
CURRENT DEVELOPMENT OF THE ONGOING DISPUTE CONCERNING THE DELIMITATION OF THE EXTENDED CONTINENTAL SHELF IN THE EAST CHINA SEA

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ABSTRACT

The East China Sea (EC Sea) is surrounded by the People's Republic of China, the Republic of Korea and Japan. The fact that the EC Sea is no more than 400 nautical miles at its maximum breadth results in overlaps on the continental shelf claimed by each State. This paper overviews and examines the current development of the ongoing maritime dispute between China and Japan concerning the extended continental shelf in the EC Sea. It shows that this maritime dispute is mainly related to the application of different principles by China and Japan to their particular advantages. China employs the natural prolongation principle and Japan employs the median line. In addition, this maritime dispute does not only include continental shelf disputes but also disputes regarding the ownership of islands. The concept of a joint development between China and Japan had been seen as the current development of the ongoing dispute over the delimitation of the continental shelf in the EC Sea. Although progress has been made, further efforts to resolve these maritime disputes are needed in accordance with Article 83 (3) of the 1982 United Nations Convention on the Law of the Sea.

Keywords: Extended continental shelf; The East China Sea; Joint development; Provisional arrangement; Dispute resolution

1. Introduction

Our oceans which cover 70 per cent of the earth's surface have been and continue to be essential to human well-being. Because of the ever-increasing number of human activities that take place in the oceans, it is of the utmost significance to have international rules that oblige States and other international laws to focus on marine affairs. Thus, the United Nations Convention on the Law of the Sea (UNCLOS) was adopted in 1982 as the most crucial source of the international law of the sea and has been known as the “Constitution for the Ocean”.¹ It established a new legal framework for the conduct of marine affairs, including the establishment of the different maritime zones such as the territorial sea, the contiguous zone, the exclusive economic zone and especially the continental shelf (CS) as well as the extended continental shelf (ECS) which will be the focus on this paper.

Historically, the ECS was practically not recognised until the adoption of the UNCLOS. At present, binding definitions and procedures, as well as the right of the coastal State to delineate its ECS, are outlined in Art 76 of the UNCLOS. Further, the UNCLOS has also established The Commission on the Limits of the Continental Shelf (CLCS or the Commission) as one of the specialist institutions under the UNCLOS for the reason of the dynamic nature of the CS system, especially the ECS stipulated by the UNCLOS.

More recently, many coastal states have paid more attention to the ECS and its abundant natural resources. Thus, the coastal States' enthusiasm can be seen by the total amount of submissions made to the CLCS. To date, the CLCS has received 88 formal submissions² and 51 preliminary information files.³ Although the CLCS was established as a specialist institution with a limited mandate, the CLCS has a considerable contribution to the progressive development of the law of the sea in future periods as more coastal States have more attention to the ECS.⁴

¹ United Nations Convention on the Law of the Sea, *Opened for Signature 10 December 1982, (Entered into Force 16 November 1994) 1833 UNTS 3 (LOS Convention)*. ‘A Constitution for the Ocean’ remarked by Tommy TB Koh of Singapore President of the United Nations Conference on the Law of the Sea, Montego Bay, Jamaica, 11 December 1982, available at http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf, (accessed 25 March 2021).

² United Nations, “Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982”. (2021) Available [online] http://www.un.org/Depts/los/clcs_new/commission_submissions.htm: (accessed 3 Jan. 22)

³ United Nations, “Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles”, (2021), available [online] http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm (accessed 3 Jan. 22)

⁴ Donald R. Rothwell, *Issues and Strategies for Outer Continental Shelf Claims*, 23 INT. J. MAR. COAST. LAW 185–211 (2008), https://brill.com/view/journals/estu/23/2/article-p185_1.xml.

Among other coastal states' attention to the ECS, the People's Republic of China (China) on May 12, 2009, submitted the preliminary information on defining its ECS to the UN Secretary-General. The Chinese Government further submitted a partial submission on the ECS in part of the East China Sea (EC Sea) on December 14, 2012. Nevertheless, the fact that the breadth of the EC SEA is no more than 400 nautical miles (nm) results in an overlap on the CS claimed by China and Japan. Therefore, China and Japan have claimed and submitted their different information on the ECS to the CLCS.

2. Method

Against that background, this paper specifically discusses the dispute over the delimitation of the ECS between Japan and China, concentrating mostly on the following questions: what are the rules governing the ECS and the obligation of States in the disputed areas? What is the primary argument of Japan and China in their submission concerning the ECS in the EC Sea? What is the recent development of the existing disputes over the ECS in the EC Sea?

The methodological approach for this research is based on the desktop research analysis. The desktop research focuses on identifying, collecting, reviewing, and assessing broad primary and secondary sources to achieve the objective and answer the above research questions. The primary sources relied upon several binding and non-binding international instruments, as well as the various documents submitted by States regarding the ECS in the EC Sea. The secondary sources such as books, articles, and reports will also be necessary for this research.

