

NOTES & COMMENTS

Problems and Practices in Maritime Delimitation in East Asia: With Special Reference to Taiwan

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The countries in East Asia continue to have problems in maritime boundary delimitation. The collision on September 7, 2010 between a Chinese fishing vessel (Minjinyu) and a Japanese patrol boat in the waters near Diaoyu/Senkaku Islands is interesting to observe as a step in dispute settlement process. The differences between the PRC and Japan on maritime boundary delimitation for the East China Sea and the legal status of Diaoyu/Senkaku Islands are demonstrated by this incident. To see things in their context, it is necessary to observe the practices of East Asian countries in handling their maritime boundary delimitations, especially those involving islands with disputed legal status. The rules of international law relating to the pacific settlement of dispute and maritime delimitation dispute resolution, which involve a preliminary sovereignty dispute over islands, are also relevant as a much broader background. The author will examine why certain maritime delimitation cases are particularly hard to handle. The lessons drawn from this paper is inspiring for Taiwan, a long-time marginalized player in East Asian regional affairs. The author will examine the difficulties and opportunities for Taiwan in maritime boundary delimitation and offer a suggestion on how to accomplish such task with neighboring countries.

Keywords

Diaoyu/Senkaku Islands, Japan's Northern Territories, Maritime Boundary Delimitation, JDZ, Taiwan, Minjinyu

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1. Introduction

On September 7, 2010, a Chinese fishing trawler, *Minjinyu*, collided with a Japanese Coast Guard patrol boat, *Yonakuni*, near *Diaoyu/Senkaku Islands*. Japanese officers then boarded *Minjinyu* to arrest the captain, charging him with “obstruction of law enforcement” under the Japanese domestic law.¹ This enraged the People’s Republic of China (“PRC”); Premier Wen Jiabao demanded the immediate and unconditional release of the captain. On September 24 of that year, Japanese prosecutors decided to let the captain leave, after 17 days of detention. The official reason for his release was that the damage to the Japanese Coast Guard vessels was slight and no one was injured.² After this incident, waters surrounding the *Diaoyu/Senkaku Islands* have been repeatedly visited by the PRC patrol boats belonging to Regional Bureau of the East China Sea Fishery Management under the Ministry of Agriculture.³ As of March 10, 2011, eight visits by such patrol boats have been sighted by Japan. Among the vessels are *Yu-Zheng* (Fishery Administration) No. 201 and *Yu-Zheng* No. 202.⁴ It is important to note that, though being warned by Japanese aircrafts, all these visits have not been physically ‘obstructed.’

The collision incident and its aftermath indicate the different positions between the PRC and Japan on the maritime boundary delimitation and the legal status of the *Diaoyu/Senkaku Islands*. The complex situation cannot be correctly understood, analyzed, characterized, and predicted without first looking at relevant rules of international law and at behavior patterns of the two States when dealing with similar problems of maritime delimitation involving islands with disputed legal status.

As another stakeholder, the Republic of China Government on Taiwan (“ROC”) is marginalized (if not ignored) in regional and international affairs.⁵ Given the special

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¹ Hu Feiyue *Japan’s action off Diaoyu raises concern*, CHINA DAILY (Sept. 10, 2011) available at http://www.chinadaily.com.cn/cndy/2011-09/10/content_11282795.htm (last visited on Sept. 27, 2011).

² Ken Jimbo, *Matter of Fact: Japan-China Relations Strained over Senkaku Islands*, NHK WORLD (Sept. 10, 2011), available at <http://www3.nhk.or.jp/nhkworld/english/tv/japan7/archives100925.html> (last visited on Sep. 27, 2011).

³ See List of the PRC Fishery Management Patrol Boats 中國漁政船總表, available at <http://60.250.180.26/pla/5741/5708.html> (last visited on Oct. 6, 2011).

⁴ See Patrol Boat from Mainland China Found in Waters of Diaoyu (available only in Chinese), CHINA TIMES available at <http://news.chinatimes.com/world/50405463/132011012701149.html>; *PRC Patrol Boat Enters Waters of Diaoyu Again* 中國漁政船又進入釣魚台海域, available at <http://www.haixiainfo.com.tw/139064.html> (all last visited on July 34, 2011).

⁵ Today, 23 States recognize the ROC government. See the list of States recognizing the ROC, available at <http://www.mofa.gov.tw/webapp/ct.asp?xItem=11624&CtNode=1426&mp=1> (last visited on Oct. 10, 2011).

legal status of Taiwan, the legal feasibility or strategy to draw maritime boundaries with its neighboring countries should be of international interest. This also makes it necessary to observe the behavior patterns of neighboring countries.

The focus of paper is on something peculiar to difficult situations concerning maritime delimitation. The author will explore the reasons why certain maritime delimitation is particularly hard to negotiate, and the ways out once used. Attention will be paid to how Taiwan's neighboring countries have solved such difficulties. To conclude, some lessons applicable to Taiwan are provided. The author will suggest possible courses concerning the collision incident mentioned above.⁶

This paper is composed of five parts including brief Introduction. Part two discusses the legal framework for settling maritime delimitation problems in East Asia. Part three analyzes the current practices of maritime delimitation issues among East Asian countries. Part four examines the situation of maritime boundary delimitation around Taiwan. The concluding part forecasts the position of waters surrounding Daoyu/Senkaku islands.

2. Legal Framework for Settling Problems of Maritime Delimitation in East Asia

A. Some Reasons behind Unsettled Maritime Delimitation Disputes

A conflict of maritime boundary claims constitutes an international dispute.⁷ The delimitation of the overlapping maritime zones is thus a settlement of such dispute.⁸ When the disputing States agree on certain boundaries and stop claiming overlapping maritime zones, such dispute is settled.

The first rule for international dispute resolution is to settle disputes 'peacefully.'⁹ The disputing States first need to resolve the issue among themselves through

⁶ The international rules of maritime delimitation go beyond the scope of this paper. The rules on acquisition of territorial sovereignty will not be discussed here, either. The sovereignty dispute over the Diaoyu/Senkaku Islands, though related in the ROC-Japan and the PRC-Japan maritime delimitations, also exceeds the aims of this paper.

⁷ J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 1 (4th ed. 2005).

⁸ For example, see *Case concerning the Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, 2009 I.C.J. paras. 77-114 (Feb. 3), available at <http://www.icj-cij.org/docket/files/132/14987.pdf> (last visited on July 18, 2011).

⁹ U.N. Charter arts. 2(4) & 33(1). See also *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970).

negotiation.¹⁰ Alternatively, a third party may intervene with non-binding suggestions¹¹ or binding decisions.¹² The competence of the third party depends on the will of the disputing States,¹³ which decide whether the dispute can be settled totally or partially, or left unsettled temporarily or indefinitely.¹⁴

When competing sovereignty claims become part of the maritime delimitation dispute, the settlement process becomes complex.¹⁵ Such a dispute cannot be settled completely without first resolving the sovereignty dispute.¹⁶ Some States will entrust international tribunals to determine territorial sovereignty,¹⁷ while others having control over the territory concerned refuse to talk,¹⁸ because sovereignty issue is non-negotiable. Additionally, lack of trust in international tribunals¹⁹ makes the settlement more impossible.

Sometimes keeping disputes unsettled is beneficial to a Party. Imagine that State A exercises effective control over a disputed island uninterrupted for long and State B, the contender, is banned by international law to use force to grab the island.²⁰ State B's claim cannot be vindicated if State A refuses to negotiate, leaving no international tribunal empowered to adjudicate.²¹ Without a compulsory international court, the

¹⁰ Merrills, *supra* note 7, at. 8-9.

¹¹ *Id.* at 28-29.

¹² *Id.* at 91.

¹³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 671 (6th ed. 2003).

¹⁴ Choon-Ho Park, *Region V - Central Pacific and East Asian Maritime Boundaries*, in 1 *INTERNATIONAL MARITIME BOUNDARIES* 298 (Jonathan Charney & Lewis Alexander eds., 1993).

¹⁵ Bernard H. Oxman, *Political, Strategic, and Historical Considerations*, in Charney & Alexander (eds.), *supra* note 14. at 20-21.

¹⁶ As stated by Professor Bowett, however, islands can be 'ignored' because their sovereignty is disputed. See D. Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitation*, in Charney & Alexander (eds.), *supra* note 14 at 136-137.

¹⁷ As described by David Anderson, the 'two-stage approach has been followed in the *Hanish Islands* arbitration between Eritrea and Yemen. However, sometimes the two issues are taken together in a single phase on the merits, as was the case in *Qatar v. Bahrain* (sovereignty over Hawar Islands) and *Cameron v. Nigeria* (title to Bakassi peninsula) in the ICJ,' available at http://www.chathamhouse.org.uk/files/3307_illp140206.doc; <http://www.icj-cij.org/docket/files/87/7027.pdf> for judgment of *Qatar v. Bahrain*, given on March 16, 2001; <http://www.icj-cij.org/docket/files/94/7453.pdf> for judgment of *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, given on October 10, 2002; <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF> for the *Arbitral Award of Maritime Delimitation between Eritrea and Yemen* rendered on October 3, 1996 (all last visited on July 18, 2011).

