

# Sino-Japanese Cooperation in the East China Sea: A Lasting Arrangement?

Alexander M. Peterson<sup>†</sup>

<b>Introduction</b> .....	442	R
<b>I. UNCLOS and the East China Sea Delimitation Dispute</b> ...	444	R
<b>II. The Senkaku Islands Dispute</b> .....	445	R
A. Chinese Claims .....	447	R
B. Japanese Claims .....	449	R
C. Determining Ownership of the Senakaku .....	451	R
1. <i>Legal Standard for Disputed Island Ownership</i> .....	451	R
2. <i>Japan's Superior Claim over the Senkaku</i> .....	452	R
<b>III. The Sino-Japanese Continental Shelf Dispute</b> .....	453	R
A. Chinese Claims .....	454	R
B. Japanese Claims .....	454	R
C. Determining Continental Shelf Delimitation .....	455	R
1. <i>Legal Standard for Continental Shelf Delimitation</i> ....	455	R
2. <i>Japan's Superior Claim to Continental Shelf                 Delimitation</i> .....	456	R
<b>IV. A History of Rocky Negotiations</b> .....	457	R
A. Struggling Sino-Japanese Negotiations .....	457	R
B. A Warm Spring .....	460	R
C. The Joint Press Release .....	462	R
D. Politics Threaten the Arrangement .....	463	R
<b>V. The Arrangement is Not Legally Binding</b> .....	465	R
A. The Arrangement is Not a Treaty .....	465	R
B. The Arrangement is Not a Binding Informal Instrument .....	467	R
C. Withdrawing from the Arrangement Would Not Breach Good Faith or Be Grounds for Estoppel .....	468	R
D. UNCLOS Does Not Establish a Duty to Jointly Develop the East China Sea .....	470	R
E. Customary International Law Does Not Establish a Duty to Jointly Develop the East China Sea .....	471	R
<b>Conclusion</b> .....	473	R

<sup>†</sup> Candidate for J.D. and LL.M. in International and Comparative Law, Cornell Law School, expected May 2010. B.A. International Relations, Ritsumeikan University, 2006. B.A. International Studies Magna Cum Laude, American University, 2006. The author wishes to thank Selig S. Harrison and Naoki Ishihara for their insights and guidance.

## Introduction

The June 2008 Sino-Japanese arrangement to jointly develop hydrocarbon deposits in a section of the East China Sea is threatened by the politics of subsequent Japanese administrations. The People's Republic of China (China) and Japan disagree about the delimitation of the East China Sea because of the ambiguity of the relevant international law, the United Nations Convention on the Law of the Seas (UNCLOS),<sup>1</sup> which declares that a state can claim an exclusive economic zone (EEZ) over a sea to a distance of 200 nautical miles (nm) from coastal baselines<sup>2</sup> or to the natural prolongation of its land territory to the outer edge of its continental margin up to 350 nm.<sup>3</sup> The East China Sea is only 360 nm across at its widest point.<sup>4</sup> Japan asserts that the median, where China and Japan's respective 200 nm EEZ claims intersect, should be the border between the nations' EEZs.<sup>5</sup> China, however, claims the border should be a full 350 nm from its coastline, based on the continuation of its continental shelf.<sup>6</sup> These conflicting claims are the result of territorial disputes and disagreements over which section of UNCLOS should govern.<sup>7</sup> In particular, the Senkaku Islands dispute,<sup>8</sup> seabed delimitation issues, and conflicting interpretations of UNCLOS are interrelated areas of disagreement that impede Sino-Japanese delimitation.<sup>9</sup>

On June 18, 2008, the foreign ministries of China and Japan announced at separate press conferences<sup>10</sup> that the "two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions."<sup>11</sup> Under the arrangement, Japan

---

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter UNCLOS] (entered into force Nov. 16, 1994).

2. *Id.* arts. 57, 121.

3. *Id.* art. 76.

4. Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT'L L. 903, 911 (2008).

5. See Kosuke Takahashi, *Gas and Oil Rivalry in the East China Sea*, ASIA TIMES ONLINE, July 27, 2004, <http://www.atimes.com/atimes/Japan/FG27Dh03.html>.

6. *See id.*

7. *See id.*

8. The Senkaku Islands are currently under Japanese control, but China claims them as the "Diaoyu," "Diaoyutai," "Tiaoyu," or "Tiaoyutai" Islands. See Michael Bristow, *Pragmatism Triumphs in China-Japan Deal*, B.B.C. NEWS, June 19, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7463492.stm>; *Chinese Minister: Japan Gas Deal "Does Not Undermine Right of Sovereignty"*, B.B.C. NEWS, June 19, 2008 [hereinafter *Chinese Minister*]. The islands will hereinafter be referred to as the Senkaku Islands, but without prejudice to the islands' other claimants; nor is the term "island" determinative of whether the Senkaku are "islands" or "rocks" according to UNCLOS.

9. See, e.g., SELIG S. HARRISON, *SEABED PETROLEUM IN NORTHEAST ASIA: CONFLICT OR COOPERATION?* (Woodrow Wilson Int'l Ctr. for Scholars, Asia Program, 2005), available at [http://www.wilsoncenter.org/topics/pubs/Asia\\_petroleum.pdf](http://www.wilsoncenter.org/topics/pubs/Asia_petroleum.pdf).

10. *See Chinese Minister, supra* note 8.

11. Press Release, Ministry of Foreign Affairs of the People's Republic of China, *China and Japan Reach Principled Consensus on East China Sea Issue* (June 18, 2008), <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t466632.htm> [hereinafter *Principled Consensus*].

and China would jointly explore and develop natural resources in a 2,700 square kilometer area of the East China Sea that straddles Japan's proposed median.<sup>12</sup> Also, Japanese corporations would invest in a Chinese-operated hydrocarbon field on the Chinese side of the median.<sup>13</sup> The arrangement does not address three other disputed hydrocarbon fields in the area.<sup>14</sup> However, the foreign ministries interpreted the arrangement slightly differently, especially regarding whether cooperation in one of the hydrocarbon fields could be deemed "joint development."<sup>15</sup>

After the foreign ministries announced the arrangement, in September 2008, the Japanese parliament confirmed flamboyant conservative Taro Aso as Japan's new Prime Minister.<sup>16</sup> Aso achieved political fame for pushing an anti-Chinese agenda, supporting the Japanese Self-Defense Forces, and promoting nationalism in Japanese schools.<sup>17</sup> In his former role as foreign minister, Aso stated that "Japan will never accept China's . . . suggestion of jointly exploring the East China Sea resources and that Japan might possibly take measures to confront China if it conducts gas and oil exploration in the East China Sea."<sup>18</sup> Although Aso has been succeeded by Yukio Hatoyama, Aso's administration reflects the kind of political opposition that could undermine the Sino-Japanese joint development arrangement.<sup>19</sup>

This Note examines the extent to which the joint development arrangement legally binds subsequent Japanese administrations. Part I explores the geomorphology of the East China Sea and explains why China and Japan have differing interpretations of the UNCLOS. Part II analyzes the Sino-Japanese dispute over the Senkaku Islands in the East China Sea and argues that Japan has a superior claim to the Islands. Part III addresses the continental shelf dispute between China and Japan and finds that China likely cannot claim the entire continental shelf as being within their EEZ. Part IV reviews the difficulty of Sino-Japanese negotiations regarding the East China Sea to date and examines the June 2008 Joint Press Statement regarding Sino-Japanese joint development of oil and natural gas reserves in the East China Sea. This Part also establishes that later Japanese administrations will likely challenge the Sino-Japanese June 2008 arrangement. Finally, Part V argues that the 2008 Sino-Japanese arrangement is not

---

12. Editorial, *Sea of Cooperation*, JAPAN TIMES, June 21, 2008.

13. *Id.*

14. *See id.*

15. *See Chinese Agency "Tentative Translation" of FM's Answers on East China Sea Issue*, XINHUA NEWS AGENCY (China), June 24, 2008 [hereinafter *FM's Answers*]. This issue is dealt with more thoroughly in Part IV.C of this Note.

16. *Taro Aso Confirmed as Japan's PM*, B.B.C. NEWS, Sept. 24, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7632864.stm> [hereinafter *Aso Confirmed*].

17. *See, e.g., Japan Alarmed by Chinese "Threat,"* B.B.C. NEWS, Dec. 22, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4551642.stm>; Editorial, *The Return of Taro Aso*, N.Y. TIMES, Sept. 24, 2008, at A28.

18. *Chine [sic] Dismisses Japanese Minister's Remarks on Trade with North Korea*, B.B.C. NEWS, Mar. 16, 2006 [hereinafter *Japanese Minister's Remarks*] (emphasis added).

19. *See, e.g., Japan Alarmed by Chinese "Threat," supra* note 17.

legally binding, but the Note concludes that the arrangement is nonetheless necessary for both Japan and China.

### I. UNCLOS and the East China Sea Delimitation Dispute

UNCLOS established the canon of laws applicable to the seas today.<sup>20</sup> The Convention came into force on November 16, 1994, one year after the sixtieth state signed it.<sup>21</sup> China and Japan both became parties to UNCLOS in 1996.<sup>22</sup>

UNCLOS defines how a state can draw its oceanic borders.<sup>23</sup> A state has default territorial borders based on its low-tide perimeter.<sup>24</sup> When a coast is “deeply indented” or has “a fringe of islands,” the state may draw “straight baselines” between “appropriate points.”<sup>25</sup> Archipelagic states may also draw straight baselines “joining the outermost parts of [their] outermost islands”<sup>26</sup> when the islands can “sustain human habitation or economic life of their own.”<sup>27</sup> All waters inside this baseline are included as part of the state’s territory.<sup>28</sup> This baseline also is used to chart the EEZ.<sup>29</sup> The EEZ extends coastal nations’ exploration and exploitation rights to 200 nm into the open ocean from the territorial baselines, allowing a state to harvest all of the natural resources within that zone.<sup>30</sup>

Under Article 57 of UNCLOS, coastal states can claim an EEZ based on a distance extending up to, but not exceeding, 200 nm from their territorial baselines.<sup>31</sup> Japan relies on Article 57 for its proposal that China and Japan’s EEZs in the East China Sea stretch only to the median between China and Japan, the point at which their two 200 nm claims intersect.<sup>32</sup> China, however, declares that it has a 350 nm EEZ based on Article 76, which allows a coastal state to declare an EEZ up to either a distance of 200 nm *or* to the natural prolongation of its land territory to the outer edge

---

20. See U.N. Div. for Ocean Affairs & the Law of the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998), [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm).

21. See *id.*

22. See U.N. Div. for Ocean Affairs & the Law of the Sea, *Status of the United Nations Convention on the Law of the Sea, of the Agreement Relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* 2, 4 (Jan. 1, 2010), [http://www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf).

23. See UNCLOS, *supra* note 1, arts. 3-16.

24. *Id.* art. 5 (“[T]he normal baseline . . . is the low-water line along the coast . . .”).

25. *Id.* art. 7.

26. *Id.* art. 47(1).

27. *Id.* art. 121(3).

