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An Empty Prize

FIGHTING OVER ROCKS IN THE EAST CHINA SEA

INTRODUCTION

In September 2012, massive protests erupted throughout China.¹ Around 3,000 protestors took part in an orderly demonstration in Shanghai, while up to 10,000 protestors turned out in Guangzhou.² Some of the protests even turned violent, as authorities used tear gas to bring rowdy crowds under control in Shenzhen, and various other cities saw incidents of arson and attacks on cars and businesses.³ These protests were not, however, about domestic economic, political, or social concerns. Rather, they represented an outpouring of anti-Japanese sentiment resulting from a dispute over the ownership of several tiny uninhabited islands in the East China Sea.⁴

The islands have been the subject of a tense sovereignty dispute between China and Japan for decades.⁵ Called the Senkakus by the Japanese, and the Diaoyus by the Chinese, the uninhabited islands are centrally located in the East China Sea, approximately 120 nautical miles to the northeast of Taiwan, 200 nautical miles to the east of mainland China, and 240 nautical miles to the southwest of Okinawa, Japan.⁶ They consist of eight individual formations.⁷ The five largest islands are volcanic structures, while the remaining three are

¹ N. D., *Anti-Japan Protests: Outrage, to a Point*, ECONOMIST (Sept. 17, 2012, 7:18 AM), <http://www.economist.com/blogs/analects/2012/09/anti-japan-protests>.

² *Id.*

³ *Id.*

⁴ *Could Asia Really Go to War Over These?*, ECONOMIST, Sept. 22, 2012, at 13, available at <http://www.economist.com/node/21563316> [hereinafter *Over These?*].

⁵ See Carlos Ramos-Mrosovsky, *International Law's Unhelpful Role in the Senkaku Islands*, 29 U. PA. J. INT'L L. 903, 904 (2008). It should also be noted that Taiwan claims sovereignty over the islands as well. In fact, China's claim is primarily derivative of its claim of sovereignty over Taiwan itself. See Steven Wei Su, *The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update*, 36 OCEAN DEV. & INT'L L. 45, 56 n.2 (2005). But for the sake of simplicity, the discussion in this note is limited to the dispute as between China and Japan.

⁶ Ramos-Mrosovsky, *supra* note 5, at 903.

⁷ Wei Su, *supra* note 5, at 46.

described as “rocky outcroppings.”⁸ Several of the islands have some vegetative covering, while the rest are barren.⁹

The total land area of all eight formations is approximately 2.7 square miles.¹⁰ Thus, the islands themselves appear to be of little value. However, some experts and commentators believe that the seas around the Senkaku/Diaoyu islands contain extensive deposits of oil and natural gas.¹¹ This has led China and Japan to assert opposing claims of sovereignty over the Senkakus/Diaoyus, each country bolstering its claim with a variety of historical and legal theories.¹² These opposing claims have hampered Sino-Japanese relations for decades.¹³ Although the dispute periodically goes into remission,¹⁴ tensions created by it have continuously frustrated attempts to delimit the broader maritime boundary between the countries—an issue which remains unresolved.¹⁵ In the past several years, the dispute has reignited, triggered by the Japanese government’s move to purchase some of the islands from their private owner, and resulting in the sometimes-violent anti-Japanese protests discussed above.¹⁶

The most recent tensions have led some commentators to speculate that actual military conflict could result.¹⁷ There is good reason to believe that certain parties on both sides would relish such a result. Indeed, one Chinese newspaper reportedly suggested “skipping the pointless diplomacy and moving straight to the main course by serving up Japan with an atom bomb.”¹⁸ Obviously, the governments of both countries would prefer to avoid armed confrontation, but the risk is real. Past flare-ups have resulted in standoffs involving military forces.¹⁹ Media reports indicate near-daily confrontations between Chinese and Japanese vessels in the waters near the islands.²⁰

⁸ *Id.*

⁹ *Id.*

¹⁰ Dai Tan, *The Diaoyu/Senkaku Dispute: Bridging the Cold Divide*, 5 SANTA CLARA J. INT’L L. 134, 136 (2006).

¹¹ SELIG S. HARRISON, WOODROW WILSON INT’L CTR. FOR SCHOLARS, ASIA PROGRAM, SEABED PETROLEUM IN NORTHEAST ASIA: CONFLICT OR COOPERATION? 5-6 (2005), available at http://www.wilsoncenter.org/sites/default/files/Asia_petroleum.pdf.

¹² See Ramos-Mrosovsky, *supra* note 5, at 904.

¹³ See *id.*

¹⁴ *Over These?*, *supra* note 4, at 13.

¹⁵ Ramos-Mrosovsky, *supra* note 5, at 904.

¹⁶ *Over These?*, *supra* note 4, at 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See, Ramos-Mrosovsky, *supra* note 5, at 904-05.

²⁰ *Blunt Words and Keen Swords: Why China Seems to Be Fanning the Flames of Its Row with Japan in the East China Sea*, ECONOMIST, Nov. 10, 2012, at 48,

Of particular concern in this country is the fact that the United States would most likely be drawn into any armed escalation.²¹ The United States, while remaining officially neutral on the sovereignty issue, has recognized that the terms of its Mutual Security Treaty with Japan would require it to respond to any military incursion over the islands.²²

The Senkaku/Diaoyu dispute, in its most recent iteration, takes place in the context of rising Chinese and Japanese nationalism and increasing dependence on imported petro-products to satisfy domestic energy requirements in both China and Japan.²³ These concerns motivate the political actors on both sides, while various aspects of international law frame the legal arguments and set out the consequences of a successful claim over the islands. The primary strategic importance of sovereignty over the Senkakus/Diaoyus is considered by most commentators to be both their presumed ability to project an Exclusive Economic Zone over the surrounding waters and their ability to potentially shift the broader maritime border between China and Japan in favor of the prevailing party.²⁴

The international law of the sea governs the consequences of a successful sovereignty claim over the Senkakus/Diaoyus, as far as maritime rights are concerned. The United Nations Convention on the Law of the Sea (UNCLOS), state practice, and the relevant decisions of the International Court of Justice (ICJ) set out the general framework under which law of the sea issues are considered by state actors.²⁵ UNCLOS sets out the rights of coastal states to various levels of sovereignty and control over radiating zones of their surrounding seas.²⁶ Notably, UNCLOS grants states an Exclusive Economic Zone

available at <http://www.economist.com/news/china/21565980-why-china-seems-be-fanning-flames-its-row-japan-east-china-sea-blunt-words>.

²¹ See, Ramos-Mrosovsky, *supra* note 5, at 905.

²² *Over These?*, *supra* note 4, at 14.

²³ *Protesting Too Much*, ECONOMIST, Sept. 22, 2012, at 53; Ramos-Mrosovsky, *supra* note 5, at 907 n.18 (noting that Japan is the world's second-largest oil importer, while China is third); *Foot on the Gas*, ECONOMIST, Sept. 22, 2012, at 48 (noting that Japan is "the world's biggest importer of liquefied natural gas").

²⁴ See *infra* Part III.