3. Literature Review

3.1. Legal Basis of the Continental Shelf

The subject of the delimitation of the ECS under the 1958 Continental Shelf Convention (CSC) was purposefully left fluid based on the exploitability of the shelf. The States had little interest in the ECS based on the understanding that there were fairly strict constraints on the depths to which the shelf could be exploited.⁵ The question of the issue of the ECS was then discussed and became one of the most controversial issues at the Third United Nations Convention on the Law of the Sea (UNCLOS III). As a result, the 1982 UNCLOS provides remarkable achievements in the ECS regime. Thus, this section discusses the legal basis for the CS under the 1982 UNCLOS.

⁵ Joanna Mossop, "The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities" (United Kingdom: Oxford University Press, 2016), <https://doi.org/10.1093/law/9780198766094.001.0001>.

In particular, Art 76 stipulates a more comprehensive description of the CS and how to delimit the ECS.⁶ Art 76 which comprises ten paragraphs, specifically emphasises the methodology and procedure to identify and delineate the ECS by a coastal State. The first three paragraphs of this Art define the CS, which includes a general introduction and concepts and outlines the principles. Paragraph 4 to 7 provides the technical criteria for the delimitation outer limit of the juridical CS. Paragraph 8 to 10 describes the procedures for submission of information to the UN.

Art 76 (1) stipulates that a coastal State has two options to delineate the CS. It includes the delimitation of the CS within 200 nm from its baselines from which the territorial sea is measured or out to a limit defined by the technical formulae laid out in Art 76 (4-7).⁷ With regards to the ECS, the coastal State shall submit all the information on its ECS to the CLCS.⁸ The CLCS is a specialist body that has the role of considering data and other material submitted by coastal States regarding the ECS in the area where those limits extend beyond 200 nm and making a final and binding recommendation.⁹ In addition, in order to assist the coastal State in the preparation of its submission, the CLCS may, at the coastal state's request, offer the coastal State scientific and technical advice.

Art 76 (4) to (7) further describes the specific technical criteria to delimit the ECS. The delimitation of the ECS is based on the determination of the outer edge of the continental margin.¹⁰ Where the outer edge of the continental margin extends beyond 200 nm, the outer limit of the CS is to be determined based on Art 76 (4). Thus, Art 76 (4) creates two alternative methods for States to use to determine the natural prolongation of the outer limits of the CS: The Gardiner Formula/ Irish Formula and the Hedberg Formula. The coastal States are also allowed to choose the most favourable method or use a combination of the two methods for the most advantageous outcomes for them.¹¹

⁶ LOS Convention, Article 76.

⁷ Article 76 (1) expressly provides that “The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance”. See also Lindsay Parson, *Continental Shelf*, in: Proelss, UNCLOS, 1st edition 2017, 589.

⁸ LOS Convention, Article 76 (8).

⁹ Ibid, See also BJARNI MÁR MAGNÚSSON, *THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES: DELINEATION, DELIMITATION AND DISPUTE SETTLEMENT* (2015).

¹⁰ The continental margin is “the submerged prolongation of land mass of the coastal State, and consisting of the seabed and subsoil of the continental shelf, the slope and the rise”, LOS Convention, Article 76 (3).

¹¹ Dominic Roughton & Colin Trehearne, *The Continental Shelf*, in *THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW VOLUME I: THE LAW OF THE SEA* (2014).

The Gardiner/ Irish Formula focuses on the thickness of the sedimentary rocks as provided in Art 76 (4)(a)(i). It provides that the outer edge of the continental margin is the point where the thickness of the sedimentary rocks is at least 1 per cent of the shortest distance from such points to the foot of the continental slope (FOS). The Hedberg Formula focuses on the distance from the foot of the continental slope and is easier to determine.¹² Hedberg's formula is defined in Art. 76 (4)(a)(i) as a line that is delimited by reference to fixed points that are located no further than 60 nm from the FOS. Thus, the Hedberg Formula has been seen as an alternative to the Gardiner Formula as it is easier to determine.¹³

The coastal States may apply the Irish or Hedberg formula to delineate their ECS. However, after applying that formula, coastal States under Art 76 (5) must apply the constraints to determine the maximum distance on the outer edge of the ECS. There are two alternative methods provided by this Article. In the first method, it is stipulated that the limits of the ECS must not extend more than 350 nm from the baseline. There is no need for the survey under this method. The only line that the coastal States are required to draw is one that is 350 nm from the baseline that is used to measure the breadth of the territorial sea. The second method stipulates that the extent of the ECS constraint must not extend further than 100 nm from the isobaths at 2,500 meters.

