping Island, between 10°11'N to 11°4°22'E, it is 700 metres long and 220 metres wide, narrow and long, and has an area of 75,900 square metres. Its elevation - 6.2 metres - is the highest of all the islands of the Nansha Group. Coralline rocks stretch outward from the island and there is a dense growth of bush on it. Until the end of the Vietnam war, this island was occupied by the Republic of Vietnam.

(iii) Sand Cay, covered with bushes, is insignificant in size.

(h) Union Bank and Reefs:

(i) Ching Hung (Sin Cowe) Island. Until the end of the Vietnam war, this island was occupied by the Republic of Vietnam.

(ii) Sin Cowe Cay. This island is a kingdom of giant sea turtles.

(i) Nanwei (Spratley/Storm) Island lies some 300 miles directly west of the southern end of Palawan of the Philippines and is the westernmost island of the Nansha group. It is approximately 500 metres long and 300 metres wide and has an area of 14.8 hectares, equivalent to 147,840 square metres. Its elevation is 2.8 metres. Rocks underwater at the vicinity of the island are dangerous to vessels. The present name of the island was given in memory of the former Honorable Governor Lo Cho Yen of the Kawiung Province who was the Governor
who restored Nansha Islands from Japan to his province. Until the end of the Vietnam war, this island was occupied by the Republic of Vietnam.

(j) Shih Li Chiao (Commodore Reef): Sand Cay.

(k) Nan Hai Chiao (Marivels Reef): Cay.

(l) An Po Sha Chou (Amboyna Cay) is known as "Ball Islet" to the Japanese. It is located at 7°50'N and 112°55'E, with an elevation of 2.8 metres, is 15,840 square metres only, and is the smallest island of the Nansha Island Group. Its shoreline is coralline, fairly straight with cliffs. Phosphates abound on the island.

Title to the Nansha (Spratly) Islands has been claimed by China (ROC and PRC), the Philippines and Vietnam, and these three countries are now occupying certain portions of the island group. Seven of these islands were occupied and garrisoned by the Philippines.

6. Surrounded by white sandy beaches and topped by tall coconut palms, the Nanwe Island is easily discernible from the sea. Seabirds and sea turtles and their eggs abound. It is said that many years ago, huge fleets of sea turtles roamed the vicinity of the Islands. Today, garrison troops have almost destroyed them.

7. Chinese history indicates that Chinese houses constructed with corallites and stones were discovered early in 1889. It was an inhabited island. A Chinese vessel named Ruttleman, or La Fu Min, meaning "Gate of the Coming Fortune", had been at anchor at the southeastern tip where the depth of the water is nine metres.
in 1971 and in 1978. These included the Panata, which has been described as 'little more than a sand bar', and the Thi tu Island. Vietnam garrisoned three islands, namely, the Nanwei (Spratly/Storm), Knan Cyih (Nam Yit) and Chin Hung (Sin Cowe) which were taken over from the former South Vietnam in 1975. Since 1947, the ROC has been in possession of the largest island of the Nansha group, Taiping (Itu Aba) Island, which has an area of 42 hectares, and is still administered from Taipei.

It may be remembered that in the Minquiers and Ecrehos Case, the King of England - who held the principal Channel Islands in 1360 - was in a position to exercise power over the Ecrehos and the Minquiers. As Judge Basdevant observed in his individual opinion:

Without ... introducing the concept of an archipelago, which is not in consonance with the geographical situation, the propinquity of these islets in relation to Jersey tends to confirm this probability. ... It would therefore seem that ... the disputed islets were ... held by the King of England.


9. See Fig.10, p.838. For further details on Taiping Island, see "Sailing south to the Spratly", 4 Sinorama (1979), pp. 26-33. Oversea Scholars, No. 119, 30 June 1982, pp. 6-15.

10. Individual Opinion of Judge Basdevant, ICJ Reports, 1953, pp. 77-78. cf. Quincy Wright, "Territorial Propinquity", 12 AJIL (1918), pp. 519-61. See above, Ch.7.
Figure 10. The Nansha Islands under divided control.

Source: Harvard Law School Studies in East Asian Law, China: No. 26, 1978, Figure 1.
Judge Levi Carneiro also stated that 'the occupation of the principal islands of an archipelago must also be deemed to include the occupation of islets and rocks in the same archipelago, which have not been actually occupied by another state'.

Although the PRC vociferously asserts a claim to the Nansha (Spratly) Islands, so far it has not despatched any troops. The Government of the Philippines, however, has been the most active in asserting its claim, which is based partly on the islands' closeness to its territory and their location on its continental shelf (although some are 250 miles away and separated by a trough in the shelf), and partly on the contention that the islands are derelict and therefore open to occupation.

Before 1974 the eastern Hsisha (Paracel) Islands were occupied by the PRC and the western by South Vietnam, but in that year the PRC drove out the Vietnamese by force. Since 1975 Vietnam has reoccupied a few of the small and widely-spaced islands.

3. Historical Background of the Boundary Dispute

The apparently political claims have had economic motives; the reason why a dispute has arisen concerning title to these islands is that potential oil resources

have recently been discovered offshore. It will be
convenient to divide this section into two sub-sections.
They are as follows:

3.1. Claims Prior to the Second World War

According to Chinese historical sources, the Hsisha
(Paracel) and Nansha (Spratly) Islands have been China's
territory since ancient times. The discovery of Chinese
temples, graves and obsolete cannons substantiates the
theory that there were Chinese in the South China Sea
region long before even the advent of the Spaniards in
the Philippines.

To assess the validity of the present Chinese (ROC and
PRC) claims, it is necessary first to examine the earliest
Chinese historical reference to these islands. The Chinese
claims date from the Han Dynasty (206 B.C. to 220 A.D.).

As early as the 2nd Century B.C., at the time of
Emperor Wu Di of the Han Dynasty, Chinese people began
sailing the South China Sea. After long years of

12. A Chinese magazine has estimated that if China's
sea-bed oil resources of the South China Sea are
taken into account, the PRC's oil deposits would
amount to 300,000 mn barrels, approaching the total
West Asian deposits of 356,000 million barrels.
The Hindustan Times, New Delhi, 4 January 1974. See
also S.K. Ghosh, "Rivalry in the South China Sea", 13

13. Ferdinand Magellan landed in the Philippines on 16
March 1521, and claimed them for Spain. The country
was named after Prince Philip of Spain. Colonisation
started in 1565; for 333 years thereafter, the
Philippines were under Spanish sovereignty.
navigation, they discovered the Hsisha (Paracel) and Nansha (Spratly) Islands. The geographical features of these islands were described by Zhen Wan who wrote as follows about the navigation route from the Malay Peninsula to the mainland of China in the Han Dynasty:

... going northeastward, one reaches Daqitou and then sails through Zhang Hai which is shallow and has a lot of lodestones underneath.\cite{16}

'Zhang Hai' was the name for the present South China Sea. The lodestones referred to are the then submerged sand cays and reefs of the Hsisha (Paracel) and Nansha (Spratly) Islands. They were called 'lodestones' because ships were liable to be stranded on them and unable to extricate themselves. 'In Zhang Hai', Tai Kang in his An Account of Fu Nan wrote, 'there are coral islands with flat base rocks, on which coral grows'.

After the discovery of the Hsisha (Paracel) and Nansha (Spratly) Islands, groups of Chinese people came to visit and develop them. In view of the doctrine of

\footnotesize
15. The geographical features of these islands are described by Zhen Wan in his Strange Things of the Southern Provinces and by Kang Tai in his An Account of Fu Nan, both of which were written in the Three Kingdoms period (220-265).
inter-temporal law, discussed earlier in this dissertation, discovery per se in the 220s may be considered to found a good title. It will be remembered, however, that settlement by private individuals does not amount to an official claim, though it may be recalled that in the Minquiers and Ecrehos Case

the English original title - resting on what was probably unconditional conquest by the Normans - was growing stronger, becoming consolidated, and finding a legal basis as a result of the successive treaties and the almost uninterrupted occupation of national sovereignty when political feudalism disappeared.17

The Chinese voyaged to these islands and their productive activities there during more than 1,000 years and the location and distribution of these islands were recorded in various works18 in which Nansha and Hsisha and the numerous islands, reefs, sand cays and banks of these two archipelagoes were given many descriptive names.19

16. See above, Ch. 3.
17. ICJ Reports, 1953, p. 97.
18. See, e.g., Record of a Daydreamer of the Song Dynasty, Brief Account of the Islands of the Yuan Dynasty, Studies on the Oceans East and West and Fair Winds for Escort of the Ming Dynasty, Compass Directions and Records of Things Seen and Heard About the Coastal Regions of the Ching Dynasty and Manuals of Sea Routes (of fishermen of various generations).
19. Jiuruluozhou (nine isles of Cowry), Shitang (rocky reefs), Chienlishitang (thousand-li rocky reefs), Wanlishitang (ten thousand-li rocky reefs), Changsha (long sand cays), Chienlichangsha (thousand-li sand cays) and Wanlichangsha (ten thousand-li sand cays).
In the chronicle of the Sung Dynasty (960 to 1278 A.D.), the four archipelagoes in the South China Sea, Tungsha, Hsisha, Chungsha and Nansha, were clearly recorded, with the original names of Chi Yang Chou, Chui Chou Yang, Chang Sha Shi Tang and Chien Li Shih Tang respectively.

In the Northern Song Dynasty (960-1126) it was recorded that the Chinese naval patrols reached the Hsisha Islands.\(^{20}\) It was evident that the North Song court had already put the Hsisha Islands under its dominion and despatched naval warships to patrol them. During the Southern Sung Dynasty (1127-1278 A.D.) another book described the Hsisha Islands as follows: "to the east (of Hainan) are 'one thousand li (Chinese mile) banks and the ten thousand li rocks', and (beyond them) is the boundless ocean ...".\(^{21}\) The western sinologists who translated this work identified these two places as the Hsisha Islands.

"On South China Sea", a document from the Southern

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20. The Outline Record of Military Affairs was an authoritative literature of the Song Dynasty, which records the military system and major affairs in national defence. It was edited by Ding Du, Deputy Prime Minister and concurrently Minister of Works, and Zeng Gongliang, Royal Attendant in Tian Zhang Ge, a title equivalent to a private councillor.

Sung Dynasty, described how water spouts suddenly appeared on the sea and no matter how hard the oars were rowed, the vessel could not move forward. It recorded the strange phenomenon of ships disintegrating at sea on calm windless days.  

Early in the Yuan Dynasty, an astronomical observation was carried out at 27 places throughout China. In 1279, Kublai Khan (or the Emperor Shi Zu) personally assigned Guo Shoujing, famous astronomer and Deputy Director of the Astronomical Bureau, to carry out the observation in the South China Sea. According to the official History of the Yuan Dynasty, Nanhai (South Sea), Guo's observation point, was "to the south of Zhuya (Hainan Island)" and "the result of the survey showed that the latitude of Nanhai is 15°N". The astronomical observation point was on today's Hsisha Islands. It is clear that the Hsisha (Paracel) Islands were, at the time of the Yuan Dynasty, within the bounds of China.

22. The possible existence of a 'devil's Triangle' in the South China Sea was reported. Between May 1979 and February 1980 within a triangular area bounded by Manila, Hong Kong and Taiwan, three vessels mysteriously disappeared. Ta Kung Pao Weekly Supplement, Hong Kong, 12 March 1981, p. 5.

23. The result of Guo's survey was: "The latitude of Qiongzhou is 19.75°N"; "the latitude of Nanhai is 15°N". This shows that the Nanhai observation point was more than 4 degrees south of Qiongzhou observation point on Hainan Island, which is exactly the location of the Xisha Islands today.
The next piece of evidence to be considered is a Report of a Chinese Naval Expedition of 1290. During the Yuan Dynasty (1280-1341 A.D.), a naval force was despatched to Java and sailed through 'the ocean of the seven islands' and 'the myriad of ten thousand li (Chinese mile) rocks'. The 'seven islands' were the seven easternmost islands of the Hsisha (Paracel) Islands and the 'myriad of ten thousand li rocks' apparently referred to the present Nansha (Spratly) Islands.\(^{24}\)

During the Ming and Ching Dynasties, the officially compiled local chronicles (Guangdong Tong Zhi, Qiongzhoufu Zhi and Wanzhou Zhi) all record, either in their sections on "territory" or on "geography, mountains and waters", that "Wanzhou covers Qianlichangsha (thousand-li sand cays) and Wanlishitang (ten thousand-li rocky reefs)". This shows that the Hsisha (Paracel) and Nansha (Spratly) Islands were under the administration of Wanzhou of Qiongzhou prefecture,\(^{25}\) Guangdong Province.


\(^{25}\) Now Wanning and Lingshui Counties, Hainan Island.
In the Ming Dynasty (1368-1644 A.D.), a Chinese official navigator, Ho Cheng, visited the Nansha Islands several times between 1404 and 1433 A.D., on his way to the Indian Ocean and Africa, and claimed them for China. Thus, one of the islands in the archipelago was named Cheng Ho Island, but it is also known by Westerners as the Tizard Bank and Reefs. Since then, the Nansha Islands have been under Chinese sovereignty. Chinese fishermen have been plying their trade between Kwantung province and the Nansha, and the islands have become an important station for Chinese fishermen in the South China Sea. A subsequent Ming Dynasty publication also described the location of the Hsisha and Nansha archipelagoes.


In 1433, a Chinese named Ma Huan wrote a book, entitled *The Overall Survey of the Ocean's Shores*, in which he referred to the Hsisha Islands as 'shih t'ang' (c. 15°47'N, 111°12'E in the China Sea) and 'wan sheng shih t'ang hou' (c. 15°47'N, 111°12'E in the China Sea).  

Between 1710-12 of the Ching Dynasty (1644-1911), Sheng Wu, Vice-Admiral of the Guangdong Fleet led a naval patrol and 'went personally on an inspection tour, setting out for Qiongya, rounding Tonggu and passing through Qizhouyang and Sigengsha, covering 3,000 li'.  

Lun-Chiung Chen also described the geographical position of these islands in *Notes on Lands Across the Sea*, published in 1730, and charted the two island groups on his "General Map of Our Seas".

In *Travel Notes of My Mission to the West*, Sung-tao Kuo, the Ching Dynasty Minister to Britain, also noted

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the existence and position of the islands and added "these islands belong to China". Thus the fact that the Hsisha (Paracel) and Nansha (Spratly) Islands have been Chinese territory since ancient times is not only recorded in Chinese archives and local chronicles but also corroborated by many official maps. 33

In 1883, Germany carried out surveys on the Hsisha (Paracel) and Nansha (Spratly Islands but ceased these operations after the Ching Government protested. 34

33. In 1974, South Vietnam claimed that the Nansha (Spratly) Islands were shown as Vietnamese territory on the first maps issued by the Empire of Annam in 1834. Keesing's Contemporary Archives, 1974, p. 26388. For maps as evidence of title to territory, see above, Ch. 7.

In 1908 the International Navigational Association requested, through the Bureau of Maritime Customs, that the Government of the Ching Empire erect lighthouses in the Hsisha Islands to ensure safe navigation.

In 1909, the Government of the Ching Empire despatched a fleet of three warships, the Fubo, the Guangjin and the Shenhua, Admiral Chiuin Li with more than 170 naval officers and men, on an inspection tour of the South China Sea. They inspected 15 islands and on the Yongxing Island they erected the Chinese Yellow Dragon flag and several landmarks by way of reasserting Chinese sovereignty. Admiral Li afterwards reported that he had encountered settlers from Hainan on the islands.35

It has been indicated in Chapter 3 that the formal ceremony of taking of possession was then generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over areas so claimed and did not require to be supplemented by the performance

35. "On Li Chiuin's Patrol of the Sea", *National News Weekly*, Vol. 10, No. 33 (21 August 1933), p. 6. In 1974, South Vietnam claimed that the Emperor Gia Long of Annam established a company in 1802 to exploit the Hsisha (Paracel) Islands and personally planted a flag there in 1816; that the French Governor-General of Indo-China declared them part of Thua Thien province in 1932; and that the sovereignty over the Hsisha and Nansha (Spratly) Islands was transferred from France to Vietnam in 1949. Declaration of the Ministry of Foreign Affairs, Republic of Vietnam, 16 January 1974. See also Keesing's Contemporary Archives, 1974, p. 26388.
of other acts, such as 'effective occupation'. It was widely accepted in the practice of states that the act of possession is landing, hoisting the flags, and proclaiming the significance of these acts. These ceremonies were regarded as being wholly sufficient in themselves to establish sovereignty over the claimed land.

Later, the journal "China Sea Pilot", published by the British Admiralty, stated that these islands were annexed by the Chinese Government in 1909, and were often visited by junks, as the following quotation reveals:

Hainan fishermen who subsist by collecting trepang and tortoise-shell, were found upon most of these islands; some of them remain for years amongst the reefs. Junks from Hainan annually visit the islands and reefs with supplies of rice and other necessaries, for which the fishermen give trepang and other articles in exchange.


There is a great deal of evidence to show that these islands were first discovered by the Chinese, and that China thus has an inchoate title which served as a temporary bar to occupation by any other state; and also, since that date, the Chinese have been continuously using and settling in these islands.