²⁵ See Jonathan G. Odom, *A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea*, 17 OCEAN & COASTAL L.J. 201, 207 (2012); John M. Van Dyke, *The Romania v. Ukraine Decision and its Effect on East Asian Maritime Delimitations*, 15 OCEAN & COASTAL L.J. 261, 271-72 (2010). Both China and Japan are signatories to and have ratified UNCLOS. See Tan, *supra* note 10, at 134.

²⁶ See generally United Nations Convention on the Law of the Sea, Dec. 10 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

(EEZ) extending out to 200 nautical miles beyond their territorial seas and contiguous zones.²⁷ Within the EEZ, a state has the exclusive right to explore and exploit natural resources, including fisheries and mineral, oil, or gas deposits.²⁸

Much has been written about the various legal claims asserted by China and Japan to support their arguments for sovereignty over the Senkakus/Diaoyus, with most commentators assuming that the “winner” would benefit from an enormously valuable EEZ around the islands.²⁹ This view is mistaken. Modern ICJ case law indicates an emerging consensus that, under UNCLOS, small, uninhabited offshore islands do not project their own EEZ or greatly impact maritime boundary delimitation.³⁰ Indeed, the dispute itself stands as one of the principal barriers to allowing either country to efficiently capitalize on the energy resources under the East China Sea, as the parties are instead focused on aggressively defending against any perceived incursion by the other into the waters around the islands.³¹

This note argues that negotiating a final delimitation of the seabed boundary between China and Japan is in fact the most effective means by which both countries can benefit from the alleged resources surrounding the Senkakus/Diaoyus. For this reason, ideas of sovereignty over the islands should be set aside for the time being, with diplomatic effort instead put toward approaching a final agreement on the delimitation of the seabed boundary. Taking contentious island disputes off the table will allow bilateral boundary negotiations to be more productive, eventually allowing both countries to benefit from unobstructed exploitation of resources on their respective sides of the line.

²⁷ *Id.* pt. V.

²⁸ Odom, *supra* note 25, at 210.

²⁹ See, e.g., William B. Heflin, *Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 1 ASIAN-PAC. L. & POL'Y J. 18:1, 2 (2000) (“The islands are of little economic value; however, the territorial sea and exclusive economic zone (EEZ) that the islands can generate under the [UNCLOS] are rich in fishing stock and may be rich in gas and oil deposits” (internal footnotes omitted)); Ramos-Mrosovsky, *supra* note 5, at 908 (“The chief benefit of sovereignty over the Senkaku islands is their presumed ability, under UNCLOS, to project areas of maritime jurisdiction over the East China Sea.”); Tan, *supra* note 10, at 137 (“Because the Diaoyu/Senkaku Islands have the potential to satisfy the criteria of Article 121(3), China and Japan have sufficient reason to believe that possession of the islands will widen their respective EEZ claims to some degree.”).

³⁰ See Van Dyke, *supra* note 25, at 271-72; see also *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, (Feb. 3, 2009), available at <http://icj.cij.org/docket/files/132/14987.pdf>.

³¹ See, e.g., *Senkaku Islands: Japan Sends Jets in China Row*, SKY NEWS (Jan. 7, 2014), <http://news.sky.com/story/1191448/senkaku-islands-japan-sends-jets-in-china-row>.

Part I of this note will present the history of the Senkaku/Diaoyu dispute and provide an overview of the arguments supporting each side's claim. Part II will discuss the relevant legal framework for the law of the sea, and particularly the status of islands under UNCLOS. Part III will discuss the emerging consensus concerning the status of islands in the resolution of boundary disputes, as evidenced by ICJ case law, indicating that the Senkaku/Diaoyu islands would neither be entitled to their own EEZ, nor would they significantly impact a judicial delimitation of the broader maritime boundary. Part IV will discuss why China and Japan should set aside sovereignty issues for the time being and work instead toward reaching an agreement on delimiting their broader maritime border, indicating some of the challenges faced by both in reaching such a resolution. And finally, Part V will provide suggestions for moving towards a final boundary settlement, as well as suggest an amendment to UNCLOS that should help to avoid similar future disputes around the world.

I. HISTORY OF SENKAKU/DIAOYU DISPUTE

China and Japan both ground their sovereignty claims over the Senkaku/Diaoyu islands on historical as well as legal arguments. The parties' positions and a brief history of the conflict are outlined below.³²

A. *Japanese Claims*

Japan dates its claim to the islands to 1895.³³ In that year, the Japanese government declared that the islands were *terra nullius* ("land belonging to no one") and announced an intention to annex and exert sovereignty over them.³⁴ Japan bases its claim, under the modern international law of territorial acquisition, on "occupation and discovery, effective exercise of sovereignty, and Chinese acquiescence."³⁵ It claims to have exercised effective sovereignty by regulating economic activity on the islands, leasing them to private individuals, and policing the islands.³⁶

³² For a much more comprehensive discussion of the historical claims made by the parties, see UNRYU SUGANUMA, SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS: IRREDENTISM AND THE DIAOYU/SENKAKU ISLANDS (2000).

³³ See Ramos-Mrosovsky, *supra* note 5, at 917.

³⁴ See *id.*

³⁵ See *id.* at 923.

³⁶ See *id.*

B. Chinese Claims

The modern dispute over the Senkaku/Diaoyu Islands arose shortly after the publication of a 1968 Survey by the United Nations Economic Commission for Asia and the Far East.³⁷ The survey, along with later geological expeditions, supports the idea that the seas surrounding the Senkaku/Diaoyu Islands contain enormously valuable oil and gas reserves.³⁸

Shortly after publication of the UN Survey, China began to vociferously dispute Japan's claim to the islands, stating that the islands "have been China's territory since ancient times."³⁹ China's claim to the islands is mostly based on historical perspective.⁴⁰ First, China claims that it exercised sovereignty over the islands since at least the fourteenth century, when Chinese sailors used them as navigational aids and sometimes for shelter from storms.⁴¹ China further argues that Japan seized the islands from China in the Sino-Japanese War of 1895.⁴² China insists that the Senkaku/Diaoyu islands are part of the Taiwan island group, which was ceded to Japan after the war.⁴³ This argument further asserts that, as part of the Taiwan group of islands, the Senkakus/Diaoyus were restored to China by the Cairo Declaration of 1943.⁴⁴

II. THE LAW OF THE SEA FRAMEWORK

This note makes no attempt to analyze the respective strengths of the parties' claims. This topic has been ably discussed in numerous other articles.⁴⁵ Rather, this note proposes that sovereignty over the islands is of extremely limited practical

³⁷ K.O. Emery et al., *Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea*, 2 UNECAFE/CCOP Tech. Bull. 3 (1969), noted in Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over the T'iao-yutai Islets (Senkaku Gunto)*, 15 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 9, 11 n.4 (1996-97).

³⁸ See HARRISON, *supra* note 11, at 5-6.

³⁹ See Ramos-Mrosovsky, *supra* note 5, at 918 (quoting Ministry of Foreign Affairs of the People's Republic of China, Statement regarding Chinese Sovereignty (Dec. 30, 1971)).

⁴⁰ See *id.* at 925.

⁴¹ See *id.*

⁴² See Alexander M. Peterson, *Sino-Japanese Cooperation in the East China Sea: A Lasting Arrangement?*, 42 CORNELL INT'L L.J. 441, 448 (2009).

