

State Practice as a Factor Impacting Potential East China Sea Boundaries

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1 Introduction

The delimitation of maritime boundaries can be a difficult process for States, particularly where there are unusual geographical features in the relevant area, or where the presence of significant resources add complexity to negotiations. Maritime boundaries can also be complicated where there are a number of States with potential jurisdiction in a relatively small area of ocean space, or where there are sovereignty disputes. The East China Sea is bounded by three littoral States, namely China; Japan; and the Republic of Korea. It is also largely free of islands save those close to the coasts of the littoral States, and, save for the Senkaku/Diaoyu Islands disputed between China and Japan in the south of the East China Sea, there are no sovereignty disputes. Yet for all of this, there are almost no maritime boundaries agreed between any of the East China Sea's littoral States. This chapter considers whether State practice in the region has impacted upon the possible conclusion of a maritime boundary, and what impact, if any, it might have on the conclusion of a possible boundary.

The chapter will commence with consideration of applicable State practice, namely the use of territorial sea baselines, and the making of submissions to the Commission on the Limits of the Continental Shelf. This will begin with a brief introduction of the applicable law in the United Nations Convention on the Law of the Sea,¹ before a discussion of the applicable practice of each of the littoral States in turn. It will then be followed by an analysis of principles of maritime boundary delimitation, with emphasis on the relevance of territorial sea baselines and areas of continental shelf beyond 200 nautical miles. The chapter will then conclude with the possible impact on State practice upon potential maritime boundaries, noting the application of the relevant law.

¹ *United Nations Convention on the Law of the Sea*, 1833 UNTS 397.

2 Regional Geography

Before considering regional State practice, it is first necessary to consider the geography of the East China Sea which is illustrated in Map 1. The International Hydrographic Organization published a definition of the East China Sea in 1953.² This provided for a western limit along the coast of mainland China, and eastern limit based the Ryukyu Islands, the northern tip of the island of Taiwan to the south and a line from the Chinese mainland to Jeju Island to Kyushu. The only littoral States bordering this area of sea are China, Japan and the Republic of Korea.

Consideration of the maritime boundaries in the East China Sea therefore can only include the maritime boundaries between China, Japan and the Republic of Korea. The Japan-Korea maritime boundary³ also extends through the Tsushima Strait and up into the Sea of Japan or East Sea, which is clearly beyond the scope of this chapter, but the parts of a potential Japan-Korea boundary south of the Tsushima Strait, and the northern extremities of the potential China-Republic of Korea maritime boundary are only just outside the geographical limits of the East China Sea. Therefore, in the context of this chapter those parts of the Yellow Sea south of the Shandong Peninsula will also be considered, as they are likely to be relevant in any diplomatic exchange between the littoral States over East China Sea boundaries.

3 Territorial Sea Baselines

3.1 *Applicable International Law*

Part II of the Law of the Sea Convention deals, *inter alia*, with territorial sea baselines. Its antecedents come from, in part the 1958 Convention on the Territorial Sea and Contiguous Zone,⁴ which itself can be traced back to the *Anglo-Norwegian Fisheries Case*.⁵ The Case permits straight baselines to be drawn in a range of circumstances, but in the absence of such circumstances makes use of the “low water line” along the coast to be the “normal baseline”.⁶

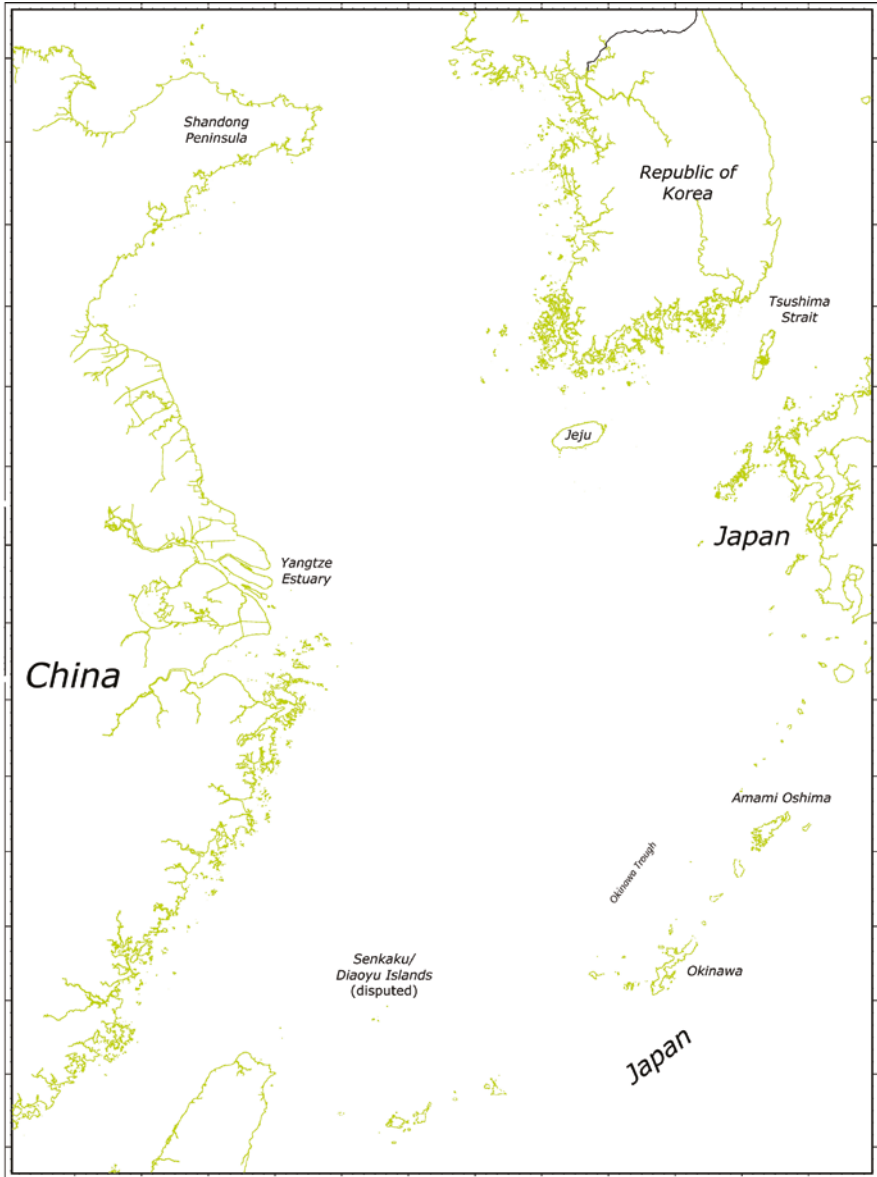
2 International Hydrographic Organization, *Limits of Oceans and Seas*, (Monaco, 3rd Edition, 1953) IHO Special Publication 23.

3 *Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries*, 1225 UNTS 1981.

4 *Convention on the Territorial Sea and Contiguous Zone*, 516 UNTS 205.

5 *Fisheries (Norway v United Kingdom)* 10 ICJ Reports 1951 p. 116.

6 *United Nations Convention on the Law of the Sea*, Article 5.



MAP 1 East China Sea

In the practice applicable to the East China Sea, the provision for straight baselines under the Law of the Sea Convention that is most relevant is Article 7. None of the littoral States appear to have applied baselines based upon reefs around islands or atolls, nor directly across the mouth of a river, although some

do draw baselines between islands that are located beyond the estuaries of some quite substantial rivers. While there are also many juridical bays, the vast majority of the baselines used do not appear to be based upon the rules for such bays contained in Article 10 of the Law of the Sea Convention.