It may be doubtful whether acts of private individuals are in themselves sufficient for occupation, but nonetheless there may be no occupation without them. It seems that actual settlement of territory is no more than evidence of the facts of possession. In the Minquiers and Ecrehos case, the ICJ included the actual and permanent settlement of Britons on the islands among the acts indicative of sovereignty. Judge Levi Carneiro went even further. Under the heading "Visits of Fishermen" he made certain comments regarding such activities as evidence of sovereignty. He maintained that under certain circumstances the presence of private persons may signify, or entail, occupation of territory by a state. Fitzmaurice interprets this passage in Judge Levi Carneiro's individual opinion as not implying that purely private acts could per se create a title but that the de facto position could

38. ICJ Reports, 1953, p. 47. See above, Ch. 3.
39. ICJ Reports, 1953, pp. 104-105. See above, Ch. 3.
afford evidence of what the position was de facto. 40

In 1909, the Chinese Government formally annexed these South China Sea islands. It is acknowledged, however, that annexation alone is incapable of giving a good title. It is necessary to establish effective occupation in order that some hold on the country be taken and maintained. This is done by two inseparable elements - annexation and settlement. By the formal act of annexation the annexing state notifies its intention of henceforth regarding the annexed territory as a part of its dominions; and by the patent fact of settlement it takes actual physical possession of the territory and retains a hold upon it. In most cases annexation comes first and settlement follows, but this order is sometimes reversed, as was the case with the British colony of Natal, the principal sea port of which, Port of Natal or Durban, was founded by a little band of British settlers in 1824, nineteen years before the district was annexed by Great Britain. 41


When the Chinese annexation of these South China Sea islands was made, there were no objections from any state. In such circumstances as previously explained, failure to protest may amount to an acquiescence, and acquiescence may be implied from silence or inaction. 42

In 1911 the Chinese Guangdong provincial government announced the putting of the Hsisha (Paracel) and Nansha (Spratly) Islands under the administration of Yaxian County, Hainan Island.

In 1921 the Ministry of Interior of the ROC approved a licence for the Ruinian, a merchant of Guangdong Province, to engage in fishing, plantation and mining on the Hsisha (Paracel). Later he was found to have transferred the licence to Japanese merchants, and the licence was withdrawn. 43

In May 1928 the Guangdong provincial government sent a study group consisting of military and civil officers, scientists and technicians to go to the Hsisha (Paracel) Islands by warship to make investigations on the spot. The group submitted a detailed report on the results of the investigations. 44

In 1929 the French Acting Governor-General in Indochina also conceded that 'according to reports from various sources, the Paracels (Hsisha) Islands should be regarded as belonging to China'. 45

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42. Protest is a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter. See I.C. MacGibbon, "Some Observations on the Part of Protest in International Law", 30 BYIL (1953), p. 293; idem, "The Scope of Acquiescence in International Law", 31 ibid. (1954), p. 143; idem, "Customary International Law and Acquiescence", 33 ibid. (1957), p. 115. See above, Ch. 4 for a full discussion of this source of title.


44. Peng-fei Shen, Reports on the Investigation of the Paracels Islands (the Chung Shan University, Canton, 1928).

In April 1930 the Far East Conference on Meteorology held in Hong Kong, with the participation of the representatives of China, France, the Philippines and the Hong Kong authorities adopted a resolution requesting the Chinese Government to establish a meteorological observation station on the Hsisha Islands. 46

The Chinese continued to hold their dominion over the Nansha (Spratly) area until the French partial occupation. On 13 April 1930, the French navy invaded the Nansha archipelago from Vietnam, occupying the Nanwei Island. 47

In 1931, France became aware of the strategic importance of the Hsisha (Paracel) Islands and tried to seize them, taking the opportunity of Japanese aggression in Manchu to do so. In a note addressed to the Chinese Legation in France on 4 December, the French Government asserted that the Empire of Annam had a "prior title" to the Hsisha Islands, thus laying a territorial claim to these islands. The Chinese Government, however, categorically rebutted this, pointing out that the Hsisha Islands had long been under China's sovereignty. 48

In a note of 30 November 1932 to the French Consul in Guangzhou, Zhu Zhaoxin, Special Inspector of the Ministry of Foreign Affairs of the ROC, again affirmed that the Hsisha Islands were part of China's territory. 49


47. Keesing's Contemporary Archives, 1939, p. 3521.


The French formal notice of the annexation of the Nansha archipelago appeared in the *Journal Officiel* on 25 July 1933. On 4 August 1933, the Chinese Foreign Ministry sent a note to the French Embassy in Nanking stating that:

Before the Chinese Government can confirm whether these islands have actually been occupied by France, with reference to the French Government's annexation Proclamation of 25 July 1933, the Chinese Government reserves all its rights on this matter.

Later, the Chinese Government again protested to France stating that there were Chinese residents inhabiting these islands, and that the French Government had admitted the fact that Chinese fishermen lived there. In accordance with public international law and custom, newly discovered islands, if there were inhabitants already there, should belong to the nation of the inhabitant. Since all the residents in these islands were Chinese, there is not the slightest doubt that the sovereignty of these islands belongs to China.

The French remained in the archipelago despite protests from the Government of the ROC in Nanking until they were driven out by the Japanese in 1939, i.e. their occupation lasted only six years. In the Arbitration Concerning Buraimi and the Common Frontier between Abu Dhabi and Saudi Arabia, the UK stated that "brief interludes of temporary conquest in areas in question can in no circumstances be

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52. Ibid., p. 219. For details, see Chun-shin Ling, "The Geography of the French Occupied Small Islands in the South Sea", *7 Geography Monthly* (1 April 1934), p. 2; Min Cho, "The Triangular Relationship Among China, France and Japan and the Question of Nine Islands in South Sea", *3 Diplomacy Monthly* (15 September 1933), p. 78.
taken to give the Saudi Arabian Government any appearance of authority after this interval".53

On examination of Chinese historical sources, it appears clear that the Chinese were the first to discover, use, settle and administer the Hsisha (Paracel) and Nansha (Spratly) Islands. Jurisdiction was exercised over them by successive Chinese Governments for more than 1,000 years. The principles of international law accept a doctrine of prescription in order to discourage state claims in the interests of peace. As has been remarked in Chapter 3 regarding the acquisition of title by prescription, the prescribing state must exercise control à titre de souverain and this must also be actual, peaceful and continuous. Since the Hsisha and Nansha Islands have been discovered, settled, used and administered by successive Chinese Governments for more than 1,000 years, prescriptive rights could develop quietly and had existed long enough to require that they be respected by other states when they became conscious of them.

In recent years, there have been discovered in the Hsisha (Paracel) and Nansha (Spratly) Islands ruins of living quarters, porcelain and articles of daily use belonging to the Tang and Song Dynasties, and wells, shrines, tombs and other relics of the Ming and Ching Dynasties. These discoveries prove that, since at least the Tang and Song Dynasties, Chinese people have lived on the Hsisha and Nansha Islands and engaged in fishing and other productive activities there. Along with the exploitation and development of the Hsisha and Nansha Islands by Chinese people, successive Chinese Governments have exercised jurisdiction over them.54

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3.2 Claims After the Outbreak of the Second World War. 55

The South China Sea is of immense strategic value. The major sea routes between Japan and the Persian Gulf, and between Vladivostok, the Soviet Eastern Sea Fleet base, and the Indian Ocean, pass through it.

On 10 February 1938, Japan occupied Hainan Island, commanding not only the Shanghai-Hong Kong-Singapore shipping lanes but also large areas of the Gulf of Tongking and the Port of Haiphong. 56

On 30 March 1939, the Governor of Taiwan, which was then under Japanese domination, announced in the Japanese official gazette that the Shinnan Gunto (renamed by the Japanese to the Nansha Islands) had been placed under the jurisdiction of the county of Kaohsiung in Taiwan. 57


56. Hainan was the subject of a Sino-French Agreement in 1897 by which China agreed never to cede the island to a third Power. In 1907 France and Japan agreed to support each other in assuring the peace and security of the regions adjacent to their territories. Keesing's Contemporary Archives, 1939, p. 3450. See also Victor Purcell, The Chinese in Southeast Asia, 2nd ed. (Oxford U.P., 1965), p. 205.

On 31 March 1939, the Japanese annexed the Nansha (Spratly) Islands which lie about half-way between French-Indo China and British North Borneo.58

In 1940, the fall of France made it virtually impossible for the colony of Indochina to resist Japan when the latter renewed its old complaint regarding the shipment of war supplies to Kunming; the French acceded to the Japanese demands to cease such supplies.59

In November 1943, Generalissimo Chiana, Kaishek of China, President Roosevelt of the U.S.A. and Prime Minister Churchill of Great Britain, together with their respective military and diplomatic advisers, conferred in Cairo. A general statement was issued that Japan should be stripped of all the islands in the Pacific which it had seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan had "stolen" from the Chinese, such as Manchuria, Taiwan and the Pescadores, should be restored to the Republic of China. Japan would also be expelled from "all the territory" which she had forcibly taken.60 This general statement

58. The Japanese owed their rapid success fundamentally to the superior strategic position from which they launched their attack. They had two systems of bases in the South China Sea, the one consisting of Hainan and Indo-China (with the surreptitiously annexed Nansha Islands as an outpost off the northern coast of Borneo), and the other formed by the Mandated Islands in the Pacific - the Mariana, Caroline and Marshall groups, strung out in the ocean between Hawaii and the Philippines. See G. F. Hudson and Marthe Rajchman, An Explanatory Atlas of the Far East (London: Faber and Faber, 1938), p. 133; Keesing's Contemporary Archives, 1939, p. 3520.

59. Purcell, op. cit., p. 205.

might have led China to believe that the Hsisha (Paracel and Nansha Spratly) Islands, originally hers, would be returned to her after the war.

On 26 August 1945, soon after Japan surrendered to the Allied Powers, her forces withdrew from the Nansha and Hsisha Islands. 61

China's best legal basis to its claims to the Nansha and Hsisha Islands is that after the World War II, these islands were restored to the Republic of China (ROC). In November 1946, the Government of the ROC sent a naval contingent, with officials from the Ministry of Interior and from the provincial Government of Kwantung to take over the islets. This group of officials made a survey of each of the major islets. Garrisons were subsequently established on several islets of the Hsisha (Paracel) and Nansha (Spratly) archipelagoes, and Chinese territorial stone tablets were erected on Yung-hsing (Woody) Island and Taiping (Itu Aba) Island. A weather station and a radio station were also built on these two islands. 62

As stated in Chapter 3 in the Clipperton Island Arbitration and the Eastern Greenland Case, in thinly populated or uninhabited areas such as the Hsisha and Nansha Islands very little actual exercise of sovereignty is required in the absence of any competing claims.

The Islands v. Palmas Arbitration illustrates also that these acts

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61. Chinese troops under command of General Lu Han entered Northern Indo-China on 16-17 September 1946. Gen. Lu, who set up his H.Q. at Hanoi, issued a proclamation to the Annamite population that his troops had entered Annam solely to receive the Japanese surrender and that China had no territorial ambitions on Indo-Chinese territory. *Keesing's Contemporary Archives*, 1946, pp. 7778-80.

62. For administrative purposes, these islets were proclaimed to be under the jurisdiction of the Kwangtung Province, but on 15 March 1947, the Republic of China issued an order to place them 'temporarily under the administration of the Navy'. *Memorandum on Four Large Archipelagoes of the Republic of China in South Sea*, Republic of China Ministry of Foreign Affairs (February 1974).
are of the kind on which claims might be based or kept alive in appropriate circumstances.

In January 1947, the Chinese Embassy in Paris issued a communique announcing the occupation of the Hsisha (Paracel) Islands and asserting the Chinese claims to that archipelago. In this statement, the Chinese underlined their contention that the islands had always belonged to China and had been governed by the Guangdong provincial authorities. The Chinese Government had never abandoned the islands.

Later, France protested against China's occupation of the Hsisha (Paracel) Islands and of Pattle Island, arguing that the Hsisha had traditionally been controlled by the rules of Annam. At that time, France also landed troops on Pattle, whereupon the Chinese Government registered a written protest with the French Ambassador in Nanking. On 1 December 1947, the Chinese Ministry of the Interior renamed every islet and thus formally annexed them into the Chinese Hainan Special District. At that time, neither Vietnam nor any other state protested to China about the taking over

63. Tak Kung Pao, Shanghai, 27 June 1947. China had exchanged notes with France on this issue between 1932 and 1938, and had not accepted the French annexation of the islands in 1933.

64. 161 The Eastern Miscellany (1947), pp. 59-60.

65. An Outline of the Geography of the South China Sea Islands, National Territory Series (the ROC: Ministry of Interior, 1947). See Fig. 11, p. 861.

Source: Heinzig, Disputed Islands in the South China Sea: Paracels-Spratlys-Pratas-MacClesfield Bank, 49, chart 3.
of the islands. 66

On 7 April 1949, through the Chinese Legation in Manila, the Government of the Republic of China informed the Philippine Government that Taiping (Itu Aba) Island was garrisoned by a Chinese Naval Unit under Commander Yang-Sen Peng, and that it had a weather observation tower, as well as radio contact with Nanking, then the capital of China. Chi-Ping Chen, the Chinese Envoy to the Philippines, advised the Philippine Under-Secretary for Foreign Affairs, Felino Neri, that Taiping Island had been settled by 150 Chinese people and naval personnel in an effort to block the traffic in arms through Hainan. 67

In 1949, President Quirino of the Philippines issued a directive for closer and more effective patrolling of the Philippines' coastline. He instructed Secretary of National Defence Ruperto Kangleon to send Commodore Jose V. Andrada on an inspection tour to Taiping (Itu Aba) Island and its vicinity. Upon learning that Filipino fishermen from Palawan often visited Taiping Island, some Philippine cabinet members suggested that these people be induced to settle there preparatory to making a claim for the annexation of the Nansha (Spratly) Islands

66. In early 1975, the Republic of Vietnam alleged that France did protest and also did occupy Pattle Island. See White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands. Republic of Vietnam (Saigon, 1975), p. 43. On 21 January 1974, a South Vietnamese diplomat added that the South Vietnamese, faced with Chinese occupation since 1947 of one of the Hsisha islands, had not tried to reject either the ROC or the PRC. They had accepted the de facto situation, but without renouncing their claim to sovereignty over the entire group. The Guardian, 22 January 1974.

67. With only a period of interruption from 1949 to 1956 owing to budgetary limitations resulting from the internal situation in China. During that period, the garrison was redeployed elsewhere due to exigencies of the civil strife.
to the Philippines. In response, the Chinese Legation in Manila reiterated Chinese sovereignty over Taiping Island. The Ministry of Foreign Affairs of the Philippines recognised that Taiping Island was a part of the Nansha Islands which was the territory of the Republic of China and stated in a cabinet meeting the need to afford greater protection to Filipino fishermen who were reportedly operating in the waters surrounding Taiping Island. This was the first round of official contact between China and the Philippines over the Nansha dispute.

On 17 May 1950, President Quirino bluntly told a press conference that the Nansha Islands belonged to the Philippines. However, this was denied by the spokesman for the Philippine Presidential Office. The Chinese Government promptly reiterated its sovereignty over the Nansha Islands. In spite of all this, however, the Philippine Government seemed determined to take possession of certain islands near Celebes, and to undertake all necessary legal steps to have them under the Philippine flag. The Philippine claim was based on propinquity, the Nansha being only 400 miles from Palawan. It may be recalled that the principle of propinquity does not apply to submarine areas, as the continental shelf is a natural prolongation of land territory under the sea.

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70. This relates to certain islands south of Mindanao near Celebes concerning which the right of propinquity was used as a basis of Philippine claims. Manila Evening News, 8 April 1950.
71. See above, Chs. 2, 3, 5, 6, 7.
In May 1950, the PRC forces landed on Hainan Island, and the ROC withdrew its forces from Hainan as well as from the Nansha (Spratly) and Hsisha (Paracel) Islands.

By the peace treaty of 1951, Japan renounced all claims to the Hsisha (Paracel) and Nansha (Spratly) Islands but the treaty did not state to whom the title was now to be attributed. Before the San Francisco Peace Conference was held, on 15 August 1951, the Foreign Minister of the PRC, Chou En-lai, pointed out, in his Statement on the U.S. - British Draft Peace Treaty with Japan and the San Francisco Conference, that 'just like the entire Nansha (Spratly) Islands, Chungsha (Macclesfield) Islands and Tungsha (Pratas) Islands, the Hsisha (Paracel) Islands and Nanwei (Spratley/Storm) Islands have always been China's territory'. He said:

... these islands although they were occupied by Japan for some time during the war ... were all taken over by the Chinese Government following Japan's surrender. Whether or not the U.S. - British Draft Treaty contains provisions on this subject, and no matter how these provisions are worded, the inviolate sovereignty of the People's Republic of China over Nanwei Island and Hsisha Island will not be affected in any way.

On 7 September 1951, at the San Francisco Peace Conference the Vietnamese delegate declared that Vietnam had reaffirmed her sovereignty over the

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72. Art. 2(f) of the 1951 Peace Treaty, 136 UNTS (1952), No. 1832, pp. 48-49; USFR (1951), VI, pp. 1120, 1157; Keesing's Contemporary Archives, 1951, p. 11681. See above, Ch. 4.