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See, e.g., *id.* at 452 (concluding that Japan has a stronger claim under international law); Ramos-Mrosovsky, *supra* note 5 (same); see also Wei Su, *supra* note 5, at 46 (arguing that China has the superior claim); Han-Yi Shaw, *The Inconvenient Truth Behind the Diaoyu/Senkaku Islands*, N.Y. TIMES (Sept. 19, 2012), <http://kristof.blogs.nytimes.com/2012/09/19/the-inconvenient-truth-behind-the-diaoyusenkaku-islands/> (same).

value, in terms of territorial or resource rights, in light of the current law-of-the-sea framework.

A. *Pre-1945*

The modern law of the sea developed over decades, as customary state practice came to be codified in international agreements. Prior to 1945, the rights and responsibilities of states with regard to the world's oceans were largely regulated by customary international law.⁴⁶ There existed near-universal agreement among states regarding some law-of-the-sea issues, such as the freedom of navigation on the high seas, while other issues were subject to bitter dispute.⁴⁷ Recognizing the need to form a consensus on these important issues to ensure peace and continued development, international bodies began the long process of attempting to comprehensively codify the law of the sea. This process was jump-started in part by the Truman Proclamation of 1945, which greatly influenced the approach taken in the early efforts to produce a comprehensive law-of-the-sea framework.⁴⁸

B. *The Truman Proclamation and the Continental Shelf Convention*

In 1945, the United States unilaterally declared sovereign jurisdiction over the continental shelf extending beyond the country's territorial seas.⁴⁹ The term "continental shelf" refers to the portion of seabed surrounding a coastal state that constitutes a "natural prolongation" of the state's land mass.⁵⁰ The shelf generally ends where the seabed makes a steep and sudden descent to the deep sea floor. This declaration evidenced a growing recognition of the importance of seabed resources, which were newly accessible due to technological advances, and inspired extensive debate and discussions about the continental shelf concept.⁵¹ The idea that the continental

⁴⁶ See Patricia O'Brien, Under-Secretary-General for Legal Affairs, U.N. Office of Legal Affairs, Speech at the Yeosu World Expo (Aug. 12, 2012), available at http://untreaty.un.org/ola/media/info_from_lc/Statement%20POB%20YEOSU.pdf.

⁴⁷ See *id.*

⁴⁸ See Keun-Gwan Lee, *Continental Shelf Delimitation in the East China Sea*, WOODROW WILSON INT'L CENTER FOR SCHOLARS, ASIA PROGRAM, at 2 (Sept. 28, 2012), available at http://www.wilsoncenter.org/sites/default/files/Keun-Gwan_Lee_1_.pdf.

⁴⁹ Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

⁵⁰ See UNCLOS, *supra* note 26, at art. 76.

⁵¹ See O'Brien, *supra* note 46.

shelf should be the touchstone for determining coastal state sovereignty pervaded early law of the sea discussions and continues to find relevance under the modern framework.

Recognizing that international consensus was needed to ensure peaceful and efficient exploitation of offshore ocean resources, the United Nations adopted the Geneva Convention on the Continental Shelf (Continental Shelf Convention) in 1958.⁵² The Continental Shelf Convention officially codified the idea found in the Truman Proclamation, and subsequently adopted by numerous other states, that a coastal state has certain sovereign rights over its continental shelf, including the exclusive right to exploit the natural resources found there.⁵³

The Continental Shelf Convention also introduced the concept of “equidistance/special circumstances” in the delimitation of maritime boundaries.⁵⁴ The equidistance/special circumstances concept provides that when two countries with coastlines opposite each other share a continental shelf, the seabed boundary between them should be determined by first drawing a line equidistant from the two countries’ baselines (low-tide shorelines, essentially), and then adjusting the line to account for any “special circumstances.”⁵⁵

C. *The North Sea Case*

The International Court of Justice’s decision in the *North Sea Continental Shelf* case⁵⁶ severely undermined the equidistance principle set forth in the Continental Shelf Convention. In this 1969 decision, the ICJ famously declared that maritime boundary “delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances”⁵⁷ The decision explicitly disclaimed the idea that equidistance should always be the primary analytical starting point in delimitation cases, instead introducing the concepts of “equitable principles” and

⁵² Lee, *supra* note 48, at 2.

⁵³ Convention on the Continental Shelf, art. 2, Apr. 29, 1958, 499 U.N.T.S. 311 (entered into force June 10, 1964).

⁵⁴ The equidistance/special circumstances principle only becomes relevant “[i]n the absence of agreement” between the states. *Id.* at art. 6; *see also* Lee, *supra* note 48, at 3.

⁵⁵ Convention on the Continental Shelf, *supra* note 53, at art. 6. “Special circumstances” might include such things as the existence of coastal islands or a large discrepancy between the respective lengths of opposing coastlines, among others. *See infra* Part III.B.

⁵⁶ *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

⁵⁷ *Id.* at 54.

“relevant circumstances,” ideas that were not explicitly mentioned in any of the existing international agreements.⁵⁸ This decision caused a great deal of confusion, as it did not seem to follow the existing law-of-the-sea framework, and instead focused on consultations and fairness.⁵⁹ The decision further undermined the existing legal framework relating to maritime border delimitation by characterizing the continental shelf as a “natural prolongation” of a coastal state’s landmass,⁶⁰ encouraging sovereign claims over ever greater extensions of the shelf.

D. UNCLOS

Today, the law-of-the-sea framework is embodied in UNCLOS, a comprehensive agreement covering all aspects of international maritime law, including border disputes, piracy, rights of transit, freedom on the high seas, pollution, and fisheries management.⁶¹ Recognizing the continuing uncertainty regarding various law-of-the-sea issues, the Third United Nations Conference on the Law of the Sea was convened in New York in 1973.⁶² The result was UNCLOS, adopted in 1982 after nearly 10 years of negotiations, and entered into force on November 16, 1994, one year after being ratified by the sixtieth country.⁶³ As of March 2014, UNCLOS has been officially adopted by 166 of the United Nations’ member states.⁶⁴ Both China and Japan have ratified UNCLOS and are officially bound by its provisions.⁶⁵

UNCLOS formalizes the rights and responsibilities of states over concentric bands of ocean emanating out from the coast.⁶⁶ First, UNCLOS provides that the area of the different zones will be measured by their distance from established

⁵⁸ *Id.*; Lee, *supra* note 48, at 3.

⁵⁹ Lee, *supra* note 48, at 3.

⁶⁰ *North Sea Continental Shelf*, 1969 I.C.J. 3.

⁶¹ See UNCLOS, *supra* note 26.

⁶² The “First” conference resulted in the Continental Shelf Convention, while a “Second,” in 1960, did not result in any binding agreements. O’Brien, *supra* note 46.

⁶³ *Id.*

⁶⁴ See U.N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND RELATED AGREEMENTS AS AT 29 OCTOBER 2013, http://www.un.org/Depts/lost/reference_files/chronological_lists_of_ratifications.htm (last updated Sept. 20, 2013).

⁶⁵ See *id.* Although the United States has not officially ratified the Convention, it does consider it to embody customary international law. See Jonathan I. Charney, *Rocks That Cannot Sustain Human Habitation*, 93 AM. J. INT’L L. 863, 872 n.39 (1999); Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Realpolitik – What Good Does Law Do in the South China Sea Territorial Conflicts?*, 30 FORDHAM INT’L L.J. 1098, 1133-36 (2007).