Article 7 of the Law of the Sea Convention provides, in part:

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.
3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.
4. Straight 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 or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

Some of the phrases used in Article 7 above, including “deeply indented and cut into”, “fringe of islands” and “general direction of the coast” were derived directly from Article 4 of the Convention on the Territorial Sea and Contiguous Zone, which in turn can be traced back to the *Anglo-Norwegian Fisheries Case*.⁷ The contention that has flowed from the interpretation of Article 7 is largely because these phrases are essentially subjective, and lacking a precise definition are capable of multiple interpretations.⁸ As a result, there are huge variations in the approaches of States in the construction of straight baseline systems. One certainty is that the United States protests whenever another State produces territorial sea baselines which do not meet the criteria which it

⁷ *Fisheries (Norway v United Kingdom)* 1CJ Reports 1951 p116 at 128–129.

⁸ J.R.V. Prescott & C.H. Schofield, *The Maritime Political Boundaries of the World*, (Leiden, Martinus Nijhoff, 2nd Edition, 2005) 139–156.

believes reflect the correct interpretation of Article 7,⁹ and over time in addition to lodging protests, the United States has also published its views on the legality of territorial baselines adopted by other States.¹⁰ Each of the baseline systems adopted by the littoral States in the East China Sea, which are illustrated in Map 2, have been the subject of such consideration.

3.2 *China*

The coastal geography of China from the Shandong Peninsula to the 25th parallel runs in a generally north-south direction, with Hangzhou Bay being a natural divide. North of Hangzhou Bay, the coastline is largely free of offshore islands, although there are some significant embayments, notably Jiaozhou Wan near Qingdao, and Haizhou Bay. There are some small islands off the coast, including Darshan Island, some 28 nautical miles off Lianyungang, Chaolian Island, around 30 nautical miles east-southeast of Qingdao, and Sheshan Island, around 19 nautical miles east off the estuary of the Yangtze River. Off Hangzhou Bay is the Zhoushan Archipelago, which consists of over 1300 islands, 103 of which are permanently inhabited. The archipelago covers over 20,000 square kilometres in area with a land area of over 1,000 square kilometres. Southward from there, the coastline is flanked by numerous small islands and embayments, particularly in the vicinity of Fuzhou.

China declared a system of territorial sea baselines along its coast, from the Shandong Peninsula to Hainan Island in 1996,¹¹ pursuant to Article 3 of the 1992 *Law of the Territorial Sea and Contiguous Zone*.¹² Neither the legislation nor the declaration provide for any methodology for the baselines, with the former requiring only coordinates for basepoints, and the latter providing the coordinates themselves. This is not unusual, with most States in their national legislation rarely providing any explanation for any individual baselines.

China ratified the Law of the Sea Convention on 7 June 1996, less than three weeks after it proclaimed its territorial sea baselines. Given the baselines have not been altered in the quarter of a century since their promulgation, it can be

9 US State Department, "Developing Standard Guidelines for Straight Baselines" (1987) 106 *Limits in the Seas* 1 at 6–7.

10 The full collection of *Limits in the Seas* is at <<https://www.state.gov/limits-in-the-seas/>>.

11 See Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996: <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf>.

12 See <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf>.

assumed that the baselines were intended to be consistent with China's interpretation of the Law of the Sea Convention, and therefore many, if not all of the baselines are based upon the application of Article 7 of the Law of the Sea Convention.

The northern portion of the territorial sea baselines are characterised by a tendency to over-reach what would be legitimate. The baselines from the south-eastern extremity of the Shandong peninsula south to the mouth of the Yangtze River do not touch the Chinese mainland at any point. The coastline concerned is not deeply indented, and China has made use of a number of widely spaced relatively small features, including Darshan Island and Chaolian Island. South of Darshan Island to the Yangtze Estuary, the basepoints appear to be either undeveloped low tide elevations or open sea, each many miles apart, and not consistent with international law. Further south, the presence of numerous small islands off the coast sees the length of the baselines substantially reduce, and the case for the islands fringing the coast grows stronger. Nevertheless, the baselines have still attracted a protest from the United States.¹³

On 13 September 2012, China deposited with the United Nations a document entitled *The Chart of Baselines of Territorial Sea of Diaoyu Dao and its Affiliated Islands of the People's Republic of China* showing the baselines and the outer limits of the territorial sea of China,¹⁴ as well as a list of geographical coordinates of points defining the baselines of China, as contained in the *Statement of the Government of the People's Republic of China on the Baselines of the Territorial Sea of Diaoyu Dao and its Affiliated Islands* of 10 September 2012. This resulted in a *note verbale* from Japan dated 24 September 2012 in which Japan claimed sovereignty over the Senkaku Islands.¹⁵

3.3 Korea

The western coast of the Korean Peninsula is relatively complex, with numerous bays and offshore islands. Some of the islands are well out to sea from the Korean mainland. Most of the larger features are inhabited, or at least were historically inhabited prior to the creation of national parks upon some

13 US State Department, 'Developing Standard Guidelines for Straight Baselines' 106 *Limits in the Seas*, 1987, 1–35.

14 See <https://www.fmprc.gov.cn/mfa_eng/topics_665678/diaodao_665718/t968769.shtml>.

15 *Note verbale* dated 24 September 2012: reprinted at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsreposit/mzn89_2012_jpn.pdf>.

of the islands. South Korea proclaimed territorial sea baselines in 1978.¹⁶ The baselines, which were updated in 2013,¹⁷ enclose deeply indented coastlines around the southern half of the Korean Peninsula, commencing off the coast near Pusan, and extending to Soryeong-do to the southwest of Seoul. The coordinates were proclaimed again in 2002, without any significant modification.

Although the baselines enclose what is clearly a deeply indented coastline, around which baselines could certainly be applied, they are not without difficulties. Firstly, there is a lack of clarity as to where the internal waters begin and end in both the west and the east. In the west, the baselines end on a small island well off the mainland coast of South Korea, leaving a substantial area of water on the maritime approaches to Incheon that may or may not be claimed as internal waters of South Korea.¹⁸ This uncertainty is in part motivated by the proximity to the DMZ boundary with North Korea, and presumably a desire not to unduly provoke North Korea.

The baselines also are quite generous in their formulation, to an extent that may be contrary to international law from the point of view of some States, although not inconsistent with regional State practice. While there is no length limitation on baselines made under Article 7 of the Law of the Sea Convention for fringing islands and deeply indented coastlines, some of the baselines are long with seven of the 19 baselines drawn pursuant to Article 7 being longer than 24 nautical miles, and two of these exceed 48 nautical miles.¹⁹ The baselines have been the subject of protest by the United States, and were the subject of a Freedom of Navigation Program protest by US navy ships in 1999.²⁰ Japan does not appear to have protested the baselines as part of the acceptance that they would not be extended to incorporate Jeju Island.

3.4 *Japan*

Japan initially moved to proclaim baselines to enclose the Seto Naikai or Seto Inland Sea, between Shikoku and Honshu Islands in 1977.²¹ In addition to these waters, Japan also has an extensive system of straight baselines around

16 Enforcement Decree of [the] Territorial Sea and Contiguous Zone Act promulgated on 20 September 1978.

17 <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mzn130-coordinates.pdf>>.

18 Prescott & Schofield, *supra* note 8, p. 150.

19 US State Department, 'Straight Baselines and Territorial Sea Claims: South Korea' 121 *Limits in the Seas*, 1998, 5–6.