¹⁸ An example is the question on the Liancourt rocks (*Dokdo* in Korean; *Takeshima* in Japanese), available at <http://www.mofat.go.kr/english/political/hotissues/dokdo/index.jsp> for the official position of Korea; <http://www.mofa.go.jp/region/asia-paci/takeshima/proposal.html> for the official position of Japan (all last visited on July 18, 2011).

¹⁹ The PRC does not trust international tribunals. See Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, 30:235 *OCEAN DEV. & INT'L L.* 248 (1999).

²⁰ U.N. Charter art. 2(4).

²¹ There is no obligation in general international law for States to settle their disputes, although they are obligated not

rules against use of force protect the occupant.

The absence of sovereignty dispute over a territory impacting on maritime delimitation does not guarantee a quick settlement of maritime delimitation dispute. The intervening third party is not always mandated to draw the boundaries.²² Certain countries only authorize tribunals to ‘declare’ the applicable principles.²³ A separate process to ‘apply’ the principles and ‘draw’ boundary lines becomes needed. Again, no guarantee exists for completing this process smoothly.

B. Process for Settling Maritime Boundary Delimitation Disputes involving Disputed ‘Land’

There are several stages to settle maritime delimitation disputes involving a sovereignty dispute over an island or naturally formed area of land (hereinafter referred to as ‘land’).²⁴

To begin with, the ‘delimitation area’ must be identified.²⁵ A ‘land’ plays some role in maritime delimitation if situated in the ‘area’ while legally capable of generating maritime zones.²⁶ The competing sovereignty claims over the ‘land’ complicate the delimitation process, turning the dispute a composite one. In other words, a disputed ‘land’ within the ‘area’ will not hinder the delimitation process, if incapable of generating any maritime zones.²⁷ Being located within the ‘area’ while capable of generating maritime zones, the disputed ‘land’ however will still not obstruct the delimitation process, if ‘ignored’ by the disputing parties or the authorized third party.²⁸ Furthermore, if such ‘land’ and maritime zone so generated lie beyond the

to use force to settle the disputes. See Brownlie, *supra* note 13, at 671.

²² See *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment, 2008 I.C.J. 12 (May 23). See also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, 2002 I.C.J. 625 (Dec. 17).

²³ See *North Sea Continental Shelf (FRG v. Denmark; FRG v. Netherlands)*, Judgment, 1969 I.C.J. 3 (Feb. 20). See also *Continental Shelf (Libyan Arab Jarnahiriya v. Malta)*, Judgment, 1985 I.C.J. 13 (June 3).

²⁴ The UNCLOS provides three kinds of naturally formed area of land: (i) low-tide elevations under Article 13; (ii) islands under Article 121 (1)(2); and (iii) rocks under Article 121(3). See Bowett, *supra* note 16, at 131.

²⁵ It is called “relevant maritime area” in the Case concerning the Maritime Delimitation in the Black Sea (Romania v. Ukraine). See 2009 I.C.J. paras. 77-114 (Feb. 3), available at <http://www.icj-cij.org/docket/files/132/14987.pdf> (last visited on July 18, 2011).

²⁶ Bowett, *supra* note 16, at 131-151.

²⁷ For example, the island of Filfla was not used as basepoint in the *Libya v. Malta* case. See *Continental Shelf (Libyan Arab Jarnahiriya v. Malta)*, Judgment, 1985 I.C.J. at 48, para. 64 (June 3). On the other hand, low-tide elevations under Article 13(2) of the UNCLOS cannot be used as base-points and have no territorial sea of its own. See Bowett, *supra* note 16, at 150. See also *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Judgment, 2001 I.C.J., at 102, paras. 207-209 (Mar. 16).

²⁸ Bowett, *supra* note 16, at 144-147. See also V. Prescott & G. Triggs, *Islands and Rocks and their Role in Maritime Delimitation*, in 5 INTERNATIONAL MARITIME BOUNDARIES, 3259 (D. Colson & R. Smith eds., 2005).

‘area,’ it should not affect the delimitation process.

For composite disputes, the Parties may agree on the drawing of boundary lines while disagreeing on sovereignty dispute settlement. The next issue is the separation of the sovereignty dispute from the delimitation process. Experiences suggest cutting a zone generated by the ‘land’ out of the ‘area,’ as an option.²⁹ Several related questions then arise.

The first question is the ‘size.’ When the disputed ‘land’ has a role to play in maritime delimitation, the cut-off zone may be huge within the ‘area.’ The remaining part might be heavily reduced, rendering the dispute settlement efforts unattractive. Therefore, certain Party would try to minimize the cut-off zone. Here, international law offers guidance.³⁰ Once accepting the argument that the disputed ‘land’ plays no role in maritime delimitation, the size of the zone becomes ‘zero.’ Such a result can be achieved if the ‘land’ is ‘ignored.’³¹ The size can be determined by either the disputing Parties through negotiation³² or the third party mandated to settle the delimitation dispute.

The second question is the classification of the cut-off zone. Articles 74(3) and 83(3) of the UNCLOS provide the legal basis and nature of such provisional arrangement (gray zone).³³ Options for provisional arrangement are: (1) provisional boundaries;³⁴ (2) special areas for fisheries;³⁵ (3) joint development of mineral resources;³⁶ (4) bilateral cooperation and third States; and (5) coordinated patrols in un-delimited waters.³⁷ To be noted, joint development arrangements can apply pending delimitation or after the delimitation dispute is settled.³⁸

²⁹ Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1984 I.C.J. at 265, para. 20 (Oct. 12). See Oxman, *supra* note 15, at 20-21; Bowett, *supra* note 16, at 136. See also David Colson, *The Legal Regime of Maritime Boundary Agreements*, in Charney & Alexander (eds.), *supra* note 14, 65-66 .

³⁰ UNCLOS arts. 13 & 121. See Bowett, *supra* note 16, at 132-134.

³¹ Bowett, *supra* note 16, at 144-147.

³² Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1984 I.C.J. at 265, para. 20 (Oct. 12).

³³ See Colson, *supra* note 29, at 67. To be noted, Prescott and Triggs pointed out joint zones in 6 maritime delimitation agreements. See Prescott & Triggs, *supra* note 28, at 3259-3262.

³⁴ David Anderson, *Developments in Maritime Boundary Law and Practice*, in Colson and Smith (eds.), *supra* note 28, at 3218.

³⁵ *Id.* See Keyuan, *supra* note 19, at 244. For details, see Delimitation of Maritime Boundaries within Caricom(background paper for report): Development of Relevant Rules for Delimitation of Maritime Boundaries, including Practical Illustrations of the Operations of Such Rules, para. 49, available at http://www.caricom-fisheries.com/website_content/publications/documents/Delimitation_of_Maritime_Boundaries_within_CARICOM.pdf (last visited on July 17, 2011).

³⁶ Anderson, *supra* note 34, 3216. See also Keyuan, *supra* note 19, 244; Delimitation of Maritime Boundaries within CARICOM.

³⁷ *Supra* note 34, at 3216.

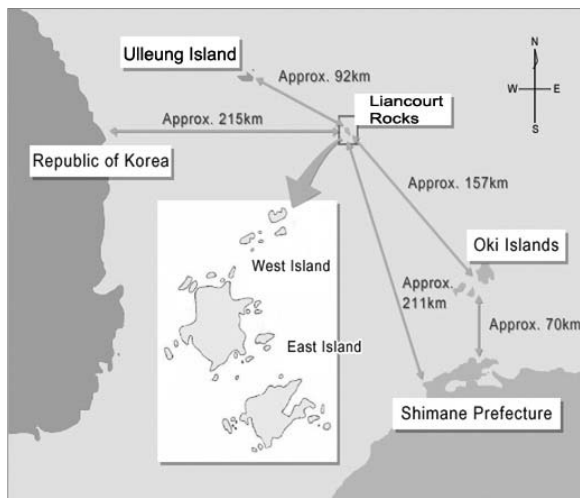
³⁸ Keyuan, *supra* note 19, at 244.

3. Practices of Maritime Delimitation by East Asian Countries

A. Maritime Delimitation around the Liancourt Rocks between Japan and Korea

The islands of the Liancourt rocks³⁹ (*Dokdo* in Korean; *Takeshima* in Japanese) consist of two islands, less than 20,000 square meters in area, lying approximately 37 degree latitude and some 87km off Ulleungdo Island of Korea, and 157.5km from Oki islands of Japan. The islands are occupied by Korea. Japan protested against the occupation of the islands by the police from Republic of Korea (“ROK”) in June 1954.⁴⁰ To date, the sovereignty debates remain.⁴¹

Map 1: The Position of the Liancourt Rocks



Sources: <http://www.mofat.go.kr/english/political/hotissues/dokdo/index2.jsp>

<http://www.mofa.go.jp/region/asia-paci/takeshima/index.html> (Modified by the author)

³⁹ See Liancourt Rocks, available at http://en.wikipedia.org/wiki/Liancourt_Rocks (last visited on Sept. 19, 2011). For the Korean position see Dokdo, available at <http://www.mofat.go.kr/english/political/hotissues/dokdo/index2.jsp> (all last visited on July 23, 2011).

⁴⁰ D. BOWETT, THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW 297 (1979). However, the year of the Korean occupation of the Liancourt rocks cited by Professor Bowett was 1970. This is incorrect. According to official website of the Japanese Ministry of Foreign Affairs, the time of Korean occupation is June 1954, available at <http://www.mofa.go.jp/region/asia-paci/takeshima/installation.html> (last visited on July 23, 2011).