28. See *id.* art. 8.

29. See *id.* arts. 55-58.

30. See *id.*

31. See *id.* art. 57.

32. See *id.*; Takeo Kumagai & Winnie Lee, *Japan Says Settles Dispute with China on East China Sea*, PLATTS OILGRAM NEWS, June 19, 2008, at 1 (noting that Japan relies on the median line theory in its dispute with China).

of the continental margin, up to 350 nm.<sup>33</sup> Furthermore, China claims that its Chunxiao gas field does not cross the median even if the Japanese method of demarcation is adopted because Chunxiao is four kilometers from Japan's claimed centerline.<sup>34</sup> Japan maintains that it may have a claim to a share of Chunxiao's profits regardless of where China chooses to extricate resources if such extrication draws on resources currently located east of the median.<sup>35</sup>

China's claim of a continuous continental shelf depends heavily upon the geomorphology of the East China Sea. China must prove that there is a steady landmass throughout its asserted 350 nm zone to maintain its continental shelf claim.<sup>36</sup> The East China Sea essentially is divided into two rift complexes: the East China Sea Basin and the Okinawa Trough.<sup>37</sup> The Okinawa Trough is separated from the East China Sea Basin by the Diaoyudao Uplift Belt, which raises the continental shelf, resembling the middle of a "w" shape in the shelf.<sup>38</sup> The Diaoyudao Uplift Belt, close to the Japanese-claimed median, may not be a natural component of the continental margin.<sup>39</sup> Thus, Japan may use the Diaoyudao Uplift Belt to dispute China's claim to a 350 nm EEZ, especially if Japan can claim ownership of the Senkaku Islands, located at the middle peak of the "w."<sup>40</sup> The Okinawa Trough is just a few kilometers away from Japanese territory, and, if China can claim the waters up to the Okinawa Trough, China would be entitled to exploit virtually the entire East China Sea.<sup>41</sup>

## II. The Senkaku Islands Dispute

The Senkaku Islands currently are under Japanese control but China claims them under the name "Diaoyu" Islands.<sup>42</sup> The status of the islands is a major issue in Sino-Japanese relations, despite the fact that the islands

---

33. UNCLOS, *supra* note 1, art. 76.

34. Takahashi, *supra* note 5.

35. *Id.*

36. See UNCLOS, *supra* note 1, art. 76 (China can claim more than a 200 nm EEZ only if it can prove that there is a "natural prolongation" of its continental shelf.).

37. See Peng Huang et. al., *Isotopic Feature and Uranium Dating of the Volcanic Rocks in the Okinawa Trough*, 49 *SCI. IN CHINA: SERIES D EARTH SCI.* 375, 375-76 (2006).

38. See *id.*; GREG AUSTIN, *CHINA'S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT* xxix (1998); Zuomin Niu, *Deposition Environment Sub-divisions of the East China Sea and Their Basic Structures*, in *PROCEEDINGS OF INTERNATIONAL SYMPOSIUM ON SEDIMENTATION ON THE CONTINENTAL SHELF WITH SPECIAL REFERENCE TO THE EAST CHINA SEA* 605 (1983).

39. See UNCLOS, *supra* note 1, art. 76.

40. See HARRISON, *supra* note 9, at 6-7.

41. See *id.* at 5-7; AUSTIN, *supra* note 38, at xxix; Niu, *supra* note 38, at 602-03.

42. Alternative English spellings are "Diaoyutai," "Tiaoyu," and "Tiaoyutai" Islands. See AUSTIN, *supra* note 38 at 162 (noting that China and Japan use different names to refer to the Islands); see also *Chinese Research Ship Sighted Near Senkaku Isles*, *DAILY YOMIURI* (Japan), Feb. 5, 2007, available at <http://www.yomiuri.co.jp/dy/world/20070205TDY02008.htm>; *2 Japanese Fighters Scramble Over Senkaku Islands*, *JAPAN ECON. NEWSWIRE*, Aug. 24, 1995.

R

R

are too small to appear on most maps.<sup>43</sup> The importance of the Islands stems from the rich seabed located directly beneath them and their potential to serve as base points for an EEZ.<sup>44</sup>

The Senkaku group consists of eight islands, each with a separate Japanese and Chinese name, comprising a total land area of less than eight square kilometers.<sup>45</sup> The islands lie near the Sino-Japanese median in the East China Sea, slightly on the Japanese side, situated just 90 nm north of the Japanese Ryukyu Islands, 120 nm northeast of Taiwan, and 200 nm southwest of Okinawa.<sup>46</sup> The Senkaku lie east of the Okinawa Trough, which is a geomorphic depression in the seabed at the eastern edge of the continental shelf west of the Ryukyu Islands.<sup>47</sup>

China claims that its continental shelf extends past the Senkaku, to the edge of the Okinawa Trough,<sup>48</sup> while Japan claims “that the seabed between the Ryukyus and the mainland is a common prolongation of both Japanese territory, i.e., the Ryukyus, and of the Chinese mainland,”<sup>49</sup> and that the Senkaku are part of the Ryukyu Islands.<sup>50</sup> Japanese ownership of the islands would seriously undermine China’s claim to a continuous continental shelf extending to the Okinawa Trough, hence China’s proposed 350 nm EEZ.<sup>51</sup>

A survey in 1968 found potential hydrocarbon fields in the East China Sea, drawing attention to the islands.<sup>52</sup> Japan was the first country to issue mining rights in the islands.<sup>53</sup> In July 1970, however, Taiwan and the Gulf Oil Company signed a contract for the exploration and exploitation of the hydrocarbon resources in a specified area of the sea northeast of Taiwan,

---

43. See Mark J. Valencia, *The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions*, 31 *ASIAN PERSPECTIVE* 127, 128 (2007); *Diaoyu Islands: Inalienable Part of China’s Territory*, July 3, 2006, available at [http://janson1986.blog.hexun.com/4439776\\_d.html](http://janson1986.blog.hexun.com/4439776_d.html) [hereinafter *Inalienable Part of China’s Territory*].

44. Some experts believe that the seabed may house hydrocarbon reserves rivaling those of the Persian Gulf. See HARRISON, *supra* note 9, at 5-7. But see Martin Fackler, *China and Japan Reach Deal on Gas Fields as Ties Warm*, *INT’L HERALD TRIB.*, June 19, 2008 (“Despite the attention they have received, the gas reserves under the East China Sea are relatively small, with some estimates putting them at the equivalent of 93 million barrels of oil, about three weeks of Japan’s energy needs.”).

45. See Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over the Tiaoyutai Islets (Senkaku Gunto)*, 15 *CHINESE TAIWAN Y.B. INT’L L. & AFF.* 9, 9-10 (1996-97) [hereinafter Chiu].

46. See *id.* at 9; CHOON-HO PARK, *EAST ASIA AND THE LAW OF THE SEA* 32 (1st ed. 1983).

47. HARRISON, *supra* note 9, at 6.

48. See *id.*, *supra* note 9, at 7-8.

49. *Id.* at 8.

50. See JAPAN MINISTRY OF FOREIGN AFFAIRS, *THE BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS*, available at <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html> (“[T]he Senkaku Islands have continuously remained as an integral part of the Nansei Shoto [Ryukyu] Islands which are the territory of Japan.”) [hereinafter *BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS*].

51. See UNCLOS, *supra* note 1, art. 76; AUSTIN, *supra* note 38, at 56.

52. See Chiu, *supra* note 45, at 10-11 & n.4 (citing K.O. Emery et al., *Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea*, 2 *U.N. ECAF/CCOP TECH. BULL.* 3 (1969)).

53. See PARK, *supra* note 46, at 7, 9.

R

R

R

which included the entire Senkaku area.<sup>54</sup> In September 1970, Japan contested Taiwan's action, asserting that the islands belonged to Japan.<sup>55</sup> China claimed the islands and all the adjacent seabed oil deposits on December 4, 1970.<sup>56</sup> With China's action, the dispute evolved into a three-party disagreement between China, Taiwan, and Japan.<sup>57</sup>

#### A. Chinese Claims

China's claim to the islands consists of four main arguments. First, China argues that the Senkaku are situated on its continental shelf.<sup>58</sup> Second, China claims prior discovery and use of the islands.<sup>59</sup> Third, China relies on Japan's prior acknowledgement of China's ownership of the islands.<sup>60</sup> Finally, China asserts that Japan took the islands under the Treaty of Shimonoseki, and, therefore, specifically ceded the islands back to China after World War II.<sup>61</sup>

China's claim of prior discovery and use of the islands is strong. Chinese sailors used the islands as a navigational marker as early as the fourteenth century.<sup>62</sup> The sailors fished in the waters surrounding the islands and occasionally used the islands as shelter from storms.<sup>63</sup> China even incorporated the islands into a coastal defense system, and, at one point, arguably granted ownership of three of the islands to a Chinese citizen.<sup>64</sup>

Although scholars are still debating applicability of the private land ownership issue,<sup>65</sup> the fact remains that China maintained peaceful ownership of the islands for an extended period of time.<sup>66</sup> Japan recognized Chinese influence over the islands.<sup>67</sup> For example, in 1885, the Japanese Foreign Minister, Kaoru Inoue, advised the Japanese government not to

54. *Id.* at 34.

55. *Id.* at 9-10.

56. *Id.* at 10.

57. See *Ma Wins Points Over Islets*, CHINA POST, June 25, 2008. Taiwan's claims to the islands are beyond the scope of this Note. For additional information about Taiwan's role, see YING-JEOU MA, *Legal Problems of Seabed Boundary Delimitation in the East China Sea* (1984).

58. See PARK, *supra* note 46, at 35. This argument is addressed more fully in Parts IV and V of this Note. R

59. See *id.* at 35-36; Chiu, *supra* note 45, at 15-16 & n. 24 (quoting and citing the author's translation of a formal statement of the People's Republic of China Foreign Ministry from Dec. 30, 1971). R

60. See PARK, *supra* note 46. R

61. See *id.*; *Inalienable Part of China's Territory*, *supra* note 43 ("After Japan's defeat at the end of World War II, Taiwan was returned to China, but its subsidiary islands, such as [the] Diaoyu Islands, were placed under trusteeship of the United States without having previously consulted any concerned parties."). R

62. See UNRYU SUGANUMA, *SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS: IRREDENTISM AND THE DIAOYU/SENKAKU ISLANDS* 47-61 (2000); Tao Cheng, *The Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L. L. 221, 254 (1974).

63. See Cheng, *supra* note 62, at 258.

64. See *id.* at 257.

65. See, e.g., PARK *supra* note 46, at 37-38. R

66. See Cheng, *supra* note 62, at 254-56; Chiu, *supra* note 45, at 19-21. R

67. See Chiu, *supra* note 45, at 20-23.

“suddenly establish publicly national boundary marks” on the Senkaku, to avoid “easily invit[ing] Chinese suspicion.”<sup>68</sup> Inoue did not explicitly acknowledge Chinese ownership of the islands but remarked that “those islands are near the Chinese national boundary” and “there are Chinese names on them.”<sup>69</sup> Two Japanese maps, of 1783 and 1785, indicating Chinese ownership of the islands also provide persuasive evidence that Japan recognized the Senkaku as Chinese territory.<sup>70</sup> Substantial evidence proves China’s ownership of the islands until 1885, but from that year onward Chinese ownership is vigorously disputed.<sup>71</sup>

China claims that Japan took the Islands by force, officially gaining ownership under the Treaty of the Shimonoseki,<sup>72</sup> which ended the Sino-Japanese war of 1895.<sup>73</sup> The treaty sealed Japan’s victory over China, granting Japan money and land, including Taiwan.<sup>74</sup> The treaty established that China would give Japan “[t]he island of Formosa,<sup>75</sup> together with all islands appertaining or belonging to the said island of Formosa.”<sup>76</sup> The Senkaku are not specifically mentioned anywhere in the treaty; however, China maintains that the islands were part of the group belonging to Taiwan,<sup>77</sup> a position that Japan disputes.<sup>78</sup> If China is correct that Japan took the islands through the Treaty of Shimonoseki, the islands should now belong to China.<sup>79</sup> Upon surrender to the Allied Forces at the end of World War II, Japan accepted the following condition set forth in the Cairo Declaration of 1943: “[A]ll the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China.”<sup>80</sup> The San Francisco Peace Treaty of 1951<sup>81</sup> also formally required Japan to relinquish its claim to Formosa, which is now

68. See *id.* at 22 & n.41.

69. See *id.* at 22.

70. See Cheng, *supra* note 62, at 256; Chiu, *supra* note 45, at 20; PARK *supra* note 46, at 33. R

71. See, e.g., Cheng, *supra* note 62, at 253-60; Chiu, *supra* note 45 at 15-19; PARK, *supra* note 46, at 33-39. R

72. Treaty of Peace, China-Japan, Apr. 17, 1895, 181 Consol. T.S. 217, available at <http://www.isop.ucla.edu/eas/documents/1895shimonoseki-treaty.htm#Treaty> [hereinafter Treaty of Shimonoseki]. R

73. See *id.* art. 2 (“China cedes to Japan in perpetuity and full sovereignty . . . [t]he island of Formosa [Taiwan], together with all islands appertaining or belonging to the said island of Formosa.”); see also Cheng, *supra* note 62, at 259.

