Chapter III

Disputes Over Islands and Maritime Boundaries in East Asia

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I. Introduction

A surprisingly large number of maritime boundaries remain unresolved around the globe, and East Asia has some particularly difficult disputes. According to one recent estimate, 259 of the planet’s 427 boundary disputes have not yet been delimited. About half of the unresolved maritime boundaries are linked in some ways to islands and 30 or 40 of these involve sovereignty disputes over territory.

In East Asia, disputes over sovereignty continue at present between Japan and Russia over the Northern Territories; between Korea and Japan over Dokdo/Takeshima/Liancourt Rocks; between Japan, China, and Taiwan over Daioyu-Dao/Senkakus; between China and Vietnam over the Paracel Islands; and between China, Taiwan, the Philippines, Vietnam, Malaysia, and Brunei over the Spratly Islands. Each of these disputes over islands affects the maritime delimitation of the region. Disputes also continue in East Asia over the proper drawing of straight baselines, historical claims to bays, the breadth of the territorial sea, and the principles that should govern maritime delimitation. This paper provides an overview of these disputes, with some recommendations regarding how some of them might be addressed.

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II. The Sea of Okhotsk

The Soviet Union, and now Russia, has occasionally suggested that the Sea of Okhotsk consists of internal waters and has drawn aggressive baselines along certain coastal areas within the Sea. The United States and other maritime countries reject Russia’s view and characterize Okhotsk as a “semi-enclosed sea” governed by Articles 122 and 123 of the 1982 United Nations Law of the Sea Convention. According to this view, although much of the Sea is covered by Russia’s exclusive economic zones (EEZs), a “peanut hole” of high seas exists in the middle of the Sea, which is governed by the high seas provisions of the Convention.

III. Peter the Great Bay

The Soviet Union, and now Russia, has claimed that Peter the Great Bay, just north of Korea, is a “historic bay” under Article 10(6) of the Law of the Sea Convention and thus that the Bay consists of internal waters. The Bay does not meet the “semi-circle” test required by Article 10(2) and has an entrance longer than 24 nautical miles (n.m.), and the United States has protested this claim.

IV. The Northern Territories

One of the most contentious and festering of Northeast Asia’s disputes concerns the small islands north of Hokkaido controlled by Russia but claimed by Japan as an essential part of its national territory. These islands – usually called the “Northern Territories” – include the Habomai group, Shikotan, Kunashir (Kunashiri in Japanese), and Iturup (Etorofu), and they contain a combined land area of 5,000 square kilometers. The Soviet Union took these islands from Japan after World War II, and expelled the 17,000 Japanese residents. Russia now claims title based on the language in the 1951 San Francisco Peace Treaty, in which Japan “renounced all right and title to the Kuril Islands.” But Japan argues that these islands are not covered by this phrase, because they were not among the islands Japan had acquired in 1875 in exchange for Sakhalin, and that, historically, they


4 According to Article 2 of the Peace Treaty of 1951, Japan renounced all claims to the Kurile Islands and to that part of Sakhalin and its adjacent islands that it had obtained in 1905.
had always been Japanese. The fishing resources around these islands are productive and intensively utilized, and include Pacific saury, Japanese anchovy, Japanese flying squid, pink salmon, Pacific cod, Alaska pollack, Pacific herring, and Japanese sardines. In the summer of 2001, Japan denounced South Korean fishing in this area, asserting that the fishing zones “are within the exclusive economic zone and under Japan’s sovereignty.” South Korea contended that it had been given permission to fish there by Russia, but to retaliate against the South Korean activity, Japan banned South Korean fishing off the Pacific coast areas of Aomori, Iwate, and Miyagi Prefectures.

V. The Maritime Boundaries Between North and South Korea

1. The East Coast of the Korean Peninsula

North Korea apparently claims one single 300-n.m. straight baseline along its east coast connecting the northeast corner of the country at the mouth of the Tumen River to its southeast corner where the Armistice Line meets the sea. Such a claim certainly exceeds the permissible limits established by Article 7 of the Law of the Sea Convention, and this line is not recognized as legitimate by most countries, including the United States. This coastline is not particularly deeply indented and does not have any fringing islands, and North Korea has never made a serious claim that its two indentations on the East Sea should be viewed as historic.
bays. Professor Paik has concluded that: “It seems very doubtful that the East Korea Bay and the small indentation north of it would fall under the category of historic bays.”

South Korean vessels do not at present challenge North Korea’s trapezoidal-shaped EEZ claim extending from this line, to avoid controversy and because the disputed area is not thought to be a resource-rich area. In February 2000, nongovernmental fisheries associations in North and South Korea negotiated an agreement that allowed South Korean vessels to fish in North Korea’s EEZ in the East Sea until 2005, with profits to be shared between the two countries. About 400 South Korean squid vessels took advantage of this arrangement.

North Korea’s claimed maritime zones in the East Sea cannot be justified under the Law of the Sea Convention or any other principles of customary international law. It is true that North Korea is somewhat geographically disadvantaged, having a concave coastline and having two neighbors (Russia and South Korea) that wrap around it. North Korea is entitled to maritime zones that allow it to project into the sea, but the principles of maritime delimitation are not designed to restructure the realities created by physical geography. The delimitation line between North and South Korea should thus be the equidistance line, which would go north of the line now claimed by North Korea and would give South Korea more maritime space.

2. The West Sea (Yellow Sea)

It will be challenging to reach agreement on the maritime boundary in the West Sea/Yellow Sea because of the five South Korean islands nestled close to the North Korean coast, and because of the disputed status and location of the “Northern Limit Line.” South Korea controls the islands of Paengyong, Taechong, Sochong, Yongpyong, and Woo which hug the western North Korean coast, coming at the closest point to within seven-n.m. of North Korea. South Korea views the maritime boundary between the two countries as the median line between these islands and the North Korean coast, based on a line called the “Northern Limit Line” (NLL),

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11 See, e.g., id. Prescott explains that: “Straight baselines would only be appropriate on the east coast [of North Korea] if they enclosed historic bays.” Id. at 19.
12 Paik, supra note 8, at 101.
14 See Paik, supra note 8, at 105 (“Considering coastal geography around North Korea, the equidistance line can be regarded as an equitable solution to the delimitation with its neighbors”).
which was drawn by the United Nations Command a month after the Armistice Agreement of July 27, 1953, leaving very little ocean space for North Korea. These five islands have a total of five square miles and were said in 1978 to be occupied by 13,000 people. North Korea does not challenge South Korean sovereignty over the islands themselves, but because the islets are within 12-n.m. of North Korea’s coast, North Korea has contended that the waters around the five islets are part of North Korea’s territorial sea.

In September 1999, North Korea unilaterally announced that it had redrawn the line so as to extend from the land boundary perpendicular from the coastline into the Yellow Sea, and was prepared to enforce this line “by various means.” The immediate cause of this dispute was apparently a concentration of crabs south of the Northern Limit Line and efforts by North Korean vessels to harvest these crustaceans. Incidents are not uncommon in this area, and violent clashes occurred during the crab seasons in June 1999 and June 2002.

The NLL has served a useful purpose as a line of military control and should continue in place until the two Koreas can reach agreement to end their state of war. But if the two Koreas were independent countries, the NLL would probably not stand as a legitimate maritime boundary under the “equitable principles” that have evolved from the decisions of based on Articles 74 and 83 of the Law of the Sea Convention, because it denies North Korea access to adjacent sea areas. The NLL is thus contrary to the principle of “non-encroachment” because it blocks North Korea’s access to the ocean in this region. Further, according to legal precedents

16 See Prescott, supra note 8, at 48–51.
20 See Van Dyke, Valencia & Garmendia, supra note 15.
21 The principle of non-encroachment is included explicitly in Article 7(6) of the Law of the Sea Convention, which says that no state can use a system of straight baselines “in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.” It played a significant role in the delimitation of the exclusive economic zone (EEZ) in the Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), 1993 I.C.J. 38, 69 para. 70, and 79–81 para. 92, where the Court emphasized the importance of avoiding the blockage of a coastal state’s entry into the sea. Even though Norway’s tiny Jan Mayen island was minuscule in comparison with Denmark’s Greenland, Norway was allocated a maritime zone sufficient to give equitable access to the important capelin fishery that lies between the two land features. The unusual 16-n.m.-wide and 200-n.m.-long corridor drawn in the Delimitation of the Maritime Areas Between Canada and France (St. Pierre and Miquelon), 31 I.L.M. 1149 (1992), appears to have been based on a desire to avoid cutting off these islands’ coastal fronts into the sea. But, at the same time, the arbitral tribunal accepted Canada’s argument
and international practice, islands do not have an equal capacity with land masses to create maritime zones, nor do they command equal strength with an opposing continental area or land mass.\textsuperscript{22}

Using an analogy from the Anglo-French Arbitration,\textsuperscript{23} territorial sea enclaves could be drawn around the five South Korean islands, but the islands themselves would be ignored in drawing the main maritime boundary. Although the territorial sea around these islands would normally be 12-n.m., because they are all so close to the North Korean coast and crowded among each other, this geographical situation might dictate the drawing of smaller territorial seas.\textsuperscript{24} Maps have also been prepared showing a hypothetical median line which would give North Korea a “finger” through these islands.\textsuperscript{25} Because the five South Korean islands are within 12-n.m. of North Korea, careful negotiation will inevitably be necessary to address and resolve this dispute.

VI. The East Sea/Sea of Japan

The East Sea/Sea of Japan is a resource rich semi-enclosed sea that presents a difficult boundary delimitation challenge.