Nansha (Spratly) and Hsisha (Paracel) Islands. But this claim was rejected by both the ROC and the PRC, although neither was represented at the Conference.

After the signing of the San Francisco Peace Treaty, a bilateral peace treaty was signed between the ROC and Japan on 28 April 1952. Article 2 of the treaty stipulated that:

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the limited States of America on September 8, 1951, Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly (Nansha) Islands and the Paracel (Hsisha) Islands.

74. The Vietnamese delegate made the following remarks: "We affirmed our right to the Spratly and Paracel Islands, which have always belonged to Vietnam". Conference for the Conclusion and Signature of the Treaty of Peace with Japan, San Francisco, California, September 4-8, 1951, Record of Proceedings (Washington D.C.: Government Printing Office, 1951), p. 263. The Guardian, 17 & 22 January 1974: when the Vietnamese had reaffirmed their sovereignty in 1951 at the San Francisco Peace Conference, this had not been disputed by the Chinese (ROC & PRC). This is hardly surprising since China was excluded from the Conference and had no opportunity to press its title.

75. The ROC Ministry of Foreign Affairs (compiled & published), Treaty between the Republic of China and Foreign States, 1927-1957 (Taipei, 1958), 249; 138 UNTS (1952), No. 1893, p. 38. At the time of the negotiation of the territory article, the Japanese delegates insisted that the Article should apply only to those areas which were under the control of the ROC. The Chinese delegates then explained that the Hsisha (Paracel) and Nansha (Spratly) Islands were Chinese Territory and should therefore be included in Art 2, "Minutes of Sino-Japanese Peace Negotiation, 5 March 1952," in Peace Treaty between the Republic of China and Japan (Taipei, 1956), pp. 52-53. Japan apparently accepted the Chinese position. Under Art. 2(f) of the 1951 San Francisco Peace Treaty, Japan renounced all right, title and claim to the Spratly Islands and to the Paracel Islands. 136 UNTS (1952), No. 1832, p. 50.
According to the Foreign Ministry of the ROC, such an arrangement in the bilateral Sino-Japanese peace treaty clearly indicated that the title to these two island groups had been renounced by Japan in favour of the ROC; and furthermore, this renunciation was clear evidence that China had complete sovereignty over these islands.

In a document, the PRC Ministry of Foreign Affairs stated:

Although the US-UK draft peace treaty with Japan did not mention the ownership of these islands after Japan's renunciation, yet in 1952, the year after the San Francisco Peace Treaty with Japan was signed, the 15th Map, Southeast Asia, of the Standard World Atlas [published in 1952 by the Japanese National Education Books Company] which was recommended by the signature of the then Japanese Foreign Minister Katsuo Okazaki, marks as part of China all the Xisha [Nan'ao] and Nansha Islands, which Japan had to renounce as stipulated by the peace treaty.

The International Civil Aviation Organisation's Regional Conference of the Pacific, was held in Manila in October-November 1955, with Col. U.B. Caldoza (Director of Philippines Civil Aeronautics) as Chairman and Mr. B.R. Momhez (French Delegate) as First Vice-Chairman; sixteen member states (China, Britain, France, the Philippines, the United States, Vietnam inter alia) sent their delegations to the conference. On 27 October 1955, the British delegation and the delegation of the International Aviation Transport Association jointly submitted an official proposal requesting the Government of the Republic of China to establish a meteorological post on one island.

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76. The ROC Foreign Ministry statement of 10 June 1956. See also "Vietnamese claim of Sovereignty Refuted". Free China Weekly, 26 June 1956, p. 3.

of the Nansha archipelago. The proposal was screened and passed by the Meterological Committee of the Organisation (with Mr. J.F. Flores - Philippine delegate - as Chairman and Mr. J.P. Barberon - French delegate - as Vice-Chairman); unanimously passed by the Conference and recorded in the Final Report: in detailed terms including specific reference to the Chinese (Taiwan) requirements.\(^7_8\)

In response to this resolution the ROC established a meterological observatory and accordingly made a daily weather report.

As has already been pointed out in Chapter 4, there is no unanimity as to whether states are under an obligation to protest if they want to preserve their rights, but failure to do so may lead to a successful plea of right by the claimant state. A lasting silence can easily be interpreted as acquiescence in circumstances which generally call for a positive reaction signifying an objection.

The situation in the Nansha (Spratly) Islands appeared to be relatively stable until 15 May 1956, when a Filipino named Tomás Cloma, a former newspaper reporter who acted as director of the Maritime Institute of the Philippines in Manila,\(^7_9\) issued "A Proclamation to the Whole World" claiming ownership of the whole territory by discovery and occupation. These 33 islands, sand cays, sand bars, coral reefs and fishing grounds in the Nansha Islands totalled 64,976 square nautical miles, and were renamed "Freedom Land" by him. He said:

>This claim is based on the rights of discovery and/or occupation open, public and adverse as against the whole world.\(^8_0\)

78. Excerpt from ICAO Doc. 7624 PA C/1 MET Section.


It may be recalled that there is no legal opportunity to base this second discovery and that original discovery itself no longer creates a title under contemporary international law.

As stated earlier, when a territory is considered as res nullius, i.e. it does not belong to any state, it can be acquired by occupation. The first condition of occupation is that the object claimed must be res nullius. The fact that an island is uninhabited does not necessarily mean that it is a terra nullius and available for occupation. Unless, however, the Nansha Islands were still terra nullius in 1956 (i.e. either as a consequence (a) of China never having properly appropriate them, or (b) if she had done, subsequently having abandoned them) they could not be subjected to occupation.\(^81\) Moreover, in the Island of Palmas Arbitration, as has been mentioned above, Max Huber made it clear that effective occupation would be recognised if it was conducted by "peaceful" means.\(^82\) The Philippines action was, nevertheless, challenged by the ROC; no prescriptive right can therefore be developed.

On the same day, Cloma addressed a letter to the Philippines Vice President, Carlos P. Garcia, informing him that forty Filipinos were undertaking survey and occupation work in a territory in the China Sea outside of Philippine waters and not within the jurisdiction of any country.\(^83\) He also issued a mimeographed map of the area claimed,

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81. See above, Ch. 3.

82. II RIAA, p. 839. For a full discussion, see above, Ch. 3, pp. 256-59.

together with a mimeographed "Notice to the Whole World" to the diplomatic corps in Manila. In the notice, Cloma told the world that he had occupied the islands and at the same time solicited the protection of the Philippine Government.

Garcia declared that Cloma's expedition was private, but he added that he saw no reason why the islands should not belong to the Philippines by virtue of 'occupation' and 'proximity'. In the Republic of China, at the same time, the Nansha impasse aroused deep concern and directed sharp criticism against the government's policy.

With regard to private acts in the context of the acquisition of territory, Judge Hsu Mo, in the Anglo-Norwegian Fisheries Case, had pointed out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State, despite the passage of time and the absence of molestation by the people of other countries. 84 With reference to the Philippines' acquisition of the Nansha (Spratly) Islands based on 'proximity', it may be recollected that in the Island of Palmas Arbitration Max Huber held that 'the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law'. 85

Early in May 1956, the Government of the Republic of China, through diplomatic channels, repeatedly asserted its sovereignty over the Nanshas region, particularly in its condemnation of Philippine intervention in the question of Nansha. On 23 May 1956, the Chinese Ambassador in Manila, acting on instructions from Taipei, filed a

84. ICJ Reports, 1951, p. 157. For details, see above Ch. 3, pp. 249-255.

85. II RIAA, p. 869. See above, Chs. 1, 2, 3.
formal protest to the Philippine Foreign Ministry alleging that the islands in question belonged to the Nansha island group, commonly known as the Nansha Islands, which was a part of the territory of the Republic of China, and that any foreign claim to them infringed on Chinese territorial sovereignty. At the end of his Note to Vice President Garcia, Ambassador Chen Chih-mai stated:

The Nansha Island Group has always been and is an integral part of the territory of the Republic of China. The Chinese Government cannot recognise any foreign claim over the island group and shall deem any such claim as an infringement upon Chinese territorial right ... it is earnestly hoped that the Philippine Government will not entertain claims that may be presented by any individuals or groups under the pretence of right of discovery and occupation or any other pretence. 86

The Chinese Ambassador called on Garcia to discuss the claim further.

In Taipei, the Chinese Ministry of Foreign Affairs presented documents to the Embassy of the Philippines which, it was claimed, proved Chinese sovereignty over the Nansha Islands. These documents, consisting of a map and a booklet entitled, A Regional Geography of the Islands of the South China Sea, were duly transmitted to Manila. 87

The right of a state to protect its territory is widely accepted. When a state objects to the territorial claim of another state it may protest against the violation of its rights, or take effective measures which clearly imply a rejection of the claim. In challenging the encroachments of a neighbour, protest interrupts the adverse possession and stops the running of prescriptive time.

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86. Noted R.N.E. No. 12607 dated 23 May 1956 from Ambassador Chen Chih-mai to Vice President Carlos P. Garcia [italics added].

Repetition of a simple diplomatic protest suffices to prevent acquisition of a prescriptive title only if the circumstances are such that it constitutes the only feasible method of asserting rights. 88

While the ROC and the Philippines were both claiming ownership of the Nansha (Spratly) Islands, South Vietnam also joined in the dispute by reasserting its claim to these Islands. The Republic of Vietnam in a communiqué issued on 24 May 1956, insisted that the Nansha Islands, along with the Haisha (Paracel) Islands, had 'always been a part of Vietnam'. The Foreign Ministry of the PRC responded with a statement on 29 May 1956 reasserting that:

"... Taiping (Itu Aba) Island and Nanwei (Storm/Spratley) Island in the South China Sea, together with the small islands in their vicinity, are known in aggregate as the Nansha Islands. These islands have always been a part of Chinese territory. The People's Republic of China has indisputable, legitimate sovereignty over these islands."

It is submitted that the PRC probably confused the 'Nanwei Island' with the 'Nansha (Spratly) Islands' because there are two English names for the Nanwei Island: "Spratley" and "Storm" Island.

On 1 June 1956, a Spokesman for the Republic of China had stated that the despatch of a task force to the Nansha Islands was 'possible and probable'. Vice-President Garcia instructed Philippine Ambassador Narciso Ramo in Taipei to inform the Chinese Government that 'it need not be alarmed by the situation'. To newspaper reporters, Garcia said the Philippine Government had not yet taken an official stand on Cloma's claim, and that the United States had not been sounded.

88. See above, Ch. 4.

89. Shao, op. cit., People's China, No. 13, 1 July 1956, pp. 25-27.
out on the matter. He thought that arbitration would be required later; and the United States could be depended upon to be a 'fair and just referee' in view of its friendly relations with both China and the Philippines. 90

On 2 June 1956 at the request of Dr. Yeh, 91 ROC's Minister of Foreign Affairs, Ambassador Ramos was called to the Foreign Office in Taipei. The Foreign Minister asked if the Ambassador had any further information from Manila concerning the Nansha Islands. The Ambassador said that he had received only an interim reply to his two telegrams to President Magsaysay. In this reply he was informed that the information provided in his two telegrams had been referred to the Inter-Departmental Conference which was expected to report to President Magsaysay in the course of two or three days. The Foreign Minister then reiterated that his government had no desire to create any further tension in the area, but directed the Ambassador's attention to the proclamation made by the Ministry of the Interior on 1 December 1947, in which the maritime boundary of the Republic of China in the South China Sea was set forth and the names of all the islands given. 92

The U.S. Embassy in Manila took the position that the ownership of these Islands was unsettled and that the Government of the United

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92. This was done, as has been seen, after the Chinese Navy had completed the takeover of the island from the Japanese. See An Outline of the Geography of the South China Sea Islands, National Territory Series (the ROC: Ministry of Interior, 1947).
States had not recognised the rights of any government over the Nansha (Spratly) and Hsisha (Paracel) Islands.

On 2 June 1956, at the request of Dr. Yeh, the Minister of Foreign Affairs of the Republic of China, Karl L. Rankin, American Ambassador to China, called at the Foreign Office in Taipei. After reviewing the historical facts on which the Chinese Government based its sovereignty over the Nansha Islands, the Foreign Minister expressed regret that the Philippine Government had not yet publicly acknowledged China's sovereignty and that Cloma had informed the press that he intended to send more men to the islands. Ambassador Rankin assured the Foreign Minister that his government had no intention of involving itself in any way in the controversy. The United States Ambassador, nevertheless, promised to forward the Foreign Minister's views to the State Department with the recommendation that the Government of the United States study these proposals with a view to bringing about an amicable settlement. According to the International News Service, it was reported from Washington that the United States was not involved in a Filipino's claim to the scattered islands. It stated that these islands were of little practical value "even at low tide, when some of them are not out of the water". 93

On 5 June 1956, a Vietnamese Minister, Cao Bai, said in Cebu that the Nanshas (Spratlys) had been under the jurisdiction of the French Colonial Government and that Vietnam subsequently had jurisdiction by virtue of the grant of sovereignty by France. He suggested that his country might lease the islands to Cloma or to the Philippine Government itself for military purposes.

On 8 June 1956, a report from Taipei stated that an ROC patrol sent to the Nansha Islands had found no trace of the supposed Cloma expedition. Officials in Taipei were reported as having received a statement that day by Admiral Stuart Ingersoll, Commander of the United States Seventh Fleet, to the effect that the United States would look with disfavour upon an extension of Chinese Communist interests to the controversial Nansha Islands.94

Faced with the Chinese (ROC and PRC) Government's strong objection, the Philippines dropped their claim for the time being.

In the course of the controversy between the Republic of China and the Philippines over the Nansha Islands, other claimants - France, Britain,95 the Netherlands and Vietnam - added their voices. On 9 June 1956, the French Charge d'Affaires in Manila informed Juan M. Arreglado, Legal Counsellor of the Philippines Ministry of Foreign Affairs, that the Nansha Islands belonged to France by virtue of an occupation effected in 1932-33. He also contended that while France had ceded the Hsisha Islands to Vietnam, it had not ceded the Nansha Islands. On 9 June 1956, a Vietnam Legation Spokesman in Manila disputed the claim of the French Charge d'Affaires. He stated that the Nansha Islands were officially incorporated into the Vietnamese province of Baria in 1929, and that the French transfer of sovereignty to Vietnam automatically included both the Nansha and Hsisha Islands.


95. Britain has a slender claim to the Nansha Islands since a British flag was planted there in the nineteenth century and up till 1889 the guano deposits were exploited for the benefit of the Borneo Company.
On 28 August 1958, there were reports from both Paris and Saigon that a Vietnamese naval shore party had planted its flag on the Ting Islands some days before. In connection with these reports Taipei promptly sent an urgent inquiry to its legation in Saigon. On 30 August, a Vietnamese Government spokesman in Saigon officially confirmed that a naval party had hoisted the national flag on Nansha Island on 22 August 1956. A Radio Peking broadcast commented that 'such an act of the South Vietnamese authorities, which violates China's sacred sovereignty, is a serious provocation against peace in Asia. The Chinese people will never tolerate it'. When the ROC learnt that a unit of South Vietnamese troops had landed on Nanwei (Storm/Spratly) Island of the Nansha Islands, it resolutely rejected the Vietnamese claim and protested strongly.96

Since this incident in 1956, in keeping with the information released by the Government of the ROC, the Chinese Navy has periodically sent a contingent to inspect the various islets in the Nansha groups and to deliver supplies to Chinese groups garrisoned on Taiping (Itu Abu) Island, the biggest island of the Nanshas.97

During the period from February 1957 to February 1958, with the approval of the Government of the Republic of China, the United States conducted a geodetic survey including Nanwei (Spratly or Storm) Island. Then, on 4 September 1958 in its "Declaration on Territorial

96. Free China Weekly, 26 June 1956, p. 1; "Infringement of Nansha Islands Protested"; see also FCW 4 September 1956.

Waters", the PRC declared the extent of Chinese territorial sea as 12 nautical miles. Article 1 of this provision applied to:

all the territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu islands, the Tungsha islands, the Hsisha islands, the Chungsha islands, the Nansha islands and all other islands [i.e. Taio Yu Tai islands] belonging to China where there are separated from the mainland and its coastal island by the high seas.98

South Vietnam, however, failed to respond to this re-assertion of Chinese sovereignty over the Hsisha and the Nansha Islands.