20 See J.A. Roach, *Excessive Maritime Claims* (Leiden, Brill Nijhoff, 4th Edition, 2020) 108.

21 *Law on the Territorial Sea* (Law No. 30 of 2 May 1977) and Cabinet Order No. 210 of 1977.

its Home Islands, as well as Tsushima, Okinawa and some of the Kurile Islands, which were proclaimed in the 1990s.²² The baselines enclose relatively large areas of sea and land, including the whole of the waters around Kyushu and Shikoku islands. The baselines were the subject of analysis by the Office for Ocean Affairs within the US State Department in 1998.²³ Their analysis considered the length of various baselines and their compliance with the requirements of Articles 7 and 10 of the Law of the Sea Convention. As a result of this analysis, the United States protested the validity of some of these baselines, largely on the basis of length. Among those baselines that are the subject of a negative analysis, territorial sea baselines to the west of Okinawa and north-west of Amami Oshima were criticised as being too generous, as well as baselines linking a series of islands to the southwest of Kyushu, which extend a total of 80 nautical miles and well off the coast of Kyushu.²⁴

4 Continental Shelf

4.1 *Applicable International Law*

The definition of the continental shelf in the United Nations Convention on the Law of the Sea is found in Article 76 of the Convention. Article 76 provides a coastal State's land territory will generate a continental shelf based upon the application of one of three techniques. The first, and most simple, is to extend the continental shelf in the same fashion as the EEZ, that is to a distance of 200 nautical miles, regardless of water depth or the configuration or composition of the seabed. The second and third techniques are applicable when the coastal State asserts a continental shelf beyond 200 nautical miles. The second is to identify the foot of the continental shelf and extend the continental shelf seaward of this point by 60 nautical miles. This is generally referred to as the "Hedberg Line", in honour of the American geographer who proposed the concept. The third technique, known generally as the "sediment thickness formula" again uses the foot of the continental slope, but continues beyond it to

22 Enforcement Order of the Law on the Territorial Sea and the Contiguous Zone (Cabinet Order No. 210 of 1977 amended by Orders No. 383 of 1993, No. 206 of 1996 and No. 434 of 2001): reprinted at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/jpn_mzn61_2008.pdf>.

23 US State Department, 'Straight Baselines and Territorial Sea Claims: Japan' 120 *Limits in the Seas*, 1998.

24 *Ibid.*, 6–13; Roach, *supra* note 20, 107–108.



MAP 2 Territorial Sea baselines in the east China Sea

such a point as where the thickness of the continental sediment is one percent of the distance from the foot of the slope.²⁵

In the cases of the Hedberg Line and the sediment thickness rule, a State wishing to use these techniques will need to submit data justifying their use to the Commission on the Limits of the Continental Shelf. The submission of this data is to occur within 10 years of the State concerned becoming a party to the Law of the Sea Convention, although the manner in which this has occurred, as a result of a compromise agreed at a meeting of the State parties, has seen the time limit as described stretched somewhat, including through the notification of a “Preliminary Information” statement, as a prelude to the making of a formal submission. Once received, the CLCS initiates a process of consideration of the validity of the data, and enters into a process of engagement with the coastal State with a view to the publication of recommendations as to the limits of the continental shelf beyond 200 nautical miles. In the event of a dispute concerning a State’s submission, the CLCS will, pursuant to its Rules of Procedure, suspend its consideration of the submission until such time the dispute is resolved or the objecting State indicates it is willing to allow consideration on the basis of it being without prejudice.²⁶

Each of the East China Sea littoral States have made submissions to the CLCS, with two of the States also lodging preliminary information prior to the making of a formal submission. It is appropriate to consider each in turn.

4.2 *China*

As China is hemmed in by neighbouring States, it does not obviously appear to have an opportunity to have an extended continental shelf that projects beyond 200 nautical miles in the East China Sea. However in May 2009, China lodged preliminary information with the CLCS with respect to an area in the East China Sea, to the north of Taiwan.²⁷ The information consists of a series of four continental slope profiles, with various points identified on them. Using those points to construct a “Hedburg line”, the Chinese coordinates produce a line with intervals of greater than the required 60 nautical miles, and that passes within 35 nautical miles of the Japanese island of Okinawa. Japan

25 M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (The Hague: Martinus Nijhoff, 1993) Vol.2, 873 et seq.

26 *Rules of Procedure of the Commission on the Continental Shelf*, UN Doc. CLCS/40/Rev.1, 17 April 2008 Rule 46, and Annex I, clause 5(a).

27 See *Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People’s Republic of China*, 11 May 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/chn2009preliminary_information_english.pdf>.

protested the preliminary information, pointing out its territory is within 400 nautical miles of China.²⁸

On 14 December 2012, China lodged a partial submission with CLCS concerning the East China Sea essentially in conformity with its Preliminary Information. It also used the baselines contained in the charts deposited with the United Nations on 13 September 2012 in the claim for extended continental shelf.²⁹ On 28 December 2012, Japan protested the Submission for the same reason as it protested the Preliminary Information as well as the use of the baselines for the Senkaku Islands/Daiyou Dao.³⁰ On 13 August 2013, Japan reiterated its view that because of the concerns expressed in its *note verbale* of 28 December 2012 that the Commission should not consider the Chinese submission.³¹

4.3 *Korea*

South Korea also appears to have no potential for a continental shelf beyond 200 nautical miles because of its proximity to neighbouring States. However it also lodged preliminary information with the CLCS³² and a Submission in December 2012.³³ The preliminary information essentially relates to the portions of the Japan – Korea petroleum joint development zone (JDZ)³⁴ more than 200 nautical miles from the nearest Korean territory, while the

28 *Note verbale* dated 23 July 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/jpn_re_chn2009e.pdf>.

29 *Submission of the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea: Executive Summary*, 14 December 2012: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf>.

30 *Note verbale* dated 28 December 2012: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf>. China responded on 5 August 2013: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/chn_re_clcs63_08_2013_e.pdf>.

31 *Note verbale* dated 13 August 2013: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_13_08_2013.pdf>.

32 See *Preliminary Information regarding the Outer Limits of the Continental Shelf*, 11 May 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/kor_2009preliminaryinformation.pdf>.

33 *Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76 Paragraph 8 of the United Nations Convention on the Law of the Sea: Executive Summary*, 26 December 2012: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/executive_summary.pdf>.

34 *Agreement between Japan and the Republic of Korea Concerning Joint Development of the Continental Shelf Adjacent to the Two Countries*, reprinted at in J.I. Charney & L.M. Alexander (eds), *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff, 1996) Vol. 1, 1065–1068.

submission moves further south and east towards Japanese territory. This area is well within 200 nautical miles of Japanese territory, so Japan responded as might be expected. A Japanese *note verbale* protesting to that effect was made in May 2009³⁵ to the Preliminary Information and similar protests were made by Japan to the Submission in 2012.³⁶

4.4 *Japan*

While Japan has made a submission to the CLCS, none of the submissions pertain to areas within the East China Sea.³⁷ One area of Japan's submission, to the south of Okinotorishima has been the subject of *notes verbales* from China³⁸ and the Republic of Korea,³⁹ but it is well to the east and south of the East China Sea. Both *notes verbales* were lodged on the basis that Okinotorishima was in fact a rock for the purposes of Article 121(3) of the Law of the Sea Convention, and therefore Japan was not entitled to generate a continental shelf from the feature.⁴⁰

35 *Note verbale* dated 23 July 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/jpn_re_kor2009e.pdf>.

36 *Note verbale* dated 11 January 2012: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/jpn_re_kor_11_01_2013.pdf>. See also subsequent notes verbal from Japan dated 30 April 2013 and 28 August 2013 reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/jpn_re_kor_30_04_2013.pdf> and <https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/jpn_re_kor_28_08_2013.pdf>; and the Republic of Korea's responses on 23 January 2013 and 26 August 2013 reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/kor_re_jpn_23_01_2013.pdf> and <https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/kor_re_jpn_26_08_2013.pdf>.