⁴¹ See the official position of the Japanese Government for the Liancourt rocks, available at

Ever since September 1954, the Japanese Government has been requesting the ROK to let the ICJ settle this issue. Denying the existence of a sovereign dispute, the ROK does not cooperate.⁴² This unsettled issue prevented the 1974 Agreement between Japan and the ROK on continental shelf boundaries from handling the surrounding area of the islands.⁴³ However, the two countries were not deterred from settling their dispute over fishing rights. A bilateral Fisheries Agreement, among the five treaties, was concluded in 1965 when Japan and the ROK normalized their relations and established diplomatic ties. Not aiming at settling the sovereignty dispute over the Liancourt rocks,⁴⁴ the 1965 Fisheries Agreement established joint regulation zones where enforcement should be carried out and exercised by the flag States only. In other words, both countries exercised exclusive control and jurisdiction over their own nationals and fishing vessels in such cut-off zones surrounding the Liancourt rocks.⁴⁵

After the establishment of the EEZs and ratification of the UNCLOS by these two countries, in 1996, the 1965 Fishery Agreement was subject to revision. In the amending process, the sovereignty issue over the Liancourt rocks haunted the negotiations.⁴⁶ The new Fishery Agreement was signed in September 1998 and ratified, with difficulties, in 1999.⁴⁷ The unofficial "Provisionally Arranged Zones" ("PAZs") defined in Article 9(1) was a kind of provisional measure to cope with, *inter alia*, the not-yet-settled sovereignty question over the Liancourt rocks under this 1998 new Fishery Agreement. Map 2 below indicates the PAZ embracing the Liancourt rocks.⁴⁸

<http://www.mofa.go.jp/region/asia-paci/takeshima/index.html> The opposing position of the ROK may be found at <http://www.mofat.go.kr/english/political/hotissues/dokdo/index2.jsp> (all last visited on July 23, 2011).

⁴² See Japanese request for judicial settlement, available at <http://www.mofa.go.jp/region/asia-paci/takeshima/proposal.html> (last visited on July 23, 2011).

⁴³ Bowett, *supra* note 40, at 301-302.

⁴⁴ HEE KWON PARK, THE LAW OF THE SEA AND NORTHEAST ASIA: A CHALLENGE FOR COOPERATION 57 (2000).

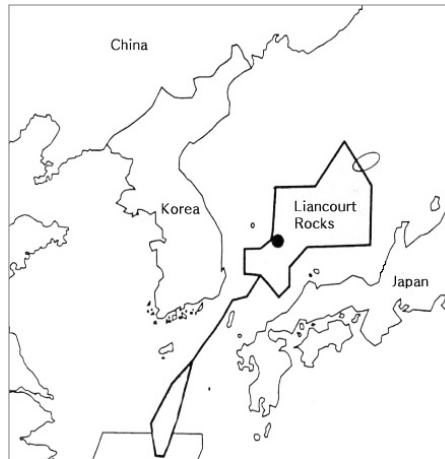
⁴⁵ *Id.* at 58.

⁴⁶ *Id.* at 59.

⁴⁷ MICHAEL GREEN, JAPAN-ROK SECURITY RELATIONS: AN AMERICAN PERSPECTIVE 12 (FN 26) (1999), available at <http://iis-db.stanford.edu/pubs/10060/Green.pdf> (last visited on July 23, 2011).

⁴⁸ YOUNG KOO KIM, SOVEREIGN RIVALRY BETWEEN KOREA AND JAPAN FERMENTED BY A DISTORTED FISHERIES AGREEMENT 15-18(2008), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=young_kim (last visited on July 23, 2011). To be noted, there are "Provisionally Arranged Zones" under the 1998 Fisheries Agreement. The northern part is in the middle of the East Sea/Sea of Japan which is regulated by Article 9(1); the southern part is in the East China Sea, below Cheju Island to be regulated by Article 9(2) of this Agreement. See Suk Kyoon Kim, *Understanding Maritime Disputes in Northeast Asia: Issues and Nature*, 23 INT'L J. MARINE & COASTAL L. 228 (2008).

Map 2: Japan/ROK PAZ surrounding the Liancourt Rocks



Source: http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=young_kim
(Modified by the author)

Embracing the Liancourt rocks, the northern part of the PAZs (Map 2) is 97,710.9 square kilometers, delineated clearly as a polygon shape.⁴⁹ To be noted, the idea of flag-State-jurisdiction provided in the 1965 Fishery Agreement continues to apply to the PAZs, as the cut-off zones, under the 1998 new Agreement.⁵⁰

B. The Maritime Delimitation around the Northern Territories between Japan and Russia

The sovereignty dispute over Japan's Northern Territories,⁵¹ occupied by Russia since August 1945,⁵² has been a stumbling block on the Japan-Russia Negotiations for a Peace Treaty.⁵³ Such a sovereignty dispute also prevents these countries from drawing

⁴⁹ Young Koo Kim, *id.* at 27.

⁵⁰ *Id.*

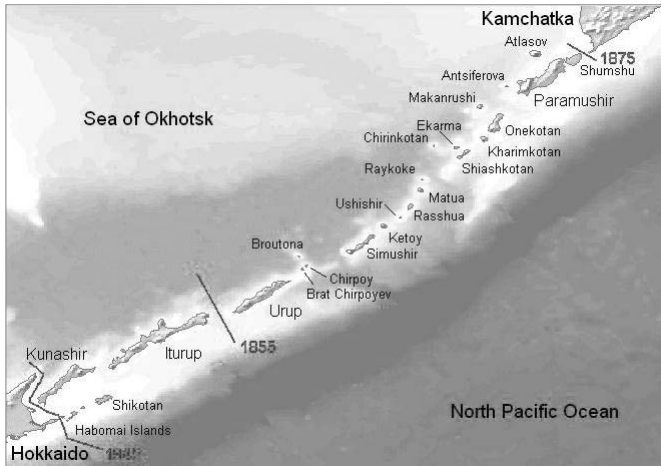
⁵¹ The Japan's Northern Territories includes: (1) Etorofu; (2) Kunashir; (4) Habomai Islands; and (4) Shikotan, available at <http://www.mofa.go.jp/region/europe/russia/territory/pamphlet.pdf> (last visited on July 23, 2011).

⁵² See Alex G. Oude Elferink, *The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 1*, 11 INT'L J. MARINE & COASTAL L., 564 (FN 136) (1996).

⁵³ For the Japanese official perspective regarding the slow progress of negotiations between Japan and Russia for concluding a Peace Treaty, see Vice-Ministerial Subcommittee Meeting of the Japanese-Russian Joint Committee on the Conclusion of a Peace Treaty and Vice Ministerial Consultations (Oct. 9, 2001), available at <http://www.mofa.go.jp/region/europe/russia/meet0110.html> For the Japanese views on the issues over Northern Territories, see Japan's Northern Territories: For a Relationship of Genuine Trustis, available at <http://www.mofa.go.jp/region/europe/russia/territory/pamphlet.pdf> See also The Tokyo Declaration on Japan-Russia Relations for the text of the Declaration

maritime boundary for surrounding areas whose map is indicated below.⁵⁴

Map 3: The Northern Territories of Japan



Source: http://en.wikipedia.org/wiki/File:Demis-kurils-russian_names.png

Like the dispute over the Liancourt rocks, the sovereignty dispute over the Northern Territories did not hinder Japan from settling disputes concerning overlapping fishery jurisdictions with Russia in the areas concerned. These two countries established the limits of their 200-mile fishing zones in 1977.⁵⁵ Bilateral negotiations then started to resolve the problems involved in the overlapping areas surrounding the Northern Territories. The negotiations succeeded in concluding two treaties giving access to each other's 200-mile zones, to be defined by their respective national legislations.⁵⁶ The Japanese Minister of Foreign Affairs once said that: "Both agreements are applicable to

(Oct. 13, 1993), para. 2, available at <http://www.mofa.go.jp/region/europe/russia/territory/edition01/tokyo.html> (all last visited on July 23, 2011).

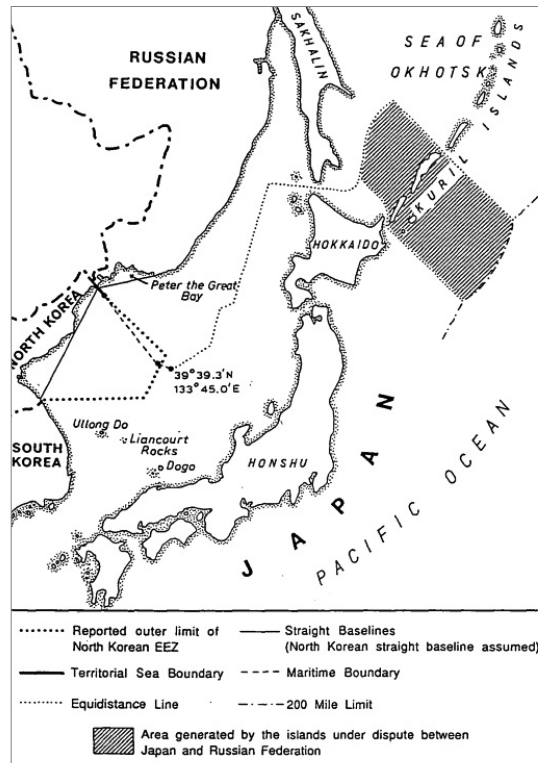
⁵⁴ Elferink, *supra* note 52, at 564. See File:Demis-kurils-russian_names.png available at http://en.wikipedia.org/wiki/File:Demis-kurils-russian_names.png (last visited on Sept. 27, 2011).