1. Baselines

Article 7(1) of the Law of the Sea Convention allows countries to use straight baselines if their coastline is deeply indented or a fringe of offshore islands masks the coastline, but under Article 7(3), the straight baselines must not depart appreciably from the general direction of the coast.\textsuperscript{26} Once straight-baselines are drawn, the waters landward of these lines are “internal waters,” which are totally controlled by

\begin{footnotesize}
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\item See infra text accompanying notes 114–18 and 163–64.
\item Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland and the French Republic, 18 United Nations Reports of International Arbitral Awards (RIAA) 74 (1977), reprinted in 18 I.L.M. 397 (1979) [hereafter cited as Anglo-French Arbitration].
\item See infra text accompanying notes 86 and 159–61.
\item See the map entitled “Potential Maritime Zones of Northern East Asia,” prepared by the Office of the Geographer, U.S. Department of State, in December 1977, showing hypothetical equidistant lines, which was republished in Bruce D. Larkin, East Asian Security Zones, 2 Ocean Y.B. 282, 291 (1980), and in Paik, supra note 8 at 106.
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the coastal country, and the next 12-n.m. are “territorial sea,” which is sovereign territory, and through which vessels can pass only if the passage is “innocent.” For maritime boundary purposes, baselines become crucial because any median or equidistance line that might be drawn to divide overlapping maritime zones would start from the baselines.

Japan’s baseline claims are of questionable legitimacy in some locations. Japan’s first effort at baseline delimitation occurred in 1977 in its Law on the Territorial Sea (Law No. 30), which went into effect on July 1, 1977. Its straight-baseline claims are disputed because Japan’s coastline is not generally viewed as being “deeply indented” nor does it have “fringing islands.” Some baselines connect remote islands far from the main islands, and some are more than 50 miles long. Deputy Minister Lark-Jung Choi of Korea’s Ministry of Maritime Affairs and Fisheries (MOMAF) has explained that 46 of Japan’s straight baselines exceed 24-n.m. in length and 21 exceed 40-n.m.27 The longest baseline is 62.26-n.m. in the area west of Kyushu. Korean scholars and officials complain in particular about the straight baselines that are drawn around Wakasa Bay, Toyama Bay, and Kyushi Bay, which do not meet the definition in Article 10 of the Law of the Sea Convention of a legal bay,28 as well as those drawn in the Shikoku area, Nodu Bay, and Hekurajima, “and in many other places.”29 These straight baselines, if accepted, would have the effect of increasing Japan’s territorial sea by about 13% and its EEZ by almost 25%.30 Deputy Minister Choi has said that “Korea must make it clear during the EEZ delimitation negotiations that [Japan’s] unlawful baselines cannot be accepted as the proper basis of establishing maritime delimitation.”31

In June 1997, a South Korean captain was arrested by the Japanese Maritime Safety Agency for violating the Japanese “Law concerning Regulation of Fishing Activities by Foreigners,” which prohibits foreign fishing in Japan’s territorial sea. His vessel was 18.9 miles off the coast of Hamada, Shimane Prefecture, but was deemed by Japan to be within its territorial waters because of its baseline claims. Japan adopted its baselines without consultation or acquiescence by South Korea, and in apparent violation of the 1965 Fishery Treaty between the two countries.

27 Lark-Jung Choi, Lessons from Korea’s Bilateral Fisheries Agreements with Japan and China (Republic of Korea Ministry of Maritime Affairs and Fisheries, Jan. 2002).
28 See Gab-Yong, Jeong, Legal Issues of Delimitation of Maritime Boundaries 4 (Korean Maritime Institute, Feb. 17, 2003). Prescott has observed that “Japan closes bays that have mouths less than 24-n.m. wide without any apparent reference to the semi-circle test contained in the 1958 and 1982 Conventions on the Law of the Sea.” Prescott, supra note 8, at 24.
29 Choi, supra note 27, at 5.
30 Id.
31 Id.
which required such consultations.\textsuperscript{32} Japanese courts at first reached inconsistent conclusions on the legal issues raised by this and other arrests, but eventually reached the conclusion that Japan had the unilateral right to declare and define its territorial sea and could exercise exclusive jurisdiction in the area.\textsuperscript{33}

2. \textit{Dokdo/Takeshima/Liancourt Rocks}

Dokdo consists of two rocky islets and 32 even smaller outcroppings in the East Sea/Sea of Japan that have a combined land area of 0.18 square kilometers. East Island (Dong-Do in Korean) has a circumference of 1.9 kilometers, and West Island (Seo-Do) has a circumference of 2.8 kilometers.\textsuperscript{34} These islets are located 88 kilometers (about 55 miles or 47-n.m.) from Korea’s Ullungdo\textsuperscript{35} and are about 158 kilometers (about 99 miles or 86-n.m.) from Japan’s Oki Islands.\textsuperscript{36} They have limited water sources, and have been uninhabited historically.\textsuperscript{37} But since 1954, about 45 South Korean marine police have been stationed there (and one family stays there in the summer) in order to support Korea’s claim to sovereignty over the islets. Once a year, “Japan sends a protest note rejecting South Korea’s claim to ownership of these features.”\textsuperscript{38} Their location in the middle of the East Sea/Sea of Japan – 50 miles southeast of Korea’s Ullungdo and 90 miles northwest of Japan’s Oki Islands – gives them an importance and status if they were to have an effect on the delimitation of marine space. They have served as a fishing station for harvesting abalone and seaweed and hunting seals, and they are near rich fishing grounds.

Korea’s claim to Dokdo goes back many centuries and is based on contacts during many previous eras.\textsuperscript{39} Japan asserts, on the other hand, that Dokdo (which it calls Takeshima) was \textit{terra nullius} in 1905 and that Japan acted in accordance with international law in claiming and incorporating the islets into Japanese territory at that time. Korea views this initiative as part of Japan’s aggressive and illegal


\textsuperscript{34} Beautiful Island, Dokdo (Republic of Korea Ministry of Maritime Affairs and Fisheries, 2000).

\textsuperscript{35} Id. at 10.

\textsuperscript{36} “South Korea’s Ullung-Do is only 47 nm from Take Shima, whereas Japan’s Oki Gunto is 86 nm distant from the disputed islands.” Prescott, supra note 8, at 48.

\textsuperscript{37} See infra text accompanying notes 73–77.

\textsuperscript{38} Prescott, supra note 8, at 48.

expansionism that led to the formal annexation of Korea in 1910. In the years immediately following World War II, the United States occupied both Japan and Korea, and it issued decrees and later entered into agreements regarding the territory of these two nations. But the 1951 San Francisco Peace Treaty40 between the Allied Powers and Japan did not mention Dokdo. After World War II, Korea reestablished its occupation of the islands and has, as explained above, maintained a small contingent of marine guards on the islets during the past half century.

Korea's claim to sovereignty over the islets is stronger than that of Japan, based on the historical evidence of its exercise of authority, the connection between Japan's 1905 claim of annexation and its expansionist activities over the Korean Peninsula, the principle of contiguity (because the islets are closer to Korea's Ullung-do than to Japan's Oki Islands), and Korea's actual physical control of the islands during the past half century.41

The judicial and arbitral decisions regarding sovereignty disputes over islands since World War II have focused more on which country has exercised actual governmental control over the feature during the previous century, than on earlier historical records.42 The first major decision by the International Court of Justice (ICJ) regarding ownership of an isolated uninhabited island feature was the decision in the Minquiers and Ecrehos Case,43 where the Court explained that: “What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”44 This view was followed in the Gulf of Fonseca Case,45 where the court focused on evidence of actual recent occupation and acquiescence by other countries to determine title to disputed islets, and in the decision in the Eritrea-Yemen Arbitration,46 where the tribunal relied explicitly on the Minquiers and Ecrehos judgment for the proposition that it is the relatively recent history of use and possession of the islets that is most instructive in determining sovereignty and that the historical-title claims offered by each side were not ultimately helpful in resolving the dispute: “The modern international

42 See generally VALENCIA, VAN DYKE, & LUDWIG, supra note 1, at 17–19.
43 MINQUIERS AND ECREHOS CASE (FRANCE/UNITED KINGDOM), 1953 I.C.J. 47.
44 Id. at 57 (emphasis added).
law of acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis."

This very same approach was utilized by the Court in its recent decision resolving a dispute between Malaysia and Indonesia over two tiny islets – Ligitan and Sipadan. The larger of the islets (Sipadan) is 0.13 square kilometers in size. Neither has been inhabited historically, but both have lighthouses on them and Sipadan has recently been "developed into a tourist resort for scuba-diving." The Court first addressed arguments based on earlier treaties, maps, and succession, but found that they did not establish any clear sovereignty. It then looked at the "effectivities" – or actual examples of exercises of sovereignty over the islets, and explained that it would look at exercises of sovereignty, even if they did "not co-exist with any legal title." Indonesia claimed title based on various naval exercises in the area conducted by themselves and previously by their colonial power (the Netherlands), but Malaysia prevailed based on the governmental actions of its colonial power (the United Kingdom) exercising control over turtle egg collection and constructing lighthouses on both islets.

The language and rulings provided by the Court are directly relevant to the Dokdo dispute. The Court’s opinion explained that "a claim of sovereignty based on… continued display of authority… involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority." In "areas in thinly populated or unsettled countries," the Court "has been satisfied with very little," but the contrary claims of other countries will also be relevant. The Court relied upon only those displays

47 Id. 1998 Award, para. 239.
49 Id. para. 14.
50 Id.
51 Id. paras. 58, 72, 80, 92, 94, 96, 114, and 124.
53 Id. para. 132.
55 Id. para. 134 (quoting from Legal Status of Eastern Greenland, id. at 45–46).
56 Id. para. 134 (quoting from Legal Status of Eastern Greenland, id. at 45–46). In this regard, the Court noted that it was significant that Indonesia's map of its archipelagic baselines "do not mention or indicate Ligitan and Sipadan as relevant base points or turning points." Id. para. 137. The Court also found significant that neither Indonesia nor its predecessor the Netherlands "ever expressed
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of sovereignty that occurred before “the dispute between the Parties crystallized [which was 1969 in the Ligitan/Sipadan dispute] unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.” In the course of its decision, the Court explained that actions of private parties will not be relevant “if they do not take place on the basis of official regulations or under governmental authority.”