37 *Japan's Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea: Executive Summary*, 12 November 2008: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/jpn_execsummary.pdf>.

38 *Note verbale* dated 6 February 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/chn_6feb09_e.pdf>. See also *note verbale* dated 3 August 2011: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/chn_3aug11_e.pdf>.

39 *Note verbale* dated 27 February 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/kor_27feb09.pdf>. See also *Note verbale* dated 11 August 2011: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/koriug11.pdf>.

40 For Japan's responses on 25 March 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/jpn_25mar09.pdf>; 26 August 2009: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/jpn_26aug09.pdf>; 9 August 2011: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/jpn_09aug11.pdf>; 15 August 2011: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/jpn_15aug11.pdf>; 9 April 2012: reprinted at <https://www.un.org/depts/los/clcs_new/submissions_files/jpno8/jpn_09apr12.pdf>.

5 Existing Boundary Arrangements

It would be wrong to suggest that the East China Sea had been entirely devoid of maritime boundary activity, which is evident in Map 3, and is discussed below. Japan and the Republic of Korea concluded only a partial maritime continental shelf boundary, as well as a petroleum joint development zone. The boundary is a continental shelf boundary concluded in the 1970s and is essentially an equidistance line.⁴¹ South of the Korean Straits, the two States came into dispute over the course of the boundary, once Jeju Island became a factor in the calculation, and so the boundary ceased. With South Korea insisting on a boundary owing much to the configuration of the seabed, and Japan favouring a line of equidistance, the two States agreed to share the disputed area in a joint development zone where they would have shared jurisdiction over petroleum-related activity.⁴² The JDZ terminates in the south at an approximate equidistance tripoint with China's EEZ.⁴³ It was a temporary arrangement, with a lifespan of 50 years from its entry into force.⁴⁴

China has also negotiated a series of provisional fisheries agreements with Korea,⁴⁵ and Japan.⁴⁶ In both cases these agreements straddle either side of a possible median line and provide for cooperation in fisheries management.⁴⁷ In 2008, Japan and China also agreed to a small petroleum joint exploration zone, although whether the "principled consensus" will amount to treaty status is questionable. It provides for cooperation on petroleum in an area adjacent to the larger Japan-Korea petroleum JDZ.⁴⁸

41 *Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries*, *supra* note 3.

42 *Agreement between Japan and the Republic of Korea Concerning Joint Development of the Continental Shelf Adjacent to the Two Countries*, *supra* note 34.

43 Prescott & Schofield, *supra* note 8, p. 436.

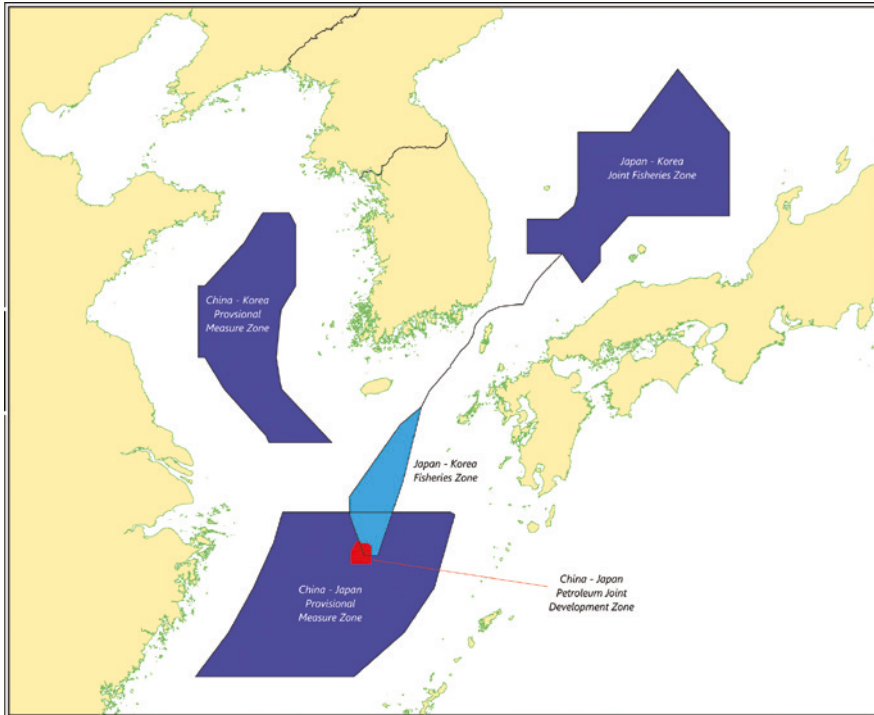
44 *Agreement between Japan and the Republic of Korea Concerning Joint Development of the Continental Shelf Adjacent to the Two Countries*, *supra* note 34, Article xxxi.

45 *Agreement of Fisheries between the Republic of Korea and the People's Republic of China*, 3 August 2000, reprinted in Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Hague: Martinus Nijhoff, 2004), 347–356.

46 *Agreement on Fisheries between the People's Republic of China and Japan*, 11 November 1997, reprinted in Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Hague: Martinus Nijhoff, 2004), 338–347.

47 For a discussion of these arrangements see G. Xue, 'Bilateral Fisheries Agreements for the Cooperative Management of the Shared Resources of the China Seas: A Note' 36 *Ocean Development & International Law*, 2005, 363–374.

48 *China and Japan Reach Principled Consensus on the East China Sea Issue*, 2008: reprinted at <<https://www.fmprc.gov.cn/ce/ceun/eng/fyrth/t448632.htm>>.



MAP 3 Maritime boundaries and joint development areas

Korea has also negotiated a provisional fisheries agreement with Japan.⁴⁹ The joint fisheries zone is in two parts: a northern portion in the vicinity of Liancourt Rocks in the Sea of Japan/East Sea, and a southern portion, south of the delimited continental shelf boundary. There is overlap between this southern zone and the China-Japan fisheries zone, although the application towards the southern limit of the Japan-Korea zone is left vague to ensure the text does not provoke a dispute with China.⁵⁰

Except for the small portion of continental shelf boundary between Japan and the Republic of Korea in the extreme northeast of the area under consideration in this chapter, all of these arrangements are designed to be temporary and without prejudice to a permanent boundary. While it might be expected

49 *Agreement on Fisheries between the Republic of Korea and Japan of 1999*, 1999: reprinted in Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia* (The Hague: Martinus Nijhoff, 2004), 327–338.

50 See *Ibid.*, Annex 1 and Agreed Minutes, para. 2.

that permanent boundaries, if agreed, would fall within these joint development zones, as a matter of law there is no basis for this to occur.

6 Maritime Boundary Delimitation

6.1 *Law of the Sea Convention Provisions*

While the Law of the Sea Convention has three articles that address maritime boundary delimitation, only two are relevant to the littoral States of the East China Sea. The geography in question means that, with the exception of the delimited maritime boundary in the Tsushima Strait between Japan and Korea, there is no location where the territories of any of the littorals is within 24 nautical miles of each other, obviating the need for a territorial sea boundary.⁵¹ As such, the only provisions of the Convention that are applicable in the relevant region are Articles 74 and 83 of the Convention, dealing with the delimitation of EEZ and continental shelf boundaries respectively. Both articles are identical save for the reference to the applicable zone:

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

The Law of the Sea Convention therefore provides no methodology for States to move forward in delimiting their boundaries beyond doing so by agreement. Articles 74(3) and 83(3) do provide for “provisional arrangements of a practical nature”, in order to foster cooperation during the period prior to the conclusion of a boundary, however such arrangements are to be “without prejudice to the final delimitation”. As such, the framing of a methodology has been left to international courts and tribunals, or observed through State practice, which in the latter case is of limited utility in providing an assessment of future boundaries. That is to say what States may agree in one part of the world will not be binding upon them, or other States, in a different part of the globe. It is therefore useful to briefly consider the approach of the courts.