⁶⁶ See Ramos-Mrosovsky, *supra* note 5, at 910.

baselines.⁶⁷ Normally, the baseline is determined by the low-tide water line along a nation's coast.⁶⁸ Under certain limited circumstances, a state is entitled to draw "straight baselines," which do not directly follow the water line but rather are constituted by straight lines drawn between distinct points along the coast.⁶⁹ A state is only entitled to draw straight baselines if its coastline is "deeply indented or cut into, or if there is a fringe of islands along the coast."⁷⁰

Under UNCLOS, all waters on the landward side of a state's baseline are considered internal waters, where the state has sovereign rights to the same extent as its rights over its land territory.⁷¹ Immediately outside the baseline is a 12-nautical-mile zone of territorial waters, where the state also has full national sovereign jurisdiction, with the exception that the state must allow "innocent passage" of foreign vessels.⁷² UNCLOS further establishes that coastal states are entitled to a "contiguous zone" extending a further 12 nautical miles beyond the territorial waters, where states are entitled to exercise the control necessary to ensure compliance with customs, immigration, or sanitary laws applicable to the territorial sea, and to punish infringement of those laws.⁷³

Of particular concern for the Senkaku/Diaoyu dispute, UNCLOS established the modern Exclusive Economic Zone (EEZ) regime.⁷⁴ Under UNCLOS, coastal states enjoy certain sovereign rights over an area extending up to 200 nautical miles from the country's baseline.⁷⁵ These sovereign rights are limited in nature but, most importantly, include exclusive resource exploration and exploitation rights within this zone.⁷⁶ As the Convention states, within the EEZ, a coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, . . . and with regard to other activities for the economic exploitation and

⁶⁷ UNCLOS, *supra* note 26, at arts. 5-14.

⁶⁸ *Id.* at art. 5.

⁶⁹ *Id.* at art. 7.

⁷⁰ *Id.* Partial straight baselines may also be drawn across the mouth of "a river [that] flows directly into the sea" or a juridical bay. *Id.*; see also Odom, *supra* note 25, at 208-09.

⁷¹ UNCLOS, *supra* note 26, at art. 8.

⁷² See UNCLOS, *supra* note 26, at art. 17; Ramos-Mrosovsky, *supra* note 5, at 910.

⁷³ UNCLOS, *supra* note 26, at art. 33.

⁷⁴ *Id.* at arts. 55-75.

⁷⁵ *Id.* at art. 57; Odom, *supra* note 25, at 210.

⁷⁶ Odom, *supra* note 25, at 210.

exploration of the zone, such as the production of energy from the water, currents and winds”⁷⁷

UNCLOS also contains a separate continental shelf regime, parallel to and supplementing, the EEZ regime.⁷⁸ Coastal states are entitled to rights similar to those applicable in the EEZ over their continental shelf, namely, “sovereign rights for the purpose of exploring [the shelf] and exploiting its natural resources.”⁷⁹ Under certain circumstances, the continental shelf regime allows a state to extend the area over which it may exercise these rights beyond the 200 nautical mile EEZ, up to a maximum of 350 nautical miles.⁸⁰ In this respect, the Convention imports the “natural prolongation” principle central to the *North Sea* case.

UNCLOS is notably vague when it comes to determining the appropriate size of an EEZ or continental shelf when the EEZs of two states overlap, or where two states share a continental shelf. In both cases, the Convention simply states that delimitation will be determined “by agreement on the basis of international law . . . in order to achieve an equitable solution.”⁸¹ This is particularly notable here, because “[t]he East China Sea is only 360 nautical miles across at its widest point,” meaning that the EEZ’s of China and Japan necessarily overlap to some degree.⁸²

Finally, Article 121 of UNCLOS establishes the law-of-the-sea framework for determining the status of islands, known as UNCLOS’s “Regime of Islands.”⁸³ This extremely brief section, containing only three short sentences, establishes that islands, as defined in the Article, are entitled to the same territorial seas, contiguous zones, EEZs, and continental shelves as coastal states.⁸⁴ “[I]sland” is defined as “a naturally formed area of land, surrounded by water, which is above water at high tide.”⁸⁵ However, Paragraph 3 of Article 121 clarifies that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”⁸⁶ This paragraph has been the subject of some debate. One noted commentator has proposed that neither full-time

⁷⁷ UNCLOS, *supra* note 26, at art. 56(1)(a).

⁷⁸ *Id.* at arts. 76-77.

⁷⁹ *Id.* at art. 77.

⁸⁰ *Id.* at art. 76.

⁸¹ *Id.* at art. 74.

⁸² Ramos-Mrosovsky, *supra* note 5, at 911.

⁸³ UNCLOS, *supra* note 26, art. 121.

⁸⁴ *Id.* at art. 121.

⁸⁵ *Id.* at pt. VIII.

⁸⁶ *Id.*

human habitation, nor a self-sustaining, land-based economic life is required for full island status.⁸⁷ Under the bare text of the Convention, seasonal habitation or an economic life based on the sea resources in the surrounding waters may be enough to confer full EEZ rights.⁸⁸ Nonetheless, this interpretation runs counter to the purpose for adoption of Article 121(3), which was “to ensure that insignificant features, particularly those far from areas claimed by other states, could not generate broad zones of national jurisdiction in the middle of the ocean.”⁸⁹

III. MODERN CONSENSUS EMERGES ON THE ROLE OF ISLANDS

The primary strategic importance of sovereignty over the Senkakus/Diaoyus is considered by most commentators to be both their presumed ability to project their own EEZ and their ability to influence the delimitation of the broader maritime border between China and Japan.⁹⁰ As UNCLOS does not provide extensive guidance on the matter, the relevance of sovereignty over small islands like the Senkakus/Diaoyus to broader maritime boundary delimitation issues is not entirely clear. There is a hardening consensus, however, observable in a series of decisions of the ICJ and the decisions of other international tribunals and adjudicators dating back to the 1970s, that small, uninhabited islands far from shore neither confer EEZ rights nor affect boundary delimitation in any significant way. Following this consensus, such islands, even some that clearly do not fit the definition of “rocks” under UNCLOS, will be denied extensive sovereign rights. They will only be entitled to a limited 12-nautical-mile territorial sea and contiguous zone, particularly if a full EEZ would produce what could be considered an inequitable result.⁹¹ This gradual diminishing of the islands’ effect on boundary delimitation appears to correlate with a parallel trend away from the natural prolongation principle in delimitation cases.

⁸⁷ See Charney, *supra* note 65, at 868-71.

⁸⁸ See *id.*

⁸⁹ *Id.* at 866.

⁹⁰ See generally UNCLOS, *supra* note 26.

⁹¹ See Van Dyke, *supra* note 25.

A. *The Senkaku/Diaoyu Islands Would Not Project Their Own EEZ*

Under the modern understanding of the international law-of-the-sea framework, it is unlikely that the Senkaku/Diaoyu islands will be entitled to their own EEZ. As noted above, Article 121(3) of UNCLOS provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”⁹² The Convention does not provide any further definition of what constitutes a rock, as opposed to an island that is entitled to full zones of national jurisdiction.