The consistent reasoning in these ICJ decisions strengthens Korea’s claim of sovereignty to Dokdo. Korea was not in a position to exercise control during the first part of the twentieth century because it had been annexed by Japan, but as soon as it regained its independence it asserted control over the islets, and has continued to exercise sovereignty over them since then. In July 2001, the South Korean National Maritime Police Agency announced it would commission a 5,000-ton-class vessel carrying a crew of 97 – entitled the Sambong, the name of Tok-do during the Choson Dynasty – to patrol the waters around Tok-do beginning in February 2002.

Article 121(3) of the 1982 United Nations Law of the Sea Convention says that “rocks” that “cannot sustain human habitation or economic life of their own” are entitled to a 12-n.m. territorial sea, but not an EEZ or a continental shelf. The terms in this provision are not defined elsewhere in the Convention, and commentators have debated whether a geological feature must literally be a “rock” to be denied an EEZ or continental shelf or whether all features that “cannot sustain human habitation or economic life of their own” are in this category. Judge Budislav Vukas has recently explained that the latter interpretation is the correct one, because of the underlying purposes of establishing the EEZ. The reason for giving exclusive rights to the coastal states was to protect the economic interests

its disagreement or protest” regarding the construction of lighthouses on Ligitan and Sipadan in the early 1960s. Id. para. 148.

57 Id. para. 135.
58 Id. para. 140.
59 Yonhap News Agency, South Korea Commissions New Patrol Boat for Disputed Isle Area (July 13, 2001).
60 Law of the Sea Convention, supra note 3.
of the coastal communities that depended on the resources of the sea, and thus to promote their economic development and enable them to feed themselves. The rationale does not apply to uninhabited islands, because they have no coastal fishing communities that require such assistance. The EEZ regime may also be “useful for the more effective preservation of the marine resources,” but it is not necessary to give exclusive rights to achieve this goal, and multilateral solutions such as Convention on the Conservation of Antarctic Marine Living Resources can serve to protect fragile resources.

An important example of “state practice” relevant to the meaning of Article 121(3) occurred in 1997 when the United Kingdom renounced any claim to an EEZ or continental shelf around its barren granite feature named Rockall which juts out of the ocean northwest of Scotland. Rockall is a towering granite feature measuring about 200 feet (61 meters) in circumference, which is about seventy feet (21 meters) high.

An earlier regionally-important example of state practice on this issue occurred in 1970, when the Republic of China (Taiwan) issued a reservation when ratifying the Convention on the Continental Shelf, apparently with reference to the Daioyu-Dao (Senkakus), stating that in “determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.” One prominent scholar from the People’s Republic of China has reported that the position of the People’s Republic of China is similar: “China holds that the Diaoyudao Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have a continental shelf.”

63 Id. paras. 3–5. 
64 Id. para. 6. 
65 Id. para. 7. 
67 Vukas Declaration, supra note 62, para. 8. 
Whatever emerges as the ultimate definition of “rock” in Article 121(3) of the 1982 Convention, it would appear to be clear that Dokdo will be covered by this term. The two tiny rocky islets that make up Dokdo consist of barren and windswept structures with limited water sources. In a 1966 publication, the features of the islets were described as follows:

Both islets are barren and rocky, with the exception of some grass on the eastern islet, and their coasts consist of precipitous rocky cliffs. There are numerous caves where sea-lions resort. These islets are temporarily inhabited during the summer by fishermen.73

Fishing vessels have visited the islets during the mild summer months, and, since 1954, the Republic of Korea has kept marine police on them, but Korean scholars have acknowledged that these islets are unsuitable for human habitation.74 Two distinguished foreign commentators have stated that: “These islets are uninhabitable, and under Article 121 of the 1982 U.N. Convention on the Law of the Sea should not have an EEZ or continental shelf.”75 Another widely-published Korean scholar has written, after discussing the language in Article 121(3), that “the natural conditions of the Dokdo Islands would suggest that these islands might not generate their own EEZs or continental shelves.”76 One of the early Korean names given to the islets was “Sokdo,” which is significant because “sok” means “rock” in Korean.77

Japan, on the other hand, has tended to take the position that all islands and islets, no matter how small, should be able to generate extended maritime zones, without regard to their size or habitability, and Japan has apparently claimed an EEZ around all its islets, no matter how small or uninhabitable. Japan ratified the Law

that the Senkaku Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have continental shelf”).

73 HYDROGRAPHER OF THE NAVY, 1 JAPAN PILOT 200 (HMSO, London, 1966). See also Hideki Kajimura, The Question of Takeshima/Todk, 28 KOREA OBSERVER 423, 434 (1997), reprinted from the original Japanese version in CHOSEN KENKYU (STUDY OF KOREA), No. 182, Sept. 1978 (“As the entire islets are rocks, there is almost no sand, let alone soil”).

74 See, e.g., CHOUNG IL CHEE, KOREAN PERSPECTIVES ON OCEAN LAW ISSUES FOR THE 21ST CENTURY 15 (The Hague: Kluwer, 1999) (stating that Dok-Do “is a rocky island and unsuitable for human inhabitation”); Han Key Lee, Korea’s Territorial Rights to Tokdo in History and International Law, 29 KOREA OBSERVER 1, 5 (1998), translated and reprinted from Lee Han-key, Chapter II: Tokdo, in HANGUK UI YONGTO. (KOREA’S TERRITORY) 227–303 (Seoul: Seoul National University Press, 1969) (“These natural features make Tokdo unfit for sustained human habitation”), id. at 35 (“this barren group of islets unfit for sustained human habitation”).

75 JOHNSTON & VALENCIA, supra note 41, at 113.


77 CHOUNG IL CHEE, supra note 74, at 8–9.
of the Sea Convention on June 7, 1996 and promulgated its Law on the Exclusive Economic Zone and the Continental Shelf on July 20, 1996, but the exact extent of the Japanese EEZ remains unclear. A Japanese foundation has published a map that draws 200-n.m. zones around every Japanese islet, no matter how small and uninhabitable, but the Japanese government has never produced an official map showing the full extent of its claims.\(^78\) Japan has apparently argued that Dokdo qualify as “an island and should not be disregarded in a continental shelf delimitation, without indicating the weight to be attributed to [them] in a delimitation.”\(^79\) A 1996 newspaper article quoted a Japanese Foreign Ministry official who requested anonymity as saying that “I think Takeshima actually can sustain some human habitation.”\(^80\) Some other countries, including the United States,\(^81\) have also been expansive in claiming extended maritime space around features that are clearly rocks, and the legitimacy of such claims remains in dispute.\(^82\)

The better approach appears to be the one that the Republic of Korea has tended to accept – that small uninhabited islets should not be able to generate EEZs and continental shelves.\(^83\) If Japan and Korea could agree that Dokdo would not be entitled to generate a continental shelf or EEZ, that agreement might go a long way to reducing the tension over sovereignty of the islets. If the maritime boundary eventually becomes the equidistance line between Korea’s Ullong-do and Japan’s Oki Island, then Dok-Do would be on the Korean side and should not affect the boundary delimitation.

3. **The 1998 Fisheries Agreement**

In 1998, Japan and Korea entered into a new fisheries agreement\(^84\) designed to accommodate their continuing dispute over the area around Dokdo, which intro-

\(^78\) For an example of what Japan’s EEZ would look like if it were claimed around every Japanese islet, see Mark J. Valencia, *Domestic Politics Fuels Northeast Asian Maritime Disputes*, 2 AsiaPacific Issues 43 (April 2000).


\(^81\) See generally Van Dyke, Morgan, and Guzirch, *supra* note 61, at 429–33.

\(^82\) Statement of Robert Smith (U.S. Department of State), at Second Biennial Forum on Joint Marine Policy Research, University of Rhode Island, Oct. 8, 2004 (stating that the United States has taken the same position as Japan regarding the interpretation of Article 121(3) of the Law of the Sea Convention, and pointing out that Dok-Do does now support human habitation – the marine police stationed there by Korea).


duced two “provisional zones” or “intermediate zones” in disputed areas, where fishing vessels from each country can operate, and also included a commitment by both countries to reduce their overall catch. One shared zone is in the Sea of Japan/East Sea near the disputed islets of Dokdo and the other is in the East China Sea south of Cheju Island and just north of the Japan-China Provisional Measure Zone. Third countries do not have rights to fish in these shared zones. The agreement also gave each country a zone that extends 35-n.m. from the coastlines, which is called an EEZ, allowing each country, after the first three years during which historic fishing rights are phased out, to harvest an equal amount from the other’s zone. This agreement has been seen as a “provisional agreement” as called for in Article 74(3) of the Law of the Sea Convention pending final determination of the maritime boundary.85

The 1998 Treaty established a compromise joint-use zone around Dokdo, and carefully regulated how much fish of each species could be caught within the zone, and in the adjacent national-jurisdiction zones. The agreement had the effect of reducing South Korean fishing in Japanese waters, but South Korea did retain access to part of the productive Yamato Bank, where some 1,000 South Korean vessels had been catching about 25,000 metric tons of squid each year (but the Korean catch was to be gradually reduced to the same level as that of the Japanese vessels).

4. The Territorial Sea in the Straits

Japan – which asserts a 12-n.m. territorial sea in general – claims only a three-n.m. territorial sea in the Soya Strait, the Tsugaru Strait, the eastern and western channels of the Tsushima Strait, and the Osumi Strait.86 South Korea has also limited its territorial-sea claim around the land areas adjacent to the Korean Strait to three-n.m., in order to permit unimpeded passage through this area.