⁵⁵ The Japanese fisheries legislation is applicable to the 200-mile zone of the Northern Territories. See Elferink, *supra* note 52, at 565. See Law Number 31 of May 2, 1977 on Provisional Measures Relating to the Fishery Zone. The setting up of Japan's fishing zone was nothing but a counter-measure against the former USSR's 200 nautical mile fishing zone. See Tadao Kuribayashi, *The United Nations Convention on the Law of the Sea and the Japanese Municipal Laws*, in *THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE*, 318 (Choon-ho Park & Jae Kyu Park eds., 1987).

⁵⁶ The two treaties are: (1) Agreement between Japan and the Soviet Union on Fisheries off the Coast of the USSR in the North-Western Part of the Pacific Ocean for the Year 1977 (May 27, 1977); and (2) Agreement between Japan and Soviet Union on Fisheries off the Coast of Japan for the Year 1977 (Aug. 4, 1977). See *supra* note 52, at 565 (FN 139).

the zone around the Northern Territories, while theoretically the two agreements countervail each other on that point.” Map 4 shows the overlapping part.⁵⁷

Map 4: Overlapping part of EEZs of Japan and Russia



Source: Alex G. Oude Elferink, *The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 1*, 11 INT’L J. MARINE & COASTAL L., 565 (FN 140) (1996) (Modified by the author)

The regime of “maintaining overlapping jurisdictions and mutual tolerance” as established by the two treaties of 1977 was incorporated into the 1984 Japan-USSR Agreement on Mutual Relations in the Field of Fishing off the Sea Frontages of Both Countries,⁵⁸ and the 1985 Agreement between the Government of Japan and the Government of the USSR Concerning Cooperation in the Field of Fisheries.⁵⁹ Again in

⁵⁷ *Supra* note 52, at 565 (FN 140).

⁵⁸ See Agreement on Mutual Relations in the Field of Fishing off the Sea Frontages of Both [Japan-USSR] Countries (Dec. 7, 1984) available at http://untreaty.un.org/unts/60001_120000/13/9/00024442.pdf (last visited on July 24, 2011).

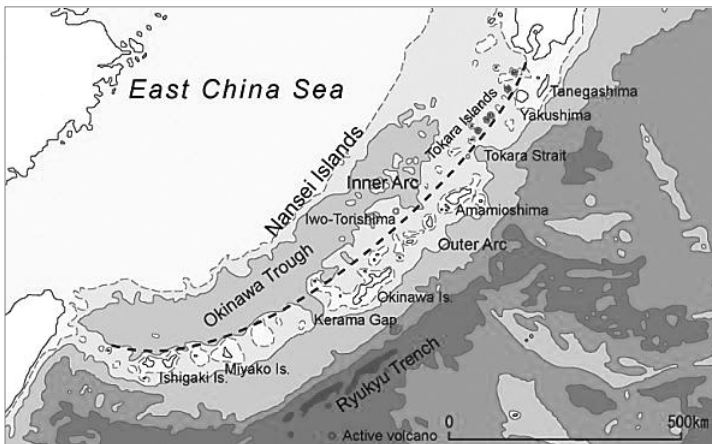
⁵⁹ Signed in Moscow on May 12, 1985, available at <http://www.mofa.go.jp/region/europe/russia/territory/edition01/agreement.html> (last visited on Oct 6, 2011).

1998, the two countries concluded an Agreement between the Government of Japan and the Government of the Russian Federation on some Matters of Cooperation in the Field of Fishing Operations for Marine Living Resources.⁶⁰ These treaties represent no compromise for the positions of either Party in their sovereignty dispute concerning the Northern Territories. These treaties only touch upon the living resources found in the Northern Territories.

C. The Continental Shelf Delimitation in the East China Sea between Korea and Japan

The East China Sea, which includes the island chain of the Ryukus, stretching from Japan down to Taiwan, is a 'semi-enclosed' sea.⁶¹ The PRC has asserted sovereignty over the continental shelf in the East China Sea (and Yellow Sea),⁶² based on the natural prolongation principle.⁶³ Such position has been shared by the ROC.⁶⁴ The ROK also

Map 5: The Okinawa Trough



Source: <http://earth-of-fire.over-blog.com/article-l-archipel-nippon-l-arc-de-ryukyu-57450302.html>

⁶⁰ Signed on Feb. 21, 1998 available at <http://www.mofa.go.jp/region/europe/russia/territory/edition01/agreement.html> to see the text of this agreement.

⁶¹ Bowett, *supra* note 40, at 283.

⁶² JEANETTE GREENFIELD, CHINA'S PRACTICE IN THE LAW OF THE SEA 117 (1992).

⁶³ Reinhard Drifte, *Japanese-Chinese Territorial Disputes in the East China Sea – Between Military Confrontation and Economic Cooperation*, (2008), available at [http://eprints.lse.ac.uk/20881/1/Japanese-Chinese_territorial_disputes_in_the_East_China_Sea_\(LSERO\).pdf](http://eprints.lse.ac.uk/20881/1/Japanese-Chinese_territorial_disputes_in_the_East_China_Sea_(LSERO).pdf) (last visited on July 24, 2011).

⁶⁴ Greenfield, *supra* note 62, at 122.

adheres to the natural prolongation principle in matters of continental shelf delimitation of the East China Sea.⁶⁵

Importantly, the Okinawa Trough (Map 5), which lies immediately westward of the Japanese island of Kyushu and the Ryukyu chain has a maximum depth of approximately 2,717 meters near its southern end and shallows rapidly to 800 meters at its southernmost end near the Ryukyu Islands. From the perspectives of the PRC, the ROC, and the ROK, this trough terminates the natural prolongation of the Japanese territory and constitutes a natural boundary between Japan and other nations.⁶⁶ Such a position is unacceptable to Japan, which claims a much larger share of the continental shelf in the East China Sea based on equidistance principle.⁶⁷ The claims of China, Japan, and Korea in the East China Sea thus overlap substantially, with the ROK's claims extending 279.98 nautical miles into areas also claimed by China and Japan.⁶⁸ It makes maritime delimitation among these States necessary.

The 1969 report made by the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas ("CCOP")⁶⁹ prompted Japan to negotiate with its neighboring countries in the East China Sea for joint development of the underwater hydrocarbon resources. From March 1969 Japan began protracted negotiations with the ROK and the ROC,⁷⁰ given that the PRC then was not recognized by Japan as the representative of the State of China.

In 1972, Japan switched diplomatic/government recognition from the ROC to the PRC. Japan, however, halted its continental shelf delimitation negotiations with the

⁶⁵ Jin-Hyun Paik, *East Asia and the Law of the Sea*, in *THE LAW OF THE SEA IN THE ASIAN PACIFIC REGION* 14 (J. Crawford & D. Rothwell eds., 1995).

⁶⁶ *Id.*

⁶⁷ Keun-Gwan Lee, *Continental Shelf Delimitation in the East China Sea* (Discussion Paper), at 7, available at http://www.wilsoncenter.org/topics/docs/Keun-Gwan_Lee_1_.pdf (last visited on July 23, 2011). See Drifte, *supra* note 63. Twenty years later in 1996 when the Law on the EEZ and Continental Shelf of Japan was enacted such position for the East China Sea is unchanged. See Article 1(2) of the Japanese Law on the EEZ and the Continental Shelf (Law No. 74 of 1996), which defines the outer limits of the EEZ as the 'equidistance line' when the 200 nautical miles line extends beyond the equidistance line, unless a different line is agreed upon between Japan and a foreign State, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law74.pdf (last visited on July 26, 2011).

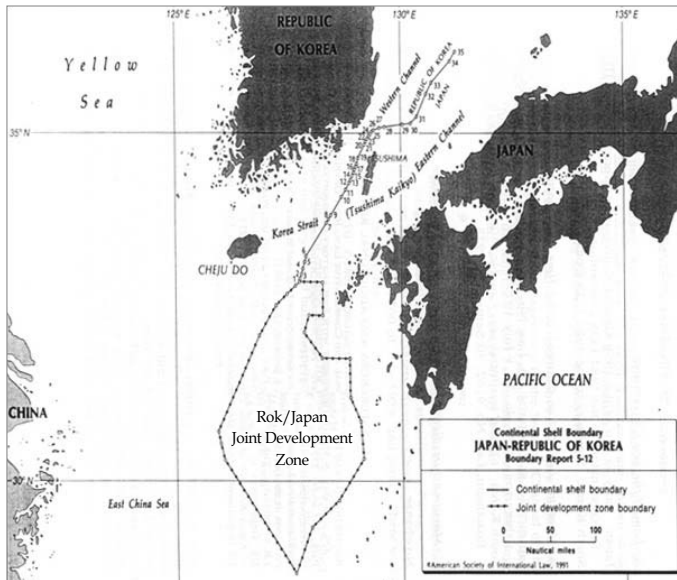
⁶⁸ Choon-Ho Park, *supra* note 14, at 297.