A noted expert on law-of-the-sea issues, Jonathan Charney, has argued that the Article’s vagueness implies that the requirement of “human habitation” or “economic life of [its] own” need not be tied to the island in its natural state.⁹³ Charney states that, “Ocean features that were not capable of sustaining human habitation or did not have an economic life in the past, but subsequently developed those capabilities owing to changes in economic demand, technological innovations or new human activities, would . . . not be Article 121(3) rocks.”⁹⁴ This makes a great deal of sense, because many small islands that undoubtedly do not fit the UNCLOS definition of rocks today were likely at some point in history both uninhabited and unable to support an economic life of their own.

But Charney takes his argument too far. He boldly claims that the text of Article 121(3) does not require either year-round human habitation or self-sustaining economic life to take an island outside the definition of “rock,”⁹⁵ and that “economic life” could be entirely based on activities in the waters around the island, as opposed to being necessarily tied to the island itself.⁹⁶ Adhering to Charney’s definition would likely eviscerate the limitations found in Article 121(3) completely. Any island whose surrounding waters could be profitably fished would no longer be a rock, and would be entitled to the full complement of sovereignty zones under UNCLOS. This was certainly not the intention of the negotiating parties. Luckily, the decisions of various international tribunals have made clear that Charney’s

⁹² UNCLOS, *supra* note 26, at art. 121.

⁹³ Charney, *supra* note 65, at 867.

⁹⁴ *Id.*

⁹⁵ *Id.* at 868-71.

⁹⁶ *Id.* at 870.

interpretation does not constitute the general understanding of UNCLOS's Regime of Islands.

While neither the ICJ nor any other authoritative international tribunal has ever gone so far as to express its own more detailed definition of a "rock" under UNCLOS, the treatment of such features in various cases provides insight into the general understanding of Article 121(3). In a range of decisions dating back to the 1969 *North Sea* cases, adjudicators have consistently "ignored or . . . given greatly reduced effect" to small features when determining national maritime entitlements.⁹⁷ Even before the adoption of the 1982 Convention, in the *Anglo-French Continental Shelf* arbitration,⁹⁸ for example, the arbitrator enclaved the British Channel Islands within the French continental shelf, limiting them to a 12-nautical-mile territorial sea.⁹⁹

State practice also confirms this understanding. For example, in the 2007 *Nicaragua/Honduras Territorial Dispute* case,¹⁰⁰ the parties stipulated and agreed that the islands at issue, some of which were in fact inhabited, were not entitled to "any maritime areas beyond the territorial sea."¹⁰¹ Furthermore, as the East China Sea is only 360 nautical miles across at its widest point, the EEZs of China and Japan *already* overlap, meaning that a theoretical EEZ around the Senkaku/Diaoyu islands would push the "winning" party's area of jurisdiction all the way up to the other's doorstep. This would run contrary to the concern for reaching an "equitable result" under UNCLOS, and would therefore be ruled out.

The Senkaku/Diaoyu islands should be considered rocks under UNCLOS Article 121(3), entitled to a 24-nautical-mile territorial sea and contiguous zone, but not an EEZ or continental shelf. The islands are tiny, with a total land mass of only 2.7 square miles,¹⁰² completely uninhabited, and devoid of appreciable natural resources. While the waters around the islands are believed to be rich in hydrocarbon deposits, this should not be sufficient to accord the Senkakus/Diaoyus the full complement of sovereignty zones.

⁹⁷ Van Dyke, *supra* note 25, at 271-72.

⁹⁸ Arbitration on the Delimitation of the Continental Shelf (Fr. v. U.K.), 18 I.L.M. 397 (1978).

⁹⁹ Stuart Kaye, *Lessons Learned from the Gulf of Maine Case: The Development of Maritime Boundary Delimitation Jurisprudence Since UNCLOS III*, 14 OCEAN & COASTAL L.J. 73, 85 (2008).

¹⁰⁰ Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 I.C.J. 659 (Oct. 8).

¹⁰¹ Van Dyke, *supra* note 25, at 273 (citing Nicar. v. Hond., 2007 I.C.J. 659).

¹⁰² Tan, *supra* note 10, at 136.

This result is consistent with the purposes of Article 121 and the EEZ concept more generally. As Jon Van Dyke notes in his article about the consequences of the recent *Romania/Ukraine* case,

Judge Budislav Vukas of the International Tribunal for the Law of the Sea explained in his opinion . . . in the *Russia v. Australia* case . . . that the purpose for giving exclusive rights over offshore resources to coastal states . . . was to protect the economic interests of the coastal communities that depended on the resources of the sea and thus to promote their development and enable them to feed themselves.¹⁰³

This rationale is clearly not implicated in the case of uninhabited islands like the Senkakus/Diaoyus.

B. *Modern Approach to Maritime Boundary Delimitation*

While the Senkaku/Diaoyu islands are unlikely to be entitled to their own EEZ or otherwise expanded zone of national sovereignty, an alternative concern would involve their potential effect on a future delimitation of the broader maritime boundary between China and Japan. If the islands have a material effect on the drawing of the boundary, then the sovereignty dispute will continue to impede delimitation negotiations. Fortunately, the decisions of international tribunals provide a great deal of guidance in this area. Recent decisions have elucidated a relatively structured methodology for maritime boundary delimitation between opposite coastal states, under which small features like the Senkakus/Diaoyus are given little to no weight.

Before addressing the role of islands and small features in determining maritime boundaries, it is necessary to consider the general framework applicable to delimitation decisions. Prior to the adoption of UNCLOS, maritime boundary delimitation between opposing coasts was not guided by any single dominant approach. The 1958 Continental Shelf Convention urged equidistance as the overriding concern.¹⁰⁴ Yet, as discussed above, the ICJ's decision in the *North Sea*

¹⁰³ Van Dyke, *supra* note 25, at 273-74; *but see* Kaye, *supra* note 99, at 83 (noting that Jan Mayen, an "island[] occupied only by research scientists and their support staff, without any indigenous population," albeit much larger in size than the Senkakus/Diaoyus, was granted a full EEZ by the ICJ).

¹⁰⁴ Convention on the Continental Shelf, *supra* note 53, at art. 6.

cases introduced the idea of “natural prolongation,”¹⁰⁵ and this became the primary guiding principle for a number of years.¹⁰⁶

Under UNCLOS, conflicts over the delimitation of the boundary between overlapping EEZs and continental shelves are supposed to be resolved by “agreement on the basis of international law” to reach an “equitable solution.”¹⁰⁷ These vague provisions provide no concrete guiding principles. Nonetheless, the Convention’s provision regarding overlapping territorial seas still requires the use of equidistance in resolving disputes.¹⁰⁸ Additionally, it has been suggested that the “equitable principles” referred to in the article concerning the EEZ and continental shelf incorporate the equidistance principle from the earlier article on the territorial sea.¹⁰⁹

The decisions of international tribunals, since the adoption of UNCLOS, have also made clear that equidistance has won out as the dominant approach. In the 1977 *Anglo-French Continental Shelf* case,¹¹⁰ “the Court of Arbitration [chose] to ignore the Hurd Deep [a deep trench in the English Channel] . . . , preferring the view that the faults did not ‘disrupt the essential unity of the continental shelf.’ Natural prolongation was held no longer to be paramount, but rather ‘in certain situations’ subject to ‘equitable principles.’”¹¹¹

This trend away from natural prolongation continued in subsequent cases. In the 1982 *Tunisia/Libya Continental Shelf* case,¹¹² the ICJ declared that natural prolongation “would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights” between adjacent or opposing coastal states.¹¹³ The 1984 *Gulf of Maine* case¹¹⁴ marked a further step away from the importance of natural prolongation. In its decision, the court “indicated that geographic adjacency better expressed the link between a State and its submarine entitlements than natural prolongation, and that any boundary drawn would be derived by operation of

¹⁰⁵ Lee, *supra* note 48, at 3.