5. Agreed Boundaries Between Japan and Korea

Japan and the Republic of Korea entered into two agreements in 1974 – a delimitation of part of their continental shelf boundary87 and the creation of a joint
development zone in disputed territory. The agreed continental shelf boundary is based on a median line which starts at the midpoint between Korea’s Cheju Island and Japan’s Goto Retto and then heads north, moving closer to the Korean coastline because of the Japanese island of Tsushima in the Korean Strait and then veering back away from the Korean coast as it heads north. This line stops abruptly at a spot known as Point 35 because of the claims both countries have for sovereignty over Dokdo and their disagreement over whether it should play a role in determining the boundary delimitation in that region.

6. The Joint Development Zone

In the second agreement, Japan and Korea established a joint development zone in a disputed area south of Cheju Island to permit each country to explore for hydrocarbons. Korea argued that Japan’s “Tori-shima group [of islands], separated by a deep trench on the seabed from the main Japanese islands, was not entitled to claim a continental shelf” and thus that, using the natural-prolongation principle, Korea’s boundary should extend almost to these Japanese islands. Japan disagreed, advocating use of an equidistance line. It took protracted negotiations to develop a joint development zone in the disputed area. Korea ratified the agreement right away in 1974, but Japan’s ratification did not occur until 1978. That same year, Japan and Korea established an agreed framework whereby both countries agreed to engage in joint exploration of the continental shelf by 2028. This joint exploration has been underway, and in August 2002, the Korea National Oil Corporation agreed with the Japan National Oil Corporation to resume cooperation which had begun in 1986.

The natural prolongation theory relied upon by Korea was prominent in 1974, but it has not been utilized by any tribunal adjudicating a maritime boundary during the past two or three decades. It may be, therefore, that when it is time to reexamine this agreement, Korea’s negotiating position will be weakened. Abandoning the natural-prolongation argument would not mean, however, that Korea must give Japan the entire area now covered by the Joint Development Zone, because “[t]he agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Jan. 30, 1974, in Charney & Alexander, supra note 87, at 1073.

90 The small Japanese islets called Danjo Gunto, located on the 32nd parallel just east of 128 degrees latitude, are awkwardly located from Korea’s perspective. “South Korea does not dispute Japan’s ownership of Danjo Gunto, but takes the view that these are Japanese islands standing on South Korea’s continental shelf.” Prescott, supra note 8, at 37.
91 Id. at 66.
92 Yonhap News Agency, South Korea, Japan to Resume Joint Exploration for Oil, Gas Reserves, BBC Monitoring Asia Pacific – Political, Aug. 1, 2002.
northwest side of the zone...corresponds almost exactly to the line of equidistance between Japan and South Korea if the Danjo Gunto are given full effect.” Korea need not allow the tiny and isolated Danjo Gunto islets to have full effect or even any effect in drawing the equidistance line, and the other small southern Japanese islands can also be discounted because their coastlines are limited in relationship to that of the opposite Korean coast. Korea should be entitled, therefore, to a portion—probably between one-fourth and one-third—of the area now covered by the Joint Development Zone.

VII. The Maritime Boundary Between Korea and China

1. China’s Baseline Claims

China’s use of a high-tide elevation about 70-n.m. off Shanghai called Dongdao (Barren Island) is of dubious legitimacy and has been challenged by its neighbors because it is so far from the coast and thus departs dramatically from the general direction of the coastline. China has also used some low-tide elevations as basepoints for its baselines. These basepoints are proper under Article 7(4) of the Law of the Sea Convention only if the low-tide elevations have lighthouses or other permanent fixtures on them. China’s coast south of the Yangtze estuary is deeply indented, but the coastline north of the Yangtze appears to be more regular and the use of baselines there is inconsistent with the requirements of Article 7 of the Law of the Sea Convention. Korean scholars have challenged all the basepoints north of the mouth of the Yangtze as violating the principles established in Articles 7 and 13 of the Law of the Sea Convention. Lark-Jung Choi, Deputy Minister of Korea’s Ministry of Marine Affairs and Fisheries, has said that “Korea must make it clear that [at least three of China’s basepoints] are not an acceptable basis for drawing the straight baseline during the talks for the delimitation of the EEZ between Korea and China.”

93 Prescott, supra note 8, at 39.
94 For a map showing the effect of the Dongdao basepoint, see Choon-ho Park, Prospects for Maritime Policy Coordination in the Asia-Pacific: Agenda for Peace of the Oceans, in Marine Policy, Maritime Security and Ocean Diplomacy in the Asia-Pacific 27 (Dalchoong Kim, Choon-ho Park, Seo-Hang Lee & Jin-Hyun Paik, eds., Yonsei University Institute of East and West Studies, Seoul, 1995).
95 See, e.g., U.S. State Dept. Bureau of Oceans and International Environmental and Scientific Affairs, Straight Baseline Claim (Limits in the Sea No. 117, 1996), at 3 (“Much of China’s coastline does not meet either of the two LOS Convention geographic conditions required for applying straight baselines,” i.e., a deeply indented coastline or a fringe of islands along the coast).
96 See Gab-Yong, Jeong, supra note 28, at 4–9.
97 Choi, supra note 27, at 8.
2. **Bohai Bai**

China has always claimed the large Bohai Bay just below Korea as a historic bay. The distance between the headlands defining the bay is 55-n.m. across,\(^98\) and thus fails to meet the definition of a juridical bay in Article 10(4) of the Law of the Sea Convention (which limits such bays to bodies of water with an entrance point less than 24-n.m. across), but China argues that the small islands scattered across the mouth of the Bay strengthen its claim. These small islands could be viewed as "a fringe of islands" that mask the coast under Article 7(1) of the Law of the Sea Convention, thus justifying the drawing a straight baselines across the mouth of the Bohai. On the other hand, it could be argued that these baselines do not follow "the general direction of the coast" and thus violate Article 7(3) of the Convention. The Republic of Korea understands China’s claim, but has never acknowledged its legitimacy. Japan has raised reservations about the claim. The United States has apparently not objected to China’s historic-bay claim for Bohai Bay.\(^99\)

3. **Delimiting the Boundary**

China has always argued that the “natural prolongation” approach should be used in both the Yellow Sea (West Sea) and the East China Sea, which, according to China’s theory, entitles China to ownership of the entire continental shelf off its coast to a “silt line,” “which divides the sands derived from Korea and the silty sediments that have flowed out from the Hwang Ho and Yangstze Rivers and given name to the Yellow Sea.”\(^100\) This sedimentation apparently “is also reflected in the topography of the seabed, feature by an axial valley two-thirds across the Yellow Sea towards Korea, which divides a smooth gentle slope extending from the Chinese shore from the steep and less regular slope off the Korean coast.”\(^101\) This “silt line” has been drawn on a published map,\(^102\) and it would cover about half of the maritime zone the Republic of Korea would be entitled to if an equidistance line were drawn between its coast and that of China. At times, China has made an even more expansive claim, arguing that it is entitled to all the submerged land

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\(^{98}\) Prescott, supra note 8, at 16.


\(^{100}\) Johnston and Valencia, supra note 41, at 106.


in the East China Sea to the Okinawa Trough, which is just west of Japan’s small southern islands. Under this approach, China’s continental shelf would include most, if not all, of the Japanese-Korean Joint Development Zone, which China has consistently denounced as a violation of its rights. China disputes the western boundaries of all South Korean leases in the Yellow and East China Seas and has also condemned the shared fishing zone Japan and Korea established south of Cheju Island.103

But China has been able to act pragmatically and has set aside its position on natural prolongation in order to enter into a sophisticated fishing agreement with the Republic of Korea. The two countries normalized their diplomatic relationship in 1992, and began discussing fishing issues in 1993. Their conflicting positions came into focus after both countries ratified the Law of the Sea Convention and proclaimed EEZs. These claims overlap, and China’s straight baseline claim, which South Korea has officially protested as incompatible with the Law of the Sea Convention, also has created difficulties.104 As explained above,105 Korea has challenged China’s use of Dongdao (a barren islet about 70-n.m. east of Shanghai) as a basepoint, and also challenges several other basepoints north of Shanghai.106

In 1997–98, the two countries finally agreed: (a) to recognize coastal EEZ areas where each country can exercise exclusive sovereign rights over the resources (the width of this zone varies but averages 60-n.m. from the coastline and provides each country with roughly equal areas);107 (b) to establish a joint fishing area (“Provisional Regulatory Zone”) in the central area where their claimed EEZs overlap (drawn from a hypothetical median line), where they exercise equal rights and manage the species through the Korea-China Joint Fisheries Committee; and (c) to create a transitional area (“Interim Co-management Zone”) extending 20 miles in both directions from the joint fishing area, where the resources were shared for four years, and thereafter became part of each countries’ coastal EEZ, under exclusive coastal state control. They established a Joint Fisheries Commission to recommend measures for conserving and managing the resources. And, very significantly, they agreed to conduct joint surveillance operations – with authorities of both countries physically present on the patrol boats – to monitor and control illegal and indiscriminate fishing activities.

103 Agence France Presse, China Denounces Japan-South Korea Fisheries Pact, Jan. 22, 1999. For different reasons, North Korea also denounced the agreement, calling it a violation of the sovereignty of the Korean nation and a “brutal trample” on international law. Xinhua News Agency, North Korea: DPRK Lashes Out at South Korean-Japanese Fishery Accord, Oct. 7, 1998.

104 Choi, supra note 27, at 8.

105 See supra text accompanying notes 94–97.

106 Choi, supra note 27, at 8.

107 Id. at 6.
This fishing agreement is a significant step forward, and it indicates that China may be willing to abandon its natural-prolongation approach, at least with regard to delimitation of the living resources. Korea’s position has always been that its boundary with China should be drawn with an equidistance line. Article 5(2) of the Korean Exclusive Economic Zone states that the equidistance line should be used if no other agreement can be reached, and MOMAF Deputy Minister Choi has expressed the view that: “Since there is no other factor to affect the principle of equity, the equidistance line seems to be the equitable standard in the EEZ delimitation between Korea and China.”