⁶⁹ Zhi-Guo Gao & Ji-Lu Wu, *Key Issues in the East China Sea: A Status Report and Recommended Approaches*, in *SEABED PETROLEUM IN NORTH EAST ASIA: CONFLICT OR COOPERATION?* 32-38 (S. Harrison ed., 2005), available at http://www.wilsoncenter.org/topics/docs/Zhiguo_Gao_and_Jilu_Wu.pdf (last visited on July 25, 2011). See also Reinhard Drifte, *Territorial Conflicts in the East China Sea: From Missed Opportunities to Negotiation Stalemate*, available at <http://www.japanfocus.org/Reinhard-Drifte/3156> (last visited on Oct. 6, 2011).

⁷⁰ *Supra* note 63.

current PRC Government,⁷¹ while the negotiations with the ROK continued. With protests from the PRC, the Japan-ROK negotiations bore fruits in 1974 by drawing a Joint Development Zone (“JDZ”) covering 100,000 square kilometers,⁷² as part of a whole package of partial boundary fixing for continental shelf. Map 6 shows the JDZ between the ROK and Japan.⁷³

Map 6: ROK/Japan JDZ in the East China Sea



Source: Choon-Ho Park, *Japan-South Korea: Report Number 5-12*, in 1 INTERNATIONAL MARITIME BOUNDARIES, 1062 (J. Charney & L. Alexander eds., 1993). (Modified by the Author)

The regime of the JDZ for exploration and exploitation of seabed resources is contained in two separate agreements⁷⁴ from the main agreement on continental shelf boundary.⁷⁵

⁷¹ At that time, the PRC did not recognize the ROK. So it was difficult for the PRC to join the negotiation with Japan and the ROK. See Choon-Ho Park, *Japan-South Korea: Report Number 5-12*, in Charney & Alexander (eds.), *supra* note 14, at 1058.

⁷² Greenfield, *supra* note 62, at 122.

⁷³ Bowett, *supra* note 40, at 301.

⁷⁴ The first one is entitled Agreement between Japan and the Republic of Korea Concerning Joint Development of the Continental Shelf Adjacent to the Two Countries. The second one is called Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries. For the text, see Choon-Ho Park, *supra* note 71, at 1065-1068, 1073-1089.

⁷⁵ Agreement between Japan and the Republic of Korea Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries. For the text, see Choon-Ho Park, *supra* note 71, at 1065-1068, 1063-1065.

The JDZ Agreement, as a provisional arrangement,⁷⁶ neither determines the question of sovereign rights over all or any portion of the JDZ, nor prejudices the positions of the respective Parties with respect to the delimitation of the continental shelf.⁷⁷ It is also interesting to note that almost the entire JDZ falls on the Japanese side of a hypothetical Japan-ROK equidistant line. Part of the lines run along a hypothetical PRC-Japan equidistant line.⁷⁸ It affects the interests of the PRC.

With its positions not consulted, the PRC has been opposing the Japanese and Korean marking off of large areas of the continental shelf in East China Sea shared by China, calling it an infringement on China's sovereignty.⁷⁹ However, Japan claims that it had neither encroached upon the PRC's continental shelf, nor infringed upon Chinese sovereignty, because Japan had strictly limited itself to the Korean side of the Sino-Korean median line in setting up the JDZ.⁸⁰ Obviously, the PRC (opting for natural prolongation principle) and Japan (applying equidistance principle) are not speaking the same language here.

D. The Maritime Delimitation Dispute in the East China Sea between China and Japan

As mentioned above, the PRC maintains a totally different approach from Japan for delimiting continental shelf in the East China Sea. With the Okinawa Trough, the natural prolongation principle favored by the PRC is unacceptable to Japan. Map 7 shows the overlapping claims.⁸¹

Coupled with the sovereignty dispute over the Diaoyu/Senkaku Islands and the PRC's mistrust in international tribunals, the PRC-Japan maritime delimitation dispute in the East China Sea is difficult to settle. The only practical option seems to be provisional arrangement under Articles 74 and 83 of the UNCLOS, in the form of the JDZ.⁸²

The idea of establishing a PRC-Japan JDZ within the East China Sea to develop seabed energy reserves had been proposed by the PRC during the early 1980s. The 1984

⁷⁶ Choung-Il Chee, *The Republic of Korea and the Law of the Sea*, in Choon-ho Park & Jae Kyu Park (eds.), *supra* note 55, at 189.

⁷⁷ Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries art. XXVIII. See Choon-Ho Park, *supra* note 71, at 1065-1068, 1073-1089.

⁷⁸ *Id.* at 1072.

⁷⁹ Greenfield, *supra* note 62, p. 124.

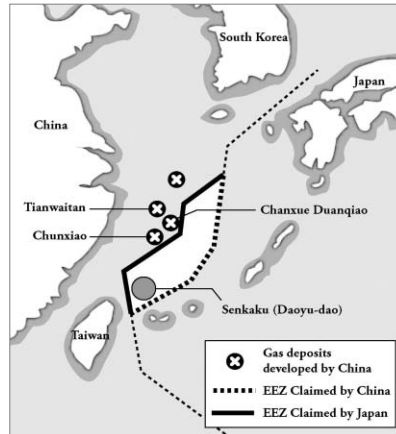
⁸⁰ *Id.* at FN 29.

⁸¹ Suk Kyoon Kim, *supra* note 48, at 223-225, 231.

⁸² Jian-Jun Gao, *Joint Development in the East China Sea: Not an Easier Challenge than Delimitation*, 23 INT'L J. MARINE & COASTAL L. 60-63 (2008).

Proposal of Deng Xiao-ping was to use the JDZ to handle Sino-Japan territorial disputes in the Diaoyu/Senkaku Islands pending the settlement of the sovereignty disputes. To respond, Japan requested the PRC to recognize Japan's sovereignty over Diaoyu/Senkaku Islands.⁸³

Map 7: Japan/PRC Overlapping Claims of EEZ in the East China Sea



Source: Suk Kyoon Kim, *Understanding Maritime Disputes in Northeast Asia: Issues and Nature*, 23 INT'L J. MARINE & COASTAL L. 224 (2008)

Such a difficulty in reaching the JDZ mechanism for seabed hydrocarbon resources did not prevent these two countries from concluding a provisional arrangement on fishery matters. In early 1975, China and Japan had signed a Fisheries Agreement⁸⁴ requiring the flag State to control its own fishing vessels when they are outside of the other party's territorial sea.⁸⁵ On November 11, 1997 the new China-Japan Fisheries Agreement was signed to supersede the 1975 Agreement. Under the 1997 Agreement, a joint fishing area called Provisional Measures Zone ("PMZ") was established in the waters where their claimed EEZs overlap. Within the PMZ the marine resources shall be jointly managed under the supervision of the China-Japan Joint Fisheries Committee with rule-making power. Zone No. 6 in Map 8 indicates this PMZ.⁸⁶

To be specific, the principle of flag State jurisdiction applies in the PMZ. Each party is

⁸³ Drifte, *supra* note 63.

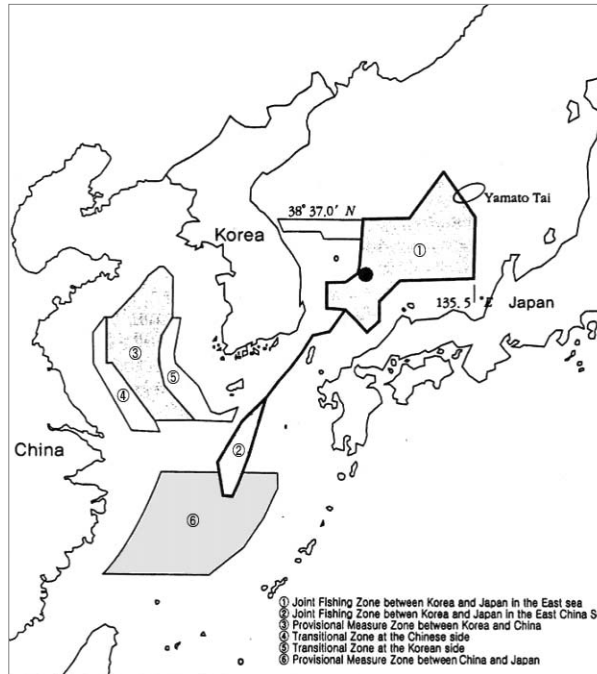
⁸⁴ Signed on Aug. 15, 1975.

⁸⁵ See the official website of the Japanese Ministry of Agriculture, Forestry and Fisheries, available at <http://www.maff.go.jp/mud/238.html> (last visited on July 23, 2011).

⁸⁶ Suk Kyoon Kim, *supra* note 48, at 226. See also The 1997 Agreement art. 11.

only responsible for controlling its own fishing vessels and nationals in the PMZ.⁸⁷

Map 8: Japan/PRC PMZ



Source: SUN PYO KIM, MARITIME DELIMITATION AND PROVISIONAL ARRANGEMENTS IN NORTH EAST ASIA 226 (2004). (Modified by the author)

Given the unsuccessful attempt to establish a JDZ for seabed hydrocarbon resources, the PRC was not deterred from taking actions to directly get the resources.⁸⁸ The increasing number of actions taken by PRC to 'exploit' the hydrocarbon resources in the East China Sea adds the momentum of Sino-Japan negotiations for JDZ.⁸⁹ Both sides finally agreed on the idea of the JDZ in 2007, as demonstrated by a joint press communiqué issued on April 11 of that year. They agreed that both "will conduct joint development in accordance with the principle of mutual benefit as a temporary

⁸⁷ The 1997 Agreement art. 7(3).