74. See Treaty of Shimonoseki, *supra* note 72, art. 2; Chiu, *supra* note 45, at 18-19. R

75. Formosa refers to Taiwan. See Treaty of Shimonoseki, *supra* note 72; Chiu, *supra* note 45, at 16. R

76. See Treaty of Shimonoseki, *supra* note 72, art. 2(b).

77. See Cheng, *supra* note 62, at 259.

78. See *id.* at 261.

79. See Conference of President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill in North Africa, U.S.-P.R.C.-U.K., Dec. 1, 1943, in 9 DEP’T ST. BULL., 393, 393 (1943) [hereinafter The Cairo Declaration]; see also Proclamation Defining Terms for Japanese Surrender, U.S.-P.R.C.-U.K., July 26, 1945, in 13 DEP’T ST. BULL. 137, 137 (1945) [hereinafter The Potsdam Declaration].

80. The Cairo Declaration, *supra* note 79.

81. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 (1952), available at <http://www.international.ucla.edu/eas/documents/peace1951.htm> [hereinafter The San Francisco Peace Treaty].

known as Taiwan.<sup>82</sup> Moreover, the 1952 Treaty of Peace between China and Japan certified that all pre-1941 Sino-Japanese treaties, including the Treaty of Shimonoseki, were null and void.<sup>83</sup> If China could prove that the islands were given to Japan through the Treaty of Shimonoseki, China would have a solid claim to the disputed islands, but because China has not proven that link, it has a weak claim to the islands.

## B. Japanese Claims

Japan puts forward four main arguments in its claim to the Senkaku. First, Japan claims that there were no signs of Chinese ownership when Japan studied and later annexed the islands before the Sino-Japanese war in 1895.<sup>84</sup> Second, Japan points out that China did not protest when the United States gained control over the islands under the Treaty of San Francisco.<sup>85</sup> Third, Japan argues that China printed maps indicating that the islands were non-Chinese territory.<sup>86</sup> Finally, Japan argues that it has peacefully governed the islands for at least the last thirty-seven years and has actively protested any foreign encroachment on the islands during that time.<sup>87</sup>

Japan argues that the Senkaku were *terra nullius*<sup>88</sup> when it took control of the islands in 1895.<sup>89</sup> Japan claims that it conducted repeated surveys between 1885 and 1895 which confirmed “that the islands were not only uninhabited but without any trace of control by China.”<sup>90</sup> Japan further asserts that a Cabinet Decision on January 14, 1895 (and not the Treaty of Shimonoseki signed on April 17, 1895) formally incorporated the islands into Japanese territory.<sup>91</sup> Japan, therefore, claims that the Senkaku were not acquired through aggression or treaty.<sup>92</sup>

International agreements after World War II substantiate Japan’s claims. Japan lost administrative capabilities of the islands in the after-

82. See *id.* art. 2.

83. Treaty of Peace, Japan-P.R.C., art. 4, Apr. 28, 1952, 136 U.N.T.S. 45, available at <http://www.taiwandocuments.org/taipei01.htm> (“It is recognised that all treaties, conventions, and agreements concluded before 9 December 1941 between Japan and China have become null and void as a consequence of the war.”).

84. See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50.

85. See *id.*; Chiu, *supra* note 45, at 24-25.

86. See Cheng, *supra* note 62, at 260 (stating that Chinese maps used the Japanese names for islands).

87. See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50; *Inalienable Part of China’s Territory*, *supra* note 43, at 1-2.

88. Land that is not claimed by any person or state. BLACK’S LAW DICTIONARY 1512 (8th ed. 2004).

89. See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50.

90. Chiu, *supra* note 45, at 17 (citing a statement from the Japanese Foreign Ministry dated March 8, 1972). See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50 (“From 1885 on, surveys . . . confirmed that the Senkaku Islands had been uninhabited and showed no trace of having been under the control of China.”).

91. BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50; Chiu, *supra* note 45, at 17 (citing a statement from the Japanese Foreign Ministry dated March 8, 1972).

92. See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50.

R

R

R

R

math of World War II, demonstrating the ability both to lose temporarily the right to control the Senkaku and also to regain that privilege.<sup>93</sup> The San Francisco Peace Treaty stipulated the transfer of the Senkaku from Japanese to U.S. control.<sup>94</sup> The U.S. Department of State denies that its temporary administration of the Senkaku affected the territoriality of the islands.<sup>95</sup> Despite the United States' claim of neutrality, neither the San Francisco Peace Treaty nor the Cairo Declaration returned the islands to China or Taiwan.<sup>96</sup> Furthermore, neither China nor Taiwan protested Japan's relinquishing control of the Senkaku to the United States.<sup>97</sup> In fact, neither China nor Taiwan officially protested the exercise of U.S. or Japanese sovereignty over the Senkaku until 1970,<sup>98</sup> almost twenty years after a proclamation transferred the islands to U.S. administration.<sup>99</sup> The Senkaku were even included in official Chinese government maps and textbooks as non-Chinese territory.<sup>100</sup> In 1972, after the dispute had begun, the United States returned the islands to Japan.<sup>101</sup> Since then, Japan has asserted sovereignty over the islands by building a lighthouse, making numerous official visits, and closely patrolling the islands with its Self-Defense Forces.<sup>102</sup> Japan contends that continued and active control over a

93. See The San Francisco Peace Treaty, *supra* note 81, art. 3; The Potsdam Declaration, *supra* note 79; The Cairo Declaration, *supra* note 79; BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50 (“[T]he Senakaku Islands are not included in the territory which Japan renounced under Article II of the San Francisco Peace Treaty. The Senkaku Islands have been placed under the administration of the United States of America as part of the Nansei Shoto Islands . . .”).

94. See The San Francisco Peace Treaty, *supra* note 81, art. 3; PARK *supra* note 46, at 34. R

95. *Hearing on the Okinawa Reversion Treaty Before the Senate Comm. On Foreign Rel.*, 92d Cong. (1971) (testimony of William P. Rogers, Secretary of State) (the Okinawa Reversion Treaty “does not affect the legal status of these islands at all. Whatever the legal situation was prior to the treaty is going to be the legal situation after the treaty comes into effect.”).

96. See Chiu, *supra* note 45, at 13-17. R

97. See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50 (“The fact that China expressed no objection to the status of the Islands being under the administration of the United States under Article III of the San Francisco Peace Treaty clearly indicates that China did not consider the Senkaku Islands as part of Taiwan. It was not until the latter half of 1970, when the question of the development of petroleum resources on the continental shelf of the East China Sea came to the surface, that the Government of China and Taiwan authorities [sic] began to raise questions regarding the Senkaku Islands.”); see also SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 118 (1997) (noting the “judicial trend of putting increasing emphasis on the absence of rival acts or claims of sovereignty”).

98. See Chiu, *supra* note 45, at 17-18 (citing a statement from the Japanese Foreign Ministry dated March 8, 1972); BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50. R

99. See BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50.

100. See Seokwoo Lee, *Territorial Disputes Among Japan, China and Taiwan Concerning the Senkaku Islands*, 3 BOUNDARY AND TERRITORY BRIEFING 7, 11 (2002).

101. See Chiu, *supra* note 45, at 25 & n.61. R

102. See *id.* at 27; *Inalienable Part of China's Territory*, *supra* note 43, at 1-2; see, e.g., *Taipei Demands Japan Remove Shinto Shrine from Disputed Island*, KYODO NEWS SERVICE, May 5, 2000 [hereinafter *Taipei Demands*]. R

territory is a major criterion for demonstrating ownership.<sup>103</sup>

The Senkaku dispute is by no means settled. It still is debated among scholars,<sup>104</sup> and international courts have not made any official ruling about the islands' true ownership.

### C. Determining Ownership of the Senakaku

#### 1. Legal Standard for Disputed Island Ownership

The *Pulau Ligitan and Pulau Sipadan* case,<sup>105</sup> decided by the International Court of Justice (ICJ) in 2002, exemplifies an accepted rule of international law regarding island disputes: active occupation and effective control over territory supersedes ambiguous ancient title.<sup>106</sup> The case involved a territorial dispute between Indonesia and Malaysia over two small islands, both located in the Celebes Sea, northeast of Borneo.<sup>107</sup> Each state claimed ownership through succession to previous claims.<sup>108</sup> In this case, as well as in the preceding cases supporting this ruling, the ICJ examined modern control of the relevant islands to determine claims of historical title.<sup>109</sup> Displays of sovereignty are essential to prove ownership.<sup>110</sup> Also, failure to protest another state's occupation of claimed territory is seen as a de facto acceptance of the other state's ownership.<sup>111</sup> The ICJ focused on which state actually occupied and administered state functions over the disputed islands as well as to what extent the states acquiesced to the other's authority.<sup>112</sup> Accordingly, the ICJ awarded both Ligitan and Sipadan to Malaysia, because Malaysia had exercised authority

---

103. See SHARMA, *supra* note 97, at 280.

104. See PARK, *supra* note 46, at 41.

105. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 17).

106. See *id.* at 684 (Dec. 17); see also *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond. v. Nicar.)*, 1992 I.C.J. 351, 564-65 (Sept. 11); *Minquiers and Ecrehos (Fr. v. U.K.)*, 1953 I.C.J. 47, 47 (Nov. 17); *Sovereignty over Clipperton Island (Fr. v. Mex.)* (1931), reprinted in 26 AM. J. INT'L L. 390, 390 (1932); *Island of Palmas (U.S. v. Neth.)*, 11 R. INT'L Arb. Awards 831 (Perm Ct. Arb. 1925); William B. Heflin, *Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 18 ASIAN-PAC. L. & POL'Y J. 1, 9-16 (2000) (discussing the cases before the Pulau Ligitan and Pulau Sipadan dispute and their relation to the Senkaku Island dispute).

107. See *Pulau Ligitan*, *supra* note 105, at 633-34.

108. See *id.* at 643-45.

109. See *id.* at 684.

110. See *id.* at 684 (“[M]easures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory which is specified by name.”).

111. *Id.* at 685 (“The Court moreover cannot disregard the fact that at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest. In this regard, the Court notes that in 1962 and 1963 the Indonesian authorities did not even remind the authorities of the colony of North Borneo, or Malaysia after its independence, that the construction of the lighthouses at those times had taken place on territory which they considered Indonesian; even if they regarded these lighthouses as merely destined for safe navigation in an area which was of particular importance for navigation in the waters off North Borneo, such behaviour is unusual.”).

112. See *id.* at 684-85.

over the islands.<sup>113</sup>

The ruling illustrates what constitutes ownership under ICJ standards. Indonesia claimed ownership of the islands because Dutch and Indonesian navies patrolled the area and Indonesian fishermen were active around the islands.<sup>114</sup> The ICJ rejected Indonesia's claim of ownership based on patrols by the Dutch and Indonesian Navies and the activities of Indonesian fishermen around the islands.<sup>115</sup> In addition, the ICJ viewed Indonesia's failure to use the islands as base points when drawing baselines for the territorial sea as evidence against ownership.<sup>116</sup> In contrast, the ICJ held that Malaysia owned the islands because it licensed boats to use the islands, constructed and maintained lighthouses on the islands,<sup>117</sup> and collected sea turtle eggs from the islands.<sup>118</sup> Further, the ICJ noted that in cases of small islands, even sparse evidence of ownership can be persuasive.<sup>119</sup>

The ICJ applied what has become a litmus test for island ownership: occupation and a rapid protest against foreign encroachment on land indicate ownership.<sup>120</sup> Failure to execute those two actions results in forfeiture of possible title.<sup>121</sup>

## 2. Japan's Superior Claim over the Senkaku

In applying the ICJ standard from the *Pulau Ligitan and Pulau Sipadan* case, it becomes clear that Japan has a superior claim over the Senkaku Islands. Japan has maintained sovereignty over the Senkaku and has peacefully governed the islands for the last thirty-seven years without dispute.<sup>122</sup> Japan demonstrated ownership by including the Senkaku in its national censuses and building lighthouses on the islands.<sup>123</sup> According to the ICJ's principles, exercise of these duties indicates ownership.<sup>124</sup> China waited almost twenty years to protest Japanese control of the islands, and did so only when the issue of natural resources arose.<sup>125</sup> Even if China previously used the islands, "discovery" is not tantamount to effec-

---

113. See *id.* at 685-86.

114. See *id.* at 679-80.

115. See *id.* at 685-86.

116. See *id.* at 680.

117. See *id.* at 685 ("The Court observes that the construction and operation of lighthouses and navigational aids are not normally considered manifestations of State authority . . . however . . . '[t]he construction of navigational aids . . . can be legally relevant in the case of very small islands . . . .").