VIII. The Maritime Boundary Between Japan and China in the East China Sea

China claims that the whole continental shelf of the Yellow Sea belongs to China on the basis of the natural prolongation theory. China utilizes the natural prolongation theory to claim the continental shelf across the East China Sea to its “silt line” or beyond to the Okinawa Trough, and challenges the Joint Development Agreement and the fishing agreement covering the area south of Cheju Island between Korea and Japan as infringing upon its sovereign resources.

The “natural prolongation” approach emerged from the 1969 decision of the ICJ in the North Sea Continental Shelf Cases, but it has not been utilized in decisions rendered during the past two or three decades. The demise of the natural prolongation theory has been explained to be a product of the recognition in the Law of the Sea Convention that coastal states are entitled to 200-n.m. continental shelves even if the sea floor around them does not conform to a geographic definition of a continental shelf. The ICJ explained in the Libya/Malta Case that “since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims.” Prescott explained after the Libya/Malta Case that “the court seemed to decide that natural prolongation was not a matter to be considered when the waters between the states were less than 400 nm wide. It is

108 Id. at 8.
109 See supra text accompanying notes 100–03.
almost as though countries sharing seas less than 400 nm wide would be drawing EEZ boundaries rather than continental shelf boundaries.”

Douglas M. Johnston and Mark J. Valencia have reported that the natural prolongation doctrine “is now somewhat discredited as a basis for continental shelf delimitation.”

Japan argues that the boundary in the East China Sea should be the equidistance or median line between China’s coastline and the small Japanese islands that extend south of Japan’s main islands. The equidistance line is now commonly used as the starting point for delimitation, but it is adjusted generally to provide some rough proportionality between the lengths of the opposite coasts.

It has now become well established that an essential element of a boundary delimitation is the calculation of the relative lengths of the relevant coastlines. If this ratio is not roughly comparable to the ratio of the provisionally-delimited maritime space allocated to each country, then the tribunal will generally make an adjustment to bring the ratios into line with each other. In the *Libya/Malta Case*, for instance, the ICJ started with the median lines between the countries, but then adjusted the line northward through 18° of latitude to take account of the “very marked difference in coastal lengths” between the two countries. The Court then confirmed the appropriateness of this solution by examining the “proportionality” of the length of the coastlines of the two countries and the “equitableness of the result.” In the *Jan Mayen Case*, the ICJ determined that the ratio of the relevant coasts of Jan Mayen (Norway) to Greenland (Denmark) was 1:9, and ruled that this dramatic difference required a departure from reliance on the equidistance line. The final result was perhaps a compromise between an equidistance approach and a proportionality-of-the-coasts approach, with Denmark (Greenland) receiving three times as much maritime space as Norway (Jan Mayen).
Using this approach, the boundary line would be moved eastward from the equidistance line toward Japan’s islands. Therefore, although China’s natural prolongation approach does not have the clout it used to, Japan’s strict equidistance approach is also unsupported by recent arbitral and judicial decisions. A tribunal today would move the line eastward, thus giving China more ocean space than Japan, but perhaps less than the distance to the Okinawa Trough, which is what China is seeking.

This dispute has been heating up and presents the possibility of a major confrontation. In September 2005, China sent five warships, including a guided missile destroyer, to the Chunxiao gas field, which is on China’s side of the equidistance line, which Japan worries may be draining gas from Japan’s side. According to Admiral Lang Ning-li, the recently retired head of Taiwan’s naval intelligence: “It is like the 1930s again, when the Central Pacific became a vital concern to both the United States and Japan, whose navy was expanding. That means there could be conflict between China and Japan, which both see these seas as vital, and can’t share this space.” A few months earlier, Japan had granted rights to the Japanese firm Teikoku Oil Company to test drill for gas and oil in a part of the East China Sea disputed by the two countries, a move that the China Daily said would make conflict between the two nations inevitable.

1. *The Senkakus/Diaoyu Dao Islands*.

These eight uninhabited features in the East China Sea (five islets and three barren rocks) are disputed between China/Taiwan and Japan. Altogether, they have a land area of seven square kilometers, and the largest (Diaoyu Dao/Uotsuri Shima) has an area of 4.3 square kilometers, with two peaks rising to about 1100 feet, but with no anchorages for any but the smallest ships to use for landings. The islets are 170

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(measured in terms of their general direction) of 1:1.31 and the ratio of their water areas of 1:1.09.

1999 Award, paras. 20, 39–43, 117, and 165–68.


120 Id.

121 *Japan’s Move in East China Sea Makes Conflict “Inevitable,”* CHINA DAILY, July 16, 2005.

kilometers from Taiwan and 410 kilometers from Okinawa. The 2,270-meter-deep Okinawa Trough separates these islets from the nearest undisputed Japanese island. Historically, these outcroppings have been used only as navigational aids.

China and Taiwan claim these islets based on discovery by Chinese in 1372, plus they were mentioned in a Chinese text in 1403, and were incorporated into China’s coastal defense system by the Ming Government in 1562. They also explain that fishers from northern Taiwan used the islets as shelters for a long period of time; that the Dowager Empress Tsu Hsi awarded property rights to three of them to a U.S. citizen of Chinese ancestry in 1893 to gather rare and precious medicinal herbs; that the islets were transferred to Japan in the Treaty of Shimonoseki in May 1895 after the 1894–95 Sino-Japanese War (as “islands appertaining or belonging to the said Island of Formosa”) and therefore should have been returned after World War II according to the 1943 Cairo Declaration (which proclaimed that Japan would be required to return all “territories which she has taken by violence and greed”), the 1945 Potsdam Proclamation, and Article 2 of the San Francisco Treaty; and that, prior to 1945, Japan administered the islets through the Taipei Prefecture, not the Okinawa Prefecture.\footnote{Tao Cheng, \textit{The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition}, 14 \textit{Va. J. INT’L L.} 221, 253–60 (1974).} China’s 1992 territorial-sea legislation asserted control over the islets and claims territorial seas around them.

Japan’s claim is based on “discovery” of the islets by a Japanese national (Tatsu-shiro Koga) in 1884, followed by formal incorporation of the islets into Japanese territory by the Japanese Cabinet on January 14, 1895, after the islets were deemed to be “terra nullius.”\footnote{But Japan had refused three earlier applications by the Okinawa Prefecture (in 1885, 1890, and 1893) to incorporate the Senkakus because of concern that such a move might lead to conflict with China. Choon-ho Park, \textit{Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy}, in \textit{East Asia and the Law of the Sea} 33 (Seoul: Seoul National University Press, 1983).} Koga attempted economic activity such as fish and bird-canning and the collection of birds’ feathers and guano between 1896 and his death in 1918, but these activities were not economically successful and no other economic activity has been attempted. The United States administered the islets after World War II and transferred jurisdiction to Japan in 1951, but specified that this action did not affect the determination of sovereignty over the disputed islands.\footnote{See generally Jean-Marc F. Blanchard, \textit{The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands}, \textit{The China Quarterly} 95 (No. 161, March 2000).} Japan has administered the islets from 1895 to 1945 and from 1951 to the present. In June 2005, a flotilla of Taiwanese fishing vessels circled around these islets to protest Japanese restrictions on fishing in the region.

Professor Lee Keun-Gwan has observed that Japan’s claim to the Senkakus/Diaoyu Dao and to Dokdo/Takeshima are both based on an argument that they were \textit{terra nullius}, “discovered” and then “effectively occupied” by Japan, and that
“in both cases the measure of occupation was taken during armed conflicts, that is, the Sino-Japanese War and the Russo-Japanese War respectively in which Japan emerged victorious.” He observed that although “occupation” may sound “neutral on its own,” during the age of imperialism it “became a powerful conceptual tool for the acquisition or aggrandizement of territory by European states” and that this method of acquiring territory “is, quite often, deeply tainted with European expansionism and colonialism.” And, as applied to Japan’s claims to the Senkakus and Dokdo/Takeshima, the doctrines of “discovery” and “occupation” are “a technical or legal camouflage that serves to justify an essentially expansionist and colonialist act on the part of the pre-1945 Japan.”

As explained above, Chinese and Taiwanese scholars have acknowledged that the Daioyu Dao do not qualify under Article 121(3) of the Law of the Sea Convention to generate EEZs and continental shelves, but it is not clear whether Japan accepts that position, and when Taiwan ratified the 1958 Continental Shelf Convention in 1970, it specifically stated that in “determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.” In any event, these tiny islets should not play a role in determining how the maritime boundary in this region should be delimited.

IX. The South China Sea

1. Sovereignty Issues: Who Owns the Spratlys?

China, Taiwan, Vietnam, Malaysia, Brunei, and the Philippines all make claims to some or all of the Spratly Islands and to some or all of the ocean space of the surrounding waters. The most unusual of the claim’s is China’s, which is based on historical data but was brought into focus with the publication of an unusual map in 1947. In that year, the Chinese government (which was then still the Kuomintang or Nationalist Government) published an official map of the archipelagoes of

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127 Id. at 4–5.

128 Id. at 6.

129 See supra text accompanying notes 70–72.


131 These claims are described and analyzed in detail in Valencia, Van Dyke, and Ludwig, supra note 1, at 17–76.
the South China Sea, using 11 interrupted lines to indicate the boundary of the islands, islets, reefs, banks and adjacent waters over which China exercised sovereignty." 132 Two of these lines in the Tonkin Gulf area were later eliminated, 133 and so this configuration has come to be known as the "nine interrupted lines." They swing deep into the South China Sea making a tongue-like configuration. Some commentators view these lines benignly, and describe them simply as a claim to the islets enclosed in the lines, 134 but at least some Chinese view it as a claim to the waters as well. China has not yet claimed an EEZ. It issued a listing of baselines on May 15, 1996 that connected the Paracels, but made no mention of the Spratlys, saying cryptically that “[t]he Government of the People’s Republic of China will announce the remaining baselines of the territorial sea of the People’s Republic of China at another time.” 135 The nature of the claim thus remains shrouded in mystery. Occasionally, however, Chinese statements – and, more importantly, Chinese actions – indicate that China actually claims all the waters and resources within these lines.