⁸⁸ Drifte, *supra* note 63.

⁸⁹ The fishery negotiations which succeeded in concluding the 1997 Sino-Japan Fishery Agreement were superseded by the Consultation on the Law of the Sea and the Delimitation of the EEZ from August 1998 onwards until they become in 2004 the Japan-China Consultations concerning the East China Sea and Other Matters. *Supra* note 63.

arrangement pending the completion of delimitation.”⁹⁰ A more concrete political agreement was concluded on June 18, 2008 between the PRC and Japan. Both countries agreed to cooperate to turn the East China Sea into a Sea of Peace, Cooperation and Friendship. With the maritime boundary left undecided, this cooperation is without prejudice to the legal position of either party. The first step of joint development will take place in Shirakaba on the Chinese side of the Japanese median line and in the northern part of the East China Sea. Both sides declared their willingness to select sites for joint development through consultations. A ‘treaty’ will have to be concluded in order to implement such joint development. To be noted, for the oil and gas fields in Shirakaba where the PRC has already undertaken development, the way of joint development is that Japanese corporations will participate in accordance with Chinese laws, whereas Japan will be making investments.⁹¹

E. Problem Analysis: The difficulties in Maritime Delimitation for East Asian Countries

In the preceding section, the author has outlined how four series of difficult negotiations among countries in East Asia (Japan, Russia, ROK, and PRC) have solved, to a certain degree, their respective maritime delimitation disputes. The negotiations relate to the maritime areas surrounding the islands of the Liancourt rocks occupied by the ROK as well as the ‘Japanese’ Northern Territories occupied by the Russians, the northern part of the East China Sea over which Japan, the ROK, and the PRC claim to have continental shelf, and the middle part of the East China Sea where Japanese and the PRC’s EEZ/Continental Shelf claims overlap.

Based on the above-mentioned, these maritime disputes are involved with either/all of the following two difficulties: (1) sovereignty disputes concerning certain islands, namely, the Liancourt rocks, the Japanese Northern Territories, and Diaoyu/Senkaku Islands; (2) the irreconcilable differences on the applicable principles to govern maritime boundary delimitation in the East China Sea, namely, ‘natural prolongation’ principle adhered to by the ROK, the PRC and the ROC versus ‘equidistance’ principle favored by Japan.

⁹⁰ Gao, *supra* note 82, at 39-40.

⁹¹ Joint Press Conference by the Japanese Ministers for Foreign Affairs and for Economy, Trade and Industry on 6:25 pm on June 18, 2008, available at http://www.mofa.go.jp/announce/fm_press/2008/6/0618.html (last visited on July 27, 2011).

F. Option Analysis: The modes of provisional arrangements reached so far and their relation with the 'difficulties'

None of these differences has been settled in any of these four series of negotiations. This has made EEZ/Continental Shelf boundary drawing in these four areas impossible so far. Yet, the parties were able to produce "two major types of provisional arrangements" so as to temporarily secure their respective interests to certain extent. The first kind of provisional arrangements are fisheries agreements to be implemented on the basis of "flag-state-jurisdiction" principle. That is to say, each party to such fisheries agreements has jurisdiction over only fishing vessels of its own nationality operating in such maritime zones. Three groups of such fisheries agreements were respectively concluded among (1) Japan and Russia, (2) Japan and the ROK, and (3) Japan and the PRC. As discussed above, these fisheries agreements, as provisional arrangements, were reached when the negotiations encountered either the difficulty of sovereignty dispute over islands, or the irreconcilable differences on applicable maritime delimitation principles.

The second type of provisional arrangement concerns the JDZs for seabed hydrocarbon resources. They were established in two pieces of maritime zones in the East China Sea by Japan and the ROK on the one hand, and by Japan and the PRC on the other hand. The author notices that, so far, such provisional arrangement does not exist for the maritime areas surrounding an island whose sovereignty status is disputed. The JDZ arrangement concluded between Japan and the PRC was away from Diaoyu/Senkaku Islands. Another important fact revealed is that such provisional arrangements were concluded for the areas where an irreconcilable difference exists on the applicable maritime delimitation principle.

Based on the above two observations, it seems fair to say that, in terms of provisional arrangement, fisheries agreements are less difficult to create than the JDZ. Of course, the easiest situation is when none of the two difficulties exists. The example is the maritime area outside the cut-off zone surrounding the islands of the Liancourt rocks where Japan and the ROK were able to draw continental shelf boundary between them in 1974. The hardest situation is when both difficulties are combined together, *e.g.* the maritime area surrounding Diaoyu/Senkaku Islands (inside the cut-off zone). So far, it was not possible for Japan and the PRC (and for Japan and the ROC) to conclude any fisheries agreement or the JDZ arrangement for this area.

4. Taiwan's Situation for the Maritime Boundary Delimitation

A. Unique Difficulties and Opportunities for Taiwan in Delimiting its Maritime Boundaries with Neighboring Countries

The ROC Government is facing great difficulties in seeking solutions on maritime boundaries delimitation with neighboring countries including Japan, the Philippines, coastal States of the South China Sea, and China (provided Taiwan is considered as a separate State from China). These difficulties must be first identified and confronted, before one can discuss how the tasks of maritime delimitation can be accomplished by the ROC.

1. Challenges for Taiwan Hard to Overcome

The first difficulty is that, presently, the ROC is not recognized as a legitimate representative for the "State of China" by Japan⁹² and the Philippines,⁹³ as well as the United Nations.⁹⁴ Unlike those few African and Latin American/Caribbean States giving government recognition to the ROC, all the East Asian countries maintain diplomatic relations with the PRC, recognizing it as the legitimate representative of the

⁹² Ministry of Foreign Affairs of Japan, Japan-China Relations, available at <http://www.mofa.go.jp/region/asia-paci/china/index.html> Japan established diplomatic relations with the PRC on September 29, 1972. At the same time, Japan stopped treating ROC as representative of the State of China. In line with the 1972 Japan-China Joint Communiqué, Japan-Taiwan Relations has been maintained as working relations on a non-governmental basis. See Ministry of Foreign Affairs of Japan, Taiwan, available at <http://www.mofa.go.jp/region/asia-paci/taiwan/index.html> (all last visited on July 21, 2011).

⁹³ Embassy of the PRC in the Republic of the Philippines, Overview of China-Philippines Bilateral Relations, available at <http://ph.china-embassy.org/eng/zfgx/zgxx/t180703.htm> The PRC and the Philippines established diplomatic relations on June 9, 1975. Since then the Philippine Government stopped recognizing the ROC as the representative of the State of China. See Joint Communiqué of the Government of the People's Republic of China and the Government of the Republic of the Philippines (Peking, June 9, 1975), available at <http://ph.china-embassy.org/eng/zfgx/zgxx/t183265.htm> (all last visited on July 21, 2011).

⁹⁴ G.A. Res. 2758(XXVI). (Oct. 25, 1971), U.N. Doc. A/L.630 & Add.1-2. The General Assembly resolution reads that:
THE GENERAL ASSEMBLY,

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

State of China. Such recognition is given to a ‘government,’ not to a ‘State.’⁹⁵ In addition, the territory of Taiwan has been declared by the PRC as an integral part of the State of China. Such position is a part of the Joint Communiqués signed by the PRC and Governments of, *inter alia*, the countries in East Asia when establishing diplomatic relations.⁹⁶ Hence, for these countries, Taiwan is a part of the State of China, whose representative is the PRC, instead of the ROC. Given this situation, these countries will face a difficult legal problem if they negotiate with the ROC for maritime boundaries they share with Taiwan.⁹⁷

The second difficulty is that the ROC has not been recognized by the countries in East Asia as a legitimate representative of a separate “State of Taiwan.” It is the official position of the ROC that the State of China it represents (called the Republic of China established in 1912 after revolution led by Dr. Sun Yat-Sen) consist of the territories of Mainland China and Taiwan.⁹⁸ The ROC is not prepared to change or reduce its territories through constitutional amendment⁹⁹ for various reasons.¹⁰⁰ As the ROC has

⁹⁵ Under international law, there is a fundamental difference between recognition of States and recognition of Governments. *Supra* note 13, at 85-101.

⁹⁶ Joint Communiqué of the United States of America and the People’s Republic of China (Shanghai Communiqué) signed on Feb. 28, 1972, para. 11, *available at* <http://www.china.org.cn/english/china-us/26012.htm>; Joint Communiqué of the Government of the People’s Republic of China and the Government of the Republic of the Philippines signed on June 9, 1975, *available at* <http://ph.china-embassy.org/eng/zfgx/zzgx/t183265.htm>; Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China signed on Sept. 29, 1972, *available at* <http://www.mofa.go.jp/region/asia-paci/china/joint72.html> (all last visited on July 21, 2011).

⁹⁷ Professor Merrills said that: “Negotiation is plainly impossible if the parties to a dispute refuse to have any dealing with each other. ...Similar consequences flow from the use of non-recognition to deny standing to the other party to a dispute, or as a general mark of disapproval. Here the problem is that official channels are never established. The consequences of this are demonstrated by the Arab-Israeli situation, where until quite recently the refusal of the Arab states to recognize Israel and Israel’s refusal to acknowledge the PLO prevented direct negotiations.” See Merrills, *supra* note 7, at 23-24. See also Bowett, *supra* note 40, at 292.