51 Even in that case, Japan and the Republic of Korea both decided to keep the territorial seas of their possessions on either side of the Tsushima Straits to 3 nautical miles in width, avoiding a territorial sea boundary: see Suk Kyoon Kim, *Maritime Disputes in Northeast Asia*, (Leiden, Brill Nijhoff, 2017) 39.

6.2 *Approach to Maritime Boundary Delimitation by International Courts and Tribunals*

Various international courts have considered a range of factors when undertaking the delimitation of maritime boundaries. Since 2005, the International Court of Justice has fixed upon a procedural approach that has been applied with consistency by that Court, as well as *ad hoc* arbitrations and the International Tribunal for the Law of the Sea. The process was applied in detail in the first instance in the *Black Sea Case (Romania v Ukraine)*,⁵² although the Court ascribed the elements of the process to earlier jurisprudence. The process is a three step process:

1. The Court will draw a provisional equidistance line, using all the features identified in the relevant area;
2. The Court will then test and if necessary adjust the provisional equidistance line to reflect an equitable result; and
3. The Court will assess whether the result produces a manifestly disproportional result.

The process has been applied in a number of cases subsequent including:

- Nicaragua/Colombia⁵³
- Peru/Chile⁵⁴
- Bay of Bengal (Bangladesh/Myanmar)⁵⁵
- Bay of Bengal (Bangladesh/India)⁵⁶
- Ghana/Côte d’Ivoire Case⁵⁷
- Nicaragua/Honduras Case⁵⁸
- Somalia/Kenya Case⁵⁹

Based on this practice, the method is the most appropriate in assessing the possible approach of an international court should there be future litigation concerning the maritime boundary between any of the littoral States or informing the negotiating positions. There are three factors which are potentially relevant

52 *Black Sea Case (Romania v Ukraine)* I.C.J. Reports, 2009, p. 101 at para 115–122.

53 *Territorial and Maritime Dispute (Nicaragua v Colombia)* I.C.J. Reports 2012, p. 624.

54 *Maritime Dispute (Peru v Chile)* I.C.J. Reports, 2014, p. 3 at para 180.

55 *Bay of Bengal (Bangladesh v Myanmar)* I.T.L.O.S. Reports 2012, p. 4 at para 233.

56 *Bay of Bengal (Bangladesh v India)*, 7 July 2014; reprinted at <<http://www.pcacases.com/web/sendAttach/383>>, at para 336 et seq.

57 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana v Côte d’Ivoire)*, I.T.L.O.S. Reports 2017, p. 4 at para 360.

58 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, I.C.J. Reports 2007, p. 659.

59 *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* I.C.J. Reports 2021 at para 122.

in the East China Sea – the use of straight baselines; the treatment of islands; and the assertion of continental shelf claims. Each will be considered in turn.

6.2.1 Use of Territorial Sea Baselines in Delimitation

The use of territorial sea baselines in maritime boundary delimitation appears to be limited. In the context of decisions of international courts and tribunals, the reasons for this are eloquently expressed by the International Court of Justice in the *Black Sea Case*:

The Court observes that the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/ opposite States are two different issues. In the first case, the coastal State, in conformity with the provisions of UNCLOS (Articles 7, 9, 10, 12 and 15), may determine the relevant base points. It is nevertheless an exercise which has always an international aspect (see *Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 132). In the second case, the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those Parties. The Court must, when delimiting the continental shelf and exclusive economic zones, select base points by reference to the physical geography of the relevant coasts.⁶⁰

Ultimately, the Court preferred to decide the location of basepoints relevant to the delimitation, rather than utilise lines identified by the coastal State. Certainly, the proclaimed territorial sea baselines used by Bangladesh and Myanmar did not figure in their litigation before the International Tribunal for the Law of the Sea,⁶¹ and the formulation used by the ICJ in the Black Sea quoted above was explicitly adopted in the case of *Bay of Bengal (Bangladesh/India)*.⁶²

Given the Law of the Sea Convention does permit coastal States to use any method they can agree upon to apply, State practice does appear to have seen the application of straight baselines in the calculation of the course of

60 *Black Sea Case (Romania v Ukraine)* I.C.J. Reports, 2009, p. 101 at para 137.

61 *Bay of Bengal (Bangladesh v Myanmar)* I.T.L.O.S. Reports 2012, p. 4 at para 264.

62 *Bay of Bengal (Bangladesh v India)*, 7 July 2014; reprinted at <<http://www.pcacases.com/web/sendAttach/383>>, at paras 221–222.

a maritime boundary. Identification of such practice can be problematic, as States rarely proscribe a methodology for the calculation of the maritime boundary, which is usually just defined with a series of coordinates. Louis Sohn in 1996 undertook consideration of the employment of straight baselines in boundary delimitation practice, generously stretched to include archipelagic States. In his study, he noted there were 20 instances of straight baselines being taken into account, but 50 instances where they were disregarded.⁶³

Sohn also makes the point that often the basepoints that will be used to anchor the territorial sea baselines will be the same basepoints used in the calculation of a boundary, effectively meaning the straight baselines make no material difference in the creation of the boundary.⁶⁴ This observation is correct, at least where the baselines employed by a State are relatively conservative. Examples of the straight baseline itself providing additional basepoints are harder to identify and significantly rarer. Ultimately, since there is no compulsion to use territorial sea baselines, either in the Convention or in the decided cases, it will be entirely a matter for the negotiating States, who will be motivated only by whether the use of baselines would be in their interest.

6.2.2 Treatment of Islands

The treatment of islands by international courts has varied considerably, but some common factors can be deduced. Even the smallest features considered in the above cases generated a full territorial sea, save St Martin's Island, whose proximity to the Myanmar coast prevented this from taking place, although the island was given full effect in the creation of an equidistance line within 12 nautical miles.⁶⁵ Features such as Quitasueño in Nicaragua/Colombia are very small,⁶⁶ consisting in that case of some isolated rocks on a reef structure, and yet Quitasueño received a full territorial sea.⁶⁷

The treatment of islands beyond the generation of a territorial sea has seen variation, although much of this has to do with the specific geography of each case.

63 L.B. Sohn, 'Baseline Considerations' in J.I. Charney & L.M. Alexander (eds), *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff, 1996) Vol. 1, 153 at 157.

64 *Ibid.*, 156–158.

65 *Bay of Bengal (Bangladesh v Myanmar)* I.T.L.O.S. Reports 2012, p. 4 at paras 298–319.

66 See <<http://www.shipspotting.com/gallery/photo.php?lid=2635873>>.

67 *Territorial and Maritime Dispute (Nicaragua v Colombia)* I.C.J. Reports 2012, p. 624 at paras 181–183.