In a paper delivered in 1994 by Pan Shiying, a senior research fellow at the Institute for International Technological Economic Studies in Beijing who is thought by some to speak for the People’s Liberation Army – Navy (PLAN), the author characterized this line as making a claim for “historic title” to the area. 136

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133 Pan Shiying, Historic Title, supra note 132; see also Pan Shiying, Nansha Islands, supra note 132, at 23.

134 See Tung-Ming Sun, Policy of the Republic of China Towards the South China Sea, 19 Marine Policy 401, 405 (1995) (the "map, upon which the ROC bases its claim, was mainly used (as indicated by its title) to depict the location of the ROC-claimed Islands in the South China Sea" (emphasis in original); see also Hungdah Chiu, The Legal Regime of Our Nansha Historic Waters, 32:8 Issues & Studies (Chinese Edition) 23 (Aug. 1993); Steven K.T. Yu, On the Legal Status of ROC’s Nansha U-shaped Line: Based upon the Regime of “Historic Waters,” 8:1 Lilun yu Zhengce (Theory and Policy) 96 (Nov. 1993), both cited in Yann-huei Song, The Issue of Historic Waters in the South China Sea Territorial Sea Dispute 34–35 nn. 81 & 82 (paper delivered to the American Enterprise Institute Conference on the South China Sea, Sept. 7–9, 1994).


136 Pan Shiying, Historic Title, supra note 132; see also Pan Shiying, Nansha Islands, supra note 132, at 23.
He defended this claim based on the international law that existed at that time, and noted that no nation protested the line for a number of years after it appeared, and that several scholars have reprinted it. His paper noted that “the application of the interrupted lines, rather than uninterrupted lines make future adjustments possible,” and ultimately recommended some form of joint development of the region.

A second paper delivered by the Taiwanese scholar Yann-huei Song at the same conference similarly defended the historic land claim but did not conclude exactly what the status of the waters within this line should be. He noted that neither the People’s Republic of China (PRC) nor the Taiwan government had ever protested the movement of ships through these waters and stated that “the PRC government has never claimed the waters enclosed in the line as historic waters.” He hinted that China might try to connect baselines between the Spratlys and claim the waters within those baselines as internal waters, with the waters outside being within a claimed EEZ, but he also seemed to understand the difficulties with such a claim.

On May 18, 1995, Chinese Foreign Ministry spokesperson Shen Guofang stated that China’s claim to the Spratlys is not designed to impede freedom of navigation through the area, but he refused to explain how China defined its claims around the islets. Some commentators writing after May 1995 have stated that China has abandoned its previous ambiguous claim to the waters of the South China Sea based on the “nine-interrupted-lines” map, but China’s actual position remains shrouded in ambiguity. China’s historical claim is a weak one, but its persistence in maintaining this claim makes it difficult to delimit the maritime boundaries of the South China Sea.

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137 Yann-huei Song, *The Issue of Historic Waters in the South China Sea Territorial Sea Dispute* (paper delivered to the American Enterprise Institute Conference on the South China Sea, Sept. 7–9, 1994). This paper referred to a January 1948 map official published by the Republic of China’s Ministry of Interior entitled, “Nan-hai-zhu-dao-wei-tzu” (or “Map of Locations of South China Sea Islands), containing the U-shaped broken line. *Id.* at 8. The title of the map would appear to indicate that it was a claim to the island features rather than to the waters and subsoil.


139 Patrick E. Tyler, *China Pledges Safe Passage for All Foreign Ships Around Contested Islands*, N.Y. Times, May 19, 1995, at A5, col. 2 (nat’l ed.). See also Reuters, *China Says Ready to Solve Spratly Dispute by Law*, July 30, 1995 (quoting Shen Guofang as saying that China had always attached great importance to the safety and freedom of navigation through international lanes in the South China Sea, and that there would not be problems in this regard in the future).

2. The Role of Taiwan

Taiwan’s involvement in the South China Sea controversies increases the complexity of these issues. On March 10, 1993, Taiwan adopted “Policy Guidelines for the South China Sea,” which asserted sovereignty over “the Spratly Islands, the Paracel Islands, Macclesfield Bank and the Pratas Islands” and also stated that: “The South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests.”

In April 1995, Taiwan’s Ministry of Foreign Affairs reemphasized this position by saying: “Undoubtedly, our government has sovereignty over the historic U-shaped territory, including the Spratly Islands.” Taiwan now occupies the largest of the Spratly islets – Itu Aba (Tai Ping Dao) – and reportedly has stationed 600 marines there. Taiwan’s activities in the Spratlys as well as its position on the issues have often supported those of China. In fact, it has been reported that the Chinese garrisons in the Spratlys receive fresh water supplies from the Taiwanese troops on Itu Aba.

3. Resolving the Sovereignty Disputes

The key decisions addressing sovereignty disputes over small islets – the Clipperton, Palmas, Minquiers and Ecrehos and Gulf of Fonseca precedents – all focus on “discovery,” and, in particular, on “occupation” of small islets. Although they do not require too much activity when the islet is uninhabitable, they do demand some formal acts and a sufficient presence to let others know of the claim. In the Spratlys, no nation’s claim appears to have been sufficiently strong or unchallengeable to persuade others to keep out of the region. Although China has argued that Western requirements of formal declarations of sovereignty should not apply in Asia, their suggested substitute – long contact with a region – does not appear to

144 Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico), Jan. 28, 1931, 26 Am. J. Int’l L. 390 (1932); Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (Miangas), April 4, 1928, reprinted in 22 Am. J. Int’l L. 867, 909 (1928); The Minquiers and Ecrehos Case (France/United Kingdom), 1953 I.C.J. 47; Gulf of Fonseca Case, supra note 45.
be sufficient because it does not put others on notice that a claim of exclusion has been made. Besides, China has stated several times that it will resolve the South China Sea issues according to international law and the principles in the 1982 United Nations Law of the Sea Convention.

If the historic claims do not resolve the question of ownership, then do the recent occupations of the islets lend weight to any of the claims? France made some minimal attempts to exert physical control over seven of the islets in the 1930s, but it was not until Japan entered the region in August 1938 that anything akin to “effective control” occurred. Japan used Itu Aba, the largest Spratly islet, as a submarine base to intercept shipping in the area. Their installations were abandoned in 1945, and, more recently, the islets have been occupied by others. In the Peace Treaty signed by Japan on September 8, 1951, Japan renounced its rights to the Spratlys, but no recipient was named. Taiwan has effectively controlled Itu Aba from 1946 to 1950 and from 1956 to the present. Vietnam has controlled many Spratly features since 1973. The Philippines has controlled some islets since 1978. Malaysia began controlling features in the southern portion of the area in 1983, and China began its efforts to occupy islets in 1988. In each case, other nations have challenged the occupations. The result has been a crazy-quilt pattern of occupation and an uneasy stalemate. Nevertheless, some of these occupations may at some point ripen into a legitimate entitlement of sovereignty.

Is “contiguity” or geographical proximity relevant here? Malaysia, the Philippines, and even Vietnam argue that they are entitled to some or all of the Spratlys because these islands are near their main land territories. Contiguity was rejected in both the Clipperton and Palmas decisions, and was not a factor in the Minquiers and Ecrehos case, but the argument has a persistent practical appeal. China, of course, thoroughly rejects it.

In summary, international legal principles will not unambiguously resolve the competing sovereignty claims to the Spratlys. All the claims are weak, because the claimants cannot demonstrate continuous and effective occupation, administration, and control, as well as acquiescence by other claimants. Each claimant undoubtedly realizes that if the dispute was presented to a tribunal or arbitrator, it may not ultimately or completely prevail. An independent decision-maker is likely to allocate these tiny islets according to the common legal principles of equity and fairness. In the long run, each claimant might be better served by putting aside the issue of sovereignty over the islets and working with the other claimants to multilaterally develop the resources of the disputed area. Such an approach would

145 See, e.g., Ji Guoxing, *The Spratlys Dispute and Prospects for Settlement* 18 (ISIS, Malaysia, 1992): “To lay claim to islands proximate to one's country contravenes not only international law but also international justice and peace…. If each country acts like that, the world would be in a muddle.”
not formally reject any of the claims, would allow each nation to maintain its legal position, and would also allow the resources to be developed for the benefit of the people of the region.

4. **Boundary Delimitation in the South China Sea**

China, Vietnam, the Philippines, Malaysia, Brunei, Indonesia, and Singapore are parties to the Law of the Sea Convention. As a formal matter, Taiwan does not appear to be eligible to be a party. Many countries have said that they view the Convention as expressing the customary international law that applies to ocean issues, and the ICJ has recognized that the central parts of the Convention are now customary international law. The Convention provides some guidance to resolve the South China Sea disputes, and other principles can be discovered through an examination of state practice.

**Features That Are Submerged at High Tide Cannot Generate Maritime Zones**

This traditional principle of customary international law is confirmed in Article 121 of the Law of the Sea Convention. Claims to maritime zones based on reefs that are submerged at high tide, even if artificial structures have been built on them, are not valid.146

**Do Any of the Spratly Islets Have the Capacity Under Article 121 to Generate EEZs or Continental Shelves?**

The central question that must be addressed before the maritime boundary issues can be unraveled is whether any of the Spratly islets have the capacity to generate an EEZ or continental shelf. Between 25 and 35 of the 80–90 distinct features in the Spratly region are above water at high tide, and these outcroppings qualify as “islands” under Article 121 of the Law of the Sea Convention and appear to be entitled to territorial seas. As explained above,147 however, Article 121(3) says that “[r]ocks which cannot sustain human habitation or an economic life of their own” do not generate EEZs or continental shelves.