The nature, the extent, and the foundation of the rights of the coastal State over its CS are discussed in Art 77. Under this Art, coastal State has sovereign rights to explore and exploit the natural resources on the CS.¹⁴ In accordance with this Art, coastal states have the right to exercise their sovereign right over the exploration and exploitation of the natural resources located on the CS. The term sovereign rights are different from sovereignty. The sovereign rights mean States have limited sovereignty on the CS.¹⁵ The rights of the coastal State over its CS are exclusive and no other State is entitled to exercise them without express consent from the coastal State.¹⁶ The legal status of the waters and air space over the CS is not affected by

¹² This formula was introduced by Hedberg in 1976, See Joanna Mossop, "The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities", 70.

¹³ Ted L. McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 INT. J. MAR. COAST. LAW 301–324 (2002), https://brill.com/view/journals/estu/17/3/article-p301_1.xml.

¹⁴ LOS Convention, Article 77 (1).

¹⁵ UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1956, VOL. II (1956), <https://www.un-ilib.org/content/books/9789213624951>.

¹⁶ LOS Convention, Article 77 Para. 2.

the coastal State's rights on the CS.¹⁷ In addition, coastal States are prohibited from violating the UNCLOS's provisions on navigation and other rights as stipulated in Art. 78(2).

3.2. Obligation of States to Cooperate in Settle Disputes by Peaceful Means

Art 83 (3) of the UNCLOS required States to cooperate on the maritime dispute over the delimitation of the CS.¹⁸ It particularly states that:

“Pending agreement as provided for in paragraph 1, States concerned, in 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 jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation”.¹⁹

This Art provides a combination of two fundamental obligations upon the States concerned “pending agreement” on delimitation. First, States concerned are required to “make every effort to enter provisional arrangements of a particular nature” pending agreement on delimitation “in spirit of understanding and cooperation”. This obligation aims to promote the adoption of certain interim measures through the provisional arrangement.²⁰ In this regard, the Arbitral Tribunal in the *Guyana/Suriname* case stated that “the provisional arrangements of a practical nature” have been acknowledged as vital tools in the achievement of the UNCLOS’s objectives.²¹ Accordingly, this provision requires disputed parties to make every effort to reach such an arrangement.

Further, the phrase “in spirit of understanding and cooperation” could also be understood to “indicates the drafters’ intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement”.²² Thus, the obligation under this phrase also further reflects the principle of good faith stipulated under Art 300 of the UNCLOS. In such circumstances, the States concerned are required to conduct negotiations in good faith, albeit it does not require reaching an agreement.²³

¹⁷ Ibid., Article 78 Para.1.

¹⁸ Ibid., Article 83 (3).

¹⁹ Ibid, this article is essentially identical to LOS Convention’s Article 74 (3).

²⁰ Virginia Commentary, vol. 2, p. 815.

²¹ The Guyana/ Suriname Arbitration Award, 30 RIAA, p. 153 para. 460

²² Ibid, para. 461.

²³ YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA (Third Edit ed. 2019).

Second, States concerned are required to “during this transitional period, not to jeopardise or hamper the reaching of the final agreement”.²⁴ This obligation aims to limit the activities of States concerned in the disputed area.²⁵ While no comprehensive explanation under the UNCLOS, the phrase “transitional period” may reasonably be considered that the obligation imposed by this provision must be applied as soon as there is an overlapping claim in a particular maritime space, based on the object and purpose of Art 83 (3).²⁶ In particular, this phrase is defined by the ITLOS Special Chamber in the *Guyana/Suriname* case as “the period after the maritime delimitation dispute has been established until a final delimitation by agreement”. The phrase “not to jeopardise or hamper” does not preclude the States concerned from conducting some activities within the disputed areas, as long as those activities do not have the effect of jeopardising or hampering the final agreement.²⁷

The obligation to promote the adoption of certain interim measures through the provisional arrangement is practically through the concept of joint development in areas pending agreement. This concept is broadly defined as “cooperative efforts between two or more States for the exploration and exploitation of mineral resources that straddle a maritime boundary or are found in areas of overlapping claims”.²⁸ The concept of joint development is applied in two particular situations – “if an offshore hydrocarbon deposit straddles a boundary line and if such resources are found in a maritime area that is claimed by two or more States”.²⁹ This concept which was initially developed to manage fisheries³⁰ and onshore resources³¹ is then applied to find adequate solutions in the areas of overlapping claims. An example is the adoption of the joint development in the EC Sea in order to address the existing overlapping claims over the CS between Japan and China which will be discussed explicitly in the next section of this paper.

4. Discussion and Analysis

4.1. The Position of China and Japan on the Extended Continental Shelf in the East China Sea

²⁴ LOS Convention, Article 83 (3).

²⁵ Virginia Commentary, vol. 2, p. 815.

²⁶ Yoshifumi Tanaka, “Part V. Exclusive Economic Zone,” in *United Nations Convention on the Law of the Sea: A Commentary*, ed. Alexander Proelss, 1st Edition (Verlag C. H. Beck oHG, 2017). 578.

²⁷ Virginia Commentary, vol. 2, p. 815.