From 6 to 27 October 1963, the Ministry of National Defence, the Ministry of the Interior and the Navy General Headquarters of the ROC jointly organised an inspection team to visit the following islands: Taiping (Itu Aba), Nanwei (Spratley/Storm), Anpo sha Chou (Amboyna), Chung Yeh (Thi-Tu) Nan Nan Tzu Chiao (S.W. Cay), Pei Tzu Chiao (N.E. Cay), Hsi Yueh (West York), Nan Yao (South Island of Harsbung or Loaita), Tun Chien Sha Chou (Sandy Cay) and Hung Hsiu (Nam Yit) Islands in the Nansha (Spratly) group. In 1966, the ROC sent a naval contingent to re-erect Chinese national boundary tablets on Nan Tzu Chiao, Pei Tzu Chiao, Chung Yeh and Hung Hsiu Islands.99

Subsequently, the ROC never failed to assert its claim over these islets whenever an appropriate occasion arose. At the fourth session


of the United Nations Cartographic Conference for Asia and the Far East, held at Manila in November 1964, a statement was made by the ROC delegation reaffirming Chinese sovereignty over the islands. A similar statement was also made by the ROC during the sixth session of the Conference held at Teheran from October–November 1970. 100

On September 26, 1972, a Chinese patrol boat captured a Japanese fishing vessel as it entered the territorial sea of Taiping (Itu Aba) Island. The Japanese vessel was released after an inspection by the Chinese patrol boat which found that no illegal acts had taken place. 101 As stated in Chapter 7, it is now accepted that each state is entitled to the portion of shelf that is the natural prolongation of its land territory. The history of this dispute is very relevant. In September 1973 South Vietnam issued a decree incorporating the Nansha Islands which were also claimed by China (ROC and PRC), as part of South Vietnam's Phuoc Tuy province. At the time this was described as purely an administrative matter. 102 Eight blocks of oil concessions for offshore oil exploration and exploitation, south and south-east of Phuoc Tuy, had been granted to four foreign consortia in July 1973 and the decree made it legally possible for other contracts to be


granted in the area of the Nansha Islands. 103

On 11 January 1974 the Foreign Ministry of the PRC issued a statement protesting to the South Vietnamese authorities about their "brazen announcement" that more than 10 islands of China's Nansha (Spratly) Islands, including Nanwei (Spratly/Storm) and Taiping (Itu Aba) Islands should be under the administration of the South Vietnamese Phuoc Tuy Province. This statement described the South Vietnamese decree as a wanton infringement of China's territorial integrity and sovereignty, and reaffirmed its claim to the Nansha, the Chungsha and the Tungsha. 104 Moreover; the natural resources in the sea areas round them also belong to China. 105 The Foreign Ministry of South Vietnam however rejected this claim on the following day. 106

On 17 January 1974, South Vietnamese troops landed on Money Island 107 and on Robert Island, one of the Hsisha Islands, after the Chinese had left. According to a South Vietnamese naval spokesman, the South Vietnamese tore down a Chinese (PRC) flag and destroyed six Chinese graves. The Vietnamese said the Chinese graves were fakes,

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103. Central News Agency (ROC), Saigon, 24 September 1973. South Vietnam also announced its intention of carrying out surveys for oil off the central Vietnamese coast, opposite the Hsisha Islands.


106. The Times, 17 January 1974: Mr. Vuong Van Bac, the South Vietnamese Foreign Minister on 16 January protested strongly against what South Vietnam termed a violation of its sovereignty by China and described Chinese operations among the Hsisha as 'a threat to the peace and security of the region'. The Guardian, 17 January 1974.

only there to establish a Chinese claim. According to both the Chinese and South Vietnamese accounts, a South Vietnamese attempt to land on nearby Duncan Island was repulsed by the PRC on 19 January 1974.108

On 19 and 20 January, 1974, after a week of controversy over the ownership of the Nansha and Nanwei Islands in the South China Sea, an armed conflict broke out between air and naval detachments of the PRC and South Vietnam in the vicinity of the Hsisha (Paracels). The PRC forces had been reinforced with Komar-class gunboats armed with Styx surface-to-surface missiles. In the series of skirmishes which followed, the Vietnamese were outmatched by the Chinese, who then became firmly in occupation of five of the largest islands - Pattle, Robert, Duncan, Drummond and Money - in the disputed Hsisha Islands. On 20 January, the PRC, claiming that it was protecting its sovereignty, attacked the South Vietnamese and pushed them off the three remaining islands on which they had stationed troops.109 On 21 January the PRC's Foreign Ministry also condemned the South Vietnamese claim to the Nansha (Spratly) Islands, which lie several hundred miles further south.110


110. The Times, 22 January 1974. The statement said none of the countries taking part in the 1951 San Francisco Conference (on a peace treaty with Japan) raised any objection to China's claim of sovereignty over the Hsisha. Although some of the Hsisha Islands were occupied for a time by France before the Second World War and by Japan subsequently after the war the Hsisha Islands as well as other islands in the South China Sea were officially taken back by the Chinese Government (NOC).
In response to the assertion of sovereignty from South Vietnam and the Philippines over the Nansha (Spratly) Islands, the Foreign Ministry of the ROC on 10 February 1974 also issued a counter-claim in similar terms. It stated that the Hsisha Islands belonged to China, whom the ROC represented, but added that it would play no part in the current conflict. However, nothing was legally settled because of these conflicting claims.

Since Chinese Communist forces had driven off the troops of South Vietnam which tried to occupy the Hsisha, 425 miles southeast of Saigon, the South Vietnamese forces then moved southward and seized several uninhabited islets in the Nansha group. On 31 January 1974, the Newspaper Dan Chu, run by President Nguyen van Thieu's Democratic Party, said that the South Vietnamese Government had landed reinforcements on the Nansha Islands. Extra South Vietnamese troops were also sent to the disputed Nanwei (Spratley) Islands to establish themselves. The PRC was unlikely to accept the occupation by South Vietnamese forces of the Nansha Islands, over which the ROC, PRC and South Vietnam all claim sovereignty.

The South Vietnam Foreign Minister, Vuong Van Bac, stated that South Vietnam had full rights to the Nansha Islands, and hence the duty


to protect them. On 4 February 1974, the PRC issued a communiqué accusing South Vietnam of new military provocation by invading and occupying islands in the Nansha group. It was "a wanton infringement of China's territorial integrity and sovereignty". The PRC would not tolerate South Vietnam's moves to reinforce its presence on the Nansha Islands. The statement continued:

The Chinese Government has stated on many occasions that the Nansha, Hsisha, Chungsha and Tungsha Islands are all part of China's territory and that the People's Republic of China has indisputable sovereignty over these islands and the sea areas around them.

The ROC also made a strong protest against the South Vietnamese military occupation on 7 February 1974 and reaffirmed Chinese sovereignty over the Nansha Islands. A spokesman in Taipei said, 'No matter what countries make what moves, our claims to sovereignty remain the same'.

On the same day the ROC garrison on Taiping (Itu Aba) Island - the operational base of the ROC in the area - was instructed to strengthen its defence posture in the area. It was also reported that four ROC naval vessels had been despatched to the Nansha area but no encounter took place with South Vietnam. The newspaper Dan Chu, organ of President Nguyen Van Thien's Democratic Party said that South Vietnam,


120. South Ocean Commercial News, Hong Kong, 13 February 1974.
ROC and the Philippines would make every effort to avoid armed clashes. Subsequently South Vietnam was reported to be building combat bunkers on several islets in the Nansha Islands and shipping tons of ammunition, fuel and food to them.

Following a meeting on 5-6 February 1974, the Provisional Revolutionary Government (North Vietnam) rebutted the legal validity of South Vietnam's granting of oil concessions in the South China Sea. It issued a communique affirming that natural resources 'are the sacred and inviolable property of the population: only a body formed by general free and democratic elections organised by the National Council of Reconciliation ... is competent to treat problems concerning resources'. North Vietnam considered that South Vietnam was only 'an instrument of American neo-colonialism' and that 'all contracts passed by it' no matter with which country or foreign enterprise 'are without value'.

In 1974 the Republic of the Philippines again renewed its interest in the Nansha (Spratly) Islands and claimed that the status of these islands was "undermined". It suggested that the 1951 Japanese Peace Treaty merely provided for Japanese renunciation of the islands. The renunciation did not specify in whose favour it was made. It was therefore suggested that the islands 'are under the trusteeship ...

123. Le Monde, 26 February 1974. See also Oil and Security (Sweden: Stockholm International Peace Research Institute, 1974), Appendix 8.
124. A similar theory was put forward with respect to other territories which Japan renounced in the 1951 Peace Treaty, such as Taiwan and Penghu. For details, see H. Chiu (ed.), China and the Question of Taiwan: Documents and Analysis (N.Y., Wash., London: Praeger, 1973), pp. 127. See above, Ch. 4, p. 361.
of the victorious allied powers of World War II', and that their status should be decided jointly by the allied Powers of the United Nations. The weakness of this theory is that after the renunciation of the Nansha Islands, these islands in theory would become a terra nullius subject to occupation by China or any other states. But none of the other contracting parties of the 1951 San Francisco Japanese Peace Treaty indicated their support for this theory.

In response to the assertion of sovereignty by South Vietnam and the Philippines over the Hsisha and Nansha Islands, the Foreign Ministry of the ROC on 10 February 1974 issued a statement of counterclaim in similar terms.

On 30 March 1974 at the 30th meeting of the United Nations Economic Commission for Asia and the Far East (ECAFE) Communist China's delegation reaffirmed the claim of the PRC to indisputable sovereignty over the Hsisha (Paracel) and Nansha (Spratly) Islands, and their surrounding sea areas. They specifically repudiated the South Vietnamese claims to and designation of any areas of the continental shelf for purposes of exploration and development of its resources that had been made in the South China Sea. On 6 May, at the same meeting of the

125. FBIS (Foreign Broadcast Information Service), PRC, 4 February 1974; AP, Manila, 11 February 1974; FBIS, PRC, 12 February 1974.


Economic Commission of the United Nations Economic and Social Council, the PRC's representative repudiated the resolutions taken at the earlier seventh UN Cartographic Conference for Asia and the Far East, in which the PRC's representative had not participated. The relevant resolutions of the previous conference recommended that a "South China Sea Hydrographic Commission" should be formed and that China's Nansha Islands and the sea area around them be included in the hydrographic plan of this Commission. China re-asserted her sovereignty over these islands and called for a withdrawal of the plan.\(^{128}\)

Since August 1974, the Government of the ROC has even extended its postal service to the Nansha (Spratly) Island for the benefit of the garrison troops and their families.\(^{129}\)

During the Caracas Second Session of UNCLOS III (between 20 June and 29 August 1974), the PRC's delegation leader, Chai Shu-fan, could not accept what the representative of the Saigon authorities had said in his statement concerning the Hsisha and Nansha islands which, as the Government of the PRC had on more than one occasion solemnly declared had always been an inalienable part of Chinese territory. The Chinese Government would not tolerate any infringement of China's territorial integrity and sovereignty by the Saigon authorities.\(^{130}\)

It may be recalled that the PRC had seized the Hsisha (Paracel) Islands from South Vietnam in 1974. In April 1975, the Democratic Republic of Vietnam took over some of the Nansha (Spratly) Islands, ...


\(^{129}\) Sunday Times, 18 May 1975: the former Saigon Government regularly sent thousands of tons of supplies of cement and building materials as well as ammunition, food and water to its South Vietnam garrison.

which had previously still been occupied by South Vietnam. On 24 November 1975, the PRC vigorously reasserted its claim to these islands also, saying that they had belonged to China since ancient times. In addition to their strategic location, comparable to that of the Hsisha Islands, the Nansha Islands may be important because of the speculation that the seabed under the waters around them contains hydrocarbon deposits. In what appeared to be a veiled warning to the Vietnamese, the Kwangming Daily of the PRC averred: "some of the islands still have not been returned to the hands of the Chinese people ... all islands belonging to China must also be returned to the fold of the motherland". The Democratic Republic of Vietnam and the Philippines both indicated that they considered the Nansha matter to be negotiable. However, the Chinese position is determinedly firm: the islands are all Chinese territory and must always remain so. The ROC, which had always maintained a garrison on Taiping (Itu Aba) Island, supported the PRC in its claim to sovereignty over the archipelagoes.

On 16 March 1976, the Democratic Republic of Vietnam issued a new map which included the Hsisha and Nansha Islands in its territory. A spokesman of the Foreign Ministry of the ROC repudiated this claim on 19 March 1976 stating:

It is an indisputable fact that the Hsisha and Nansha Islands have long been an inalienable part of the territory of the ROC.

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132. Ti-tsu Shih, "The South Sea Islands have been China's Territory since Ancient Times", Kwangming Daily, 26 November 1975.
In May 1976, a consortium of three Swedish companies and seven Philippine companies contracted with the Government of the Philippines to engage in oil exploration on Reed Bank, which is situated on the continental shelf of the Nansha Islands. On 28 May, a spokesman of the Foreign Ministry of the ROC said:

The Reed Bank is situated within the Nansha Islands, which is Chinese territory. The government of the ROC has repeatedly declared that the Nansha Archipelago is an integral part of the territory of the ROC. Therefore, no other country can have the right to enter into a contract for oil exploration or exploitation on the Reed Bank.\textsuperscript{135}

Since then, a Swedish-Philippine consortium had been carrying out oil explorations in the Reed Bank area of the Nansha Islands. On 14 June 1976, the PRC issued a strongly-worded statement, firmly repeating its longstanding claim to sovereignty over four groups of islands in the South China Sea, including the Nansha and Hsisha Islands, which had always been part of its territory. It read:

... the resources there belong to China ... any foreign country's armed invasion and occupation of any islets in the Nansha archipelago, or any exploration and exploitation of oil and other resources, is an encroachment on Chinese territory, and impermissible. Any other country's claim to sovereignty over any island is null and void.\textsuperscript{136}

The PRC further said that it considered the Nansha Islands to be part of its territory, and issued a warning against any occupation or exploitation of them. Similar statements against the Philippines' drilling operation have also been lodged by the ROC and by Vietnam.\textsuperscript{137}


The Philippine Foreign Secretary, Carlos Romulo, said on 15 June 1976 that there was no problem between the Philippines and the PRC concerning the Nansha (Spratly) Islands, and that Philippine exploitation and exploration of the islands had been discussed by President Marcos of the Philippines with the PRC leaders during his visit to Peking in June 1975.\(^{138}\) He also maintained that the Nansha Islands were within the continental shelf and the exclusive economic zone of the Philippines.\(^{139}\)

On 24 July 1976, the Philippine Petroleum Association proposed the partition of the South China Sea for the purposes of licensing oil explorations to resolve the conflicting claims of China, Vietnam and the Philippines. The association's president, José de Venecia, Jr., a former minister in the Philippine embassy in the old South-Vietnamese capital of Saigon, said delimitation would be based on "a North Sea-type formula with variations".\(^{140}\) Under this formula, the Philippines would get the Reed Bank (where, claimed President Fernando Marcos, oil had been found by a Swedish-American-Philippine drilling consortium) and the Nansha (Spratly) Islands. The PRC and Vietnam would share the Hsisha (Paracel) Islands.

Despite warnings by the ROC, PRC and Vietnam, in May 1976 an

\(^{138}\) Keesing's Contemporary Archives, 1975, p. 27334.

\(^{139}\) Keesing's Contemporary Archives, 1976, p. 27872.

international consortium involving Swedish, U.S.\textsuperscript{141} and Philippine interests began drilling for oil off the Nansha Islands, on the Reed Bank continental shelf, about 200 miles west of the Philippine island of Palawan. A spokesman for the Philippine National Oil Company said that the drilling had already reached nearly 11,000 feet and was continuing. The Philippine Foreign Minister, Carlos Rómulo, also said that the exploration had nothing to do with these other countries because "the Reed Bank was within the continental shelf of the Philippines, which was declared by the Republic of Philippines to be within the economic exploitation zone of the country, in accordance with the 1958 Convention on the Continental Shelf".\textsuperscript{142}

The problem remains, however, that China (both the PRC and ROC) continue to claim all these areas.

A meeting was held in Manila on 23 August 1976 attended by the PRC, the Democratic Republic of Vietnam,\textsuperscript{143} Thailand, Malaysia, Indonesia


\textsuperscript{143} India offered to help Hanoi to work offshore Vietnamese oilfields abandoned by multinational oil companies which secured exploration rights from the Nguyen Van Thieu regime. \textit{The Guardian}, 27 July 1976.
and the Philippines. The purpose of this meeting was to try to settle the dispute over the Reed Bank area of the Nansha Islands in the South China Sea. A spokesman for the Foreign Ministry of the ROC, Chung Hu-pin, stated on 27 August 1976 that regardless of the meeting's purpose, any agreements made during its course would not be recognised by the ROC. 144

In May 1977 the Democratic Republic of Vietnam again declared that it was extending its territorial sea and 200 mile exclusive economic zone, as a result of which Hsisha and Nansha Islands were taken into its domain. This prompted the ROC to make a statement, in a press conference on 28 May 1977, reaffirming Chinese Sovereignty over the Hsisha and the Nansha Islands; 'any unilateral action shall not alter the status of these islands'. 145

The Soviet Union hinted at support for Vietnam by stigmatising the PRC's action as an exhibition of its expansionist tendencies.

Relations between Vietnam and China were extremely cool during 1977, largely because of the dispute over the Hsisha (Paracel) and Nansha (Spratly) Islands: both of these islands were shown on an official Vietnamese map issued in 1976 as Vietnamese territory. 146

On 20 May 1977, Vietnam declared a twelve mile limit for territorial waters and added that Vietnam would exercise control over an adjacent area also 12 miles wide, 147 and that its 'exclusive economic

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145. Overseas, Digest Fornightly, No. 333, Taipei 1 June 1977, pp. 4-5.


zone' extended to 200 nautical miles from Vietnam's coast. It further stated that 'all the islands and archipelagos belonging to Vietnamese territory and situated outside the territorial waters mentioned' had their own territorial waters and exclusive economic zone, but did not specify the islands and archipelagos in question.  