Until recent times, the Spratlys were not inhabited except by occasional wandering fishers. Although they were occasionally visited, they had no independent

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146 Article 60(8) of the Law of the Sea Convention states that artificial islands generate no zones. See Jonathan I. Charney, *Central East Asia Maritime Boundaries and the Law of the Sea*, 89 Am. J. Int’l L. 724, 736 (1995): “There is no support [for a claim based on a submerged reef] in the LOS Convention or in general international law.” Article 47(1) of the Law of the Sea Convention does allow dying reefs to be used as archipelagic basepoints, and Article 7(4) allows baselines to be drawn from low-tide elevations if they have lighthouse on them or have received “general international recognition.”

147 See supra text accompanying notes 60–72.
economic life of their own. The language in Article 121(3) appears to require that the relevant “economic life” of features must be “of their own.” Thus an artificial economic life supported by a distant population in order to gain control over an extended maritime zone is not sufficient.

The largest islet, Itu Aba, is 0.43 square kilometer in area. Spratly Island is 0.15 square kilometer and only five others are larger than 0.1 square kilometer – Thitu Island, West York Island, Northeast Cay, Southwest Cay, and Sand Cay. The others are truly small. The highest feature is Namyit Island, at 6.2 meters. Only ten of the islets appear to sustain trees naturally – Itu Aba, Loaita Island, Namyit, Nanshan Island, Northeast Cay, Sand Cay, Southwest Cay, Thitu Island, West York Island, and Sin Cowe. Only a few of the islets have been used for guano exploitation – Spratly Island and Amboyna and Southwest Cays. Itu Aba and Thitu have been used historically as regional bases for fishers from Hainan Island and elsewhere.

In an earlier writing, I drew upon the writings of Gidel to suggest that only islands that have shown the ability to sustain stable human populations of at least 50 persons should be allowed to generate maritime zones, and that the Spratlys do not meet this requirement. Other authors have reached similar conclusions regarding the inability of these islets to sustain human habitation and thus to generate EEZs or continental shelves. More important is State practice. Vietnamese

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151 See, e.g., Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 *Ocean Dev. & Int’l. L.* 64, 69 (1994) (“It is unlikely, however, that the islet [referring to Itu Aba] could ‘sustain human habitation or economic life of [its] own’ and, therefore, while it would generate a territorial sea and a contiguous zone, the application of an EEZ or a continental shelf is less certain under Article 121”). See also Gerardo M.C. Valero, *Spratly Archipelago Disputes*, 18 *Marine Policy* 314, 315 (1994) (“The islands constituting the Spratlys, in and of themselves, are, on the one hand, too small and too barren to independently support permanent human settlements and, on the other, are not distinguished by any significant on-shore natural resource”). Reaching the same result is Michael Bennett, *The People’s Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 *Stanford J. Int’l. L.* 425, 430 (1992) (“The [Spratly] islands have no permanent inhabitants and are too small to sustain permanent, independent settlements”). Quite significant is the statement made by the Legal Adviser for the Philippine Department of Foreign Affairs, who wrote that the “disputed Spratly Islands are mostly coral reefs which allow only sparse growth of mangroves, shrubs, and stunted trees. This area can hardly support human habitation.” Jorge R. Coquia, *Maritime Boundary Problems in the South China Sea*, 24 *U.B.C.L. Rev.* 117, 120 (1990). A consultant for the Crestone Oil Company has characterized the islets as “tiny” and “of virtually no economic value.” Daniel Dzurek, *Boundary and Resources Disputes*
officials now appear to have adopted the view that the Spratly islets cannot generate EEZs or continental shelves. Ambassador Hasjim Djalal of Indonesia has also expressed that view. Although the arguments against allowing any of the Spratlys to generate extended maritime zones seem strong, occasional authors continue to suggest that at least some of the islands can generate zones. And China frequently acts as if it assumes the islets can generate extended zones.

It is most logical and practical to conclude that none of the Spratlys can generate any extended maritime zones, but if agreement cannot be reached on this approach, a fallback position might be to allow the islets to generate a “regional” zone that would be shared and jointly managed. This position would recognize that the Spratlys have been visited and, to some minimal extent, used by the people of the region for centuries, and that it should continue to be viewed as a shared resource.

in the South China Sea, 5 Ocean Y.B. 254, 259, 271 (1985); see also Daniel J. Dzurek, Southeast Asian Offshore Oil Disputes, in Ocean Yearbook 11 at 157, 171 (1994), (where he says the “reefs and islands in the Spratly Islands are minuscule and had no economic importance until the development of the new Law of the Sea . . .”). (Nonetheless Dzurek asserts that Spratly Island is entitled to generate a continental shelf, because the garrisoning of troops there establishes that it “can sustain human habitation.” Id.) An Australian scholar generally sympathetic to the Chinese position has written that “any argument that such islands [as the Spratlys] should . . . have a much wider shelf claim – rather than for example constitute a territorial sea enclave – would be one equally without established precedent or authority.” Jeannette Greenfield, China’s Practice in the Law of the Sea 165 (Oxford: Clarendon Press, 1992).

152 Ho Si Thoang, chair of Petro Vietnam, has been quoted as saying that “by international law a chain of atolls like the Spratlys are not entitled to a 200-nautical mile economic zone.” Dzurek, Offshore Oil Disputes, id. l.c., at 171 (citing Petro Vietnam Official on Spratlys Exploration, Bangkok Post, Inside Indochina (supplement), Nov. 2, 1993, at 2, as transcribed in FBIS, Daily Report: East Asia, Nov. 3, 1993, at 54.) At the First Meeting of the Technical Working Group on Legal Matters in the Indonesian-Canadian workshops on the South China Sea, held in Phuket, Thailand, July 2–5, 1995, the Vietnamese Legal Adviser, Nguyen Qui Binh, told Van Dyke that Vietnam did not think the Spratly islets had the capacity to generate exclusive economic zones or continental shelves. (But in its May 12, 1977 Statement Declaring a Territorial Sea, a Contiguous Zone, a Continental Shelf and an Exclusive Economic Zone, para. 5, Vietnam made a broad claim for all such zones which one commentator has interpreted to include the Spratlies and Paracels as well as its mainland coasts. See Valero, id. at 317 n. 12).


154 See, e.g., Dzurek, Offshore Oil Disputes, supra note 151, at 171; Prescott, Commentary and Map, supra note 148; Victor Prescott, Sharpening the Geographical and Legal Focus on the Potential Regional Conflict in the Spratly Islands 5 (paper presented at the Workshop on the Spratly islands: A Potential Regional Conflict, Institute of Southeast Asian Studies (SEAS, Singapore, December 8–9, 1993); R. Haller-Trost, International Law and the History of the Claims to the Spratly Islands (South China Sea Conference, American Enterprise Institute, Sept. 7–9, 1994); Coquia, supra note 151, at 120, also appears to believe that ownership of the Spratly islets “will enable a claimant state to declare jurisdiction and/or sovereignty over wide areas of the ocean,” even though he acknowledges that the islets “can hardly support human habitation.”
This conclusion has a precedent in the Gulf of Fonseca case, where Honduras, Nicaragua, and El Salvador were recognized as having a "condominium" ownership over the waters and resources of the Gulf of Fonseca, which were characterized as jointly-owned historic waters.

Should Some of the Spratly Features Now Be Characterized as "Artificial Islands," and, If So, What Is Their Legal Status?

Article 60(8) of the Law of the Sea Convention states clearly that artificial islands do not have the capacity to generate EEZs or continental shelves. Some of the current structures built on reefs can only be characterized as "artificial islands." The Chinese occupations of Subi Reef, Johnson South Reef, and Mischief Reef, the Malaysian occupation of Dallas Reef and Investigator Shoal, and the Vietnamese occupations of Vanguard and Prince of Wales Banks, all seem to fit this description. Article 60(8) was designed to discourage nations from building up submerged reefs and low-tide elevations in order to generate extended maritime zones. If it is not interpreted according to its clear language, then we would foresee continued efforts to reclaim submerged features in order to lay claim to open ocean areas.

Are the Spratly Islets That Are Above Water at High Tide Entitled to Generate 12-Nautical-Mile Territorial Seas?

Article 3 of the U.N. Law of the Sea Convention allows "Every State" to establish territorial seas around its land areas "to a limit not exceeding 12 nautical miles," and Article 121 allows every feature that is above water at high tide to generate such a zone. Vietnam declared a 12-n.m. territorial sea around the Spratlys in a 1977 statement and China did so in its 1992 Territorial Sea Law. One commentator has reported that Malaysia has claimed a 12-n.m. territorial sea around Swallow Reef and Amboyna Cay but not around its other claimed features.

Even though the Law of the Sea Convention allows countries to declare 12-n.m. territorial seas around coasts and islands, it does not necessarily follow that a territorial sea of this size is legitimate in all locations and for all purposes. Article 300, entitled "Good faith and abuse of rights," reminds countries that they must not invoke rights under the Convention in a manner that imposes an unacceptable burden on other nations. Examples can be found where states have agreed to establish

155 Gulf of Fonseca Case, supra note 45.
158 Haller-Trost, supra note 154, at 66.
territorial seas of less than 12-n.m. around islands that are on the “wrong” side of a median boundary line. The Venezuelan island of Isla Patos, between Venezuela and Trinidad & Tobago, the Abu Dhabi island of Dayynah, between Abu Dhabi and Qatar, and the Australian islands in the Torres Strait, between Australia and Papua New Guinea, all have territorial seas of only three-n.m. These examples provide a logical precedent for the South China Sea, because these islands, like the Spratlys, are all small and have no permanent civilian population. The islands in the crowded Aegean Sea generate only six-n.m. territorial seas. Hasjim Djalal has observed that the Spratly islets are not entitled to any territorial seas at all, and instead should simply be protected by small “safety zones.” Certainly the claimant parties could agree that the islets that are above water at high tide generate territorial seas of less than 12-n.m., and such an agreement would be consistent with the view that the resources of the region should be shared by the peoples of the region, or possibly by the international community as a whole.