²⁸ VASCO BECKER-WEINBERG, JOINT DEVELOPMENT OF HYDROCARBON DEPOSITS IN THE LAW OF THE SEA (2014).

²⁹ *Ibid.*

³⁰ *Ibid.*, See also Kenneth Beauchamp, *The Management Function of Ocean Boundaries*, 23 SAN DIEGO LAW REV. 611 (1986).

³¹ *Ibid.*, see also “Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government concerning the Principles of Geological Co-operation between the Czechoslovak Republic and the Republic of Austria”, done at Prague on 23 January 1960, published at 495 U.N.T.S. 7241 (1964), pp. 112–122.

The submission related to the CS is governed by Art 76 (8), Art 4 of Annex II to the UNCLOS and the Decision of the 11th Meeting of States Parties to the UNCLOS (SPLOS/72). Thus, States Parties to the UNCLOS who entered into force prior to May 13, 1999, must submit to the CLCS information about their ECS, along with supporting scientific and technical data, by May 13, 2009. However, the 18th meeting of the SPLOS further concluded that “the time period referred to in Article 4 of Annex II to the Convention and the decision contained in SPLOS/72, paragraph (a), may be satisfied by submitting to the Secretary-General preliminary information...”.

As a result, China and Japan, as States Parties to the UNCLOS which entered into force occurred before May 13, 1999,³² have submitted their information pertaining to the ECS before May 13, 2009. In November 2008, Japan made a partial submission,³³ followed by China in May 2009, which made a preliminary submission.³⁴ Given that Japan has not made any submission on the CS of the EC Sea, the current discussion focuses on the submission made by the Chinese Government and the response of Japan to China’s submission.

Since 1996, the Chinese Government, through the State Oceanic Administration of China (SOA) has carried out three particular surveys aimed to get data on the CS in the EC Sea.³⁵ On May 12, 2009, the Chinese Government submitted the preliminary information on the ECS in part of EC Sea to the UN Secretary-General.³⁶ Based on the preliminary information, China specified to prepare the submission of the information on the ECS. In addition, China intends to submit all or part of its information on the ECS upon the completion of the study.³⁷

³² China deposited their instruments of accession and ratification of the LOS Convention on June 7, 1996, while Japan on June 20, 1996. See at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (accessed 3 January 2022).

³³ The Government of Japan, “Executive Summary of Japan’s Submission to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea”, 2008. This submission is however not related to the East China Sea continental shelf. Available at https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (accessed 3 January 2022).

³⁴ People Republic of China, “Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People’s Republic of China”, submitted to the UN in 11 May 2009. Available at https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf (accessed 3 January 2022).

³⁵ Pan Jun, *The Delimitation of the Continental Shelf beyond 200 Nautical Miles in the East China Sea*, CHINA OCEAN LAW REV. (2014).

³⁶ People Republic of China, “Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People’s Republic of China”.

³⁷ *Ibid.*

In response to the preliminary information submitted by China, the government of Japan through the Permanent Mission of Japan to the UN (JPNUN) submitted their position.³⁸ Japan argues that “the distances between the opposite coasts of Japan and the People’s Republic of China in the area with regard to which the People’s Republic of China has submitted preliminary information is less than 400 nautical miles”.³⁹ Accordingly, Japan argues that both Countries have an obligation to cooperate as stipulated in Art 88 of the UNCLOS.⁴⁰ Thus, Japan further argues that “the establishment of the outer limits of the continental shelf beyond 200 nautical miles in the area comprising less than 400 nautical miles and subject to the delimitation of the continental shelf between the States concerned cannot be accomplished under the provisions of the Convention”.⁴¹ In addition, Japan has also submitted the same position with regard to preliminary information submitted by the Republic of Korea on May 11, 2019.⁴²

China formally submitted information to the CLCS on the ECS on December 14, 2012.⁴³ Based on its submission, the delimitation of China’s ECS in part of EC Sea is in accordance with the UNCLOS and the Rule of Procedure of the CLCS and the Scientific and Technically Guidelines of the Commission and other legal instruments. This submission is further received by the CLCS and circulated to all Member States of the UN and States Parties to the UNCLOS.⁴⁴

The executive summary of China's submission contains seven sections, including “introduction, maps, and coordinates, Commission members who provided advice during the preparation of the submission, provisions of Article 76 invoked in support of the submission, natural prolongation of land territory, description of the outer limits of the continental shelf in

³⁸ Communications received in relation to preliminary information submitted by JPNUN (SC/09/246), Available at https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/jpn_re_chn2009e.pdf (accessed 3 January 2022).

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Communications received in relation to preliminary information submitted by JPNUN (SC/09/248), Available at https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/jpn_re_kor2009e.pdf (accessed 3 January 2022).