118. See *id.* at 681.

119. See *id.* at 682.

120. See Heflin, *supra* note 106, at 16.

121. See *id.*

122. See, e.g., *Inalienable Part of China's Territory*, *supra* note 43, at 1-2.

123. See Chiu, *supra* note 45, at 27; *Inalienable Part of China's Territory*, *supra* note 43, at 1-2; BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50.

124. See *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon. v. Malay.), 2002 I.C.J. 625, 684-85 (Dec. 17).

125. See Chiu, *supra* note 45, at 17-18 (citing a statement from the Japanese Foreign Ministry dated March 8, 1972); BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 50.

tive “occupation” and cannot generate valid territorial title.<sup>126</sup> Japan’s peaceful and effective occupation of the islands, therefore, indicates a superior claim.

Japan’s ownership of the Senkaku Islands greatly strengthens its boundary claim, although whether the islands are base points depends on whether the islands are considered “habitable” and whether they are indeed “islands” and not “rocks.”<sup>127</sup> If Japan were declared the legal owner of the islands, the Japanese EEZ would expand at least to the claimed median and probably further. If China were declared the legal owner of the islands, its claim of a continuous continental shelf would be greatly strengthened.

### III. The Sino-Japanese Continental Shelf Dispute

China and Japan also differ on continental shelf delimitation principles. China claims a 350 nm EEZ based on the extension of its continental shelf, but Japan insists that China and Japan should each maintain an EEZ only to the point at which their 200 nm EEZs intersect.<sup>128</sup> China has the fourth longest coastline in the world, but it would only have the tenth largest maritime resource zone if the Japanese median approach is adopted.<sup>129</sup> Therefore, China resists the Japanese approach of an EEZ based on distance.<sup>130</sup>

UNCLOS calls for disputing parties to make a peaceful compromise that is mutually beneficial.<sup>131</sup> Both China and Japan have formulated domestic policies comporting with UNCLOS rules.<sup>132</sup> However, both are frustrated by UNCLOS’ failure to delimitate overlapping resource zones.<sup>133</sup> China and Japan have agreed that the dispute should be resolved through peaceful dialogue.<sup>134</sup> Efforts to do so, however, are often marred by the political relations between the two nations.<sup>135</sup>

---

126. See *supra* note 106.

127. See UNCLOS, *supra* note 1, arts. 47(1), 121; see, e.g., Leticia Diaz et al., *When is a “Rock” an “Island”?—Another Unilateral Declaration Defies “Norms” of International Law*, 15 MICH. ST. J. INT’L L. 519 (2007).

128. See *supra* text accompanying notes 31–41; Takahashi, *supra* note 5.

129. See AUSTIN, *supra* note 38, at 56.

130. *Id.*

131. UNCLOS, *supra* note 1, art. 123 (“States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.”).

132. See, e.g., Reiji Yoshida & Shinichi Terada, *Japan, China Strike Deal on Gas Fields*, JAPAN TIMES, June 19, 2008, <http://search.japantimes.co.jp/cgi-bin/nn20080619a1.html> (reporting that China and Japan plan to engage in a joint venture “while still technically maintaining their own claims” over the border dispute).

133. See, e.g., *id.*

134. See *id.*

135. See *id.* (“Disputes over EEZ boundaries in the East China Sea are a constant source of friction between Japan and China that have fanned nationalist sentiment on both sides.”).

### A. Chinese Claims

China maintains that a coastal state has the right to “reasonably define” the limits of its territorial sea according to its geographical conditions.<sup>136</sup> China adhered to this policy in protests against Japanese activities in the East China Sea.<sup>137</sup> On June 13, 1977, the Ministry of Foreign Affairs clarified China’s policy claiming that “[t]he People’s Republic of China has inviolable sovereignty over the East China Sea continental shelf . . . [and the continental shelf is the] natural extension of Chinese continental territory . . . .”<sup>138</sup> In fact, the Chinese Ministry of Foreign Affairs uses the term 大陆架 (*dalu jia*), meaning continental or mainland territory, to define the continental shelf, whereas Taiwan and other Chinese speaking countries use the much more supple term 陆地领土 (*ludi lingtu*), meaning land territory, to describe the same phenomenon.<sup>139</sup> The specificity of China’s terminology illustrates China’s resolve to claim the continental shelf.

Chinese claims have a basis in UNCLOS. UNCLOS defines a continental shelf as the “natural prolongation of [a country’s] 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.”<sup>140</sup> On submarine ridges, such as in the East China Sea, the continental shelf claim can reach a maximum of 350 nm from the baselines.<sup>141</sup> A coastal state can exercise sovereign rights over its continental shelf for the purpose of exploring and exploiting its natural resources.<sup>142</sup> Enforcing sovereign rights over its claimed continental shelf, however, would violate Japan’s median principle.

### B. Japanese Claims

UNCLOS also can be construed to substantiate Japan’s equidistance claim. Japan adheres to the median principle with outlying islets as its base points for measurement.<sup>143</sup> Article 15 stipulates that a state is not entitled to extend its territorial sea beyond the median when two opposite states cannot agree on delimitation, except when “historic title or other

136. See Comm. on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of Nat’l Jurisdiction, Sub-comm. II, *Working Paper: On Sea Area Within the Limits of National Jurisdiction*, art. 1(2), U.N. Doc. A/AC.138/SC.II/L.34 (July 16, 1973) (submitted by the Chinese Delegation); AUSTIN, *supra* note 38, at 50–51. R

137. See FM’s Answers, *supra* note 15 (quoting Chinese Foreign Minister Yang Jiechi: “On the East China sea delimitation, China has never and will not recognize the so-called ‘median line’ as advocated by Japan. China upholds the principle of natural prolongation to solve the delimitation issue of [sic] East China Sea continental shelf.”). R

138. AUSTIN, *supra* note 38, at 52; DAVID G. MULLER, JR., CHINA AS A MARITIME POWER 214 (1983) (citing *Xinhua Statement*, XINHUA, June 13, 1977, at A9). R

139. See AUSTIN, *supra* note 38, at 52. R

140. UNCLOS, *supra* note 1, art. 76(1).

141. See *id.* art. 76(6).

142. *Id.* art. 77.

143. See PARK, *supra* note 46, at 257. R

special circumstances” exist.<sup>144</sup> Japan claims that China does not have historic title and that the East China Sea does not entail special circumstances.<sup>145</sup> Also, Article 57 clearly states that “[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>146</sup> Japan further relies on Article 82, which requires coastal states to make payments for exploiting nonliving resources in the continental shelf beyond 200 nm from its baselines, to show that control of a continuous continental shelf does not always equate to legal ownership.<sup>147</sup>

### C. Determining Continental Shelf Delimitation

#### 1. Legal Standard for Continental Shelf Delimitation

On June 3, 1985, the ICJ made an important ruling on a continental shelf dispute between Libya and Malta.<sup>148</sup> The *Libya-Malta Continental Shelf Delimitation* case is applicable to the East China Sea dispute because it illustrates how the ICJ may decide continental shelf disputes based on UNCLOS.<sup>149</sup> The case also addresses concepts of landmass, continental shelf delimitation, and an island-state’s ability to have a continental shelf—issues which are factors in the East China Sea dispute.<sup>150</sup> The case established a major precedent for later rulings: when two 200 nm EEZs (based purely on distance) intersect between two opposite states, the legal concept of a continental shelf’s natural prolongation is irrelevant because each state has the right to explore and exploit the shelf’s resources up to 200 nm from its baselines.<sup>151</sup>

Malta—a group of islands in the Mediterranean Sea<sup>152</sup>—and Libya—a mainland state on the coast of North Africa<sup>153</sup>—are separated by only 340 kilometers.<sup>154</sup> Libya argued that, based on its superior land mass and its continuous continental shelf, Libya should be granted majority control of the sea between itself and Malta.<sup>155</sup> Experts testified that the continental shelf had a major indentation near Malta and that the indentation should

---

144. UNCLOS, *supra* note 1, art. 15.

145. See PARK, *supra* note 46, at 257-59.

146. UNCLOS, *supra* note 1, art. 57.

147. See *id.* art. 82.

148. Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 56-58 (June 3).

149. See *id.* at 29-31.

150. See *id.* at 33 (“In the view of the Court, even though the present case relates only to the delimitation of the continental shelf and not to that of the exclusive economic zone, the principles and rules underlying the latter concept cannot be left out of consideration.”).

151. See *id.* at 38, 55-56.

152. *Id.* at 20-22.

153. *Id.*

154. *Id.*

155. See *id.* at 31 (“In Libya’s view, the prolongation of the land territory of a State into and under the sea . . . was a ‘geological fact’ and natural prolongation in the same physical sense, involving geographical as well as geological and geomorphologic aspects, remains the fundamental basis of legal title to continental shelf areas.”).

serve as the boundary between the two states.<sup>156</sup> Malta argued that the ICJ should apply the equidistance principle, despite the indentation, because physical and geographical features are not relevant to the question of prolongation when two 200 nm EEZs based on distance intersect.<sup>157</sup>

Even though UNCLOS was not yet in effect during the dispute, both states had signed the treaty, so the ICJ used many of UNCLOS' tenets to decide the case.<sup>158</sup> The ICJ acknowledged that the delimitation of the continental shelf and the EEZ are separate but intertwined and placed heavy emphasis on distance from the coast, which is common to both concepts.<sup>159</sup> The ICJ ruled that "[l]andmass has never been regarded as a basis of entitlement to continental shelf rights, and such a proposition finds no support in the practice of States, in the jurisprudence, in doctrine, or indeed in the work of the Third United Nations Conference on the Law of the Sea."<sup>160</sup> The ICJ also recognized that Libya and Malta both agreed that entitlement to a continental shelf is the same between an island-state and a mainland state.<sup>161</sup> The ICJ found that, in cases in which two states' 200 nm EEZs intersect, the concept of natural prolongation of the continental shelf should not be considered, because each state has the right to explore and exploit the shelf's resources up to 200 nm from its baselines.<sup>162</sup> The ICJ's opinion, based on UNCLOS' tenets, creates a strong precedent for future disputes.

## 2. Japan's Superior Claim to Continental Shelf Delimitation

Japan and China are in a similar physical situation as Malta and Libya. Japan is an island state separated from China by only 360 nm of the East China Sea.<sup>163</sup> The *Libya-Malta* case undermines possible Chinese claims because it holds that landmass is not a factor in shelf delimitation, islands are entitled to continental shelf claims, distance is more important than the natural prolongation of the continental shelf, and states should not be able to claim over 200 nm in an enclosed sea less than 400 nm across.<sup>164</sup> Based on the principles that the ICJ enforced in the *Libya-Malta* ruling, Japan may have a legal claim to an equidistant median border in the East China Sea.

China, however, has a de facto advantage over Japan because China has already started developing sites in its uncontested waters of the East China Sea.<sup>165</sup> The energy resources located in the East China Sea could be

---

156. See *id.* at 34-35.

157. See *id.* at 31-32 ("For Malta, the principle is the application of the 'distance criterion'; continental shelf rights, whether extending without restraint into the open sea or limited by reference to a neighbouring State, are controlled by the concept of distance from the coasts.").

158. See *id.* at 29-31.

159. See *id.* at 33.

160. *Id.* at 41.

161. See *id.* at 42.

162. See *id.* at 55-56.

163. See Ramos-Mrosovsky, *supra* note 4, at 911; see also *Continental Shelf*, 1985 I.C.J. at 20.

164. See *Continental Shelf*, 1985 I.C.J. at 55-56.

165. See HARRISON, *supra* note 9, at 3-6.

in one large pool, and China could be legally siphoning out the resources from both sides of the median from its developed sites.<sup>166</sup> China's advantage will bring Japan to the bargaining table, even if Japan has superior legal claims to delimitation and the Senkaku.