The typical approach over a long period of time has been to ignore or reduce the impact of the island where that feature was perceived to exert a disproportionate effect upon the course of the median line, relative to its size.⁶⁸ In the cases since 2005, the same approach was applied with the treatment of Serpents Island in the *Black Sea Case*,⁶⁹ the numerous small islands in *Nicaragua v Colombia*⁷⁰ and *Nicaragua v Honduras*,⁷¹ and St Martin's Island in the *Bay of Bengal (Myanmar/Bangladesh)*.⁷² The most extreme situation can be seen in the treatment of Quitasueño and Serrana in *Nicaragua v Colombia*. These features were enclaved within the Nicaraguan EEZ, explained by the Court as because they were remote from the remainder of the Colombian

68 See *Newfoundland/Nova Scotia Arbitration*, 26 March 2002: reprinted at <https://www.cns.opb.ns.ca/sites/default/files/pdfs/phaseii_award_english.pdf>: Sable Island (which was part of Nova Scotia) was not used in the calculation of the boundary as it would cause a disproportionately negative impact on the boundary for Newfoundland. The island's territorial sea was unaffected, given its significant distance from the boundary; *Anglo-French Channel Arbitration* 18 ILM 397 (1979): the Channel Islands, which were within a few miles of the French coast, were enclaved within the French continental shelf, while the more remote Scilly Isles and Ushant were given a reduced effect on the calculation of a boundary; *Dubai/Shajah Arbitration* 91 ILR 543 (1981): Abu Musa was restricted to a 12 nautical mile territorial sea because of the disproportionate impact upon Shajah of a median line; *Tunisia/Libya Continental Shelf Case* I.C.J. Reports 1982, p. 18: the Kerkennah Islands were given a reduced effect in the calculation of the maritime boundary; *St Pierre et Miquelon Arbitration* 31 ILM 1148 (1992): islands belonging to France (St Pierre and Miquelon) were given reduced effect, but still received an entitlement beyond the territorial sea; *Qatar/Bahrain Case* [2001] ICJ Reports 40: the International Court of Justice effectively discounted small isolated features from both States that each would have exerted a profound effect on the course of a median line; *Eritrea/Yemen Boundary Arbitration* <http://www.pcacases.com/web/sendAttach/518>, 3 October 1996: a number of Yemeni islands in the vicinity of the median line were given reduced effect; *Jan Mayen Case* I.C.J. Reports 1993, p. 38: the small island of Jan Mayen was given a reduced effect in the calculation of a boundary between it and Greenland; *Gulf of Maine Case (Canada v United States)* I.C.J. Reports 1984, p. 246: the effect of Seal Island was reduced due to the disproportionate effect it would have on a median line; *Libya/Malta Case* I.C.J. Reports 1985, p. 15: the International Court of Justice reduced the effect of Malta itself in the calculation of the continental shelf boundary, due to its small size relative to Libya; *Guinea/Guinea-Bissau Arbitration* 25 ILM 251 (1986): the impact of Alcatraz Island was reduced to its vicinity, and so as to not impact on a continuing basis out to sea.

69 *Black Sea Case (Romania v Ukraine)* I.C.J. Reports, p. 101.

70 *Territorial and Maritime Dispute (Nicaragua v Colombia)* I.C.J. Reports 2012, p. 624 at para 167 et seq.

71 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, I.C.J. Reports 2007, p. 659 at para 304 et seq.

72 *Bay of Bengal (Bangladesh v Myanmar)* I.T.L.O.S. Reports 2012, p. 4.

EEZ, and their linking to it would have been unfair to Nicaragua.⁷³ In the most recent *Somalia/Kenya Case*, the ICJ declined to use the small and arid Diua Damasciaca islets as basepoints in the construction of the maritime boundary as they “would have a disproportionate impact on the course of the median line in comparison to the size of these features”.⁷⁴

From the cases, a number of factors can be identified:

1. Relatively small islands are not treated equally as compared to large mainland territories;
2. Even very small islands receive a full territorial sea unless within 24 nautical miles of the opposing State’s coast;
3. Small islands usually receive a reduced effect in the calculation of a median line, or may be discounted depending on whether their likely impact on a boundary would be very great; and
4. The enclaving of islands in another State’s jurisdiction is unusual, and always stems from a grossly disproportionate impact were they to receive treatment to link with their remaining territory’s EEZ.

Another factor relevant in the treatment of islands in delimitation is whether the island generates any maritime jurisdiction beyond a territorial sea, assuming it is a natural feature clear of the water at high tide. Article 121(3) of the Law of the Sea Convention provides that a rock that is not capable of human habitation or an economic life of its own, will be limited to a territorial sea, and not generate an EEZ or continental shelf. The Annex VII Tribunal in the *South China Arbitration*⁷⁵ took an approach to the interpretation of this provision that set a very high standard for demonstrating what constitutes human habitation or an economic life of its own. By discounting actual habitation as a basis, and focusing on the creation of a largely self-sustaining community,⁷⁶ it found that none of the features in the South China Sea qualified as capable of human habitation or an economic life of their own. The Tribunal made this finding in spite of the many hundreds of military personnel from China, Malaysia, the Philippines, Taiwan and Vietnam living on these islands on a permanent basis as government personnel sent to crew a military outpost would not qualify as a settled community.⁷⁷ This included the largest island in the Spratlys, Itu Aba, which the Tribunal noted was over forty hectares in area,

73 *Territorial and Maritime Dispute (Nicaragua v Colombia)* 1.C.J. Reports 2012, p. 624 at para 167 et seq.

74 *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* 1.C.J. Reports 2021 at para 114.

75 *South China Sea Arbitration (Philippines v China)*, 12 July 2016: reprinted at <<http://www.pcacases.com/web/sendAttach/2086>>.

76 *Ibid.*, at para 520.

77 *Ibid.*, at para 620.

possessed numerous fruit trees and some potable water, as well as a population of several hundred Taiwanese armed forces personnel.⁷⁸

6.2.3 Delimitation of the Continental Shelf beyond 200 Nautical Miles
 Another issue that is potentially relevant to the region centres on maritime boundary delimitation of areas of continental shelf beyond 200 nautical miles. In 1969, the ICJ in the *North Sea Continental Shelf Cases*⁷⁹ held that the appropriate principle to use in the delimitation of the continental shelf was “natural prolongation”. That is to say, where there is a significant submarine feature in the continental shelf, such as a trench or trough that constitutes a break in the seabed, that break should be used as the location of a continental shelf boundary. The concept fell out of favour in subsequent cases, with the ICJ noting in the *Libya/Malta Case* that with the advent of a continental shelf based entirely on distance within 200 nautical miles, the configuration of the seabed was irrelevant to delimitation. The ICJ stated:

... the law applicable to the present dispute, that is, to claims relating to continental shelves located less than 200 miles from the coasts of the States in question, is based not on geological or geomorphological criteria, but on a criterion of distance from the Coast or, to use the traditional term, on the principle of adjacency as measured by distance.⁸⁰

However, this approach still left open the use of natural prolongation beyond 200 nautical miles, as the ICJ acknowledged in the same judgment:

This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 [M] from the shore, natural prolongation, ... , is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concept of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf.⁸¹

78 *Ibid.*, at paras 580–614.

79 *North Sea Continental Shelf Cases* 1.C.J. Reports 1969, p. 3 at para 19.

80 *Libya/Malta Case* 1.C.J. Reports 1985, p. 15 at para 61.

81 *Ibid.*

In more recent cases, this window to continue using natural prolongation in delimitation beyond 200 nautical miles has seemingly closed, with judgments stressing a single approach to delimitation that does not distinguish between parts of the continental shelf.⁸² In the *Bay of Bengal (Bangladesh/Myanmar)* ITLOS was explicitly clear on this issue:

In the view of the Tribunal, the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm. This method is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf ...⁸³

The same approach was used by the Annex VII Tribunal in the *Bay of Bengal (Bangladesh/India)*.⁸⁴ In the *Somalia/Kenya Case*, the ICJ merely continued the geodetic used to set the boundary within the EEZ, indicating no change in methodology.⁸⁵

7 Possible Boundaries

7.1 *China/Republic of Korea*

In applying the approach to boundary delimitation used in the Black Sea Case, a possible maritime boundary between China and the Republic of Korea would be initially marked out through the drawing of a median line and making adjustments to account for any features that might have a disproportionate impact upon the course of the boundary. Since both States are relatively far apart, with no inconveniently located islands or peninsulas, in theory this should be straight-forward. However, drawing the median line will require consideration of which basepoints are to be used in its construction, as both States have extensive straight baseline systems facing each other across the

⁸² *Barbados/Trinidad & Tobago Arbitration*, XXVII R.I.A.A. 147 (2006), para 213.