⁴³ People Republic of China, “Executive Summary, Submission by the People’s Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea”. Available at https://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf (accessed 3 Jan. 22)

⁴⁴ UN, Circular Communications from the Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, 14 December 2012. Available at https://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/clcs_63_2012.pdf (accessed 3 January 2022).

part of ECS and maritime delimitations”.⁴⁵ The submission was made by the SOA and the Ministry of Foreign Affairs of China took the lead. The China Geological Survey, the Chinese Academy of Sciences, China Petrochemical Corporation, and other departments along with the technical assistance and advice from Lv Wenzheng as a member of the CLCS.⁴⁶

According to the executive summary, the ECS in the EC Sea is the natural prolongation of China’s mainland territory. This argument is based on the geomorphologic and geological features of the EC Sea. Therefore, China has an argument to claim the ECS in the EC Sea.⁴⁷ However, the Government of Japan through the permanent mission of Japan to the UN has requested the CLCS not to consider the submission of the ECS in the EC Sea made by China.⁴⁸

The Government of Japan argues that “the distance between the opposite coasts of Japan and the People’s Republic of China in the area with regard to the submission is less than 400 nautical miles”.⁴⁹ Furthermore, Japan also states that the delimitation of the CS in this area shall be affected by an agreement according to Article 83 (3) of the UNCLOS. Accordingly, China cannot individually establish the ECS in the EC Sea. However, China disagrees with Japan’s position and argues that China’s submission to the ECS is in strict accordance with Article 76 of the UNCLOS, Annex II, and in accordance with the relevant rules of the Commission.⁵⁰

In addition to the ECS issue, the Government of Japan further expressed concern about the references to the Senkaku Islands (Diayou Dao in Chinese). Japan argues that “There is no doubt that the Senkaku Islands are an inherent part of the territory of Japan in light of historical facts and based upon international law. The Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands”.⁵¹ Accordingly, Japan did not accept China's submission, which contains Senkaku Islands, including the baselines that China argues. However, China does not accept Japan’s position and argues that “Diaoyu Dao and its affiliated islands have been an inherent territory

⁴⁵ People Republic of China, “Executive Summary, Submission by the People’s Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea”.

⁴⁶Ibid.

⁴⁷Ibid.

⁴⁸ Permanent Mission of Japan to the United Nations New York, SC/12/372, 28 December 2012, Available at https://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf (accessed 4 Jan. 22).

⁴⁹ Ibid.

⁵⁰ Permanent Mission of People’s Republic of China to the United Nations New York, CML/017/2013, Available at https://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/chn_re_jpn07_01_2013e.pdf (accessed 4 Jan. 22).

⁵¹ Permanent Mission of Japan to the United Nations New York, SC/12/372.

of China since ancient times. China's sovereignty over Diaoyu Dao and its affiliated islands has a sufficient historical, geographical and legal basis. Japan's occupation of and claim of sovereignty over Diaoyu Dao is illegal and invalid, and in no way change the fact that Diaoyu Dao belongs to China".⁵²

4.2. Current Development on the Delimitation of the ECS in the EC Sea

The dispute concerning the delimitation of the CS between China and Japan dates back to the 1970s. In January 1974, Japan and South Korea in the northern waters of the EC Sea without consultation with China arbitrarily designated a "*Japan-South Korea Joint Development Zone*" that goes deep into the CS of the EC Sea. Accordingly, China has repeatedly lodged solemn protests against the Joint Development Program between Japan and Korea in the EC Sea.⁵³

Scholar has argued that the disputes in the EC Sea have been known as mixed disputes, including the delimitation of maritime boundary, ownership of islands, energy resources exploitation, and fisheries.⁵⁴ Hence, the dispute over the delimitation of the ECS in the EC Sea involves a complex and unique condition where the breadth of the sea areas between China and Japan is no more than 400 nm. On the one hand, China claims the ECS of the EC Sea under Art 76 (4)-76(7) of the UNCLOS based on the seabed topography of the CS in the EC Sea. On the other hand, Japan has its arguments that the breadth of the CS in the EC Sea can only be claimed as less than 200 nm. Therefore, these conditions can be defined as disputes of delimitation on the ECS.⁵⁵

Another major challenge in these disputes is the application of the different principles in their perspective positions on the CS entitlement, as well as the disputed islands. China employs the natural prolongation principle while Japan employs the principle of the median line. According to China, the CS in the EC Sea based on the geological and geomorphological structure shows that the Chinese CS extends well beyond 200 nm to the Okinawa Trough. Thus, China has repeatedly asserted that the CS in the EC Sea extends up to the Okinawa Trough based on the principle of natural prolongation.⁵⁶ In contrast, Japan employs the median line and argues that

⁵²Permanent Mission of People's Republic of China to the United Nations New York, CML/001/2013. Available at https://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/chn_re_jpn07_01_2013e.pdf (accessed 4 Jan. 22).

⁵³ Fenglan Zhou, *China-Japan Dispute over East China Sea and Its Resolution in Prospects*, J. CONTEMP. ASIA-PACIFIC STUD. (2005).