#### IV. A History of Rocky Negotiations

##### A. Struggling Sino-Japanese Negotiations

On August 19, 2003, Sinopec, China National Offshore Oil Corporation (CNOOC), Royal Dutch/Shell, and Unocal Corporation entered into a joint venture to exploit gas reserves in the Chinese side of the East China Sea beginning in mid-2005.<sup>167</sup> Gas production was expected to reach 2.5 billion cubic meters per year by 2007.<sup>168</sup> On September 24, 2004, however, the two non-Chinese partners in the joint venture, Royal Dutch/Shell and Unocal Corporation, announced their withdrawal, citing doubts over the commercial viability of the resources in the area.<sup>169</sup>

Although the withdrawing partners publicly denied that territorial disputes influenced their decision,<sup>170</sup> such disputes almost certainly played a role. Earlier that year Japan had protested that the project impinged on its territory.<sup>171</sup> Three years earlier, in December 2001, four Japanese coast guard patrol vessels fired on an unidentified ship infringing on Japan's EEZ in the East China Sea, sinking the ship and killing all fifteen crew members.<sup>172</sup> Just after the agreement fell through, in November 2004, one of China's nuclear-powered submarines entered Japanese-claimed waters near the Senkaku, forcing Japan's Maritime Self-Defense Force to chase the submarine with destroyers and aircraft.<sup>173</sup>

China has since created four gas fields in its undisputed territory in the East China Sea, each of which has both a Chinese and Japanese name: Chunxiao, Shirakaba; Longjing, Asunaro; Tianwaitian, Kashi; and Duanqiao, Kusunoki, respectively.<sup>174</sup> The Chunxiao gas field lies only

---

166. See *id.* at 4 (“[T]he Japanese Agency for Natural Resources and Energy issued a report . . . announcing a ‘high probability’ that the structures where China is drilling extend onto the Japanese side. . . . Moreover, it added, ‘there is reason for concern’ that Chinese production operations will extract gas from the Japanese side.”).

167. Press Release, CNOOC Limited, East China Sea Gas Development On Track (Sept. 29, 2004) (on file with author).

168. Xie Ye, *Oil Giants Pull out of East China Sea Gas Fields Project*, CHINA DAILY, Sept. 30, 2004.

169. *Id.*

170. *Id.*

171. *Id.*

172. See Mark J. Valencia, *Tokyo Seeks Sea Change: Japan's Hot Pursuit of Using Force in Territorial Waters Raises Concerns*, WASH. TIMES, Jan. 25, 2002, at A16 (noting that while Japanese pursuit and attack of the ship began in Japan's claimed EEZ, the Japanese vessels fired on and eventually sank the “intruding” ship in what Japan recognizes as China's EEZ).

173. Mark Magnier, *China Regrets Sub Incident, Japan Says*, L.A. TIMES, Nov. 17, 2004, at A3.

174. See Editorial, *Joint Project with China*, JAPAN TIMES, Jan. 29, 2009, available at <http://search.japantimes.co.jp/cgi-bin/ed20090129a1.html>.

four kilometers from the median.<sup>175</sup> Japan, afraid that the fields would siphon off part of a larger deposit that rests on its side of the median, started negotiations.<sup>176</sup>

From October 2004 to mid-2008, China and Japan held eleven rounds of negotiations regarding the delimitation of the East China Sea, four of which marked serious turning points in Sino-Japanese relations.<sup>177</sup> The first round took place on October 25, 2004.<sup>178</sup> During negotiations, China denied Japan's request to obtain Chinese data on the Chunxiao field.<sup>179</sup> At the next round the following May, Japan rejected China's proposal that the two countries jointly explore the area east of the median.<sup>180</sup>

The complex negotiations<sup>181</sup> were complicated further by contemporaneous developments in Sino-Japanese relations. The East China Sea disagreement may have exacerbated the violent anti-Japanese protests in Beijing on April 9, 2005, when protesters attempted to storm the Japanese Embassy.<sup>182</sup> The Chinese government-sanctioned protest was the largest since the 1999 bombing of the Chinese Embassy in Belgrade.<sup>183</sup> The day after the April 9 protest, demonstrators in the cities of Guangzhou and Shenzhen trashed Japanese storefronts, harassed Japanese nationals, and called for a boycott of all Japanese goods.<sup>184</sup> "Even Chinese Premier Wen Jiabao turned up the heat on Apr[il] 12 when, during a visit to India, he declared that Japan 'needs to face up to history squarely.'"<sup>185</sup> On April 23, "20,000 furious Chinese protesters shouting 'Japanese pigs, come out!' rampaged through Shanghai, tossing stones and tomatoes at the Japanese Consulate, trashing shops and flipping over a Nissan van. Two Japanese were reported injured."<sup>186</sup>

---

175. Takahashi, *supra* note 5.

176. See Eric Watkins, *Japan, China in Stalemate over Maritime Boundaries*, OIL & GAS J., Nov. 8, 2004, at 28 ("The Cunxiao [sic] gas field lies just west of a line Japan claims as the boundary of its exclusive economic zone. Japan has repeatedly complained that the pipeline, which is due for completion by May 2005, could breach its ocean economic zone. Japan also argues it has a right to claim its share if any resources are found in the Chinese zone along the median line.").

177. See generally Kung-wing Au, *The East China Sea Issue: Japan-China Talks for Oil and Gas*, 25 EAST ASIA 223 (2008); *Ball Game at China-Japan Summit*, B.B.C. NEWS, Dec. 29, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7164089.stm> [hereinafter *Ball Game*].

178. Au, *supra* note 177, at 228-29.

179. *Id.* at 225 (discussing Japan's unanswered demand for data). The day after the meeting, Japanese Minister of Trade and Industry, Shoichi Nakagawa, commented, "I don't know why these discussions were even held . . . I don't plan to get involved in further talks that end without resolution." Watkins, *supra* note 176, at 28.

180. Au, *supra* note 177, at 29.

181. For more on the tenor of the meetings, see generally *id.*; *Access to Resources Blocked: East China Sea Boundary Dispute Prevents Gas-Field Development*, DAILY YOMIURI (Japan), Apr. 27, 2005.

182. For more on the protests, see Brian Bremner, *Why Japan and China are Squaring Off*, BUS. WEEK, Apr. 25, 2005, at 57.

183. *Id.*

184. *Id.*

185. *Id.*

186. Melinda Liu & Christian Caryl, *Asia: Furies Unleashed*, NEWSWEEK, Apr. 25, 2005, at 22.

Japan responded on April 13, when “the Ministry of Economy, Trade and Industry began procedures to grant Japanese companies concessions to conduct test drilling for natural gas and oil” on the Japanese side of the East China Sea.<sup>187</sup> On April 22, eighty-eight members of Japan’s parliament jointly visited Yasukuni Shrine, which honors Japanese war dead, including war criminals from World War II.<sup>188</sup> The pilgrimage showed support for Prime Minister Junichiro Koizumi, who helped spark the Sino-Japanese conflict through his repeated visits to the shrine, despite the Chinese government’s protest.<sup>189</sup> Japanese officials also demanded an official apology from China, and Japanese citizens staged a small anti-Chinese protest in Tokyo.<sup>190</sup>

In the wake of the protests, the leaders of Japan and China realized that their countries were headed down a dangerous path and agreed to start making bona fide efforts to negotiate the delimitation of the East China Sea.<sup>191</sup> The second important round of talks was held in Beijing from May 30 to 31, 2005.<sup>192</sup> The parties agreed to negotiate the border dispute and potential joint development of the area.<sup>193</sup> A little over a week after the discussions, sixty fishing boats from Taiwan formed a blockade around the Senkaku to protest Japanese plans to control fishing activities in the area.<sup>194</sup>

The third major consultation was held from September 30 to October 1, 2005, in Tokyo, during which the two sides discussed the possibility of launching joint development projects.<sup>195</sup> Japan proposed the median demarcation and joint development of the Chinese gas fields.<sup>196</sup> Both sides agreed to meet again that month, but the negotiation was stalled after Prime Minister Koizumi’s visit to the Yasukuni Shrine on October 17, 2005.<sup>197</sup>

The 2005 round was postponed until March 6 to 7, 2006.<sup>198</sup> In the

---

187. See *Teikoku Oil Applies for Test-Drilling in E. China Sea*, JAPAN ECON. NEWSWIRE, Apr. 28, 2005.

188. *Japanese Lawmakers Visit War Shrine Amid Chinese Protests*, DEUTSCHE PRESSE-AGENTUR (F.R.G.), Apr. 22, 2005.

189. See *id.*

190. See Edward Cody, *Japanese Oil Drilling Plan Draws Protest from China*, WASH. POST, Apr. 14, 2005, at A16.

191. Hidetoshi Ikebe, *Koizumi-Hu Summit 1st Step to Repairing Rift*, YOMIURI SHIMBUN, Apr. 25, 2005, at 2.

192. *Au, supra* note 177, at 229.

193. *Id.* (noting that Japan rejecting China’s proposal to jointly develop fields east of the median line, and that “both sides could only agree to set up a working group of foreign affairs officials to work on the issue”).

194. See *Sixty Taiwan Boats Head for Islands Disputed with Japan*, KYODO NEWS SERV., June 9, 2005.

195. See *Oil and Gas in Troubled Waters: Japan and China*, ECONOMIST, Oct. 8, 2005.

196. See *id.*

197. *Au, supra* note 177, at 229-30.

198. *Id.* at 230; *Senkaku Area Not in China Gas Proposal: Japan Seeks Compromise on 4 Gas Fields*, YOMIURI SHIMBUN (Japan), Mar. 11, 2006.

fourth round, China proposed joint development of two sites, including the area around the Senkaku islands.<sup>199</sup> Japan rejected China's offer.<sup>200</sup>

### B. A Warm Spring

Sino-Japanese relations started improving soon after Prime Minister Shinzo Abe succeeded Prime Minister Koizumi on September 26, 2006.<sup>201</sup> Soon after becoming Prime Minister, Abe visited Beijing on October 8, 2006, for the first bilateral summit between Chinese and Japanese heads of state in five years.<sup>202</sup> By mid-April 2007, just two years after the serious Sino-Japanese protests, Chinese Premier Wen Jiabao became the first Chinese leader to visit Japan since 2000.<sup>203</sup> Wen even wrote a poem to summarize the meaning of his visit: "Spring has come. The sun shines brightly. The cherry tree blossoms proudly and the snow and ice have melted."<sup>204</sup> Part of Abe's appeal to China was his decision to not visit Yasukuni Shrine, in stark contrast to his predecessor, Prime Minister Koizumi.<sup>205</sup> After starting strong, however, Abe's administration, marred by scandal, became extremely unpopular among Japanese voters, forcing Abe to resign after only one year in office.<sup>206</sup>

The trend of improving Sino-Japanese relations continued with Prime Minister Yasuo Fukuda.<sup>207</sup> Fukuda assumed office in late September 2007, and, by December of that year, he made his first official visit to China.<sup>208</sup> Wen welcomed Fukuda saying, "Prime Minister Fukuda said the spring has come in our relations and, after two-and-a-half hours of talks, I truly feel that the spring of China-Japan relations has arrived."<sup>209</sup> Wen and Fukuda did not reach an agreement on the East China Sea issue but agreed to raise discussions at the vice-ministerial level, a major step for-

---

199. See *Senkaku Area Not in China Gas Proposal: Japan Seeks Compromise on 4 Gas Fields*, *supra* note 198.

200. See *id.*

201. See *Abe Elected as New Japan Premier*, B.B.C. NEWS, Sept. 26, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/5380366.stm>; *First China Visit for Japan's Abe*, B.B.C. NEWS, Oct. 4, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/5405066.stm> (noting that Mr. Abe's election "brought the hope of a regional rapprochement").