⁹⁸ Act Governing Relations between the People of the Taiwan Area and the Mainland Area <http://www.mac.gov.tw/ct.asp?xItem=51158&ctNode=5914&mp=3> (last visited on July 21, 2011). Article 1 of this Act provides: “This Act is specially enacted for the purposes of ensuring the security and public welfare in the Taiwan Area, regulating dealings between the peoples of the Taiwan Area and the Mainland Area, and handling legal matters arising there from before national unification. With regard to matters not provided for in this Act, the provisions of other relevant laws and regulations shall apply.” Article 2 (1)(2) provides: (1) ‘Taiwan Area’ refers to Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the Government; (2) ‘Mainland Area’ refers to the territory of the Republic of China outside the Taiwan Area.

⁹⁹ Article 4 of the ROC Constitution provides: “The territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly,” *available at* <http://english.president.gov.tw/Default.aspx?tabid=1107> (last visited on July 21, 2011).

¹⁰⁰ One of the major reasons may be that the United States Government, as a weapon provider, does not support the independence of Taiwan which necessitates abandonment of Mainland China. See A Strong and Moderate Taiwan (Speech by Deputy Assistant Secretary of State, Thomas J. Christensen to U.S.-Taiwan Business Council, at US - Taiwan Defense Industry Conference, held on September 9-11, 2007, in Westin Annapolis Hotel, Annapolis, Maryland), *available at* http://www.us-taiwan.org/reports/2007_sept11_thomas_christensen_speech.pdf Regarding

not declared independence, no opportunities have been provided to the countries in East Asia to decide if they are to recognize such a new State whose territory consists of Taiwan only.¹⁰¹ In other words, the situation of recognition given to a new State has not arisen for Taiwan. Considering that a separate State of Taiwan as opposed to the State of China does not exist, these East Asian countries will have difficulties to negotiate with the ROC government representing this non-existing State on matters of maritime delimitation.

The third difficulty is of a political nature. The countries near Taiwan will offend the PRC if they negotiate with the ROC on the problems of maritime delimitation. Maritime delimitation is to set the boundaries of maritime zones regulated by the UNCLOS. The sovereignty, sovereign rights, and jurisdictions to be exercised in the various zones as defined by the UNCLOS are of utmost sensitivity to all the coastal States. Without the acquiescence of the PRC, choosing the ROC as a negotiating partner for boundary-setting over the waters surrounding Taiwan (Chinese territory from these Countries' point of view) would be explosive in their relations with the PRC. To be submitted, such situation would remain even if the ROC declares independence, given the nationalism policy held by the PRC.

The fourth reason for neighboring countries of Taiwan to refrain from negotiating with the ROC is perhaps due to the benefits to be gained from waters surrounding Taiwan. Since 1949 when the PRC was established, Beijing has never exercised any degree of control over Taiwan or its surrounding waters. This fact could work as an excuse for countries neighboring Taiwan to refuse to enter into maritime boundaries negotiations with the PRC over the waters surrounding Taiwan, especially in the eastern part, notwithstanding their acknowledgement or recognition that Taiwan forms a part of the State of China. By refraining from negotiating with both the ROC and the PRC, the maritime boundaries between Taiwan and these countries will never be officially determined as a matter of international law. This situation provides incentives for neighboring countries to usurp rights not allocated to them by the UNCLOS in terms of maritime zones.

The fifth reason for the aforementioned countries not to treat Taiwan as an official partner in maritime boundary negotiation is perhaps based on the somehow passive, if not inactive, attitude of Taiwan towards certain sensitive maritime issues. The first example is the dispute concerning the sovereign title over the Diaoyu/Senkaku

the US position to 'oppose' the independence of Taiwan, see Hsiu-chuan Shih, *MOFA to look into Gates' use of 'oppose' in speech*, *TAIPEI TIMES* (June 11, 2011), available at <http://www.taipetimes.com/News/front/archives/2011/06/11/2003475203> (all last visited on July 21, 2011).

¹⁰¹ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 198-221 (2nd ed. 2006).

Islands¹⁰² where the ROC has done little to persuade Japan for a settlement. Another example is Oki-no-Tori Shima. Taiwanese fishing vessels have been excluded from the alleged Japanese EEZ surrounding that rock. However, the ROC said nothing against the Japanese Submission for the Extended Continental Shelf to the CLCS, unlike the PRC and the ROK Governments.¹⁰³

Given the situations mentioned above, it is costless for Taiwan's neighboring countries to ignore requests for negotiation by the ROC; not to mention the idea of any special agreement conferring powers to settle maritime boundary disputes upon any international tribunal.

2. *The Opportunities No Other State Has*

With respect to the maritime boundary delimitation issue between Taiwan and China, the situation is even more interesting to observe. From the ROC's viewpoint, as demonstrated by its constitution and laws¹⁰⁴ as well as the policies of its consecutive Administrations,¹⁰⁵ cross-Strait relations are not State-to-State relations, but District-to-District relations within a single but not-yet-unified State of China (officially called the Republic of China).¹⁰⁶ Although there are relevant voices inside Taiwan pushing for

¹⁰² For the positions and explanations of the Japanese Ministry of Foreign Affairs on Japan's sovereign title over the Diaoyu/Senkaku Islands, see Ministry of Foreign Affairs of Japan, The Basic View on the Sovereignty over the Senkaku Islands, available at <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html> (last visited on July 4, 2011).

¹⁰³ Commission on the Limits of the Continental Shelf ("CLCS"), *Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission by Japan*, available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm (last visited on July 4, 2011). To be noted, third party notifications by PRC and Korea can be found on this website.

¹⁰⁴ *Supra* note 98.

¹⁰⁵ President Lee Teng-Hui of the ROC adopted "The ROC's Unification Guidelines" on March 14, 1991. During the presidency of Chen Shui-Bian, the Guidelines were abolished on March 1, 2006. See the official website of the Mainland Affairs and Information and Research Center (available only in Chinese), available at <http://www.mac.gov.tw/ct.asp?xItem=68276&CtNode=5836&mp=4> However, President Chen's policy of "One country on each side," or "One Side, One Country" failed. Under Chen's theory, "What is not under the effective control by the ROC (e.g. Chinese Mainland) should be abandoned." Hence, Taiwan need not defend the rights under international law claimed by PRC. See *Interview With Taiwanese President Chen Shui-bian*, THE WASHINGTON POST (Oct. 10, 2003), available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A9815-2003Oct10¬Found=true> (all last visited on July 2, 2011).

¹⁰⁶ On May 30, 2011, the ROC President, Dr. Ma Ying-Jeou made the following speech:

Under the ROC constitutional framework, the cross-strait relationship is not one between states, but a special relationship for which the model of recognition under conventional international law is not applicable. Therefore, we cannot and do not recognize mainland China's sovereignty, nor should we or do we deny its authority to govern mainland China. To put it simply, "mutual non-recognition and mutual non-denial" means "the two sides do not recognize each other's sovereignty, nor do they deny each other's authority to govern."

See Remarks by H.E. Ma Ying-jeou, President of the Republic of China, at the 2011 International Law Association Asia-Pacific Regional Conference, available at <http://www.cils.nccu.edu.tw/Opening%20Address%20of%20>

independence, the ROC seems not prepared to make such declaration. It is probably due to the repeatedly announced lack of military support from the United States.¹⁰⁷

On the other side of the coin, the position of the PRC is somehow in harmony with that of the ROC, in the sense that both Governments claim to represent the same State of China consisting of the identical territories. There are of course differences between them as follows: (1) different names are given by these two Governments to the State of China they claim to represent; and (2) the ROC and the PRC are denying each other the title of legitimate representative of the same State with different names.

The most remarkable position of the PRC is its appreciation for the ROC to keep hold on certain islands in the South China Sea, over which some other neighboring States claim sovereignty.¹⁰⁸ The cross-Straits relations could be well described by a saying, “whatever is yours is mine.” Based on this doctrine, and the fact that Taiwan is not yet separated from the State of China, the rights in international law that has been maintained or obtained by the ROC in Taiwan belongs to the State of China represented by PRC as a matter of law. Also, the forfeiture of the rights and jurisdiction once possessed by the ROC with regard to the areas under its effective control amounts to the loss of the rights pertaining to the State of China represented by the PRC in the eyes of international law. For the ROC, the other way around is true, as well. This accounts for the above-mentioned ‘appreciation’ borne by the PRC for the actions taken by the ROC. Perhaps it is this theory and mindset that may constitute the key to the difficult situations facing Taiwan when it seeks to settle the maritime boundary disputes with neighboring countries.

B. Lessons for Taiwan in the Future Maritime Delimitation

1. Why are the Lessons Relevant for Taiwan?

The difficulties faced by the ROC in its quest for maritime boundary delimitation are many-sided. Apart from its unique legal and political difficulties, the ROC actually faces the same obstacles that Japan has. The ROC (and the PRC) claims territorial sovereignty over the Diaoyu/Senkaku Islands occupied by Japan which also claims sovereignty there. A similar situation exists for Japan concerning the islands of the Liancourt rocks

President%20Ma%20Ying-jeou.pdf (last visited on July 26, 2011). On the “special interim relations” between the separate governments of a divided nation, see ERIC YONG JOONG LEE, LEGAL ISSUES OF INTER-KOREAN ECONOMIC COOPERATION UNDER THE ARMISTICE SYSTEM 143-6 (2002).