⁵⁴ Suk Kyoon Kim, *China and Japan maritime disputes in the East China Sea: A note on recent developments*, OCEAN DEV. INT. LAW (2012).

⁵⁵ Pan Jun, "The Delimitation of the Continental Shelf beyond 200 Nautical Miles in the East China Sea".

⁵⁶ People Republic of China, "Executive Summary, Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea".

Japan has the same CS as China. Accordingly, Japan does not acknowledge the natural prolongation of China's CS and argues that the equidistance method should be applied to delimit the CS in the EC Sea.⁵⁷

The existing literature provides that delimitation disputes on the ECS in the EC Sea have quite a similar aspect to the CS disputes in the Timor Sea between Australia and East Timor. The delimitation of the ECS in the Timor Sea has also experienced difficulty in the negotiations where the breadth of the water between the two States is less than 400 nm. Australia has the same argument as China that neither the Timor Through nor the Okinawa Trough delimitation of the ECS should employ the natural prolongation principle. In contrast, both East Timor and Japan argue that the delimitation of this water should employ the equidistance method.⁵⁸

Furthermore, the territorial sovereignty issue over Diaoyu Dao also has a critical point in delimiting the CS in the EC Sea. China argues that China had always controlled Diaoyu Dao, precisely before the First Sino-Japanese War. According to the Chinese government, Japan's occupation of China was caused by the "1985 Treaty of Shimonoseki". Thus, Diaoyu Dao and other Chinese territories occupied by Japan during World War II were to be returned to China under the terms of the "1943 Cairo Declaration and the 1945 Potsdam Proclamation". However, the Government of Japan, certain Japanese scholars and the media argue that Diaoyu Dao has nothing to do with the Treaty of Shimonoseki.⁵⁹

China's position is tightly against the violation by Japan on China's sovereignty of the Diaoyu Dao. As a consequence of this, the government of China, as mentioned in his *note verbal*, does not recognise the position taken by Japan.⁶⁰ Additionally, the Chinese government has maintained that China has sovereignty over Diaoyu Dao by promulgating legislation and making a declaration concerning the territorial sea, such as the "Law of the People's Republic of China on the Territorial Sea and Contagious Zone"⁶¹ and the "Declaration of the

⁵⁷ Pan Jun, "The Delimitation of the Continental Shelf beyond 200 Nautical Miles in the East China Sea.", 151.

⁵⁸ Ibid.

⁵⁹ Zhang Haipeng & Li Guoqiang, *The Treaty of Shimonoseki, the Diaoyu Islands and the Ryukyu Issue*, 7 INT. CRIT. THOUGHT 93–108 (2017), <https://www.tandfonline.com/doi/full/10.1080/21598282.2017.1288362>.

⁶⁰ Permanent Mission of People's Republic of China to the United Nations New York (CML/017/2013), above n. 50

⁶¹ According to this law "The territorial sea of the People's Republic of China is the sea belt adjacent to the land territory and the internal waters of the People's Republic of China. The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China". The aims of this law are "to exercise its sovereignty over its territorial sea and the control over its contagious zone, and to safeguard its national security and its maritime rights and interests", See "Law of the People's Republic of China on the Territorial Sea and Contagious Zone", 1992, Article 1.

Government of the People's Republic of China on China's Territorial Sea"⁶² to express China's position on the law of the sea matter, especially on the issue of China's territorial sea.⁶³

The delimitation of the ECS between neighbouring states indeed has been argued by many scholars as to the critical element of many maritime boundary negotiations and is considered a topic that will receive significant attention. As discussed above, it is clear that China and Japan have a number of disputes about the CS in the EC Sea. Accordingly, China and Japan have two legal obligations as specified by Art 83 (3) – the obligation to “make every effort to enter provisional arrangements of a particular nature” and “during this transitional period, not to jeopardise or hamper the reaching of the final agreement”.⁶⁴

China and Japan, therefore, have established the concept of “joint development” to address this issue of the CS. In 2007, both Countries reached an agreement over the provisional arrangement of a joint development that would last until the final delimitation was accomplished.⁶⁵ As a result, in 2008, China and Japan announced a joint press statement on the “Principled Consensus on the East China Sea Issue” which consists of three parts. The first part focus on the cooperation of two Countries in the EC Sea. It expressly states that “the two countries cooperate with each other without prejudice to the legal positions of both countries during the transitional period pending agreement on the delimitation and taken the first step to this end”.⁶⁶

The second part of the Principled Consensus contains “Understanding on Japan-China Joint Development in the East China Sea”.⁶⁷ It provides the specific areas for joint development through joint explorations by mutual agreement and applies the “Principle of Mutual Benefit”. The third part of the Principled Consensus states that “Chinese enterprises welcome that Japanese corporation(s) will participate compliance with China's laws regarding cooperation

⁶² The Declaration stipulates that “the breadth of the territorial sea of China shall be 12 nm in all China's territories”. Not only within the Chinese mainland, the China's territories in this Declaration also includes China's coastal islands, as well as Taiwan. Hence, the Declaration includes its “surrounding islands, the Penghu Island, the Dongsha Island, the Xisha Islands, the Zhongsha Islands, the Nansha Islands, and all other islands belonging to China which are separated from the mainland and its coastal islands by the high sea”. This Declaration also states that China is using straight baseline on the mainland coast and its outermost coastal islands, See “Declaration of the Government of the people's Republic of China on China's Territorial Sea”, Beijing, September 4, 1958.