¹⁰⁶ See *supra* Part II.

¹⁰⁷ UNCLOS, *supra* note 26, at arts. 74, 83.

¹⁰⁸ *Id.* at art. 75.

¹⁰⁹ Lee, *supra* note 48, at 8.

¹¹⁰ Arbitration on the Delimitation of the Continental Shelf (France v. U.K.), 18 I.L.M. 397 (1978).

¹¹¹ Kaye, *supra* note 99, at 75 (internal footnotes omitted).

¹¹² Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18 (Feb. 24).

¹¹³ *Id.* at 46.

¹¹⁴ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12).

international law rather than ‘physical fact.’”¹¹⁵ This further demonstrated the emerging view that equitable principles would take precedence over geology in delimitation cases.

Finally, the 1985 *Libya/Malta* case¹¹⁶ signaled a turning point in the modern ICJ jurisprudence regarding maritime boundary delimitation.¹¹⁷ The court adopted a structured framework where it would first draw an equidistant line between the parties’ opposing coasts, and then take into account relevant “special circumstances,” meaning primarily geographical factors, in determining whether any adjustments were necessary to avoid an inequitable result.¹¹⁸ By explicitly adopting equidistance as the starting point for determining maritime boundaries, the *Libya/Malta* court demonstrated a clear break from the previous natural prolongation, or geologically based, framework. A number of more recent cases follow the two-step framework from *Libya/Malta*, further diminishing the importance of natural prolongation as a methodological approach. For example, in the *St. Pierre and Miquelon* case,¹¹⁹ “the Court of Arbitration . . . did not mention natural prolongation in its initial discussion of how to approach a maritime delimitation.”¹²⁰

The ICJ, in the 2002 *Cameroon/Nigeria* case, succinctly expressed the now-dominant delimitation approach:

The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result.”¹²¹

Of particular significance for the discussion in this note is that these more recent cases, in considering whether relevant

¹¹⁵ Kaye, *supra* note 99, at 76 (quoting *Delimitation of Maritime Boundary in Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 293 (Oct. 12)).

¹¹⁶ *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3).

¹¹⁷ See Phaedon John Kozyris, *Lifting the Veils of Equity in Maritime Entitlements: Equidistance with Proportionality Around the Islands*, 26 DENV. J. INT’L L. & POL’Y 319, 342-43 (1998).

¹¹⁸ Lee, *supra* note 48, at 4.

¹¹⁹ *Delimitation of Maritime Areas between Canada and the French Republic* (Can. v. Fr.), 31 I.L.M. 1149 (1992).

¹²⁰ Kaye, *supra* note 99, at 77.

¹²¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, 2002 I.C.J. 303, 441 (Oct. 10).

circumstances merit an adjustment to the equidistant boundary line, have consistently disregarded small, uninhabited islands.¹²²

C. *The Role of Small Islands and Other Features in Delimitation Decisions*

Under the modern approach to maritime boundary delimitation, the Senkaku/Diaoyu islands are unlikely to carry much, if any, weight in determining a final maritime boundary between China and Japan. Recent decisions of international tribunals in delimitation cases consistently disregard or minimize the effect of offshore islands on boundary delimitation. In the 1999 *Eritrea/Yemen* arbitration, the tribunal completely disregarded “the uninhabited Yemeni island of Jabal al-Tayr and . . . the Zubayr group . . . , stating simply that their ‘barren and inhospitable nature and their position well out to sea mean that they should not be taken into consideration in computing the boundary line.’”¹²³ These islands are at least as prominent as the Senkaku/Diaoyu islands, with lighthouses and a steady stream of beach-going visitors.¹²⁴

In other cases, the ICJ and other tribunals have recognized the relevance of islands in drawing a boundary line, but accorded them only half or reduced effect. This is generally the case when larger and more significant islands than the Senkakus/Diaoyus are present. For example, in the *Gulf of Maine* case, the ICJ accorded Machias Seal Island only reduced effect on the final delimitation.¹²⁵ This was despite the fact that the island contains a lighthouse (staffed year-round) and several houses, and is visited by bird-watching tours.¹²⁶ Similarly, in the *St. Pierre and Miquelon* case, the court “reduced the impact of [the] two islands [at issue] as against the Newfoundland coast”¹²⁷ The islands at issue in that case had a total land area of 242 square kilometers, and a population of approximately 5,831 people.¹²⁸ Certainly the tiny

¹²² See Van Dyke, *supra* note 25, at 273-74.

¹²³ *Id.* at 272.

¹²⁴ *Id.*

¹²⁵ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); Kaye, *supra* note 99, at 84.

¹²⁶ Machias Seal Island, IMPORTANT BIRD AREAS CANADA, <http://www.ibacanada.com/site.jsp?siteID=NB019&lang=EN> (last visited Nov. 15, 2012).

¹²⁷ Kaye, *supra* note 99, at 84.

¹²⁸ World Factbook: Saint Pierre and Miquelon, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sb.html> (last visited Nov. 15, 2012).

unpopulated Senkaku/Diaoyu islands would have a far lesser impact on any final boundary delimitation than these.

It is clear that the ICJ and other international tribunals have accorded decreasing importance to small islands in deciding larger boundary delimitation issues. Under the modern interpretations of UNCLOS in delimitation cases, the Senkakus/Diaoyus would not be entitled to their own EEZ, nor would they be significantly taken into account in determining an equitable median line boundary. These tiny, uninhabited formations, far from the shores of both China and Japan, are unlikely to be accorded even the reduced effect exemplified by the *Gulf of Maine* and *St. Pierre and Miquelon* cases. It is far more likely that they would be disregarded altogether, or enclaved within the EEZ of the opposing party, were the parties to submit the dispute to an international body for delimitation purposes.

The political actors on both sides of the dispute are likely aware of this reality. The fight over the Senkakus/Diaoyus is therefore less about competition for resource rights than it is about rising Chinese and Japanese nationalism and the simmering competition for Asian hegemony. The islands are a convenient focal point for both sides to use in pressing broader goals of regional influence.¹²⁹ The escalating tensions and rhetoric from both sides are a reflection of these broader political concerns, rather than any real concern for the strategic importance of the islands.¹³⁰

IV. THE CASE FOR AND CHALLENGES TO BORDER DELIMITATION

A. *The Case for Border Delimitation*

While the Senkaku/Diaoyu dispute continues to fill the headlines and occupy the attention of Chinese and Japanese decision-makers, the lack of a final delimitation of the broader seabed boundary between the countries stands as an even more fundamental roadblock to improved relations and mutual resource exploitation. Without a mutually agreed boundary, both sides are incentivized to make bold, and sometimes

¹²⁹ See, e.g., *Face-off: China's New Air-Defence Zone Suggests a Worrying New Approach in the Region*, ECONOMIST (Nov. 30, 2013), <http://www.economist.com/news/leaders/21590930-chinas-new-air-defence-zone-suggests-worrying-new-approach-region-face> (noting how China's approach to the island dispute reflects a broader pattern of "growing regional assertiveness").