⁸³ *Bay of Bengal (Bangladesh v Myanmar)* I.T.L.O.S. Reports 2012, p. 4 at para 455.

⁸⁴ *Bay of Bengal (Bangladesh v India)*, 7 July 2014; reprinted at <<http://www.pcacases.com/web/sendAttach/383>>, at para 457.

⁸⁵ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* I.C.J. Reports 2021 at para 196.

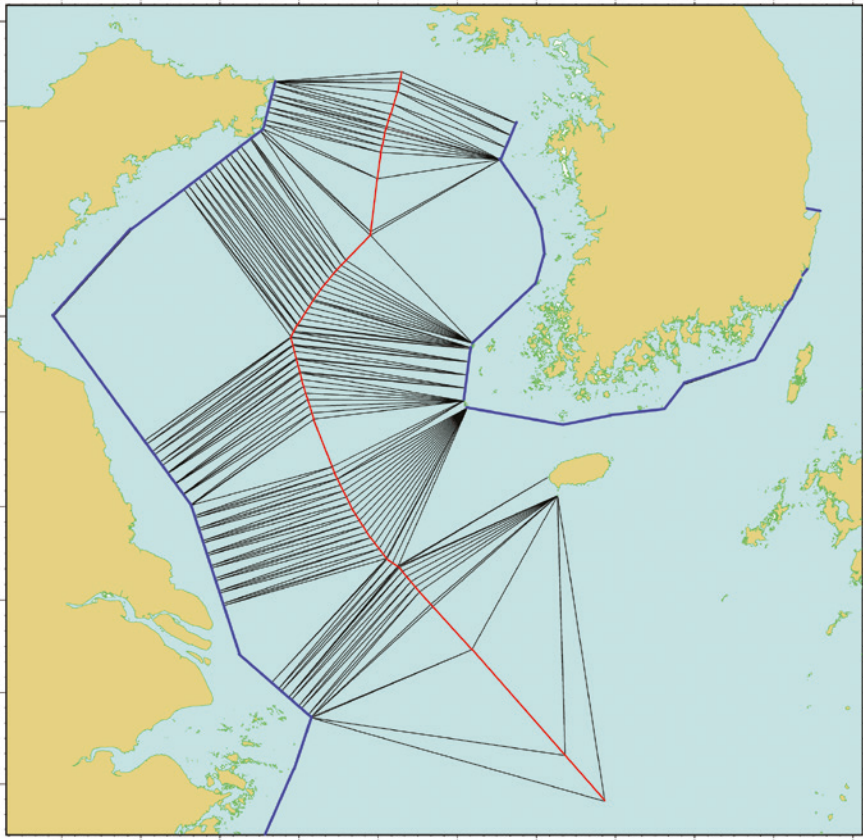
East China and Yellow Seas, with neither having a relevant basepoint on their mainland territory, save for the terminal point of the Chinese baselines.

The relevance of the baselines and their possible use can be seen in the accompanying map. It shows the control lines used in the construction of the median line, identifying the basepoints used in the construction of the line. What is interesting from this map is that it demonstrates the Chinese baselines are far more significant in the construction of the median line than their Korean counterparts. Since the Chinese baselines mask large sections of the coast, including those connecting the small islands south of the Shandong Peninsula, the baselines themselves become relevant to the construction of the median line. This is even more stark in the baselines employed between Darshan Island and Sheshan Island. These baselines are very long, and according to the analysis in *Limits in the Seas* are anchored on undeveloped low tide elevations, which is inconsistent with Article 7 of the Law of the Sea Convention.⁸⁶ These baselines provide a large number of control points in the construction of the median line in Map 4. While the Korean baselines are also relevant in this fashion in places, a much larger portion of the Korean control points are based on islands.

On this basis, the Republic of Korea would be much better served through the use of a median line constructed from actual land features, while China does much better from using its baseline system. In the unlikely event that an international tribunal were ever to consider a possible boundary, the treatment of territorial sea baselines in international case law in the construction of a boundary would greatly favour the Korean position.

On the Korean side, the islands used in the baseline systems do appear, from the information available, to be entitled to generate the full range of maritime zones (Mara Island; Soheugson-so and Hong-do), with the exception of North Clifford Island to the west of Taean, which has only a lighthouse. If this island could not be used to generate an EEZ, there are four inhabited islands closer to the coast within the limits of the Taeanhaean National Park just to the east, so the impact upon Korean jurisdiction would be limited. On the Chinese side, the critical features are the Zhoushan Islands, which extend the Chinese baselines to the east of Shanghai. Although the islands are small, many have been inhabited for many centuries.

86 US State Department, 'Straight Baselines: China' (1996) 117 *Limits in the Seas* 1 at 3–8.



MAP 4 Theoretical equidistance line and control points

7.2 *China/Japan*

For the maritime boundary between China and Japan, there are a number of complicating factors. First is the disputed status of the Diaoyu/Senkaku Islands. Since maritime jurisdiction is based upon sovereignty over land territory, where there is a dispute over sovereignty it is effectively impossible to resolve the course of a maritime boundary involving maritime zones generated from such territory. Since neither Japan nor China has shown any sign of a compromise involving the islands, the dispute makes the conclusion of a maritime boundary impossible in the southern quadrant of the East China Sea.

Even if a solution to the sovereignty dispute could be found, it is unclear whether the Islands would generate the full range of maritime zones. They have not been inhabited since before World War II, and from 1945 until 1972

they were under the control of the United States, which mainly used them as a site for military training. The first recorded permanent settlement of the Islands was in 1900 when a fish processing facility was built by a Japanese businessman. His venture failed in 1940 and the Islands have remained uninhabited since that time. On that basis, applying the definition of “capable of human habitation”, as used in the *South China Sea Arbitration*, might be problematic, as there would seem to be a lack of a settled community, and the only economic activity was essentially extractive in nature.

The presence of the island of Taiwan in the south also adds to the complexity. Japan does not recognize the government in Taipei, but is unlikely to treat with China to determine a maritime boundary between its territory and Taiwan as the island is not under the control of Beijing. The government in Taipei has proclaimed territorial sea baselines, enclosing the two small islands (P’eng-chia Yu and Mien-hua Yu) to the north of the main island,⁸⁷ but there has been no adoption of those baselines nor a separate proclamation by Beijing.

Further north, the maritime boundary between the Ryukyu Islands of Japan and China is also problematic. In this instance, there are a full set of territorial sea baselines on only one side of the delimitation. China’s baselines shield its entire mainland coast while the Japanese baselines around Okinawa and Amami Oshima are irrelevant in the calculation of a median line as other Japanese islands are closer to the Chinese coast. The baselines enclosing a number of offshore features to the southwest of Kyushu are relevant in the construction of a median line.

In the vicinity of Okinawa, a median line would rely upon only three Japanese islands in its construction: Kume Island, Torishima and Iōtorishima. The first of these is inhabited and certainly would generate the full range of maritime zones under Article 121(3) of the Law of the Sea Convention, even with the most conservative interpretation. The remaining two islands are problematic. Torishima is a small isolated feature 38 kilometres north of Kume, and is uninhabited. It has been used as a bombing range for the American and Japanese militaries, and in physical area, it is less than one tenth the size of Itu Aba Island in the South China Sea, which was found to be a rock in the *South China Sea Arbitration*. North of Okinawa, Iōtorishima, which is 2.5 square kilometres in area, is an active volcano that remained inhabited for hundreds of years until 1958 when the residents were evacuated for their own safety. Whether this historic occupation would be sufficient, given there was formerly a settled community as required from the formulation used in the *South China Sea*

87 *Law on the Territorial Sea and the Contiguous Zone*, 21 January 1998, Annex 2.