⁶³ Wu Jilu, *China's Marine Legal System-An Overall Review*, 17 OCEAN COAST. LAW J. (2012).

⁶⁴ LOS Convention, Article 83 (3).

⁶⁵ Kung-wing Au, *The East China Sea Issue: Japan-China Talks for Oil and Gas*, 25 EAST ASIA 223–241 (2008), <http://link.springer.com/10.1007/s12140-008-9051-2>.

⁶⁶ Japan-China Joint Press Statement Cooperation between Japan and China in the East China Sea, available at <https://www.mofa.go.jp/files/000091726.pdf>, see also

http://www.china.org.cn/2008-06/19/content_15853629.htm (Accessed 3 Jan. 22)

⁶⁷ Ibid

with foreign enterprise in the exploration of off-shore petroleum resources, in the development of the existing Shirakaba (Chinese name: Chunxiao) oil and gas".⁶⁸

This joint development has been seen as the new development on the EC Sea disputes on the ECS. However, several arguments have arisen as the different interpretations of the "Principled Consensus". Among those arguments, the legality of its Principle Consensus has been argued by two States. On the one hand, China has an argument that the Principle Consensus has the same legal force as a treaty in terms of binding the state parties. On the other hand, Japan argued that the Principle Consensus could not be considered an internationally binding agreement.⁶⁹ Scholars also have different arguments on the legality of this Consensus. This Consensus has been argued to have a legal effect and comprises the natures of wording generally linked with an international treaty. However, other scholars based on the "Vienna Convention on the Law of Treaties"⁷⁰ argued that this Principled Consensus does not meet the requirements of a treaty in international law.⁷¹

In addition, the Principle Consensus only covers a small portion of the contested region of the EC Sea, and it doesn't address any of the other concerns, such as the dispute regarding the Diaoyu Islands.⁷² As a result, there were several incidents such as the arrest of a Chinese fishing boat near the Diaoyu Islands by the Japanese Coast Guard in September 2010.⁷³ In addition, the Japanese government made the decision to "nationalize" three islands that are a part of the disputed island group in September 2012. Similarly, the Chinese government on 13 September 2012 submitted "The Chart of Baselines of Territorial Sea of Diaoyu Dao and its Affiliated Islands of the People's Republic of China" to the UN Secretary-General.⁷⁴ In addition, the Chinese government also published a white paper on the "Diaoyu Dao, an Inherent Territory

⁶⁸ Ibid

⁶⁹ Xinjun Zhang, *Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation*, 42 OCEAN DEV. INT. LAW 53–65 (2011), <http://www.tandfonline.com/doi/abs/10.1080/00908320.2011.542105>.

⁷⁰ The 1969 Vienna Convention on the Law of Treaties (1969), UNTS 1155 (1980): 331; ILM 8 (1969): 679.

⁷¹ Kim, *supra* note 54.; Gao Jianjun, *A Note on the 2008 Cooperation Consensus Between China and Japan in the East China Sea*, 40 OCEAN DEV. INT. LAW 291–303 (2009), <http://www.tandfonline.com/doi/abs/10.1080/00908320903077100>.

⁷² Zhang, "Why the 2008 Sino-Japanese Consensus on the East China Sea Has Stalled: Good Faith and Reciprocity Considerations in Interim Measures Pending a Maritime Boundary Delimitation,".

⁷³ Yann-huei Song, *The Legal Contest in the East China Sea*, in MARITIME ISSUES AND REGIONAL ORDER IN THE INDO-PACIFIC 149–164 (Hai D.T. Buszynski L. ed., 2021), https://link.springer.com/10.1007/978-3-030-68038-1_10.