¹³⁰ See *Over These?*, *supra* note 4, at 13.

outlandish, sovereignty claims to avoid foreclosing future bargaining points. An agreed boundary would eliminate the need for this unproductive behavior and allow unobstructed exploitation of the likely extensive energy deposits under the East China Sea.

B. Conflicting Theories: The Chinese and Japanese Approaches to Boundary Delimitation

The most recent flare-up in tensions over the Senkaku/Diaoyu islands coincides with a tense 10-year leadership transition in China, and elections in Japan.¹³¹ These domestic concerns are likely exacerbating the dispute, and preventing either side from compromising for fear of looking weak at a time of political importance. It has even been reported that the massive anti-Japanese protests in mainland China have been orchestrated and promoted by the Chinese government, possibly as a distraction from social and political issues.¹³² Fortunately, China's new Communist Party leadership has now been announced,¹³³ and elections in Japan were held on December 16, 2012.¹³⁴ This will hopefully relieve some of the need to cater to domestic audiences in both countries, allowing leveler heads to prevail in dealing with the Senkaku/Diaoyu dispute.

While the dispute over the islands is unlikely to reach a final resolution in the near future, the political actors on both sides would be wise to take this opportunity to set sovereignty issues to one side in order to make headway on weightier issues. The related area where progress is most needed is with regard to the currently undefined seabed boundary between China and Japan. The lack of a clear boundary has caused a great deal of uncertainty, and continues to prevent full-scale exploration and exploitation of available energy resources in the area. Because sovereignty over the Senkaku/Diaoyu islands will have little if any impact on placement of the boundary,¹³⁵ there is no reason to delay delimitation until the sovereignty issue is resolved.

Unfortunately, because neither party has expressed any interest in submitting the boundary delimitation to an international tribunal for a binding resolution, delimitation

¹³¹ *Id.*

¹³² *Protesting Too Much*, *supra* note 23, at 53.

¹³³ T. P., *Habemus Papam! China Reveals its New Leaders*, *ECONOMIST* (Nov. 15, 2012), <http://www.economist.com/blogs/analects/2012/11/china-reveals-its-new-leaders>.

¹³⁴ *Japan's Election: Go On Mr. Abe, Surprise Us*, *ECONOMIST* (Dec. 22, 2012), <http://www.economist.com/news/leaders/21568731-new-prime-ministers-first-term-power-was-disaster-it-need-not-be-way-again-go>.

¹³⁵ *See supra* Part III.

will have to be effected by bilateral negotiation.¹³⁶ This will be quite challenging. Aside from the numerous issues souring Chinese–Japanese relations in general, including Japan’s imperial past and China’s rising power, maritime boundary delimitation negotiations will be plagued by the parties’ extremely divergent methodological approaches to delimitation. But there is room for compromise on both sides, and a final resolution is not beyond the realm of possibility.

1. The Chinese Approach to Maritime Boundary Delimitation

China’s official position regarding the maritime border between China and Japan adheres to the natural prolongation principle, as expressed in the 1969 *North Sea* cases.¹³⁷ Under this principle, China insists that it is entitled to an extension of its EEZ out to 350 nautical miles, giving it exclusive rights over nearly the entire East China Sea, all the way up to the Okinawa Trough, a stone’s throw from the Japanese Ryukyu islands.¹³⁸ As noted above, the natural prolongation approach to boundary delimitation focuses on the idea that the continental shelf is a “natural prolongation” of the coastal state’s land mass.¹³⁹ This approach therefore has the effect of affording primary importance in making delimitation decisions to geological and geomorphological conditions.

Taking its cue from the *North Sea* line of cases, China continues to insist that the “equitable solution” referred to in UNCLOS Articles 74 and 83 is consistent with the natural prolongation principle. In a government policy document entitled “Working Paper on Sea Area within the Limits of National Jurisdiction,” China laid out its approach to boundary delimitation.¹⁴⁰ The document references geographical and geological conditions, as well as the existence of natural resources and economic development needs as relevant delimitation factors.¹⁴¹ The inclusion of geological factors most closely reflects

¹³⁶ See Ramos-Mrosovsky, *supra* note 5, at 937–38.

¹³⁷ Lee, *supra* note 48, at 11; see also 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>.

¹³⁸ Lee, *supra* note 48, at 11.

¹³⁹ See *supra* Part I.

¹⁴⁰ Chinese Delegation to the United Nations, Working Paper on Sea Area within the Limits of National Jurisdiction, U.N. Doc. A/AC.138/SC.II/L34 (July 16, 1973) reprinted in JEANETTE GREENFIELD, CHINA’S PRACTICE IN THE LAW OF THE SEA 230–32 (1992).

¹⁴¹ *Id.*

China's adherence to the natural prolongation principle. As international tribunals, especially the ICJ, moved away from natural prolongation, it became clear that the geology and geomorphology of the ocean floor was of little relevance to delimitation decisions.¹⁴² But China continues to claim sovereignty over the entire seabed all the way out to the Okinawa Trough, "contend[ing] that this geomorphological feature constitutes the natural frontier between the continental shelves of China and Japan."¹⁴³

This view is not completely without support in UNCLOS. The provisions on the continental shelf expressly allow for a coastal state to extend its area of exclusive resource rights out to a maximum of 350 nautical miles, if such a claim is supported by the actual natural prolongation of the state's land area under the sea.¹⁴⁴ However, the Article is unclear about how this principle should be interpreted when an extended shelf would conflict with the EEZ of another country. Furthermore, international tribunals have expressly decided against allowing such extensive claims to seabed in such cases, as discussed in Part V.A. below.¹⁴⁵

2. The Japanese Approach to Maritime Boundary Delimitation

Japan's official position regarding the maritime border between China and Japan in the East China Sea adheres strictly to the median line, or equidistance, approach.¹⁴⁶ This is the approach most closely embodied in UNCLOS.¹⁴⁷ Although UNCLOS does not expressly mention the equidistance principle with regard to areas where EEZs collide, it is likely that the mention of "equitable principles" in this regard incorporates the equidistance idea found in the Articles regarding the territorial sea.¹⁴⁸ International courts and tribunals most often take this approach in delimitation cases.¹⁴⁹ The modern trend in delimitation cases shows a growing consensus that equidistance/special circumstances is the appropriate framework.

¹⁴² See Kozyris, *supra* note 117, at 349.

¹⁴³ Lee, *supra* note 48, at 13.

¹⁴⁴ See UNCLOS, *supra* note 26, at art. 76.

¹⁴⁵ See *infra* Part V.A.

¹⁴⁶ Lee, *supra* note 48, at 7.

¹⁴⁷ *Id.*

¹⁴⁸ See UNCLOS, *supra* note 26, at art. 15.

¹⁴⁹ See *supra* Part III.