202. See *First China Visit for Japan's Abe*, *supra* note 201.

203. See *China PM Wraps up Visit to Japan*, B.B.C. NEWS, Apr. 13, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6551029.stm> (noting that Wen also played baseball in Kyoto, Japan, wearing the number 35 on his [Ritsumeikan University] jersey to symbolize the thirty-five years of Sino-Japanese bilateral relations).

204. *Id.*

205. See *Ball Game*, *supra* note 177.

206. See Chris Hogg, *Japan's Political Revolving Door*, B.B.C. NEWS, Sept. 27, 2008, [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/7637286.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/7637286.stm) (explaining that "the reality is that most Japanese prime ministers stay in office just long enough to meet the US [sic] president and get a photo to impress the grandchildren.").

207. See *Japan's PM Stays Away from Shrine*, B.B.C. NEWS, Aug. 15, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7562510.stm>.

208. See *Ball Game*, *supra* note 177.

209. *China and Japan PMs Hail Progress*, B.B.C. NEWS, Dec. 28, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7160993.stm>.

ward.<sup>210</sup> Sino-Japanese relations were strengthened further by Fukuda's decision to follow Abe and refrain from visiting the Yasukuni Shrine.<sup>211</sup>

In the spring of 2008, Sino-Japanese relations fully started to blossom. Chinese President Hu Jintao made his first visit to Japan, and signed the Joint Statement between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a Mutually Beneficial Relationship Based on Common Strategic Interests alongside Fukuda, the fourth such agreement since 1972.<sup>212</sup> The Joint Statement declared that both Japan and China should "shoulder greater responsibility for the peace and development of the world in the 21st Century."<sup>213</sup> The Joint Statement further provided that the two countries would develop a system "for the periodic exchange of visits by the leaders of the two countries, with the leader of one country visiting the other country once a year in principle."<sup>214</sup> After the meeting, Fukuda told a joint news conference that the two countries "agreed a solution is in sight for the long pending issue of developing resources in the East China Sea as Japan and China have held meaningful discussions and made significant progress."<sup>215</sup> Fukuda's vision seemed to become a reality on June 18, 2008, when China and Japan announced that they had reached an arrangement to jointly develop one of the four gas fields in the East China Sea.<sup>216</sup>

Following the announcement, Chinese citizens staged protests at the Japanese Embassy in Beijing and more than 500 people demonstrated in the business district of Changsha, Hunan province.<sup>217</sup> Within a week of the arrangement, however, Sino-Japanese relations were strengthened further by the visit of a Japanese warship arriving in China for a five-day port call, the first visit by a Japanese navy ship since World War II.<sup>218</sup> The warship carried relief supplies for the victims of the 2008 Sichuan earthquake.<sup>219</sup>

---

210. See *id.* ("Japanese Foreign Minister Masahiko Komura said . . . 'China has shown some understanding of Japan's principles, but I do not feel we have been able to get over the remaining problems.'").

211. See *Japan's PM Stays Away from Shrine*, *supra* note 207.

212. See *Landmark China-Japan Deal Agreed*, B.B.C. NEWS, May 7, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7387027.stm> [hereinafter *Landmark Deal*]; see also Joint Statement Between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a "Mutually Beneficial Relationship Based on Common Strategic Interests," Japan-P.R.C., (Ministry of Foreign Affairs of Japan), May 8, 2008 [hereinafter Joint Statement of Mutually Beneficial Relationship], available at <http://www.mofa.go.jp/region/asia-paci/china/joint0805.html>.

213. Joint Statement of Mutually Beneficial Relationship, *supra* note 212, para. 6(5).

214. *Id.* para. 6(1).

215. *Landmark Deal*, *supra* note 212.

216. See *China and Japan Strike Gas Deal*, B.B.C. NEWS, June 18, 2008, <http://news.bbc.co.uk/2/hi/business/7461043.stm>. For a detailed analysis of why China and Japan needed to reach the arrangement, see Alexander M. Peterson, *Exploration of the East China Sea: An Opportunity for Cooperation*, 32 WITTENBERG E. ASIAN STUD. J. 123 (2007).

217. See *Anti-Japanese Protesters Assail Sino-Japan Gas Pact*, B.B.C. NEWS, June 19, 2008.

218. See *Japan Warship Begins China Visit*, B.B.C. NEWS, June 24, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7470518.stm>.

219. See *id.*

## C. The Joint Press Release

China and Japan formalized the arrangement<sup>220</sup> to develop jointly certain areas of the East China Sea in a press statement that the Foreign Ministry representatives of China and Japan distributed at separate domestic press conferences on June 18, 2008.<sup>221</sup> The arrangement stressed that China and Japan had reached a “principled consensus” on the East China Sea issue.<sup>222</sup> The arrangement sought to make the East China Sea a “sea of peace, cooperation and friendship,” by “conduct[ing] cooperation in the transitional period prior to delimitation without prejudicing [China and Japan’s] respective legal positions.”<sup>223</sup> “Under the deal, Japan and China [would] jointly explore a 2,700 square kilometer area” straddling the median.<sup>224</sup> Japanese corporations would also invest in the Chunxiao gas field.<sup>225</sup> The arrangement does not cover three other gas fields, or the Senkaku.<sup>226</sup> Though the arrangement is only a page long, the term “joint development” is used six times, but “joint development” carefully is not used when referring to the Chunxiao gas field.<sup>227</sup> Instead the arrangement declares that

Chinese enterprises welcome the participation of Japanese legal person [sic] in the development of the existing oil and gas field in Chunxiao in accordance with the relevant laws of China governing cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources.<sup>228</sup>

Despite the clarity of the arrangement regarding the Chunxiao gas field, some Chinese citizens were outraged.<sup>229</sup>

Less than a day after the arrangement was announced, China made great efforts to stress that the arrangement was not considered a joint development agreement for the Chunxiao gas field.<sup>230</sup> Following the release of the joint press statement, Vice Foreign Minister Wu Dawei stressed that “Japan’s acknowledge [sic] of China’s sovereign rights over Chunxiao is one of the important precondition [sic] of the consensus

---

220. “The term ‘arrangement’ is often used to indicate legal instruments that are less formal than a ‘treaty’ or ‘agreement.’” SUN PYO KIM, MARITIME DELIMITATION AND INTERIM ARRANGEMENTS IN NORTH EAST ASIA 42 (2004).

221. See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, JOINT PRESS CONFERENCE BY MINISTER FOR FOREIGN AFFAIRS MASAHIKO KOUMURA AND MINISTER OF ECONOMY, TRADE AND INDUSTRY AKIRA AMARI (REGARDING COOPERATION BETWEEN JAPAN AND CHINA IN THE EAST CHINA SEA), June 18, 2008 [hereinafter JAPAN PRESS CONFERENCE], available at [http://www.mofa.go.jp/announce/fm\\_press/2008/6/0618.html](http://www.mofa.go.jp/announce/fm_press/2008/6/0618.html); *Sea of Cooperation*, *supra* note 12.

222. See Principled Consensus, *supra* note 11; *Chinese Minister*, *supra* note 8.

223. Principled Consensus, *supra* note 11.

224. See *Sea of Cooperation*, *supra* note 12.

225. See *id.*

226. See JAPAN PRESS CONFERENCE, *supra* note 221.

227. See Principled Consensus, *supra* note 11.

228. *Id.*

229. See Stephanie Ho, *China “Clarifies” Agreement with Japan*, VOICE OF AMERICA NEWS, June 19, 2008.

230. See *id.*; *Sea of Cooperation*, *supra* note 12.

R

R

R

R

between China and Japan on the East China Sea issue.”<sup>231</sup> A few hours later, Japanese Foreign Minister Masahiko Koumura responded at a separate press conference by stating

Regarding any statement that was made by the Chinese side to the effect that this is not a joint development, I for my part would say that this is a question of how the definition is drawn and in the event that the Chinese side would make the statement that this is not joint development, I certainly do not intend to raise a complaint and tell them that is wrong.<sup>232</sup>

Despite Koumura’s reassurance, Chinese domestic criticism remained severe, and, on June 24, 2008, Chinese Foreign Minister Yang Jiechi clarified again that:

The development through cooperation is totally different from the joint development. Joint development is a transitional arrangement which is not valid under laws of any party involved. What the Chinese and Japanese companies will do in the Chunxiao oil and gas field is the development through cooperation, an act that will be done in accordance with Chinese laws.<sup>233</sup>

The remaining language of the arrangement, however, was not reiterated or questioned; largely because the foreign ministries recognized that China and Japan still needed to work out the details of the two projects, including the percentage of Japanese investment in the Chunxiao field, exact sites for joint development, and special laws “for launching their joint gas exploration project . . . .”<sup>234</sup>

#### D. Politics Threaten the Arrangement

In early September 2008, Prime Minister Fukuda resigned from his position, “blaming obstruction from the opposition, which control[ed] the upper house of parliament,”<sup>235</sup> and conservative Taro Aso became the new prime minister.<sup>236</sup> Japan’s first Catholic prime minister and a former Olympic sharpshooter,<sup>237</sup> Aso achieved fame throughout his long career in politics by pushing a nationalist, anti-Chinese agenda.<sup>238</sup> Aso first gained international recognition while serving as foreign minister under Prime

231. *Vice-Minister Reasserts China’s Sovereignty over East China Sea Gas Field*, B.B.C. NEWS, June 19, 2008.

232. JAPAN PRESS CONFERENCE, *supra* note 221.

233. *FM’s Answers*, *supra* note 15 (referring to Regulations on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises promulgated by the State Council, Jan. 30, 1982, effective Jan. 30, 1982 and amended Sept. 23, 2001, available at <http://www1.cei.gov.cn/ce/elaw/law/lb82a1e.txt>).

234. *Japan Eyes Special Law for Gas Project in E. China Sea*, KYODO NEWS INT’L, June 20, 2008.

235. *Japan PM Hopefuls Poised for Race*, B.B.C. NEWS, Sept. 9, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7607414.stm>.

236. *Aso Confirmed*, *supra* note 16.

237. *Conservative Catholic Taro Aso Elected Japan Prime Minister*, U.S.A. TODAY, Sept. 24, 2008, available at [http://www.usatoday.com/news/world/2008-09-24-japan-prime-minister\\_N.htm](http://www.usatoday.com/news/world/2008-09-24-japan-prime-minister_N.htm).

238. See generally *The Return of Taro Aso*, *supra* note 17, at A28 (“As foreign minister from 2005 to 2007, Mr. Aso soured relations with China and South Korea and raised

R

R

Minister Koizumi, the leader who saw the low point of Sino-Japanese relations in recent years and who presided over the repeated protests and violence that accompanied distrust over the East China Sea issue.<sup>239</sup> Within a few months of becoming the foreign minister, Aso publicly suggested

that Japan's emperor ought to visit the militaristic Yasukuni Shrine, where 14 Japanese war criminals are among those honored, and . . . that Taiwan owes its high educational standards to enlightened Japanese policies during the 50-year occupation that began when Tokyo grabbed the island as war booty from China in 1895.<sup>240</sup>

As one commentator described Taro Aso's behavior:

[Taro Aso] has been neither honest nor wise in the inflammatory statements he has been making about Japan's disastrous era of militarism, colonialism and war crimes that culminated in the Second World War. . . .

Mr. Aso has also been going out of his way to inflame Japan's already difficult relations with Beijing by characterizing China's long-term military buildup as a 'considerable threat' to Japan.<sup>241</sup>

As foreign minister, Aso was so critical of China regarding the East China Sea issue to the point that the Japanese Economy, Trade and Industry Minister publicly slammed his anti-Chinese approach.<sup>242</sup> Aso retorted by claiming:

I don't know of many people who are prepared to express honest views to China about how other countries, particularly neighbouring countries like Japan, really feel about China . . . I believe that we must represent Japan's true feelings and it must be done by someone like myself.<sup>243</sup>

As foreign minister, Aso regularly visited the Yasukuni Shrine, despite repeated official Chinese condemnations.<sup>244</sup> Also in 2006, Aso praised Japan as "one country, one civilisation, one language, one culture and one race" despite the fact that Japan has a substantial population of linguistic, cultural, and racial groups other than "Japanese."<sup>245</sup>

---

tensions throughout the region, praising the achievements of prewar Japanese colonialism, justifying wartime atrocities and portraying China as a dangerous military threat.").