Arbitration, or whether the abandonment of the island for over 50 years is too long and is recognition that the island is not inhabited is a moot point.

Moving northward, Yokoatejima and Takarajima represent potential basepoints for Japan, however only Takarajima is inhabited, as Yokoatejima is a steep sided volcano which was last active in the 19th Century. Even if it were unable to be used, the availability of Takarajima would see little change in the course of the median line. Enclosed with the baselines surrounding Kyushu, the basepoints generated by and Suzume Island (part of the Uji Islands) and Kusagaki-gunto would also be relevant. Neither of these features are inhabited.

On the Chinese side, while there are a large number of fringing islands scattered along the southern coast from Shanghai southwards, the baselines employed are very long, with five of the six used being in excess of 34 nautical miles in length, and half more than 69 nautical miles long. As is evident from Map 4, these baselines are used as control points for a median line, which is disadvantageous to Japan, although given the numbers of other features inboard of the baselines, the impact upon the course of the median line would not be great. The Chinese islands anchoring the basepoints appear to be either inhabited islands, or smaller features with navigational aids upon them.

A distinct factor in the possible China/Japan boundary in the East China Sea is the existence of the Okinawa Trough, and the extended continental shelf claimed by China in its submission to the Commission on the Limits of the Continental Shelf. The Chinese submission runs to the edge of the Trough and approaches to between 20 and 25 nautical miles from Japanese territory. This appears to indicate that China views the trough as the logical boundary between its jurisdiction and Japan's jurisdiction. However since the Trough is more than 200 nautical miles from the nearest Chinese territory this presumably mean that there would have to be a water column boundary much further to the west.

The existence of the Okinawa Trough would be unlikely to sway an international court or tribunal that it should be used as the maritime boundary between China and Japan. As noted above, cases have not used submarine features in this fashion nor referred positively to such an approach since the *North Sea Continental Cases* in 1969, and more recently have indicated that there should be no distinction in the approach used to delimit the continental shelf whether within 200 nautical miles or beyond it. As such, China's position with respect to the Trough is not strong.

On the other hand, the positions of China and Japan are analogous to that of Nicaragua and Colombia in their maritime boundary delimitation case. Colombia's small and remote offshore islands were faced with the mainland coast of Nicaragua, masked with its own small offshore islands, and a similar

description could be made of the geography of Chinese and Japanese territories across the East China Sea, albeit much further apart. In that case, the ICJ held that the smaller Colombian islands should be given less weight, and the median line drawn was adjusted to Nicaragua's favour. A tribunal might therefore be of the view some adjustment in China's favour is appropriate, although unlike that case, most of the Japanese islands are inhabited, so should not be discounted altogether. While the amount of such an adjustment is entirely speculative, given the Japanese islands are much further from the coast of China than the Colombian islands, the scale of the adjustment might be less than in that case.

7.3 *Japan/Republic of Korea*

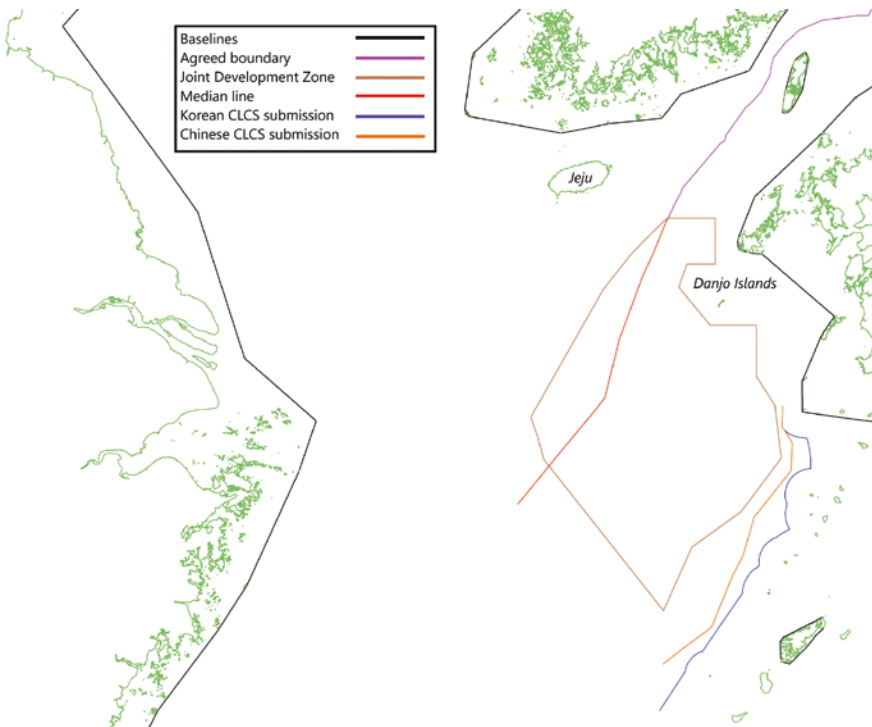
A median line between the republic of Korea and Japan is dominated by Jeju Island on the Korean side, and a number of small features on the Japanese side. For Japan, the Danjo Islands are located to the west of Kyushu and fall outside of the joint development zone agreed between the two States in 1974. The Danjo Islands are uninhabited, although there has been a manned lighthouse on Me Island, in the southwest of the group, for many years. To the north of the group is a small feature on the charts marked as Torinoshima, consisting of two outcrops with elevations of 17 and 9 metres. All of these features would generate a territorial sea, but it is likely that Korea would dispute their ability to generate an EEZ, and as much seems to be reflected in the course of the joint development zone around them.

If the Danjo Islands are ignored, the Japanese features that exert impact on a median line are Fukue Island and its smaller near neighbour, Saganoshima, both of which are inhabited. Using these islands and Jeju Island produces a median line as marked on Map 5. The theoretical line is not affected by Japan's straight baselines and is much closer to the western side of the joint development zone.

The Republic of Korea, like China, has also made a claim to an area of shelf beyond 200 nautical miles which is influenced by the presence of the Okinawa Trough. The claimed area of shelf is even closer to the Japanese islands than the Chinese claim, and for the reasons discussed above in that context, is unlikely to influence the course of a possible maritime boundary.

8 Conclusions

There is little likelihood of an international court or tribunal having a role in determining any of the maritime boundaries in the East China Sea. While



MAP 5 East China Sea continental shelf claims

Japan has not made a choice of procedure for disputes under the Law of the Sea Convention, nor sought any exemption from jurisdiction for boundary disputes, both China and the Republic of Korea have sought to use the optional exception for maritime boundary disputes under Article 298. As such, Japan could avoid a referral of a boundary dispute with its Chinese or Korean neighbours on the basis of reciprocity.

A negotiated boundary would not be assisted by reliance upon the State practice on the parties. Chinese territorial sea baselines impact upon the course of median lines if they are used in their calculation, and the continental shelf submissions to the CLCS made by China and Korea would make negotiation of a maritime boundary based on those submissions virtually impossible. When combined with the disputed status of the Senkaku/Diaoyu Islands and the presence of the island of Taiwan, there seems little prospect at present of concluding maritime boundaries. That said, the littoral States have been able to agree to joint arrangements with respect to fisheries, which is suggestive that some accommodation between each may be possible, if unlikely.