V. SUGGESTIONS FOR MOVING FORWARD

A. *Necessary Compromises*

As currently expressed, the claims of China and Japan overlap by approximately 81,000 square miles.¹⁵⁰ Clearly, neither side will be willing to sacrifice that entire area by agreeing to fully adopt the other side's delimitation approach. Thus, to reach a mutually beneficial agreement on the boundary between China and Japan in the East China Sea, both parties must compromise on their expressed claims and desired approaches. Such a compromise will require extremely strong political will in the face of prevailing nationalistic fervor and domestic political concerns, but these obstacles should not be insurmountable, considering the enormous economic benefit attendant to a successful development agreement.

First, China must drop its adherence to the "natural prolongation" principle. This idea has been superseded by the 1982 UNCLOS agreement, as confirmed by subsequent ICJ case law. While the natural prolongation principle is still mentioned in the UNCLOS provisions dealing with an extended continental shelf, the decisions of international adjudicators have made clear that this principle loses all relevance when it conflicts with the base 200-nautical-mile EEZ of another state. The ICJ, in the *Libya/Malta* case, stated the modern view as follows:

The Court . . . considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. [For areas] situated at a distance under 200 miles from the coasts in question, . . . the geological and geomorphological characteristics of those areas are completely immaterial.¹⁵¹

It is clear that, under widely accepted international law concerning maritime boundary delimitation, China's claim of a continental shelf extending all the way out to the Okinawa Trench, well within 200 nautical miles of the Japanese coast, is untenable. Bold claims of sovereignty over nearly the entire

¹⁵⁰ East China Sea, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/countries/analysisbriefs/east_china_sea/east_china_sea.pdf (last updated Sept. 25, 2012).

¹⁵¹ Continental Shelf (*Libya v. Malta*), 1985 I.C.J. 13, 35 (June 3).

East China Sea naturally lead to deep concern among China's neighbors, and cast doubt on China's commitment to international norms. Progress toward a mutually agreed-upon delimitation will be completely stymied until China drops its adherence to the outdated and outmoded natural prolongation principle.

Japan, meanwhile, must be willing to allow for adjustment of the equidistant line in China's favor. Modern delimitation case law, in taking "relevant circumstances" into account, reflects the idea that coastline length may be relevant when adjusting the equidistant line.¹⁵² China's extensive coastline would likely compel an adjudicator to shift the line somewhat in China's favor.¹⁵³ A pure median line approach would fail to take account of the enormous discrepancy between the lengths of China's and Japan's relevant opposing coastlines, leading to an inequitable result.

In seeking an equitable solution, the ICJ has often taken into account relative coastal lengths in order to shift the median line toward one of the parties. For example, in the *Gulf of Maine* case, the ICJ noted that it was "obvious that the length of the coasts belonging to the United States . . . is considerably greater than that of the coasts belonging to Canada," and went on to consider coastal length a "special circumstance of some weight, which . . . justify[ed] a correction of the equidistance line . . ."¹⁵⁴ Similarly, in the *St. Pierre and Miquelon* case, "the ICJ made positive references to proportionality, but rejected the notion that the ratio of coastal lengths should itself be determinative . . . , and sought its own solution in the form of concrete lines, apparently taking into account proportionality, but without quantified particularization."¹⁵⁵

China, with a coastline many times longer than the relevant opposite coastline of Japan, should be entitled to a significant adjustment of the median line in its favor. Japan's adherence to a strict median line approach, without allowing for such adjustment, stands as a roadblock to reaching an appropriate delimitation of the seabed boundary between the countries.

¹⁵² See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 322 (Oct. 12).

¹⁵³ See Peterson, *supra* note 42, at 453 ("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.").

¹⁵⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine*, 1984 I.C.J. at 322.

¹⁵⁵ Kozyris, *supra* note 117, at 354 (internal footnotes omitted).

B. *Suggested Amendment to UNCLOS*

Sovereignty disputes over small islands, similar to the Senkaku/Diaoyu dispute, exist in numerous parts of the world.¹⁵⁶ It is highly likely that at least some of these disputes are primarily motivated by a belief that sovereignty will bring with it extensive resource rights. To avoid these types of disputes in the future, greater definition of the Regime of Islands under UNCLOS is needed. Article 121 of UNCLOS, which defines the status of islands and rocks under the modern law-of-the-sea regime, contains a mere three lines of text and provides little guidance to state actors. While the decisions of international tribunals have fleshed out the customary understanding of these provisions, indicating that small, offshore features are not entitled to the full complement of sovereignty zones, this approach has not been universally accepted by state actors.

UNCLOS expressly provides for a procedure by which amendments to its provisions can be adopted.¹⁵⁷ An amendment to the Convention clearly indicating that small, uninhabited islands are not entitled to their own EEZs would be extremely valuable. Such an amendment should contain express, but flexible, guidelines concerning land area, population, and economic activity to provide guidance to state actors. The International Hydrographic Bureau has already formulated a mathematical definition of various island types based on land area.¹⁵⁸ These definitions could be incorporated into UNCLOS, along with appropriate references to population and other relevant concerns, giving state actors a much clearer perspective from which to approach sovereignty disputes. If both sides are fully aware that a particular island will not be entitled to extensive maritime zones, they are far less likely to escalate any dispute.

CONCLUSION

The Senkaku/Diaoyu sovereignty dispute is a political distraction that has precluded progress on broader boundary

¹⁵⁶ See generally ROBERT W. SMITH & BRADFORD L. THOMAS, *ISLAND DISPUTES AND THE LAW OF THE SEA: AN EXAMINATION OF SOVEREIGNTY AND DELIMITATION DISPUTES* (Clive Schofield & Andrew Harris eds., 1998) (discussing numerous island disputes around the world).

¹⁵⁷ See United Nations Convention on the Law of the Sea, arts. 312-16, Dec. 10 1982, 1833 U.N.T.S. 397.

¹⁵⁸ See Leticia Diaz, Barry Hart Dubner & Jason Parent, *When is a "Rock" an "Island"? – Another Unilateral Declaration Defies "Norms" of International Law*, 15 MICH. ST. J. INT'L L. 519, 535 (2007).

delimitation issues, and thereby impeded cooperation in the joint exploitation of East China Sea resources. Political actors on both sides of the dispute are highly cognizant of the various norms of international law relevant to law of the sea matters, and are likely aware that the islands, on their own, carry little to no strategic advantage in terms of resource rights. Thus, a negotiated boundary delimitation is the only plausible legal and diplomatic means of determining China's and Japan's respective rights to seabed resources. An agreed-upon boundary, or at least a long-term joint development agreement, would allow more rapid development of the existing seabed energy resources, feeding the growing Asian economies and reducing dependence on imports.

The sovereignty dispute should be set aside, as has been done in the past,¹⁵⁹ to focus attention on the more weighty issue of boundary delimitation. While there will remain a number of challenges to overcome in reaching any lasting solutions, including the memory of Japan's imperial history of aggression in the region, and contemporary regional fears of a powerful China acting outside the norms of international relations, the benefits to be gained by both sides as a result of an agreement should outweigh such concerns. Pure economic self-interest dictates that compromise is possible.

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¹⁵⁹ See, e.g., *id.* at 539.

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