In a memorandum of 1977, the PRC stated:

The Nansha and Xisha [Hisha] Islands, over which there was never any issue, have now become a major subject of dispute in Sino-Vietnamese relations. Before 1975 the Soviet Union had always recognised that the Nansha and Xisha Islands were Chinese territory. They too changed their attitude as soon as you [Vietnam] created a dispute.  

On 12-16 March 1978, during a visit to the Philippines by the PRC's Deputy Premier, Li Hsien-nien, President Marcos of the Philippines announced that the countries had agreed to settle the dispute over the Nansha (Spratly) Islands in a spirit of friendliness and conciliation.  

A statement issued by the PRC's Foreign Ministry on 27 December 1978, declared that the Nansha (Spratly) and Haisha (Paracel) Islands had 'always been part of China's territory', and that claims to sovereignty over any of the Nansha Islands by any foreign country were all illegal, null and void. The Vietnamese Foreign Ministry, however, rejected these 'arrogant allegations' on the following day, declaring that Vietnamese sovereignty over both groups of islands was inviolable.  

In September 1979, a decree was published in Manila which unilaterally declared the Nansha (Spratly) Islands to be part of Philippine territory,\textsuperscript{152} despite the fact that President Marcos had in 1978 agreed with the PRC and Vietnam to settle any disputes including that involving the Nansha and Hsisha (Paracel) Islands peacefully and in a spirit of friendliness and conciliation.\textsuperscript{153} The decree was aimed at reinforcing the Philippines' claim to a 200-mile exclusive economic zone which extended in the north into the Bashi Channel, where the ROC was also claiming a 200-mile economic zone.

On 28 September 1979, the Vietnamese Foreign Ministry issued a White Book reaffirming Vietnam's claim to the Hsisha (Paracel) and Nansha (Spratly) Islands. The White Book in the first place claimed that:

The Vietnamese feudal state was the first in history to occupy, claim ownership of, exercise sovereignty over and exploit, in the name of the state, these two archipelagos, which had never before come under the administration of any country.

The Vietnamese geographical works of the 17th and 18th centuries were quoted in support of this claim. Secondly, the White Book claimed that the Emperor of Annam had ordered the occupation of the Hsishas (Paracels) in 1816, and his successor had in 1836 commanded that a survey of the islands be carried out and markers be erected. Thirdly, it was claimed that the French Government, which then ruled Vietnam, had annexed the Nansha (Spratlys) in 1933. Fourthly, at the San Francisco Peace Conference in 1951, Tran Van Huu, the then Vietnamese Prime Minister, had reaffirmed Vietnamese sovereignty over the Hsisha

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and Nansha Islands, and this statement had not prompted any protest.
Finally, the South Vietnamese Government had established its control
of the Nansha in 1956, and in 1975 the armed forces of the South
Vietnamese Provisional Revolutionary Government had "liberated" a
number of the islands.154

On 30 January 1980, the PRC's Foreign Ministry, published a
document which, by citing numerous historical records and official
documents, proved China's sovereignty over the Hsisha and Nansha
Islands and exposed the fallacious nature of the Vietnamese authorities'
claims. This document claimed (a) that the Hsisha and Nansha Islands
had been discovered by Chinese mariners, and were described in Chinese
geographical works of the third century A.D.; (b) that the Chinese
Emperor had exercised jurisdiction over them in the 11th century; (c)
that they were shown as Chinese territory on official maps of the 18th
and early 19th centuries; (d) that Li Zhun, Admiral of the Guangdong
Fleet, inspected the Hsishas in 1909, set up stone tablets and hoisted
the Chinese flag, and that two years later the islands were placed under
the administration of Hainan Island. The document therefore concluded
that "consecutive jurisdiction was exercised over them by successive
Chinese Governments for more than 1,000 years".155

A Soviet-Vietnam Agreement on co-operation in exploration and
exploitation of oil and natural gas on the Vietnamese continental shelf
was signed in Moscow on 3 July 1980. On 21 July, the PRC's Foreign
Ministry made a statement warning Vietnam and the Soviet Union not to

155. "China's Indisputable Sovereignty Over the Xisha and Nansha
Islands". China Official Annual Report, 1981, (Hong Kong:
proceed with prospecting off the Hsisha (Paracel) and Nansha (Spratly) Islands, which were claimed by both Vietnam and China (both the ROC and the PRC). The Vietnamese Foreign Ministry described the statement as 'a brazen intervention in Vietnam's internal affairs', and reaffirmed Vietnam's claim to the islands. On 11 June 1982, the PRC again rejected Vietnamese claims to sovereignty over the Hsisha (Paracel) and Nansha (Spratly) Islands in the South China Sea, saying they were absurd and preposterous.

4. The Question of the China-Vietnam Boundary

4.1 A Brief History of Vietnam

Annam (Vietnam) had been under Chinese domination for over a thousand years. During the Han dynasty (206 B.C. - 147 A.D.), Annam was an autonomous kingdom under a vague Chinese suzerainty.

159. In the Russo-Turkish Treaty of 1800, which formed the Ionian Islands into a republic placed under the suzerainty of the Sublime Porte, and described as 'vassal of the Sublime Porte, that is to say dependent on it, subject to it (soumise) and protected by it'; and in the London Convention of 1827, which laid down that the Greeks should hold of the Sultan as of a suzerain, and should pay him an annual redevance in consequence. Von M. Boghitchewitch, Halbsouveränität. Administrative und politische Autonomie seit dem Pariser Vertrage (Berlin: Julius Springer, 1903), pp. 91-93; Malcolm McIlwraith, "The Rights of a Suzerain", 12 LWR (1896), pp. 115-15, 228-29; W.H.H. Kelke, "Feudal Suzerains and Modern Suzerainty", ibid., pp. 215-27. In international law, "suzerainty" means that the country has entire self-government as regards its own internal affairs, but that it cannot take action against or with an outside Power without the permission of the suzerain. Lord McNair, International Law Opinions (Cambridge U.P., 1956), p. 38.
A.D. Annam was again under Chinese suzerainty. The French conquered Cochin-China (southern portion of Vietnam) in 1863 and made it a colony, while the central part, Annam, and the northern part, Tonkin, had remained independent and tributary to China. In 1883 Annam and Tonkin were recognised as French protectorates. After the Sino-French War of 1884-1885, a peace treaty was signed in April 1885 by which China withdrew from Tonkin, abandoned its claim to suzerainty in Indo-China, and recognised the French Protectorate over Annam.

4.2 Sino-French Boundary Convention, 1887

The boundary between China and Vietnam was delimited under two conventions between the French Government and the Chinese Empire signed in Peking in 1887, stones being erected to mark the frontier. The 1887 Convention concerning the delimitation of the Frontier between China and Tonkin (Vietnam) was signed on 26 June 1887. Article 3 provides:

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161. Cochin-China being so named by the Portuguese, is called in the language of the original inhabitants. Annam, which is the west, in that it is situated on the west of China. Christofer Borri, Cochin-China (London: Robert Raworth, 1633), p. 13.

Au Kouang-Tong, il est entendu que les points contestés qui sont situés à l’est et au nord-ouest de Monkaï, au-delà de la frontière telle qu’elle a été fixée par la commission de délimitation, sont attribués à la Chine. Les îles qui sont à l’est du méridien de Paris 105° 43, de longitude est, c’est-à-dire, de la ligne nord-sud passant par la pointe orientale de l’île de Teha-Kou ou Ouan-chan (Tra-co) et formant la frontière sont également attribuées à la Chine. Les îles go tho et les autres îles qui sont à l’ouest de ce méridien appartiennent à l’Annam.\textsuperscript{163}

In conformity with this boundary treaty, islands to the East of the 105° 43 of longitude East of Paris were clearly adjudged as belonging to China. It appears that the Hsisha, Chungsha, Tungsha and Nansha Islands are situated east of the above-mentioned meridian.\textsuperscript{164}

In this context, it may be of interest to compare the above provision with Article 3 of the 1881 Argentine-Chile Boundary Treaty, which provided:

In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espiritu Santo, in parallel 52° 40’, shall be prolonged to the south along the meridian 68° 34’ west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.\textsuperscript{165}

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\textsuperscript{163} See Fig. 11, p. XXX. "Convention relative à la délimitation de la frontière entre la Chine et le Tonkin, signée à Pikin le 26 Juin 1887", Recueil des Traites de la France, Tome Dix-Siètieme 1886-1887 (Paris: A Durand et Pedone-Lauriel, 1891), p. 387 italics added.

\textsuperscript{164} Cf. Art. 3(1) of the 1969 Vienna Convention on the Law of Treaties which stipulates: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Georg Schwarzenberger, "Myths and Realities of Treaty Interpretation", 22 Current Legal Problems (1969), pp. 219-21; Louis B. Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties", 150 Recueil des Cours (1976-II), pp. 205-90.

\textsuperscript{165} Award of Her Britannic Majesty’s Government pursuant to the Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and the Republic of Chile concerning the region of the Beagle Channel (London: HMSO, 1977), p. 9.
The Chinese-Vietnamese boundary extends 796.4 miles eastward from the Laos tripoint to the northern distributary of the Pei-lun on the Gulf of Tonkin. For 505.9 miles (63.2% of the total), the boundary follows water divides, both major and minor, within the Yunnan Plateau and the highlands of East Tonkin. Rivers and streams form the frontier for an additional 113.6 miles (27% of the remainder). The remaining 9% of the border has been delimited by straight line segments (13.3 miles) or by numerous other features (40.8 miles).

The entire boundary has been demarcated and no territorial disputes are known to exist.
The Beagle Channel Arbitration called for the examination of voluminous historical and geographical material which the Tribunal carried out with meticulous thoroughness, itself making an inspection of the Beagle Channel region. In the Award, three islands - Picton, Nueva and Lennox - located where the Beagle Channel opens out into the Atlantic, and claimed as part of its territory by both Chile and Argentina, were pronounced to belong to Chile. The Tribunal relied on a strict and literal interpretation of the provisions of the 1881 Treaty and its Protocol (1893); despite this, Article 3 was not wholly free from ambiguity: for example, it stated that 'to Chile shall belong all the islands to the South of the Beagle Channel up to Cape Horn and those there may be to the west of Tierra del Fuego'. At least Picton was not demonstrably 'south of the Beagle Channel', and all three islands were to the east of the meridian of longitude of Cape Horn and were not obviously islands 'up to Cape Horn', given the westerly location of Chile and its territories. The Tribunal held: 'since these islands are not attributed at all by Article 3, they are automatically Chilean'.

Moreover, in the Brazil-British Guiana Boundary Arbitration, as has been mentioned above, the Tribunal held that:

The frontier ... is fixed by the line leaving Mount Yakontipu; it follows eastwards the watershed as far as the source of the Ireng (Mahu); it follows the downward course of that river as far as its confluence with the Takutu; it follows the upward course of the Takutu as far as its source, where it joins again the line of frontier determined in the Declaration annexed to the Treaty of Arbitration concluded ... on the 6th November, 1901.

In virtue of this declaration every part of the zone in dispute which is to the east of the line of frontier shall belong to Great Britain, and every part which is to the west shall belong to Brazil. 167

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166. Ibid., pp. 63-64, para. 106.
167. 1904 XI RIAA, p. 23.
The frontier along the Ireng (Mahu) and Takutu was fixed at the thalweg (or mid-channel) as the boundary line; wherever the water-course divided into more than one branch, the frontier was to follow the thalweg of the most eastern branch.

The conclusion may be drawn from the above evidence that, since the Hsisha (Paracel) and Nansha (Spratly) Islands lie east of the demarcation line established by the 1887 Convention, they should be included in Chinese territory. 168

4.3 Vietnamese Legislation

South Vietnam proclaimed on 7 September 1967 that the continental shelf, with all the natural resources found therein, adjacent to the territorial sea of Vietnam, was under the exclusive jurisdiction of the government of the Republic of Vietnam.

The Petroleum Law of 1 December 1970 provided that the ownership and the control of all natural petroleum deposits, not only within the territory of the territorial waters of the Republic of Vietnam but also within its continental shelf, should all belong to the State. The continental shelf was defined as including "the seabed not more than 200 metres deep, or if more than that, a depth which still admits of exploitation of natural resources by technical means". 169

168. The 796.4 mile boundary between Vietnam and China has been delimited by acts and demarcated by official boundary commissions established by China and France. The alignment of the boundary is shown correctly on the Carte de l'Indochine 1 = 100,000 published by the French Service Geographique de l'Indochine and on the series Indochine-Carte de la Frontiere du nord-ouest 1 = 200,000 published by the same source. Chinese maps delineate the boundary in the same manner. "China-Vietnam Boundary". IBS, No. 38 (The Geographer: Office of Research in Economic and Science Bureau of Intelligence & Research, 1964), p. 6.

169. Law No. 011/70.
An Order of 9 June 1971, provided in Article 1:

It is hereby declared that a part of the waters and continental shelf of the Republic of Vietnam ... including the islands there, be open for petroleum exploration and exploitation concessions. 170

Article 2 indicated the following points, which connect to form a closed line determining the seaward boundary of that part of the continental shelf which is open for concessions:

| 11° 00' N | 108° 36' E | 8° 31' N | 101° 56' E |
| 11° 00' E |           | 9° 36' N | 101° 30' E |
| 7° 05' N  | 107° 20' E | 10° 09' N | 101° 27' E |
| 7° 20' N  | 107° 52' E | 10° 03' N | 103° 31' E |
| 7° 34' N  | 103° 19' E | 10° 22' N | 103° 41' E |
| 7° 42' N  | 102° 58' E |           |          |

In conformity with what is specifically stipulated in Article 2 of this Order, the areas claimed by South Vietnam apparently do not include the Hsisha (Paracel) and Nansha (Spratly) Islands. 172 Precisely what is the reason for this is not clear; it may well be that the Vietnamese government at that date did not regard these islands as belonging to Vietnam.

4.4 Gulf of Tonkin

In United States v. Louisiana, Justice Harlan said:

170. Order No. 249 - BKT/VP/UBQGDH/ND.

171. Ibid.

A land boundary between two states is an easily understood concept. It marks the place where the full sovereignty of one State ends and that of the other begins. The concept of a boundary in the sea, however, is a more elusive one.\footnote{173}

A dispute had arisen between the PRC and Vietnam over the sea area in the Gulf of Tonkin.\footnote{174} According to a Vietnamese memorandum, the 1887 Sino-French Boundary Convention fixed the borderline at 105° 43' longitude east of the Paris meridian, or 108° 3' longitude east of the Greenwich meridian. Vietnam contend that this demarcation line constitutes the sea boundary in the Gulf of Tonkin. The effect of that position would be to award two-thirds of the Gulf to Vietnam.\footnote{175}

On 12 May 1973, Han Nian-long, the PRC's Deputy Foreign Minister, asserted that this article of the convention referred only to the islands in the Gulf of Tonkin, and did not lay down a sea boundary line.

On 26 December 1973, North Vietnam informed the PRC of its intention to prospect for oil in the Gulf of Tonkin, and proposed that negotiations should be held on the delimitation of the border. The PRC accepted this proposal on 18 January 1974, but stipulated that prospecting should not take place in the area between the 18th and 20th parallels and the 107th and 108th meridians, and that third countries should not be involved in the exploration and exploitation of the Gulf. Negotiations opened in Peking on 15 August 1974. According to Vietnamese memorandum, the Chinese side refused to accept the boundary-line laid

\footnote{173}{363 U.S. 1, 33 (1960).}

\footnote{174}{Known to the Chinese as the Beibu Gulf and to the Vietnamese as the Bac Bo Gulf.}

down in the 1887 Convention, or to put forward any alternative. In 1977, Li Hsien-nien (Li Xian-Nian), a PRC Deputy Premier, said:

The Vietnamese comrades' attitude to the division of the Beibu Gulf sea area cannot be considered as friendly. The sea area here has never been divided, yet you [Pham Van Dong, the Vietnamese Prime Minister] assert that it has. You insist on drawing a dividing line close to our Hainan Island, so as to occupy two-thirds of the Beibu Gulf sea area. Being neither fair nor reasonable, this is unacceptable to us .... 176

Here is a conflict between the PRC and Vietnam concerning the interpretation of the 1887 Sino-French Boundary Convention. In the event of doubt, restrictive interpretation must be the rule, since - according to Article 31 of the 1969 Vienna Convention on the Law of Treaties - the ordinary meaning, object and purpose, as well as the inter-temporal element must be taken into consideration for its interpretation. 177

In October 1977, the PRC refused to discuss the boundary unless the Vietnamese agreed to abandon their insistence that the sea-boundary had been previously established in the 1887 Sino-French Boundary Convention. As a compromise, the Vietnamese proposed that the land boundary should

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first be discussed, and that each side might maintain its own views on the Gulf of Tonkin, which would be the subject of further negotiation. Since no agreement was reached over the land boundary, the question of the sea boundary also remained unsettled. When the 1979 Amoco-PRC Agreement was announced in July, revealing that Amoco would conduct geophysical operations in an area of the Tonkin Gulf on the Chinese side of the median line but within a so-called "hands-off" zone, Vietnam labelled the proposed surveys 'a brazen violation of the territorial integrity of Vietnam and its sovereignty over its natural resources', and a warning was issued to foreign oil companies involved in surveys to the effect that they must "bear the consequences" of their actions. The Vietnamese claimed that Amoco's designated block lay within a neutral zone in the Tonkin Gulf, where China and Vietnam had agreed in 1974 not to explore for oil until ownership was mutually determined. Vietnam therefore argued that the Amoco-PRC Agreement violated this earlier accord.\textsuperscript{178} It has been suggested that the position of U.S. oil companies in the Gulf of Tonkin was politically motivated:

\textsuperscript{178} For details, see Cole R. Capener, "Legal Aspects of Sino-American Oil Exploration in the South China Sea", \textit{14 The J. of International Law and Economics}\ (1979-80), pp. 443 - 83.
... the involvement of U.S. firms in and near contested areas in the South China Sea effectively merges U.S. and Chinese interests in the event of a flareup of the long-standing territorial dispute. The second subtlety of the move is Peking's attempt to preempt Hanoi's hope to woo U.S. oil companies to aid in Vietnam's offshore oil activities. 179

Hanoi's reaction was sharply critical, and although Peking ultimately postponed the surveys for six months, the ingredients for confrontation remain.