239. See *Jingoism at Home Won't Aid Japan Abroad*, S. CHINA MORNING POST, Mar. 25, 2006, at 12 [hereinafter *Jingoism at Home*]; see also *supra* text accompanying notes 177-200

240. *Japan's Offensive Foreign Minister*, N.Y. TIMES, Feb. 13, 2006, at A22.

241. *Id.* The "considerable threat" comment is a direct quote from Aso while speaking as Foreign Minister in December 2005. See *Beijing Blasts Aso's Remarks of China Threat*, JJI PRESS, Dec. 22, 2005; see also Deborah Cameron, *Japanese Set to Take Tough Line on China*; *Foreign Minister a Loose Cannon*, AGE (Austl.), Mar. 18, 2006 [hereinafter *Loose Cannon*].

242. *Nikai Chides Aso for Suggesting Gas Project Countermeasures*, JAPAN ECON. NEWSWIRE, Mar. 17, 2006.

243. *Loose Cannon*, *supra* note 241.

244. See *Jingoism at Home*, *supra* note 239.

245. *Taro Aso Announces Japan PM Bid*, B.B.C. NEWS, Sept. 5, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7600603.stm>.

In early March 2006, following unsuccessful negotiations with China, Aso explained that “Japan has no intention of jointly developing resources in the sea” and that “[s]peaking in terms of history and international law, the [Senkaku] islands are Japanese territories and, without a doubt, no territorial row exists.”<sup>246</sup> On March 15, 2006, Aso reportedly said that, “Japan will never accept China’s latest suggestion of jointly exploring the East China Sea resources and Japan might possibly take measures to confront China if it conducts gas and oil exploration in the East China Sea.”<sup>247</sup>

Although Aso’s tenure as Prime Minister ended in September 2009, his approach demonstrates how subsequent prime ministers, such as his successor Yukio Hatoyama,<sup>248</sup> may frame Sino-Japanese relations. China will view Hatoyama as an extension of previous Japanese prime ministers, and may look to the experience of Aso and recent prime ministers to formulate a plan for Sino-Japanese relations.

## V. The Arrangement is Not Legally Binding

This Note argues that arrangement between China and Japan is not legally binding because the arrangement is neither a treaty nor an enforceable informal instrument. Further, withdrawal from the arrangement would neither breach good faith nor be grounds for estoppel. Neither UNCLOS nor customary international law establishes a duty to jointly develop the East China Sea.

### A. The Arrangement is Not a Treaty

The fundamental distinction between an informal arrangement and a treaty is that the parties do not intend for an informal arrangement to create a binding, legal relationship.<sup>249</sup> Most of the international legal norms applicable to treaties are codified in the Vienna Convention on the Law of Treaties, adopted in 1969.<sup>250</sup> Japan became a party to the convention in 1981, and China followed in 1997.<sup>251</sup> The Vienna Convention only applies to treaties, which the Convention defines as “international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more

---

246. *Japan, China Still Miles Apart on Gas Fields*, NIKKEI WEEKLY (Japan), Mar. 13, 2006.

247. *Japanese Minister’s Remarks*, *supra* note 18 (emphasis added).

248. Hiroko Tabuchi, *Leader and Cabinet Start Term in Japan*, N.Y. TIMES, Sept. 17, 2009, at A15.

249. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301(1) (1987) (stating that an “‘international agreement’ means an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.”).

250. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 43 (2d ed., 2006).

251. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL XXIII-1 (signatories, declarations, and reservations to the Vienna Convention on the Law of Treaties), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf>.

related instruments and whatever [their] particular designation.”<sup>252</sup>

Although China and Japan wrote their arrangement in a single instrument, and shared it with the public as a joint press release,<sup>253</sup> agreeing to a written instrument does not demonstrate conclusively that the nations intended to be bound by their agreement. The Vienna Convention instructs that:

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.<sup>254</sup>

. . . .  
The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: (a) [t]he instruments provide that their exchange shall have that effect; or (b) [i]t is otherwise established that those States were agreed that the exchange of instruments should have that effect.”<sup>255</sup>

The Sino-Japanese arrangement does not provide that it has binding effect, and China and Japan have not otherwise agreed that the arrangement should be binding. The text of the arrangement provides that,

The governments of China and Japan have confirmed this [principled consensus on cooperation], and will work to reach agreement on the exchange of notes as necessary and exchange them at an early date. The two sides will fulfill their respective domestic procedures as required.<sup>256</sup>

When introducing the joint press statement, the Japanese Foreign Minister noted that Japan and China “will enter into negotiations to conclude the necessary international treaty and . . . are aiming to move to an implementation phase at the earliest time possible.”<sup>257</sup> The Foreign Minister’s comment illustrates that Japan did not intend for the arrangement to be binding. Several days after the joint press release, the Chinese Foreign Minister similarly clarified that China did not intend for the arrangement to be binding, by stating that “[t]he principled consensus reached by China and Japan on joint development is a transitional measure, or a temporary arrangement.”<sup>258</sup> The arrangement was a written instrument, but the arrangement did not provide that it shall be binding, and China and Japan did not otherwise establish that they agreed to be bound by the arrangement. Therefore, the arrangement is not a treaty.

Although the Sino-Japanese arrangement is not a treaty under the Vienna Convention, the arrangement nonetheless could be binding.

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or

---

252. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

253. See JAPAN PRESS CONFERENCE, *supra* note 221.

254. Vienna Convention, *supra* note 252, art. 11.

255. *Id.* art. 13.

256. Principled Consensus, *supra* note 11.

257. JAPAN PRESS CONFERENCE, *supra* note 221.

258. *FM’s Answers*, *supra* note 15.

between such other subjects of international law, or to international agreements not in written form, shall not affect . . . the legal force of such agreements . . . .<sup>259</sup>

The U.S. Department of State has clarified how to understand the binding effect of informal arrangements, based on customary international law.

Documents which do not follow the customary form for international agreements, as to matters such as style, final clauses, signatures, or entry into force dates, may or may not be international agreements. Failure to use the customary form may constitute evidence of lack of intent to be legally bound by the arrangement. If, however, the general content and context reveal an intention to enter into a legally binding relationship, a departure from customary form will not preclude the arrangement from being an international agreement. . . . Decisions will be made on the basis of the substance of the arrangement, rather than on its denomination as an international agreement . . . .<sup>260</sup>

Rather than applying the Vienna Convention's rules regarding treaties, the entire context of the arrangement and the expectations and intent of China and Japan must be analyzed to understand whether and to what extent the arrangement is binding.<sup>261</sup>

#### B. The Arrangement is Not a Binding Informal Instrument

Whether an informal instrument is binding depends on the circumstances in which it was concluded, subsequent statements and actions of the instrument's authors, and registration of the instrument.<sup>262</sup> The instrument's form in this case was an unsigned joint press statement which did not refer to itself as an "agreement" or a "treaty" but as a "principled consensus" and contemplated that China and Japan would "work to reach agreement on the exchange of notes as necessary and exchange them at an early date."<sup>263</sup> The arrangement's form does not suggest that the arrangement is binding because the arrangement contemplates that a further exchange of documents would be necessary to reach an agreement.

The circumstances in which the nations concluded the arrangement also do not indicate that the arrangement is binding. The arrangement is not a final agreement, and the context of the arrangement suggests that it is merely another step in a process of continuing negotiations that have been ongoing since 2004.<sup>264</sup> This is apparent in the text of the arrangement, which states, "[t]he two sides have taken the first step to [the joint develop-

---

259. Vienna Convention, *supra* note 252, art. 3.

260. 22 C.F.R. § 181.2(a)(5) (2008).

261. See 22 C.F.R. § 181.2(a)(2) ("In deciding what level of significance must be reached before a particular arrangement becomes an international agreement, the entire context of the transaction and the expectations and intent of the parties must be taken into account.").

262. See Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787, 800-04 (1986).

263. Principled Consensus, *supra* note 11.

264. See *Ball Game*, *supra* note 177.

ment of the East China Sea] and will continue to conduct consultations in the future.”<sup>265</sup>

Furthermore, subsequent statements by the authors of the arrangement have not demonstrated that the arrangement is binding. At the press conference where the arrangement was announced, the Japanese Foreign Minister referred to the arrangement as, “the first step toward realizing the common understanding between leaders of the two countries that the East China Sea should be a ‘Sea of Peace, Cooperation and Friendship.’”<sup>266</sup> The Chinese Foreign Minister similarly referred to the arrangement as, “a key step to implement the major consensus reached by leaders of both countries.”<sup>267</sup> The Chinese Foreign Minister added that, “[t]he principled consensus reached by China and Japan on joint development is a transitional measure, or a temporary arrangement. It will not affect China’s sovereign rights and jurisdiction over the East China Sea.”<sup>268</sup> Responding to a question at the joint press conference about when an actual treaty can be concluded, the Japanese Foreign Minister stated, “All I can say is that we want it to happen as quickly as possible, but given that a political agreement has already been achieved I do not think it will take all that long.”<sup>269</sup>

Even if the nations intended for the instrument to ensure some rights, neither has registered the arrangement, and so it cannot be used as evidence before “any organ of the United Nations,” including the ICJ.<sup>270</sup> Thus, the arrangement is not binding as an informal instrument because the context of the arrangement’s creation, the authors’ subsequent comments, and the arrangement’s lack of registration all illustrate that neither China or Japan intended for the arrangement to be a binding agreement.

### C. Withdrawing from the Arrangement Would Not Breach Good Faith or Be Grounds for Estoppel

Even if an arrangement is not binding, it is still possible to derive legal rights and obligations from it. A unilateral declaration of intent may become binding under the international legal principle of good faith if the state making the declaration intends to be bound by it.<sup>271</sup> Further, a gov-

---

265. Principled Consensus, *supra* note 11.

266. JAPAN PRESS CONFERENCE, *supra* note 221.

267. *FM’s Answers*, *supra* note 15.

268. *Id.*

269. JAPAN PRESS CONFERENCE, *supra* note 221.

270. U.N. Charter art. 102(2), available at <http://www.un.org/aboutun/charter/> (“No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”).

271. See, e.g., *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 269 (Dec. 20) (“The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.”).

ernment may be estopped from repealing its statements or conduct when those statements or conduct lead another government to reasonably act to its own detriment or to the benefit of the first government.<sup>272</sup> The Japanese Foreign Minister made several statements at the press conference that indicate that Japan might treat the arrangement as binding. For example, the Foreign Minister stated: (1) “In concrete terms, [Japan and China] will undertake joint development;” (2) that this arrangement had “a concrete outcome;” and (3) that Japan had “already won through these negotiations the right to participate in capital to a certain degree by Japanese corporations in the development on the Chinese side of the median line where China has already been undertaking.”<sup>273</sup>

Though these statements seem to indicate a unilateral declaration of intent by Japan, “[i]t is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced.”<sup>274</sup> The actual substance of the comments must be viewed within the context of the other comments made, namely the Japanese Foreign Minister’s comment at the release of the joint press statement, stating that Japan and China “will enter into negotiations to conclude the necessary international treaty and . . . are aiming to move to an implementation phase at the earliest time possible.”<sup>275</sup> Viewing all the statements together in the context of the joint press conferences, Japan did not make a binding promise.

Furthermore, even if the Japanese Foreign Minister’s comments could be interpreted as a promise, there is no evidence that China relied on that promise. The Chinese Foreign Minister clarified that, “[t]he principled consensus reached by China and Japan on joint development is a transitional measure, or a temporary arrangement.”<sup>276</sup> Chinese Vice Foreign Minister Wu made a similar statement that “the new agreement allowed for the joint development of one area of the East China Sea which has yet to be finalized.”<sup>277</sup> China has not interpreted the Japanese Foreign Ministers comments as a binding promise.

The arrangement also lacks a termination clause, thus allowing either Japan or China to withdraw from the arrangement at anytime without breaching good faith.