What Continental Shelf Claims Can Be Made by the Claimant States?
The geography of the South China Sea presents an interesting challenge in interpreting and applying Article 76 of the Law of the Sea Convention. If one concludes that the Spratly islets do not have the capacity to generate EEZs or continental shelves, then these zones must be determined by reference to the continental land masses and the larger bordering islands. The continental shelf southeast of Vietnam and northwest of the Sarawak (Malaysia)/Brunei border extends substantially beyond 200-n.m. from their respective coasts. Under Article 76(5), Vietnam and Malaysia would each apparently be allowed to claim the resources on this shelf out to 350-n.m., in the absence of competing claims. Malaysia’s extended continental shelf claim to the north and east and Brunei’s extended continental shelf claim do not appear to be justified, however, because of the East Palawan Trough near the coast. A Philippine claim based on an extended continental shelf also would not be justified because of the deep indentation on the sea floor just west of the main Philippine islands.

What Is the Role of the Continental Shelf Commission?

Article 76 and Annex II of the Law of the Sea Convention establish a 21-member Continental Shelf Commission, which has the responsibility to evaluate claims by coastal nations for shelves extending beyond 200-n.m. Because of the complex formula found in Article 76, it is necessary to have some neutral body evaluate the claims made by nations seeking additional resources. It is not clear, however, what this Commission should do in a situation where the extended claims overlap. Although phrased as “recommendations,” the Commission’s decisions must be respected by the concerned nations. If any of the South China Sea nations were to submit a claim to the Commission, the Commission’s ruling could have an important impact on the ultimate delimitation of boundaries in this region.

What Principles Govern the Delimitation of Maritime Boundaries?

Once the difficult and complex issues identified above are addressed and resolved, it then becomes appropriate to determine how the maritime boundaries in the region should be drawn. Article 6 of the 1958 Convention on the Continental Shelf and Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone adopted the “equidistance principle” as the method for resolving competing claims to surrounding waters. Under this principle, a disputed area is divided along a line equidistant between the countries involved. But the 1982 Law of the Sea Convention carefully avoided referring to “equidistance” as the proper approach, and instead provided in Articles 74(1) and 83(1) a carefully crafted formula that gives only subtle hints regarding how disputes should be resolved:

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

The goal is thus to achieve an “equitable” resolution to boundary disputes, and a variety of principles have been developed to achieve this goal.\(^{162}\)

The “equitable principle” with the most direct relevance to the South China Sea maritime boundary dispute is that islands do not have an equal capacity with land masses to generate maritime zones. Because of this principle, even if one or more of the tiny Spratly islets were deemed to be capable of generating extended maritime zones, they would not command equal strength with an opposing continental area or a larger island. The focus on control of the Spratlys may, therefore, be misdirected.

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\(^{162}\) See, e.g., Van Dyke, Korea’s Maritime Boundaries, supra note 1, at 510–16.
Islands can generate maritime zones, but they do not generate full zones when they are competing directly against continental land areas. This conclusion has been reached consistently by the Court and arbitral tribunals. Although the language of Article 121(3) would appear to dictate the result that the Spratly islets should not be allowed to generate any extended maritime zones, even if they are allowed to do so, their capacity to generate such a zone would be very weak in relation to competing claims from continental or large-island land masses. Because the features in the Spratly group are extremely tiny outcroppings, it is virtually certain that a tribunal would give these features only limited relevance in delimiting maritime boundaries.

**Will High Seas Areas Remain After the Maritime Boundaries Are Delimited, and, If So, How Will This Area Be Governed?**

If the Spratly islets are not permitted to generate extended maritime zones, and if the principles laid out in the Law of the Sea Convention are applied, then an area beyond national jurisdiction will remain in the center of the South China Sea. Under the Law of the Sea Convention, the fishery resources in this zone would be governed by the freedom of the seas principle found in Article 87, as modified by the 1995 Agreement on Straddling and Migratory Stocks.

The seabed mineral and hydrocarbon resources in areas beyond national jurisdiction, if any, which are of more importance to the South China Sea disputes, would apparently be governed by the International Sea-Bed Authority. It is unclear how that body would operate in a semi-enclosed sea such as the South China Sea. Outside powers would certainly need the approval of the International Sea-Bed Authority to explore and exploit sea-bed resources there. But it might also be

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163 1982 U.N. Law of the Sea Convention, supra note 3, art. 121; the I.C.J. ruled in the *Jan Mayen Case*, supra note 21, that Jan Mayen could generate an EEZ and continental shelf even though this 380-square-kilometer barren islet has never sustained a permanent population, and maintains only a scientific station staffed by 25 rotating individuals. 1992 I.C.J. at 38, 69, 73–74, paras. 70, 80.

164 See Van Dyke & Bennett, supra note 150, at 54–64 (discussing Anglo-French Arbitration, supra note 23; *Case Concerning the Continental Shelf (Tunisia/Libya)*, 1982 I.C.J. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, 1984 I.C.J. 246; and *Continental Shelf (Libya/Malta)*, 1985 I.C.J. 13). See also Jonathan I. Charney, *Central East Asia Maritime Boundaries and the Law of the Sea*, 89 Am. J. Int’l L. 724, 741 (1995): “small features distant from the mainland shore usually have a limited impact on the overall maritime delimitations within the 200-nautical-mile EEZ as a result of the application of various techniques for enclaving and discounting these features.”

appropriate to have a regional advisory board to ensure regional involvement in
the decision-making.

A Shared Regional “Common Heritage”?
Although the Convention does not explicitly authorize this approach, it may be
appropriate for the nations of this region to assert a regional claim of ownership
over the resources of the South China Sea beyond areas of national jurisdiction. This
result may be appropriate in light of the unique problem created by the ambiguity
over whether the Spratly islets can generate extended maritime zones. The unusual
1992 decision of the ICJ Chamber in the Gulf of Fonseca Case concluding that
El Salvador, Honduras, and Nicaragua hold undivided interests in the maritime
zones both landward and seaward of the closing line across the Gulf of Fonseca may
provide a useful precedent for a solution to the South China Sea disputes.166

If one accepts the early Chinese contacts with the Spratlys, one has to also recog-
nize that China was in some sense a colonial power over Vietnam and other areas
of this region. Once this colonial domination ended, Vietnam and the other areas
would logically have inherited the sovereign claims made by the colonial master,
just as the Central American republics inherited the claims made by their colonial
master, Spain. But the islets and the maritime space cannot be easily divided,
because China still exists and still claims this region. It may therefore be appropriate
to see the jurisdiction over the islets and the surrounding marine space as shared
between China and Vietnam, as well as the other nations that were dominated by
China in earlier periods.

It has also become increasingly common for countries to establish joint develop-
ment areas in disputed maritime regions, and this approach may be a logical solution
in the Spratly area. Jose de Venecia, a close confidant of the then-President Fidel
Ramos and a leading member of the Philippine Congress, introduced a resolution
proposing a “condominium system: for the whole South China Sea.”167 Further, the
then-Legal Adviser to the Philippine Department of Foreign Affairs has stated that
the marine resources of this region “should be explored, exploited and managed
by all nations jointly for the benefits of all peoples.”168 In August 1995, Taiwan’s
President Lee Teng-hui proposed that the 12 nations and territories with interests
in the region give up their claims to the disputed islets and invest $10 billion to
establish a South China Sea Development Co. to develop the natural resources
cooperatively.169

166 Gulf of Fonseca Case, supra note 45.
167 Coquia, supra note 151, at 125 n. 19 (citing House of Representatives Resolution No. 1010
introduced by Congressman Jose de Venecia).
168 Id. at 125.
169 Kyodo, Lee Urges Joint Venture Plan for South China Sea Works, JAPAN TIMES, Aug. 22, 1995,
at 4.
In 1990, in Singapore, Li Peng, who was then China’s Premier, proposed that the question of sovereignty be set aside and the resources of the South China Sea be jointly developed. It has never been clear what China’s vision of joint development is, but it appears that it involves cooperating in areas where the other Southeast Asian nations have strong claims to ocean resources. In any event, this idea is clearly one worth exploring in more detail.

The Claimant States Have a Duty to Cooperate in Managing the Resources and Protecting the Environment of a Semi-Enclosed Sea

Articles 122 and 123 of the Law of the Sea Convention establish the concept of a ‘semi-enclosed sea’ and require the nations bordering such seas to cooperate with regard to a number of issues. The South China Sea meets the definition of a ‘semi-enclosed sea’ under Article 122, because it consists “entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.” Article 123 provides that the coastal states “shall endeavor, directly or through an appropriate regional organization” to coordinate (a) management, conservation, and exploitation of the living resources, (b) protection and preservation of the marine environment, and (c) scientific research.

X. Conclusion

These unresolved sovereignty and maritime boundary issues create obstacles limiting the ability of the people of East Asia to exploit the resources of their coastal areas. Some disputes concern resources of potential value and some involve matters of substantial national importance related to historical wrongs. They are complex, but are certainly capable of resolution. Because some controversies raise issues that are linked to other disputes, something of a gridlock exists, and not much effort has been expended recently to reach permanent solutions to these disagreements. The peoples of East Asia have reached pragmatic provisional solutions to many of their maritime controversies, and permanent solutions will be found to these maritime boundary disputes when the countries involved perceive that it is in their political and economic interest to resolve them.

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170 At a press conference in Singapore on Aug. 13, 1990, the visiting Chinese Premier Li Peng said that “China is ready to join efforts with Southeast Asian countries to develop the [Spratly] Islands, while putting aside for the time being the question of sovereignty…. Under the proposal, Vietnam, China and the Philippines would withdraw their military units from the islands in favor of joint development of the area’s seabed and marine resources.”

171 For examples of joint developments elsewhere, see Valencia, Van Dyke & Ludwig, supra note 1, at 183–87.

172 See, e.g., Van Dyke, North-East Asian Seas, supra note 1, at 409–17.