In July 1980, the Soviet Union also signed an agreement with Vietnam for joint exploration of the disputed submarine areas; this prompted the following statement from the PRC's Foreign Ministry:

It is illegal for any country to enter these areas without China's permission to carry out exploration, exploitation and other such activities, and any agreement or contract concluded between other countries for these purposes in the aforesaid areas is null and void. 180

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5. The Question of Continental Shelf Delimitation in the South China Sea

5.1 The Geological Description of the South China Sea

The water lying south of China, bounded to the west by Vietnam, to the east by the Philippines and to the south by Borneo, are always described on western maps as the South China Sea.

Geographically, the South China Sea is a large body of water on the southeastern shore of the Asian Continent. It is separated from the Pacific Ocean by Taiwan, the Philippine islands, Brunei, certain of the Indonesian islands and those of Malaysia. It is one of a number of semi-enclosed seas that surround the whole eastern edge and south-eastern corner of Asia, flanked by a chain of island arcs.

The South China Sea may be divided into two main geographical regions, with the dividing line running between Cap St. Jacques in the west to Barum point in the east. A large part of this sea area lies on a continental shelf to the south, known as the Sunda Shelf, with depths of less than 100 fathoms. The continental shelf, which connects the three large islands of Sumatra, Borneo and Hava with the Asian mainland, is adjacent to the territories of Brunei, Indonesia, Malaysia and Vietnam.

The main basin of the South China Sea is contiguous to the Gulf of Tonkin in the northeast, through the Sunda Shelf, to the Gulf of Thailand on the west and is also surrounded by Brunei, Mainland China, Indonesia, Malaysia,
the Philippines, Taiwan and Vietnam.

The northern half of the South China Sea is a deep basin with a vast abyssal plain, where depths exceed 100 fathoms. In this northern area the shelf is confined to the coastal regions, its width varying considerably owing to the coast's configuration. Off South Vietnam the mean width of the shelf is twelve miles: further north, off the south coast of China, the width increases to 150 miles. In the eastern part of this area, the shelf is limited to a narrow coastal strip with a mean width of twenty miles, extending from Luzon to North Borneo; but in the west of the South China Sea, the shelf forms a large embayment which includes Hainan and the Gulf of Tonkin.

This region is topographically complex and warrants detailed consideration. The deep shelf 'off shelf waters' can be subdivided into three regions: the deep sea basin, the Palawan Trough and, between these two deeps, a comparatively shallow plateau on which there are numerous islands, coral reefs and banks. Two other features are the West Luzon Trough, 2600 metres deep, and the Manila Trench, west of Luzon, which is 5000 metres deep.

Along the north-western boundary of the basin, the continental slope is gentle and falls to a depth of 1000 fathoms over a mean distance of 100 miles: to the south, off Vietnam, the slope is much steeper, and depths of 1000
fathoms are reached within forty miles of the coast.
Along the eastern boundary, off Luzon and Palawan, the
slope is very steep; the shelf drops away to 1000 fathoms
within a distance of twenty miles. There are a few large
shallow areas within the limits of the deep sea basin: the
Macclesfield Bank and the Paracel Islands and Reefs, which
consist of an extensive group of low-lying islands and reefs
with deep passages between them. 181

It is therefore, clear that the complex geological
factors of this northern region of the South China Sea need
to be considered in the question of shelf delimitation around
the Nansha (Spratly) and Hsisha (Paracel) Island groups,
since both lie in the northern sector.

181. See Fig. 13, p. 907. Underwater Handbook, No. 1, N.P. 623.
China and Jawa Seas (London: Hydrographer of the Navy,
1968) Ch.5, pp.5-1,5-3, nn.5.1,5.7. UN Eco. Comm. for
Asia and Far East, Comm. for Co.ordination of Joint
Prospecting for mineral Resources in Asian Offshore
Tao Cheng, 'The Dispute over the South China Sea
Islands'. 10 Texas ILJ (1975), pp.265-77; Chiu & Park
op cit., 3 ODIL (1975), pp.1-28; Ely and Pietrowski,
Jr., 'Boundaries of Seabed Jurisdiction off the
Pacific Coast of Asia', 8 Natural Resources Lawyer
(1976) p.625; Harrison, op cit., pp.91-100, 124; Chiu
756-57; Stephen W. Ritterbush, 'Marine Resources and
the Potential for Conflict in the South China Seas',
2 The Fletcher Forum (January 1978), pp. 64-85;
Greenfield, op. cit., pp. 143 et seq.; William R.
Feeoney, 'Dispute Settlement, the Emerging Law of the
Sea, the East Asian Maritime Boundary Conflicts', 8
Asian Profile (1980), pp. 583-84; Justus M. Van der
kroef, 'Competing Claims in the South China Sea', 9
Figure 13: South China Sea

Source: British Admiralty Chart No. 1263
5.2 The Seabed Delimitation of the South China Sea

5.2.1 Submerged Land areas

It will be noted that there are a good number of submerged shoals and banks in the Nansha Islands. Some of them are constantly covered by waters. China (both the ROC and the PRC) and the Philippines claim submerged shoals and banks of the Nansha groups in the South China Sea. Thus, one of the crucial questions is whether these submerged land areas are legally susceptible to state appropriation.

There seems never to have been any theoretical or practical dispute as to whether submerged land areas are in general subject to appropriation by states. There have been numerous disputes, both amongst writers and in the practice of states, as to the manner in which land areas may be acquired and, particularly, as to the degree of state activity necessary for their valid exclusive acquisition. But it never seems to have been asserted that

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182. The term 'shoal' denotes an area covered by shallow water, a part of which is not submerged at lowest low tide. Royal Decree concerning the Territorial Waters of the Kingdom of Saudi Arabia (Royal Decree No. 33 of 16 February 1958), UN Doc. ST/LEG/SER.B/15 (1970), p.114

183. On 2 March 1978, Panata was occupied by the Philippines and which was described as 'little more than a sand-bar', with no vegetation or fresh water. Keesing's Contemporary Archives, 1978, p.28913.
an area of land is, on account of its being desert, swamp, or jungle, or permanent ice-cap, incapable of state appropriation. Such areas have been claimed by states as a general practice; boundaries have been established in them by neighbouring states; international arbitration tribunals have dealt with claims to sovereignty in respect of them with relatively little comment as to any special problem which they might raise.

It might be surmised that the practice of states and of judicial and arbitral tribunals implies that all land areas, whether or not inhabited, or in need habitable, are in principle susceptible to appropriation by states. Thus, for example, in the Bulama Island Arbitration (Great Britain - Portugal), the sovereignty over the Island of Bulama on the West Coast of Africa and over a certain portion of territory opposite this island on the mainland, was proved and established by the Portuguese Government. This award was based on the Portuguese possession of the mainland and the appurtenance of the island without regard to whether or not the disputed areas were subject to appropriation. The British Guiana - Venezuela and British Guiana - Brazil Boundary Arbitrations concerned substantial areas which

184. (1870) 61 BFSP. p.1103; J.B. Moore, International Arbitration Vol. 11, p.1909
185. (1899) Parl. Papers (C.9533) 1899, No. 7; 92 BFSP p.160
186. [1904] XI RIAA, p.11
not only at the time of their adjudication (1899 and 1904 respectively) were virtually uninhabited, but have substantially remained so up to the present day. The former award was pronounced without reasons being given and, therefore, furnished no guide as to the views of the arbitral tribunal. In the latter award, mention is made only of the paucity of acts of sovereignty by either party so that not even the zone of territory over which the right of sovereignty of one or other of the two Parties may be held to have been established and can be fixed with precision. No doubt the same was true in both arbitrations as they concerned very similar areas. Nevertheless, in both cases, the arbitral tribunals determined the course of the boundary between the states without suggesting that any area was not subject to appropriation.

The major awards relating to territorial disputes of the 20th century are, as had already been mentioned, the Island of Palmas, Clipperton Island, and the Minquiers and Ecrehos Cases. Characteristically, they relate to territory of little significance - small, isolated islands. The other major internation adjudications relating to land territory are the Eastern Greenland and the Western Sahara.

189. ICJ Reports, 1953, p.47. See above, Chs. 3,4.
191. ICJ Reports, 1975, p.6.
cases; these cases did not involve conflicting claims to sovereignty, but rather decisions as to whether the territory in question was res nullius or under the sovereignty of Denmark-Norway and Morocco-Mauritania respectively at a certain date.

The reasoning behind these awards is quite simple: it involves merely a balancing of the activities of the parties with regard to the territory and awards in favour of the party displaying relatively more activity and closer links with the territory. Again it displays the characteristics noted in the boundary awards: that the traditional concepts of international law relating to the acquisition of sovereignty over territory area of little assistance in determining concrete disputes. It is further to be noted that in these awards the tribunals were all explicitly directed to determine whether sovereignty rested with one party or another: the possibility of division of the territory or condominium was excluded, as was also the possibility of designating the area with the status or territorium nullius. Accordingly, the decisions do not display the same detailed discussion of the issues as is found in boundary awards.

192. In the Minquiers and Ecrehos Case, the Court observed that the terms in which the question before it was formulated required 'to determine which of the Parties has produced the more convincing proof of title to one or the other of these groups, or to both of them. By the formulation of Article 1 the Parties have excluded the status of res nullius as well as that of condominum'. Art. 1 of the compromis between Great Britain and France of 1950. ICJ Reports. 1953, p.52
In the Island of Palmas Arbitration, the dispute related to sovereignty over the Island of Palmas which is situated between the Philippines and the Dutch East Indies. Sovereignty was claimed by both the Netherlands and the United States of America. The Permanent Court of Arbitration was not asked whether this island was ipso jure susceptible to appropriation. Similarly, in the Clipperton Island Arbitration, the issue of sovereignty over an uninhabited Pacific Island was adjudicated, again without reference to any question of whether the island was ipso jure susceptible to state appropriation.

In the Legal Status of Eastern Greenland Case the PCIJ adjudicated the issue of sovereignty over Greenland without reference to the issue of whether an area of which only a narrow coastal strip was at all habitable - and that very sparsely populated and mainly used for seasonal hunting and fishing - the rest being permanent 'Inland Ice' - could be appropriated in toto. In this context the Court only observed that:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.193

The issue was treated as one regarding the relative, if limited exercise of state functions, rather than one raising the questions of whether the area was capable of appropriation or not.

193. PCIJ Series A/B, No. 53, p.46.
To some extent, however, it may be that international tribunals have considered themselves barred by the terms of reference of any issue concerning sovereignty from entering into any discussion of whether the area at issue was in law susceptible to state appropriation. In the Minquiers and Ecrehos Case, the ICJ adjudicated the issue between Great Britain and France concerning sovereignty over certain uninhabited islets or rocks in the English channel. It is lex lata that territory, in order to be capable of appropriation of sovereignty, must be situated permanently above the high-water mark and not consist, for example, of a drying-rock only uncovered at low-tide, unless it is already within the territorial waters of appropriable territory. In the Minquiers and Ecrehos groups there were a good number of such rocks. Therefore, in the compromis submitting the case to the Court, the parties had introduced a phrase

requesting the Court to determine whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic.

195. The object of the phrase underlined above was to render it unnecessary for the parties to argue, or for the Court to determine whether any particular islet, reef, or rock was or was not in fact capable of appropriation, as being permanently above the high-water mark. The effect of the phrase is that the successful party would have declared sovereignty over the groups as such and this would extend to all the islets, reefs and rocks that fulfilled the required conditions, and that no actual determination of these would be necessary. It was, however, contended on behalf of France that this phrase meant not only that the islets, reefs and rocks must be physically capable of appropriation, but that they also must be juridically so; the United Kingdom contended in reply that this argument, even if otherwise well founded, involved a misconstruction of the relevant phrase in the compromis because this phrase related to the character of the islets, reefs and rocks, not to the capacities of the parties who might or might not be incapacitated from appropriating the groups; but the islets, reefs and rocks,

situated above high-water mark (or within the territorial waters of the islet, reef and rock so situated) clearly were capable in themselves of appropriation, and this was what was denoted by the phrase in the *compromis*.196

The formulation does not seem to have precluded the Court from deciding that the islets, reefs and rocks were not in law 'capable of appropriation'. In fact, the Court implicitly endorsed the rule that certain kinds of territory are not ever capable of juridical appropriation. The obvious example is that of the islet, rock, bank or shoal which is only uncovered at low-tide. Nevertheless, this example may have been rendered less simple in its application than formerly by reason of the modern doctrine of the continental shelf. If territory is claimed *qua*

196. This view was endorsed by the Court, which said 'these words must be considered as relating to islets and rocks which are physically capable of appropriation. The Court is requested to decide, in general, to which Party sovereignty over each group as a whole belongs, without determining in detail the fact relating to the particular units of which the groups consist.' ICJ Reports, 1953, p.53. The Court unanimously decided that 'the sovereignty over the islets and rocks of the Ecrehos and Minquiers groups, in so far as these islets and rocks are capable of appropriation belongs to the United Kingdom' ibid., p.72. See also Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II', 32 *BYIL* (1955-6), p.20, at pp.46-47; Cf. D.H.N. Johnson, 'The Minquiers and Ecrehos Case', 3 *ICOL* (1954), p.14; E.C. Wade, 'The Minquiers and Ecrehos Case', 40 Transactions of the Grotius Society (1954), p.97; A.G. Roche, *The Minquiers and Ecrehos Case* (Geneva: Librairie Droz, 1959), pp. 178-186.
continental shelf, the mere fact that it is submerged is irrelevant to the claim, the validity of which will depend on other facts (and in any event territorial waters will be generated) but if the territory is claim qua land and not as sea-bed, then the question of submergence remains fully relevant. There may be other kinds of territory which are not physically capable of juridical appropriation, such as the unsettled question of icebergs, ice-shelves and frozen sea. It can be argued that both ice-islands formed from ice-shelves and ice-floes can be occupied by man and that the mere fact that territory is uninhabited or even uninhabitable on a normal basis does not render it legally incapable of appropriation.

197. There are two kinds of icebergs. The glacier type are chunks of glaciers or ice-tongues, which are broken off by tidal or wave action. The tabular type originate from the ice-shelves, the large ones like the Ross ice-shelf as well as the smaller ones all around the coast, where the ice cap protrudes into the sea. The question arises whether these icebergs can be occupied. For occupation only the tabular type could be considered. See M.W. Mouton, 'The International Regime of the Polar Regions', 107 Recueil des Cours (1962-III), pp.207-08. Cf. Donat Pharand, The Law of the Sea of the Arctic (Ottawa: Univ. of Ottawa Press 1973) pp.190-204.

198. In the Clipperton Island Arbitration, the umpire decided that France, who had acquired title over an island in 1858, was still sovereign in 1897, although she had done virtually nothing to maintain that sovereignty in the meantime. II RIAA, p.1105; Cf. the Legal Status of Eastern Greenland Case PCIJ Series A/B, No. 53, p.46. See Fitzmaurice, op. cit., 32 BYIL (1955-6), pp.47-48; C.H.M. Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', 25 BYIL (1948), pp.314-17; Rene Dollot, 'Le droit international des espaces polaires', 75 Recueil des Cours (1949-II), p.121; Symmons, op. cit. pp.22-23.
To conclude, it might thus be submitted that the practice of states of judicial and arbitral tribunals suggests that all land areas, whether inhabited or habitable, are in principle susceptible to appropriation by states. Indeed, there are some principles of international policy excluding submerged land areas which are constantly covered by waters from subjection to state appropriation. 199

5.2. Low-tide Elevations

While the baseline provides an apparently simple solution to the problems of variations in the coastline, particular problems, can arise with islands, rocks and low-tide elevations adjacent to the coast; the baseline should be adjusted taking these factors into account. It will be recollected that in the South China Sea, China (both the ROC and the PRC) claims submerged shoals and banks in the Nansha Islands. Some of these banks and shoals are indeed situated on the same continental shelf. If the South China Sea islands so generate continental shelves, the banks and shoals could be claimed by either the ROC or the PRC as being on their respective continental shelves. Since some

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199- In the Anglo-Norwegian Fisheries Case, the Court said: 'It is the land which confers upon the coastal state a right to the waters of its coasts' ICJ Reports, 1951, p.133. In the Rann of Kutch Arbitration, the Rann had been deemed incapable of permanent occupation, so the requirement of possession could not play the role which it would otherwise have played. [1968] 50 ILR, p.2
of these shoals and banks are unrelated to any nearby islands, and the principle of 'proximity' does not confer any title to sovereign rights over the continental shelf or to the nearby islands, title to their territorial sea may be claimed by either the ROC or the PRC. As has already been discussed in Chapter 7, a low-tide elevation is a naturally formed area of land which is surrounded by, and is above water at low-tide, but is submerged at high tide. It may be composed of rock, reef, sand, silt or mud. If it is located wholly or partially within a state's territorial limits, its low-water line may be used as the baseline for measuring the territorial sea boundary.