---

272. See, e.g., *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 6, 63-64 (June 15) (separate opinion of Sir Gerald Fitzmaurice), available at <http://www.icj-cij.org/docket/files/45/4879.pdf> (“The essential condition of the operation of the rule of . . . estoppel . . . is that the party invoking the rule must have ‘relied upon’ the statements or conduct of the other party either to its own detriment or to the other’s advantage. . . . [B]ut the essential question is and remains whether the statements or conduct of the party impugned produced a change in relative positions, to its advantage or the other’s detriment.”).

273. JAPAN PRESS CONFERENCE, *supra* note 221.

274. *Nuclear Tests*, 1974 I.C.J. at 269.

275. JAPAN PRESS CONFERENCE, *supra* note 221.

276. *FM’s Answers*, *supra* note 15.

277. *China Defends “Interim” Japan Gas Deal Amid Online Criticism*, B.B.C. NEWS, June 19, 2008.

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.<sup>278</sup>

The arrangement stated that, “the two sides will conduct cooperation in the transitional period prior to delimitation,” but did not define whether “delimitation” refers to the entire East China Sea area, the disputed region of the East China Sea, or the much smaller area proposed for joint development.<sup>279</sup> Neither of the foreign ministers clarified what “delimitation” means in this instance, but both understood that this arrangement would last only until there was “delimitation.”<sup>280</sup> The Chinese Foreign Minister claimed that “[t]he principled consensus reached by China and Japan on joint development is a transitional measure, or a temporary arrangement. It will not affect China’s sovereign rights and jurisdiction over the East China Sea.”<sup>281</sup> The Japanese Foreign Minister reiterated that the arrangement would last only “during the transitional period pending agreement on the delimitation.”<sup>282</sup> There is substantial room for either party to maneuver the definition of “delimitation” to achieve withdrawal from the arrangement. The arrangement, however, may entail a legal duty in other respects.

#### D. UNCLOS Does Not Establish a Duty to Jointly Develop the East China Sea

UNCLOS establishes explicit guidelines for the conduct of parties interested in claiming resource deposits lying in disputed territory.<sup>283</sup>

[T]he States concerned, in a spirit of understanding and cooperation, *shall make every effort* to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.<sup>284</sup>

While UNCLOS uses the word “shall,” the use of “make every effort” negates the idea that states must actually enter into or maintain binding transitional arrangements.<sup>285</sup> In fact, Sino-Japanese negotiations regarding the East China Sea have been ongoing since 2004, and even if China or

---

278. Vienna Convention, *supra* note 252, art. 56(1).

279. Principled Consensus, *supra* note 11.

280. *Id.*

281. *FM’s Answers*, *supra* note 15.

282. JAPAN PRESS CONFERENCE, *supra* note 221.

283. UNCLOS, *supra* note 1, art. 142.

284. *Id.* art. 74(3) (emphasis added) (discussing negotiation over EEZ delimitation), art. 83(3) (emphasis added) (discussing negotiation over continental shelf delimitation).

285. See D.H. Anderson, *Strategies for Dispute Resolution: Negotiating Joint Agreements*, in *BOUNDARIES AND ENERGY: PROBLEMS AND PROSPECTS* 473, 476 (Gerald Blake et al., eds., 1998); Ian Townsend-Gault, *Regional Maritime Cooperation Post-UNCLOS/UNCED: Do Boundaries Matter Any More?*, in *INTERNATIONAL BOUNDARIES AND ENVIRONMENTAL SECURITY: FRAMEWORKS FOR REGIONAL COOPERATION* 3, 5 (Gerald Blake et al., eds., 1997).

Japan withdrew from the 2008 arrangement, neither state would be violating UNCLOS because the state would still presumably be making “every effort” that it finds tolerable.<sup>286</sup>

UNCLOS also created special negotiation rules for states bordering semi-enclosed seas, which includes the East China Sea.<sup>287</sup>

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they *shall* endeavour . . . to coordinate the management, conservation, exploration and exploitation of the *living resources* of the sea . . . [coordinate] the protection and preservation of the *marine environment* . . . [and create] joint programmes of scientific research in the area . . . .<sup>288</sup>

This clause requires states with interests in a common resource to negotiate in good faith with a view toward constructive cooperation.<sup>289</sup> As argued above, withdrawal from the current Sino-Japanese arrangement would not breach the requirement of good faith.<sup>290</sup> Also, UNCLOS’ requirements for cooperative efforts specify activities such as the conservation of living marine resources, protection of the marine environment, and coordination of marine scientific research, rather than the joint development of hydrocarbon and other nonliving resources.<sup>291</sup> While UNCLOS clearly supports the concept of transitional cooperation in disputed areas, especially in semi-enclosed seas, UNCLOS does not require China and Japan to reach an actual agreement to jointly develop the East China Sea.

#### E. Customary International Law Does Not Establish a Duty to Jointly Develop the East China Sea

Customary international law is created through two elements, one objective and the other subjective. The objective element is consistent state practice.<sup>292</sup> The subjective element is that the consistent practice must be performed by actors who recognize the practice as binding (*opinio juris sive necessitates* or *opinio juris*).<sup>293</sup> Broadly speaking, a rule of customary international law requiring joint development would compel states with interests in a common deposit to cooperate, even if they opposed joint development. Failure to cooperate would constitute a violation of international law.

---

286. See Anderson, *supra* note 285; Townsend-Gault, *supra* note 285.

287. See UNCLOS, *supra* note 1, art. 122 (“For the purposes of this Convention, ‘enclosed or semi-enclosed sea’ means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.”).

288. *Id.* art. 123 (emphasis added).

289. See *id.* art. 300.

290. See *supra* Part V.C.

291. See, e.g., UNCLOS, *supra* note 1, arts. 61–68. *But see id.* Part XI (deeming “solid, liquid, or gaseous mineral resources” located beyond the EEZ to be the common heritage of mankind and requiring equitable benefit sharing for any profits derived therefrom).

292. MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 32 (4th ed. 2000).

293. *Id.*

The state practice element requires a finding that the practice is “both extensive and virtually uniform in the sense of the provision invoked . . . .”<sup>294</sup> If practice is not widespread, however, it may still give rise to local or regional custom, especially in regard to certain subject matters, like joint development of hydrocarbon resources.<sup>295</sup> Thus, although customary international law usually is defined as constant and uniform state practice, the required degree of consistency may vary according to the subject matter of the rule in question.<sup>296</sup> State practice, however, should generally be consistent enough that instances of inconsistent practice are deemed a breach of the rule and not an indication of a new rule.<sup>297</sup> The challenge is identifying the point at which state practice becomes consistent enough to demonstrate that states recognize the practice as binding.<sup>298</sup> In certain cases, the ICJ has been willing to infer the existence of *opinio juris* on the basis of relatively sparse examples of state practice.<sup>299</sup> In other cases, the ICJ has applied a more stringent approach, requiring actual, discernible evidence that a legal rule’s acceptance led to state practice.<sup>300</sup> The ICJ probably would apply the more stringent approach in this case because positive obligations, which require a state to act in a certain prescribed manner, must be performed with greater consistency to be considered a customary rule than negative obligations, which enjoin a state to refrain from certain actions.<sup>301</sup> There is neither the requisite state practice nor the *opinio juris* to create a customary international law rule requiring China and Japan to jointly develop the natural resources in the East China Sea.<sup>302</sup> There has been substantial state practice regarding cooperation

---

294. See DUNOFF ET AL., *supra* note 250, at 79.

295. See, e.g., *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276-78 (Nov. 20) (noting that a “general practice accepted as law” could occur at a regional or local level between a few states or just two states).

296. See Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 149 (1987) (“Exactly how much state practice will substitute for an affirmative showing of an *opinio juris*, and how clear a showing will substitute for consistent behavior, depends on the activity in question and on the reasonableness of the asserted customary rule.”).

297. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 186, at 98 (June 27) (“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”).

298. See Maurice Mendelson, *The Subjective Element in Customary International Law*, 1995 BRIT. Y.B. INT’L L. 177, 180 (arguing that the ICJ has “given relatively, little useful guidance” on the standard of proof for *opinio juris*).

299. See, e.g., Kirgis, *supra* note 296, at 147 (noting that the *Nicaragua* decision demonstrates that “when issues of armed force are involved, it may well be that the need for stability explains an international decision maker’s primary reliance on normative words rather than on a combination of words and consistent deeds.”).

300. See, e.g., *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 4, 28 (holding that accumulated state practice does not by itself constitute evidence of the acceptance of the supposed rule as binding customary international law).

301. See DIXON, *supra* note 292, at 29.

302. See DUNOFF, ET AL., *supra* note 250 at 78-80 (background on the formation of customary international law, including glosses on state practice and *opinio juris*).

over delimiting and developing various continental shelves pursuant to ICJ recommendation,<sup>303</sup> but that practice has not been “both extensive and virtually uniform” to the point necessary to create binding international law, and any indication of *opinio juris* is ambiguous at best.<sup>304</sup> There also have been numerous bilateral agreements for joint development of disputed marine deposits of natural resources,<sup>305</sup> especially in East Asia.<sup>306</sup> That state practice alone, however, is insufficient to infer the existence of a customary international law for the East Asian region because there is no evidence that the cooperation was pursued under a sense of legal duty.<sup>307</sup> Neither China nor Japan, therefore, has a duty to jointly develop natural resources in the East China Sea.

### Conclusion

Hatoyama and subsequent prime ministers of Japan may be tempted to withdraw from Japan’s arrangement with China to jointly develop the hydrocarbons in a section of the East China Sea. Although withdrawal would not be illegal, it would damage the fragile political and economic Sino-Japanese relationship. A continued or enlarged arrangement could result in benefits to both Japan and China by bolstering their economic interdependence.

The arrangement to jointly develop a section of the East China Sea may have been motivated by domestic reasons. Prime Minister Fukuda, suffering from low domestic approval ratings, may have sought a political achievement in foreign affairs to bolster his own approval, and President Hu may have wanted to solidify ties with Japan ahead of the Beijing Olympics in August 2008.<sup>308</sup> Even if the leaders of China and Japan did not cooperate with the sole goal of friendly relations, however, the economic benefits that are possible from cooperation are staggering.

---

303. See, e.g., *North Sea Continental Shelf Cases* (F.R.G. v. Den/F.R.G. v. Neth.), 1969 I.C.J. 3, para. 97, at 52 (Feb. 20) (describing delimitation practices by countries on the North Sea); *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 320-323 (Jan. 20) (Evensen, J., dissenting) (noting multiple instances of cooperation between states in the delimitation process).

304. See David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?*, 93 AM. J. INT’L L. 771, 795 (1999) (concluding that there is most likely not customary international law to jointly develop common offshore oil and gas deposits).

305. See, e.g., *Joint Declaration on Cooperation over Offshore Activities in the South West Atlantic, Arg.-U.K.*, Sept. 27, 1995, 35 I.L.M. 301 (1996); *Agreement on the Continental Shelf Between Iceland and Jan Mayen, Ice.-Nor.*, Oct. 22, 1981, 2124 U.N.T.S. 247.

306. See, e.g., *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and North Australia*, Dec. 11, 1989, Austl.-Indon., 29 I.L.M. 469 (1990); *Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Japan-S. Korea*, Jan. 30, 1974, 1225 U.N.T.S. 103.

307. See, e.g., Mendelson, *supra* note 298, at 199-200 (noting that settling disputes through equidistant delimitation did not necessarily imply the existence of a legal obligation to do so).

308. See *Sea of Cooperation*, *supra* note 12.

China became Japan's largest trading partner in 2004.<sup>309</sup> Japan is the second biggest investor in China after Hong Kong,<sup>310</sup> and is increasingly important in China as the Yen grows stronger against the U.S. dollar. The profitability of the natural resources in the East China Sea pales in comparison with the other economic opportunities that abound from a more prosperous Sino-Japanese relationship overall, such as increasing the popularity of Japanese products in China, ensuring that Japanese companies will manufacture goods in China, and bolstering cross-border tourism. Hatoyama and subsequent prime ministers should learn from Prime Ministers Abe and Fukuda. Japanese leaders should view Sino-Japanese relations as a top political and economic priority.

---

309. *Pride and Prejudice*, *ECONOMIST*, Mar. 25, 2006, at 17.

310. *Id.*