¹⁰⁷ *Supra* note 100.

¹⁰⁸ This is based on personal communications between the author and some high ranking officials of the PRC who may not be quoted.

and the Northern Territories, occupied and claimed by the ROK and Russia, respectively. With similar disadvantage, the fact that Japan reached certain agreements with the ROK and Russia indicates ways for the ROC (and the PRC) to solve this dispute. It is not unreasonable for the ROC to present to Japan the kind of request Japan once conveyed to the ROK and Russia.

Based on the foregoing, it is submitted that what Japan once obtained from the ROK and Russia concerning waters surrounding the Liancourt rocks and Northern Territories should mark the ceiling price that the ROC (or the PRC) can get from Japan for the maritime area surrounding the Diaoyu/Senkaku Islands. Otherwise, the Japanese Government will lose face, for giving more ground than the ROK and Russian counterparts had done in similar battles.

The above-mentioned Japanese reactions towards the PRC in the East China Sea are also inspiring. Like the PRC, the ROC holds that the natural prolongation principle must apply to maritime boundary delimitation in the East China Sea. It is believed that the identical difference between the PRC and Japan concerning the 'applicable principle' makes the PRC-Japan interactions highly enlightening for Taiwan.

2. The Lessons for Taiwan to Learn from its Neighboring Countries

Given the above-mentioned situations, there are certain lessons to be learned by the ROC, if it would like to solve in any way the equally (if not more) difficult disputes of maritime delimitation with its neighbors.

First, the difficulty for Japan in solving sovereignty disputes over the Liancourt rocks and the Northern Territories did not dishearten its government from gaining maritime jurisdiction of less exclusiveness/density in waters surrounding such islands. Although these two groups of islands have been occupied by other States, it is believed that Japan's achievement in bringing the ROK and Russia into conclusion of bilateral Fisheries Treaties is a diplomatic victory worthy learning by other countries, including Taiwan.

Second, to make possible the drawing of maritime boundaries, the State parties to such negotiations focused on areas away from those surrounding the disputed islands. Hence, the boundary line does not traverse into disputed waters in the "cut-off zones." The example can be seen from the 1974 Agreement between Japan and the ROK on continental shelf boundary, which does not enter into the areas surrounding the Liancourt rocks. Hence, the ROC should look for 'real' maritime boundary delimitation in areas to the east of Taiwan which are away from Diaoyu/Senkaku Islands.

Third, in areas where drawing EEZ/Continental Shelf boundaries were impossible, State parties worked on provisional arrangements. As summarized just now, fisheries

agreement and the JDZ are two options for provisional arrangement. Fisheries agreements are reachable no matter which difficulty the State parties encounter, be it sovereignty dispute or difference on applicable delimitation principle. On the other hand, the JDZ seems feasible when no sovereignty dispute exists in the maritime area concerned. Therefore, it is submitted that the most the ROC can get from Japan in the waters surrounding Diaoyu/Senkaku Islands would be a fisheries agreement based on the flag-State-jurisdiction principle. In the area of the East China Sea beyond the cut-off zone surrounding Diaoyu/Senkaku Islands, both fisheries agreement and the JDZ can be options for the ROC in its negotiations with Japan. Here, the problem comes again. What should the ROC do to make Japan accept these options in waters inside and outside of the cut-off zone?

Fourth, there are two types of fisheries agreement as provisional arrangement based on flag-State-jurisdiction principle: (1) the ROK-Japan and the PRC-Japan agreements,¹⁰⁹ which transform the maritime areas concerned into nobody's Exclusive Fishery Zones ("EFZ");¹¹⁰ and (2) the Japan-Russia agreements which turn the maritime zones surrounding Japanese Northern Territories 'everybody's EFZ.'

Fifth, although in the East China Sea many countries claim overlapping EEZ/EFZ and continental shelf rights, the maritime delimitation negotiations did not always involve all stakeholders as a matter of fact. Japan and the ROK established the JDZ in 1974 under two treaties for their overlapping zones, excluding the PRC from this deal. On the other hand, the PRC unilaterally explored and exploited hydrocarbon resources in the East China Sea against the will of Japan; it brought the Japanese Government to negotiation table. Consequently, in June 2008, the JDZ between the PRC and Japan was achieved under a bilateral political agreement. Perhaps the ROC need not wait until the sky falls for Japan to get ready for maritime boundary delimitation negotiations, as the latter once did react to the PRC's unilateral measures. It is believed that Japan should be able to sympathize with the ROC in its unilateral measure, as the former once ignored the PRC when reaching agreement with the ROK. Nonetheless, the question remains: how should the ROC do to "win Japan's sympathy"?

The biggest lesson is that negotiations are only 'the means,' but not the ends. It is, *inter alia*, the benefits of exploiting the natural resources from the ocean that constitute

¹⁰⁹ They are as follows: (1) the joint regulation zones surrounding the Liancourt rocks under the 1965 ROK-Japan Fisheries Agreement; (2) the PAZs regime under the 1999 ROK-Japan Fisheries Agreement; and (3) the PMZ regime established in the 1997 Sino-Japan Fisheries Agreement.

¹¹⁰ This is because neither Party recognizes that the other Party has the sovereignty over the islands so that the waters surrounding the islands become nobody's EEZ. This situation makes it unacceptable for fishing vessels flying one Party's flag to be subject to the other Party's EEZ-related jurisdiction when operating in the water surrounding such island

'the ends.' Therefore, the difficulty for negotiations to move on does not necessarily make the end unreachable. Equally important is that the stubborn attitude opposing dialogue may change if the other party desists in the fruitless request for negotiation while jumping into actual exploration or even exploitation of the resources.

5. Concluding Remarks: Prospects for Waters surrounding Diaoyu/Senkaku Islands and Advices for Taiwan

Herewith, the author would like to provide his personal interpretation and prediction of the collision incident near Diaoyu/Senkaku Islands on September 7, 2010 and aftermath, based on the experiences and lessons learned above.

First of all, situations in the Diaoyu/Senkaku Islands may represent opportunities for the PRC-Japan negotiations towards establishing an informal fisheries agreement/understanding as a provisional arrangement pending settlement of sovereignty dispute over the islands. The PRC is most probably aware of the difficulties in reaching a formal fisheries agreement with Japan for the waters surrounding Diaoyu/Senkaku Islands, as well as the encouraging past experiences of Japan in concluding fisheries agreements with the ROK and Russia. What the PRC can do now is to create a *fait accompli*, instead of asking Japan to yield to no avail.

It involves two major steps. First, the PRC can keep dispatching patrol vessels into waters surrounding the Diaoyu/Senkaku Islands and get Japan 'used to' this situation. The purpose for the PRC law enforcement vessels to be there is not to control Japanese fishing vessels according to Chinese/PRC domestic laws. Rather, the aim is to secure fishing grounds for Chinese fishing vessels while enforcing the PRC fisheries laws and regulations upon its own vessels. Second, the PRC can allow (if not send) its fishing vessels to enter this area for fishing operations. As the presence of the PRC patrol vessels is already 'tolerated' by Japan, it becomes less likely and more difficult for the PRC-registered and well-protected fishing vessels to be boarded, inspected, or even detained by the Japanese patrol boats. Once this happens, a tacit understanding concerning a kind of fisheries arrangement will materialize between the PRC and Japan. That is to say, instead of having a formal international fisheries agreement, both sides can reach a tacit "unwritten fisheries agreement/understanding." Meanwhile, the principle of flag-State-jurisdiction will be *de facto* applying in these waters.

Suppose the above scenario comes true, those Taiwan-registered fishing vessels

located in the water surrounding Diaoyu/Senkaku Islands will have to subject themselves to the jurisdiction of the PRC patrol vessels, like Yu-Zheng No. 202, if not to the jurisdiction of Japan (which would not be tolerated by the PRC). To avoid such a huge political/legal embarrassment, it is suggested that the ROC should reflect on its options hard and quick, given the repeated and uninterrupted visits of the PRC patrol vessels in such waters. As mentioned above, it is unlikely that Japan will negotiate with the ROC for maritime boundary delimitation. In fact, whenever fishing vessels from Taiwan enter into the waters surrounding the Diaoyu/Senkaku Islands, they are harassed, if not detained, by Japan's patrol vessels. What is worse, the ROC patrol vessels dare not enter waters surrounding Diaoyu/Senkaku Islands alone. However, this paper indicates certain opportunities and basis for the ROC to cooperate with the PRC and vice versa. In this connection, once the ROC resolves to embody its maritime jurisdictional claims here, it is submitted that the only feasible step this Government can take seems to be dispatching patrol vessels to enter waters surrounding Diaoyu/Senkaku Islands, *together with (if not following) the PRC patrol vessels.* [Italic added] Such cooperation will, in a way, resemble what Japan did in the East China Sea with the ROK in reaching the bilateral JDZ excluding the PRC. It is believed that by doing this an opportunity may arise for the ROC law enforcement vessels to be able to patrol those waters and to enforce the ROC fishery laws on the Taiwan-registered fishing vessels there. This way the area can be turned into a "three parties' EFZ" or "nobody's EFZ for three parties." However, whether the ROC will seize such opportunities is beyond the author's ability to foresee.