5.2.3 Exposed Rock and Islets

As previously stated, both the ROC and the PRC consider the continental shelf as the natural prolongation of the 'land territory' (or 'continental territory') under the sea. In applying this principle to the mid-ocean islands, such as the Hsisha and Nansha Islands in the South China Sea, it appears that these islands should not be the basis for determining any continental shelf. It will be observed that the ROC's reservation to Article 6 of the 1958 Continental Shelf Convention explicitly excludes 'exposed rocks and islets' in delimiting its continental

200 lu-ti ling-tu in Chinese (ROC); ta-lu ling-tu in Chinese (PRC).
shelf boundary. However, it may be argued that the ROC's reservation concerns the delimitation between two or more states on the same continental shelf, which does not affect mid-ocean islands; that is, mid-ocean islands still have the same status as the land territory.\footnote{Chiu, op. cit., China Quarterly, No. 72 (1977), p.743, 759.}

The PRC's proposed definition of the continental shelf, as has been seen, refers to the 'continental territory'. It may thus be interpreted as denying any individual continental shelf for islands. On 2 April 1974, at a meeting in Colombo of the 30th Session of the UNECAFE, the PRC's delegate Hung Ming-tu said, while discussing the problem of prospecting for mineral resources in the Asian offshore areas:

\begin{quote}
China hereby reiterates that all seabed resources in China's coastal area and those off her islands belong to China. China alone has the right to prospect and exploit these seabed resources.\footnote{'Chinese Representative Speaks at ECAFE Meeting' Peking Review, Vol. 17, No.15, 12 April 1974, pp.6-7 [italics added]. See above, Ch.8, p.784.}.
\end{quote}
It will be recalled that on 6 May 1974, at the Economic Commission of the 56th Session of the United Nations Economic and Social Council, the PRC's delegate Wang Tzu-Chuan said that:

Nanska as well as Hsisha, Chungsha and Tungsha islands have always been China's territory and that the PRC has indisputable sovereignty over these islands and the sea areas around them. The term 'sea areas' may indicate that the PRC claims a broader shelf area around these islands. As the PRC supports the 200-mile exclusive economic zone, it also claims the right to exploit the sea-bed in a 200 mile arc surrounding them.

The PRC's working paper for the UNCLOS III on sea area within the limits of national jurisdiction recognizes that a territorial sea exists for islands, and even recognizes the 'archipelagic principles' in delimiting an island's territorial sea. The application of these principles in the case of the South China Sea islands would give Communist China a very large sea area. Moreover, in its working paper on economic zones, the PRC did not preclude in relation to islands the assertion of an economic zone beyond their territorial sea.

203. NCNA. 13 May 1974, pp.25-26 [italics added]. See above Ch. 8.
204. UN Doc.A/AC.138/SC II/L.34 (1973); 12 ILM (1973) pp.1231-234.
foregoing, it is clear that the PRC might claim that the South China Sea islands can generate territorial seas and economic zones.

With regard to Article 121 of the Draft Convention on the Law of the Sea, which stipulates that rocks which cannot sustain human habitation or economic life of their own shall have no economic zone or continental shelf; the PRC has maintained silence during the UNCLOS III; if this implies 'acquiescence', then the principle of recognition would apply. 205

5.2.4 Straight Baselines

The exclusive economic zone (EEZ), as was discussed very briefly in Chapter 1, emerged in UNCLOS III negotiations and is a zone sui generis, but subject to to residual high seas freedoms, of 200 nautical miles' width, from the baselines used to measure the breadth of the territorial sea. Few writers have drawn attention to the fact that the breadth of the EEZ is measured not from the coast but from the baselines, and that the coastal States may draw straight baselines of great lengths enclosing vast sea areas as internal waters. For examples, the Philippine Islands consist of some 7,10½ islands arising from a common submarine platform. Under an Act of 17 June 1961, as has already been mentioned in Chapter 7, a series of 80

205. See above, Ch. 4, pp.297-318
straight baselines - completely enclosing the islands, with an average length of 102 miles, the longest being 140 miles - was drawn. They enclose the entire Sulu Sea and close the important Surigas Strait, Sibutu Passage, Balabac Strait and Mindoro Strait and produce a water/land ratio of 1,81a:1:1.206

In addition, the baselines employed by the Philippines in the vicinity of the 118°E meridian in the eastern part of the South China Sea in some places lie over 100 miles off the coast of Luzon Island. The waters within the baselines are treated as internal waters. The legal justification for this is based on historical,207 economic and strategic criteria, and on the necessity of security and control over these sea areas. Any attempt by the Philippines to measure its territorial sea or economic zone from this line would

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207. In the Anglo-Norwegian Fisheries Case, the Norwegian seaward area of 4 miles was established by reason of a prescriptive derogation from the general rule. ICJ Reports, 1951, p.116. In the Philippines' Case however, Professor O'Connell said that there is no historical evidence that Spain had exercised jurisdiction over the entire sea areas prior to 1898, or that the U.S.A. did so thereafter. The U.S. protested against the Philippines' straight baselines by a Note of 18 May 1961. O'Connell, op. cit., 45 BYIL (1971).
inavoidably result in conflict with China's (both the ROC and PRC) claim to the Nanyen Rock (or Huang-Yen Island as it is called) on the PRC's map and its sea area. It will be recollected that many shoals claimed by the ROC and the PRC in the eastern part of the Nansha Islands are separated by the Palawan trench; nevertheless, the Philippines has drawn a baseline far beyond the coast of Palawan Island, not far from several shoals claimed by either the ROC or the PRC. Any attempt by the Philippines to claim a territorial sea or an economic zone from this baseline would indeed be opposed by the Chinese since the length of such baselines would contravene the restriction of Article 147(2) of the Convention on the Law of the Sea, which expressly states that the maximum length is 125 nautical miles. Although this law is a lex ferenda, the

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208. The Nanyen Rock is located at approximately 117°50'E and 150°N, near the west part of the Philippines' Luzon Island, and is separated from Luzon Island by a sea area beyond 200 metres depth.

209. Cf. Art.147(3)(4): 'The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them...'

210. It has been shown earlier that international judicial and arbitral tribunal cannot render judgment sub specie legis ferendae. See Fisheries Jurisdiction Case, ICJ Reports, 1974, p.3. See above, Ch.
Preamble of the Convention purports that 'a new and generally acceptable Convention on the law of the law' is being laid down. Article 311 of the same Convention provides that 'this Convention shall prevail, as between States Parties, over the Geneva Convention on the Law of the Sea of 1958'. Moreover it will be remembered that the ICJ in the Anglo-Norwegian Fisheries Case held that 'it had no difficulty in finding that for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States'. The regime of the territorial sea came within the domain of international law, and its baselines could only be determined by that law, so that the claims of individual States to extend the sea areas unilaterally could have little legal validity under the contemporary international law.

5.2.5 Archipelagic Principle

A special issue for the delimitation of sea areas in the South China Sea is the proposed 'archipelagic principle', which is an extension of the normal baseline method. In simplified form, it involves drawing a series of straight lines around

211. See, e.g., the Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.146. In the Nottebohm Case, the ICJ laid down that the provisions of a state's municipal laws are not necessarily conclusive to establish its right to exercise diplomatic protection under international law. ICJ Reports, 1955, p.23
the outside of the islands of the archipelago, rather than plotting each island's baselines separately. This has the effect, as has been mentioned in Chapter 7, as is the case in Indonesia\textsuperscript{212} and the Philippines,\textsuperscript{213} of including in territorial waters, inland sea and passageways, which would otherwise qualify as high seas.

There has been some bilateral practice in using straight baselines in an agreement for the delimitation of continental shelf; for instance, the 1969 Indonesia-Malaysia Agreement on the Delimitation of the Continental Shelves in which straight baselines connecting distant islands, in one case 240 miles from the main island of Borneo, were delineated.\textsuperscript{214}

\begin{enumerate}
\end{enumerate}
On 25 February 1982, Malaysia recognised Indonesia's 'archipelagic principle' under the principle, Indonesia lays claim to all the waters enclosed within lines drawn from the outermost points of its more than 13,000 islands, covering some 660,000 square miles of ocean. Malayan recognition of the claim is included in a maritime agreement signed in Jakarta. It relates particularly to the waters of the South China Sea and those between peninsula and East Malaysia. In turn, Indonesia recognises Malaysia's traditional fishing rights and rights of free passage for the laying of undersea cables. 215

In a working paper, the PRC proposed to the United Nations Sea-Bed Committee that:

An archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it. 216

215. David Watts, 'Indonesia's Sea claim supported', The Times, 26 February 1982, p.5

The archipelagic baselines, if applied to the South China Sea Islands, might be extended to the delimitation of the archipelagic continental shelf, in which case more complications would arise. Had China (both the ROC and the PRC) applied the archipelagic principle in delimiting its South China Sea island's territorial sea boundary, it would definitely gain a very large sea area in the South China Sea. Under Part IV of the Convention on the Law of the Sea, the archipelagic baselines apply to anything other than an archipelagic state as defined in that part. It is doubtful whether this principle also applied to islands off the mainland, as asserted by the PRC. If, according to the Convention on the Law of the Sea, the archipelagic baselines could not apply to islands off the mainland, in this regard, it will be adverse to China's interests in signing the Law of the Sea Convention without resolving this problem as such issues may eventually be determined by judicial decisions.

In the light of the Anglo-French Continental Shelf Arbitration, however, after pointing out that the Channel Islands are not only 'on the wrong side' of the mid-channel Median line but wholly detached geographically from the United Kingdom, the Court decided in the first place that a primary boundary should be drawn equidistant from the French coast and the coast of the mainland of the United Kingdom. Secondly, a separate boundary line had to be drawn between the French shelf south of the mid-channel
equidistant line and the Channel Islands at a distance of 12-mile from the territorial sea baselines of the Channel Islands. The effect of the decision was, for the Channel Islands, to enclose them within an enclave, and to give France a band of continental shelf in mid-channel continuous with its continental shelf east and west of the Channel Islands.

On the basis of an examination of the Court's treatment of the Channel Islands and the Scilly Isles archipelagos, Professor Brown concluded that less than justice was done to the U.K. in respect of the Channel Islands. This part of the Award seems difficult to justify in terms of either the application of the special circumstances rule to a substantial group of islands, or a comparison with the treatment of the Scilly Isles.

It appears that the PRC's claim to the sea-bed in the South China Sea is primarily based on its claim to

217. Anglo-French Continental Shelf Arbitration, Miscellaneous No. 15 (1978), Cmnd. 7438, pp. 76-78, paras. 146-50; 94-95, para. 199. See above, Ch. 7

sovereignty over the Tungsha, Haisha, Chungsha and Nansha Islands: its territorial sea and EEZ claims are founded on this claim to sovereignty. 219

5.2.6 Troughs

One example of a special consideration which has particular reference to the South China Sea is the extent to which troughs (or trenches) should be taken into account in delimiting the submarine-boundary. 220 It may be recalled that the principal trough formations in the South China Sea are: the Palawan Trough; the deep sea basin, the West Luzon Trough, 2600 metres deep; and the Manila Trench, west of Luzon, which is 5000 metres deep. 221

219. In the Anglo-French Continental Shelf Arbitration, the Court agreed that an island's right to a territorial sea and its effect as a base point in continental shelf delimitation only had a certain connexion; [1977] Miscellaneous No.15(1978), Cmmd.7438, p.74, para.139. Paper, the PRC proposed that 'the breadth and limits' of the territorial sea as define by a coastal state are, in principle, applicable to the islands belonging to that State', and that a coast State may define an EEZ 'in accordance with its geographical and geological conditions'. UN Doc.A/AC.138/SC.II/L.34 UN General Assembly Official Records: 28th Session, Suppl.No.21 (A/9021), Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Vol.5(New York: United Nations, (1973)(SC.II/WG/Paper No. 4)6.5, p.47

220. See above, Ch.7.

Questions arise, in particular, as to whether the Palawan (or Borneo) Trough should be ignored in determining the submarine boundaries of Brunei and Malaysia; and whether the Luzon trough or the Manila Trench should be ignored in determining the submarine boundary of the Philippines, or whether it should be regarded as the 'natural' (geographical/geological) boundary of the shelf.

Does the presence of these troughs insulate the Philippine islands arc from the sea-bed of the South China Sea, and so constitute 'special circumstances' that deprive the Philippines of the right to use their western coast as a baseline for the demarcation of a median line as against the Asian mainland? Some American writers think it does not; no explanation has been given for their

222. See, e.g., the sea-bed between the ROC's southern part of Taiwan and the Philippines' north part of the Luzon Island which is separated by a trough more than 1,000 metres depth.

223. In the Anglo-French Continental Shelf Arbitration, the Court of Arbitration stated when considering the effect of the Channel Islands on the submarine boundary line that it had to consider whether they constituted 'special circumstances' which call for 'a departure from or variation of the equidistance method'. A similar dictum was also made in respect of the Scillies. Miscellaneous No.15(1978). Cmnd. 7438, pp.77, para.148; 114-15, paras.244-45.
reasoning. These writers suggest that the Palawan Trough, the West Luzon Trough and the Manila Trench have no legal significance in the determination of seabed boundaries. They argue that these features should not be regarded, on geological grounds, as marking the boundary of the natural prolongation of the Chinese land-mass but that the whole submarine area should be subject to the jurisdiction of the various coastal states. Some guidance, as has been discussed in Chapter 7, may be gained from both the North Sea Continental Shelf Cases and the Anglo-French Continental Shelf Arbitration. In the former case the

224. Their assumption is that the Asian continental margin ends in the deep Trenches on the Pacific side of the Philippines, not in these South China Sea troughs, and that the Philippines are among the island arcs that enclosed the South China Sea as a part of the Asian continental margin. See Northcutt Ely and J.M. Marcoux, 'National Seabed Jurisdiction in the Marginal Seas: The South China Sea', in George T. Yates III and John Hardin Young (ed.), Limits to National Jurisdiction over the Sea (Charlottesville: Virginia U.P., 1974), pp.143-144.

225. Ely and Pietrowski, 'Boundaries of Seabed Jurisdiction Off the Pacific Coast of Asia', 8 Natural Resources Lawyer (1975), p.611, at p.625

ICJ was prepared to ignore the Norwegian Trough; and in the latter case the Court of Arbitration considered the Hurd Deep Fault Zone not to be a geographical feature capable of exercising a material influence on the determination of the submarine boundary either in the Atlantic region or in the English Channel. Obviously, if there is 'a major and persistent structural discontinuity of the sea-bed and subsoil', the trough could be relevant to the determination of the submarine boundary.

In the North Sea Continental Shelf Cases, the geological aspect was emphasised in determining the notions of adjacency and natural prolongation, in order to find out whether the direction taken by certain configurational features should influence continental shelf boundary delimitation. The Anglo-French Continental Shelf Arbitration applied the same notion of natural prolongation. In the Aegean Sea Continental Shelf Case Greece had ratified the Continental Shelf Convention (Turkey had not), and claimed that all islands possessed shelf rights; Turkey responded that as these islets were on its geological

227. Miscellaneous No.15(1978), Cmnd. 7438, pp.61-62, para.104. See above, Ch.7
228. ICJ Reports, 1969, p.51, para.95. See above, Ch.7
229. ICJ Reports, 1978, p.36, para.86. See above, Ch.7.
shelf they were part of the natural prolongation of its land territory.

It is submitted that there is no established rule of international law to support that sort of approach - the Palawan Trough, the West Luzon Trough and the Manila Trench have no effect in the determination of the continental shelf boundaries; therefore, the South China Sea should be viewed as a whole, from the bathymetric point of view, in order to determine whether these troughs represent a major and persistent structural discontinuity of the sea-bed and subsoil that interrupts the essential geological continuity of the continental shelf.