⁷⁴ Ibid., See also United Nations. (2012a) M.Z.N. 89.2012.LOS (Maritime Zone Notification), 21 September. Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn89ef.pdf (accessed 4 January 2022).

of China” in 2012.⁷⁵ Further, the government of China officially submitted the information on the ECS to the CLCS on December 14, 2012.⁷⁶

There have been several incidents that occurred after several years since the establishment of the Principle Consensus. For example, the Japanese government argues that there was unilateral development activity in the EC Sea. In contrast, the Chinese government argues that a certain number of oil and gas activities are all located under Chinese jurisdiction. In response, the Japanese government has continuously asked the Chinese government to stop its unilateral development and to continue negotiations based on the Principle Consensus as soon as possible.⁷⁷

Despite unilateral actions taken by both countries, there are also several positive developments in China and Japan's relationships regarding the joint development of oil and gas resources in the EC Sea.⁷⁸ For example, both Countries recently agreed to resume adhering to the Principles Consensus and enhancing dialogue and exchanges.⁷⁹ Furthermore, Prime Minister Abe reiterated the importance of stability in the EC Sea to improve Japan and China relations.⁸⁰ Consequently, Japan and China have decided to agree to properly manage disputes and handle sensitive problems to promote and implement the Principle Consensus and to build joint works in maintaining peace and stability to transform the EC Sea into a “sea of peace, cooperation and friendship”.⁸¹

As discussed above, the recent efforts made by both Parties are consistent with the obligation stipulated by Art 83 (3) of the UNCLOS. However, further actions are needed to strengthen the provisional measures such as joint development with the Principle Consensus as the basis of negotiation. To this end, the conclusion of the agreement on the joint development of the

⁷⁵ The people's Republic of China, Diaoyu Dai, an Inherent Territory of China, September 2012. Available at http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474983043212.htm (accessed 4 January 2022).

⁷⁶ People Republic of China, “Executive Summary, Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea”.

⁷⁷ Song, “The Legal Contest in the East China Sea,”. See also Reuters, “Japan Protests Over China Drilling Vessel in Disputed Waters”, 2018. Available at <https://www.reuters.com/article/us-japan-china-gas-idUSKBN1JP0KF> (accessed 4 January 2022); MOFA, Japan, “The Current Status of China's Unilateral Development of Natural Resources in the East China Sea”. Countries & Regions, 2019. Available at https://www.mofa.go.jp/a_o/c_m1/page3e_000356.html. (accessed 4 January 2022).

⁷⁸ Song, *Ibid.*

⁷⁹ *Ibid.*, see also Xinhua net, “China and Japan Held the 11th Round of High-Level Consultation Meeting on Maritime Affairs” (in Chinese), 2019. Available at http://www.xinhuanet.com/world/2019-05/11/c_1124480563.htm. (Accessed 4 January 2022).

⁸⁰ MOFA, “Japan, Japan-China Summit Meeting and Dinner”. Countries & Regions, 2019. https://www.mofa.go.jp/a_o/c_m1/cn/page3e_001046.html. (Accessed 4 January 2022).

⁸¹ China Daily. “Xi, Abe Reach 10-Point Consensus to Promote Bilateral Relations”, 2019. Available at: <http://www.chinadaily.com.cn/a/201906/27/WS5d14c3dda3103dbf1432ab0a.html>. (Accessed 4 January 2022).

hydrocarbon deposits offers potential means to strengthen the cooperation between two countries in the EC Sea. However, the existing dispute of Diaoyu Islands would have significant challenges to concluding such an agreement. Accordingly, to achieve this objective, Japan and China should agree to set aside their territorial disputes over the Diaoyu Islands and work together to conclude joint development over the hydrocarbon deposits and other areas of cooperation such as the protection of the marine environment, fisheries resources and marine scientific research.⁸² In addition, some scholars argue that the political will of both Parties perhaps becomes the most crucial factor for the success of any provisional agreement as stipulated by Art 83 (3) of the UNCLOS.⁸³

5. Conclusion

The fact that the maximum breadth of the EC Sea is no more than 400 nm results in overlap on the CS claimed by China and Japan. The dispute is primarily concerned with the application of different principles by two States. According to the principle of natural prolongation, China consistently argued that the natural prolongation of the CS in the EC Sea extends up to the Okinawa Trough. In contrast, Japan employs a median line and argues that Japan shares the CS with China. Accordingly, Japan does not acknowledge the natural prolongation of China's CS and argues that the delimitation of the CS should employ the equidistance method. The dispute in the EC Sea is not only the ECS dispute but also includes disputes regarding the ownership of the Diaoyu Islands which gave significant challenges to the delimitation of the ECS and the conclusion of the provisional measures such as joint development of hydrocarbon deposits in the EC Sea. Thus, the concept of joint development has been seen as the current development conducted by two States to address this issue. However, several arguments on current joint development have arisen. Therefore, China and Japan shall continue their negotiation on the delimitation of the ECS in the EC Sea as stipulated by Art 83 (3) of the UNCLOS.

⁸² Song, "The Legal Contest in the East China Sea,".

⁸³ Ian Townsend-Gault & William Stormont, *Offshore Petroleum Joint Development Arrangements: Functional Instrument? Compromise? Obligation?*, in THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES (Gerald Blake et al. eds., 1995).; Clive Schofield, *Unlocking the Seabed Resources of the Gulf of Thailand*, 29 CONTEMP. SOUTHEAST ASIA CS29-2D (2007), <http://bookshop.iseas.edu.sg/ISEAS/DoiBook.jsp?cSeriesCode=CS29/2&cArticleNo=d>.