5.2.7 Special Circumstances

In the North Sea Continental Shelf Cases, as has been noted, the ICJ recommended that the general configuration of the coasts of the Parties be taken into account, as well as (i) the presence of any special or unusual features; (ii) the geographical and geological structures and the natural resources of the continental shelf areas involved; and (iii) the principle of proportionality. In particular, the bilateral agreements which have been entered into 'indicate the basic acceptability of the 'equidistance principle', modified by the special or general circumstances of each case.
Problems with islands and with geographical or geological phenomena could be solved by using the 'special circumstances' exception to the equidistance principles which is adopted in Article 6 of the Continental Shelf Convention. This is the approach of International tribunals in the North Sea Continental Shelf Cases and in the Anglo-French Continental Shelf Arbitration. Although it has the effect of leaving the equidistance principle in some doubt, it is a practical solution, which tries to introduce the 'equitable principle'. Thus, in the Case concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya), the ICJ held that 'the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances' which include, inter alia, 'the existence and position of the Kerkennah Islands'.

An additional problem which deserves special consideration is that of deposits of natural resources by the boundary line. As yet, there is little geological information available for most boundary areas in the South China Sea, but in one case, that of the Brunei-Sarawak boundary, it is possible that there are bisected deposits of natural resources. Some guidance might be gained from looking at a more complicated case in the Arabian (or

230. ICJ Reports. 1982, pp.89, para.129; 93, para.133A(1) B(3). See above, Ch.7
Persian) Gulf, which was settled by a series of boundary treaties. The 1968 Iran-Saudi Arabia Agreement is one of the most complex submarine boundary agreements ever reached. Three stages were involved. First, the 'equidistance principle' was applied. Second, the equidistance principle was modified in the vicinity of the island of Khang to give it 'half-effect', as had been shown in Chapter 7, because the island would deflect the boundary inequitably towards one state; a line was chosen half-way between the equidistance line (without considering the island) and the equidistance line between the island and the adjacent coast. Third, the equidistance principle was again modified, in a zig-zag fashion, to provide an equitable division of known oil structures. It is to be hoped that this resolution of the boundary between these two states will provide an encouragement to

231. See above, Chs. 5 and 6.


233. The half-effect lines is that (i) a line equidistance from the mainland Saudi Arabia and the island of Khang (full effect), and (ii) a line equidistant from both the mainland of Iran and Saudi Arabia: the island of Khang is given no effect in determining the equidistant line. Cf. Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Reports, 1982, p.89, para.129. See above, Ch.7.
the South China Sea littoral states in seeking an equitable solution to their disputes.
PART IV
CHAPTER 10

Recommended Solutions (Conclusions)

The China Sea islands disputes, unlike those over Rockall or the Aegean Sea Islands, are complicated by ownership as well as delimitation problems; in particular, the geographical and geological structure of the seabed and subsoil, potential oil deposits, and the inter-governmental relationship among the Philippines, the ROC, the PRC, South Korea and Vietnam, present great obstacles to a complete solution. There are several ways to resolve the China Sea islands disputes. They are as follows:

1. **Use of Force**

   As has already been noted, the PRC used force to regain Hsisha Island. It should, however, be pointed out that under contemporary international law, the use of force for the settlement of territorial and continental shelf boundary disputes is obsolete and unlawful.¹

2. **Diplomatic Negotiation**

   A dispute can be settled by direct negotiation between the

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1. There are exceptions to this general prohibition when force may be used, as where it is employed by the UN itself through the medium of action authorised by the Security Council, by regional institutions under regional arrangements, and by states acting in individual or collective self-defence. In all these cases, however, the use of force is undertaken by the UN or subject to its control. Charter of the UN, Arts. 24, 39-50, 106. Ch. VII (arts. 39-51), 53, 107. See above, Ch. 1.
disputants. Patient negotiations among the parties can solve most of their territorial and continental shelf boundary disputes. When a dispute cannot be solved through diplomatic negotiation, a variety of methods, such as good offices, mediation, inquiry and conciliation, may be employed.

Negotiations may be held between states even where diplomatic relations are non-existent. Examples of this are the US-PRC ambassadorial level talks held in Warsaw during the 1960s, and the "liaison offices" in the PRC and ROC before and after President Carter's formal recognition of the PRC in 1979. Such actions need not imply recognition.

Negotiations for the establishment of effective joint-venture groups are necessarily complicated. Various considerations affect the possibility of forming a group possessing the optimal combination of assets for the task. Among such considerations are: experience in deep-water technologies; experience with high-pressure formations; capital and rig availability; geological expertise; different points of view on work programme, etc. In most cases it is a combination of

2. The chief method of settling international disputes, whether arising between the states in respect of state interests or in respect of private claims, is by direct negotiation between the governments of the states. Mavromattis Palestine Concessions Case (1924) PCIJ Ser. A, No. 2, p. 13. In some cases states may be obliged by treaty to seek a solution to their disagreements by this method. The Charter of the UN provides that parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security should first seek a solution by negotiation: Art. 33(1). The obligation to negotiate does not, however, include an obligation to reach agreement Case concerning Railway Traffic between Lithuania and Poland (1931) PCIJ Ser. A/B, No. 42, p. 116. Art. 3 of the 1947 Treaty of Brotherhood and Alliance between the Kingdom of Iraq and the Hashemite Kingdom of Transjordan provides: "The High Contracting Parties undertake to settle any disputes arising between them by means of friendly negotiation". A Survey of Treaty Provisions for the Pacific Settlement of International Disputes 1949-1962 (New York: UN, 1966), p. 89.
3. **International Arbitration**

Article 37 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, defines the subject of international arbitration as "the settlement of disputes between states by judges of their own choice and on the basis of respect for law", and the "recourse to arbitration implies an engagement to submit in good faith to the award".

Arbitration has in the past often played a useful part in the settlement of international disputes. Awards of international tribunals in the settlement of territorial and continental shelf boundary disputes are manifold. The Beagle Channel Arbitration

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5. See the International Convention for the Pacific Settlement of Disputes of 1899, amended by the Convention for the Pacific Settlement of International Disputes of 1907 UKTS 9 (1901); Cd.798; UKTS 6 (1971); Cmnd. 4575.
and the Anglo-French Continental Shelf Arbitration are obvious examples. Arbitration between states under treaties concluded by the disputants is almost invariably regulated by a compromis, which defines the subject matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal. The Law applicable in arbitration between states is always, though not necessarily, international law. Arbitrium est judicium, which is final and cannot be appealed against. It is noteworthy that the ROC is still a member of the Permanent Court of Arbitration. Disputes which cannot be settled by diplomatic means are obvious examples.

The Permanent Court of Arbitration (PCA), which has its seat at the Hague, was created in 1899. J.P.A. Francois, "La Cour Permanente d'Arbitrage, son origine, sa jurisprudence, son avenir", 87 Recueil des Cours (1955-1), pp. 461-548. Cf. M.D. Copithorne, "The Permanent Court of Arbitration and the Election of Members of the ICJ", 16 Canadian YBIL (1978), pp. 315-22. The UK was a party to arbitrations under the PCA in the following cases: Venezuelan Preferential Claims (1904) 9 RIAA, p. 99; Japanese House Tax Case (1905) 11 RIAA, p. 51; Mustcat Dhows Case (1905) 11 RIAA, p. 83; North Atlantic Coast Fisheries Case (1901) 11 RIAA, p. 173; Savarkar Case (1911) 11 RIAA, p. 243; Chevreau Case (1931) 2 RIAA, p. 1113. The Court has been little used in recent years, although it is still in existence.

6. Cf. Art. 2 of the 1908 Convention between Great Britain and the U.S.

7. The principle of res judicata applies to such awards. Pious Fund Case (1902) 9 RIAA, p. 1, at 13; Orinoco SS Co Case (1910) 11 RIAA, p. 227, at 240; Trail Smelter Arbitration (1941) 3 RIAA, p. 1905, at 1950. The decision will only bind the parties to the litigation. Art. 84, the Convention for the Pacific Settlement of International Disputes. There are few authoritative decisions as to the grounds upon which an award may be re-opened and set aside as a nullity, but among them there may be (a) invalidity of the compromis; (b) excess of jurisdiction by the tribunal; (c) procedural defects, such as inadequacy of the reasons for the award; (d) fraud and corruption; (e) essential error; and (f) new evidence. For details, see R.Y. Jennings, "Nullity and Effectiveness in International Law" in Cambridge Essays in International Law (London: Stevens & Sons, 1965), pp. 64-87; W. Michael Reisman, Nullity and Revision (New Haven & London: Yale U.P., 1971), pp. 265 et seq.

8. The Permanent Court of Arbitration (PCA), which has its seat at the Hague, was created in 1899. J.P.A. Francois, "La Cour Permanente d'Arbitrage, son origine, sa jurisprudence, son avenir", 87 Recueil des Cours (1955-1), pp. 461-548. Cf. M.D. Copithorne, "The Permanent Court of Arbitration and the Election of Members of the ICJ", 16 Canadian YBIL (1978), pp. 315-22. The UK was a party to arbitrations under the PCA in the following cases: Venezuelan Preferential Claims (1904) 9 RIAA, p. 99; Japanese House Tax Case (1905) 11 RIAA, p. 51; Mustcat Dhows Case (1905) 11 RIAA, p. 83; North Atlantic Coast Fisheries Case (1901) 11 RIAA, p. 173; Savarkar Case (1911) 11 RIAA, p. 243; Chevreau Case (1931) 2 RIAA, p. 1113. The Court has been little used in recent years, although it is still in existence.
negotiation may be submitted to the Court for arbitration.

4. Judicial Settlement

In the judicial settlement of territorial and continental shelf boundary disputes, as in arbitration, the principles of international law are applied. Again, the decision of the ICJ is final and there can be no appeal. The decision, nevertheless, has no binding force except between the parties and in respect of that particular case. Since the ROC is no longer a member of the UN, it would be difficult for her to employ the ICJ for a judicial settlement.

Although the PRC, Japan, the Philippines and Vietnam


10. In the Advisory Opinion on the Effect of Awards of the UN Administrative Tribunal, the ICJ relied on 'the well-established and generally recognised principle of law' according to which 'a judgment rendered by a judicial body is res judicata and has binding force between the parties to the dispute'. ICJ Reports, 1953, p. 53.

11. Art. 60 of the ICJ Statute. Art. 61(1) provides: "An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such party's ignorance was not due to negligence".

12. Arts. 34(1), 35(2) (3) of the ICJ Statute. See also Art. 93(2) of the UN Charter. It may be necessary to decide whether the ROC should be assimilated in all respects to a state with regard to locus standi before the Court. Article 2 of the 1947 Treaty of Amity between the Republic of China and the Republic of the Philippines provides: "Should any dispute arise between the two High Contracting Parties which cannot satisfactorily be adjusted by diplomacy, or through mediation or arbitration, the Parties shall not use force for settlement, but shall refer the dispute to the International Court of Justice for final adjudication". In force 24 October 1947. 11 UNTS (1947), No. 175, p. 361.
can resort to the ICJ for a judicial settlement, Japan and the Philippines have accepted the compulsory jurisdiction of the ICJ with reservations. The PRC and Vietnam, like all other communist countries, have no confidence in any judicial settlement.

The justiciability of a dispute depends upon having an authority which can exercise a "jurisdictional act" over the issue. Indeed, it may be argued that the political nature of the ownership of the Tiao Yu Tai, Nansha and Hsisha Islands disputes makes them "non-justiciable" because they affect the vital interests of the disputants.

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13. Japan recognises the compulsory jurisdiction 'in relation to any other state accepting the same obligation and on condition of reciprocity'. This acceptance does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement. ICJ Yearbook 1980-1981, No. 35 (The Hague: ICJ, 1981), p. 69; the Philippines recognises the compulsory jurisdiction provided that this acceptance shall not apply to any dispute arising out of or concerning jurisdiction or rights claimed or exercised by the Philippines in respect of either the natural resources of the sea-bed and subsoil of the continental shelf of the Philippines, or the territory of the Philippines, including its territorial seas and inland waters. Ibid., pp. 81-82.

14. Allott concludes that the problem of the Court is a problem of confidence in the possibility and appropriateness of adjudication between states. Allott, op. cit., International Disputes: The Legal Aspect (London: Europa, 1972, p. 158.

15. Art. 1 of the 1903 Agreement between the UK and France providing for the Settlement by Arbitration of Certain classes of Questions which may Arise between the two Governments provides: "Differences which may arise of a legal nature ... shall be referred to the Permanent Court of Arbitration ... provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties".
principle, there is a distinction between "justiciable" ("legal") disputes and "non-justiciable" ("political") disputes. Justiciable disputes will be proper for the consideration of the judges of the ICJ, while non-justiciable disputes can only be dealt with by the non-judicial delegates to the Security Council and the General Assembly of the UN. In practice, however, a dispute is justiciable if both disputants are willing to submit it to arbitration or judicial settlement, and non-justiciable if both disputants are not so willing. A decision for either arbitration or judicial settlement involves the risk of losing; many Asian governments are therefore unwilling to entrust their disputes to a judicial process.

5. Joint Exploitation

How can these territorial and continental shelf boundary disputes be settled? Should the territorial issue be resolved before the delimitation of the continental shelf boundaries, or vice versa? Since the continental shelf is a natural prolongation of land territory under the sea, and the sea itself is a natural appurtenance of the land, the delimitation of the land boundary is closely linked to the delimitation of the continental shelf boundary. For mutual benefit

the disputants may co-operate in the exploration and exploitation of natural resources found in overlapping submarine areas, if there is agreement between them to enter into a **condominium.**\(^7\) It is submitted that joint exploitation would provide a practical means of avoiding all these complex issues.\(^8\)

There are at least four types of joint co-operation agreements,\(^9\) giving various alternatives in respect of performance, control, ownership of the hydrocarbons found, and approaches to funding and risk capital. They are: (a) concession contracts with joint-venture arrangements; (b) service contracts; (c) production-sharing contracts; and (d) entrepreneur contracts.\(^10\)

The contents of concession contracts vary widely. Recent versions provide for a specified percentage of state-participation, ordinarily between 50-75 percent. Such recent state-participation

\[^{7}\text{Condominium, joint exercise of sovereignty over territory by two or more subjects of international law. See above, Ch. 5.}\]

\[^{8}\text{In the North Sea Continental Shelf Cases, the Court did not consider that unity of deposit constitutes anything more than a factual element which it was reasonable to take into consideration in the course of the negotiation for a delimitation. ICJ Reports, 1969, pp. 51-52, para. 97. In his separate opinion, Judge Jessup dwelled on the questions of co-operation and unitization in some detail. Ibid., pp. 81-83. In the Case concerning the Continental Shelf (Tunisia-Libyan Arab Jamahiriya), Judge Evensen expressed his dissenting opinion that: "An arrangement for joint exploration, user or even joint jurisdiction over restricted overlapping areas may be a corollary to other equity considerations". ICJ Reports, 1982, pp. 320-21.}\]


arrangements ordinarily contain provisions for "carried interest". Under a "carried interest" contract the expenses for the government's share of exploration and drilling activities is borne by the private company or companies concerned up to the time when a commercial find has been made. If the results are negative, the companies absorb the entire cost, including the state's percentage in the joint venture. The usual carried-interest contract also provides that if a commercial find is made the companies will be reimbursed over a period of time for the state's share of the costs of exploration and drilling from the proceeds of production.  

Service contracts, production-sharing contracts and entrepreneur contracts are other examples of joint-co-operation arrangements between a state and private oil companies. Service contracts and production sharing contracts have many common features. The main such feature is that the state concerned formally retains its ownership of the area as well as of any hydrocarbon finds made. The private oil company carries all financial risk at least up to the time when a commercial find has been made. The company thereafter has the right to buy a certain percentage of the oil or gas produced at agreed prices (service contracts) or to obtain a certain percentage in kind of the oil or gas produced over a period of years (production-sharing contracts). Whether and to what extent the company will be reimbursed for its expenses after a commercial find has been made varies from contract to contract. These two types of contracts may also be categorized as "risk contracts". Entrepreneur contracts in the strict sense of the term imply that a contractor undertakes to perform certain

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21. Ibid.
tasks in relation to petroleum activities and is paid for his services according to the terms of the contract. This type of contract is not a risk contract in the ordinary sense.\textsuperscript{22}

International law may be applied to such contracts as appears from international arbitral precedents such as the \textit{Abu Dhabi},\textsuperscript{23} \textit{BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic},\textsuperscript{24} and \textit{Texaco v. Libyan Arab Republic}.\textsuperscript{25} It is submitted that a joint-venture arrangement with participation by Chinese (ROC and PRC) and Japanese chosen oil companies may offer a viable solution to hydrocarbon activities in the submarine area of the East China Sea.

Fundamental questions concerning the legal relationship between state and territory will also have to be resolved before the problems associated with the China Sea islands can finally be settled. Even if, and when, the territorial disputes are resolved, the residual problems of seabed delimitation will still present complex problems as this dissertation has illustrated. However, it is hoped that by clarifying the facts of both the territorial disputes and those concerning the seabed delimitation and relating them to the previous legal situation, that this dissertation will have contributed to the peaceful settlement of these problems.

\begin{itemize}
\item \textsuperscript{22} Ibid.
\item \textsuperscript{23} [1951] 18 \textit{ILR}, p. 144.
\item \textsuperscript{24} [1973 & 1974] 53 \textit{ILR}, p. 300.
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