

Sharing Disputed Maritime Space in East Asia: Prospects for Regional Maritime Regime Building

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August 16, 2009

Abstract

In East Asia, the existence of islands in the disputed area complicates the task of delimiting maritime boundaries, because "sovereignty" over disputed islands, if granted to the challenger state, would possibly enable the challenger state to claim "sovereign rights" over the continental shelf and/or the exclusive economic zone (EEZ) around the islands. In addition, East Asian maritime issues have become multilateral, rather than purely bilateral, issues. They are interconnected with each other, possibly making bilateral solutions contradictory and conflicting with one another. The danger of conflict escalation at sea looms particularly large during a global shortage of energy and marine resources. Against this backdrop, this paper aims to critically assess extant practices of sharing disputed maritime space in East Asia and the prospect for devising harmonious regional and multilateral solutions for thorny maritime issues.

Prepared for presentation at the International Conference on Institution Building in Asia for Peace and Development, organized by the Asian Peace Science Network, the JICA-Research Institute, and the Research Institute of Economy, Trade and Industry, Tokyo, August 28-29, 2009.

I. Introduction

East Asia is home to many of the world's most vexing territorial disputes. The territories in dispute need not cover the entire soil of a particular state, as in the cases of the two Chinas and the two Koreas, in order to seriously strain interstate relationships. Even small, barely habitable offshore islands can serve as the most persistent and explosive bone of contention. Examples of unresolved island disputes include competing sovereignty claims to the Dokdo/Takeshima Islands in the East Sea/Sea of Japan, the Senkaku/Diaoyu Islands in the East China Sea, the Northern Territories/Kurile Islands in the Northwest Pacific Ocean, the Islands of Sipadan, Sebatik, and Ligitan in the Celebes Sea, and the Paracel and Spratly Islands in the South China Sea.

The energy hungry coastal states in the region all eye the high potentials of oil and gas deposits near disputed islands. They also rely on contested offshore areas to provide a large portion of their marine diets. As has been reported widely, the danger of conflict escalation looms particularly large during a global shortage of energy and marine resources. Yet material concerns are hardly the sole drivers of the island disputes in contemporary East Asia. Most of them also raise questions of national identity and pride, thereby feeding territorial nationalism following the end of ideology.

From an institutionalist point of view, boundary arrangements can increase certainty, reduce transactions costs, and thus facilitate international cooperation. Yet the task of delimiting national boundaries, whether land or maritime, is often time-consuming, requiring strong political will and tireless diplomatic efforts of all neighboring states with conflicting claims. In East Asia, the existence of islands in the disputed area certainly complicates the task of delimiting maritime boundaries, because "sovereignty" over disputed islands, if granted to the challenger state, would possibly enable the challenger state to claim "sovereign rights" over the continental shelf and/or the exclusive economic zone (EEZ) around the islands.

In addition, East Asian maritime issues have become multilateral, rather than purely bilateral, issues. They are interconnected with each other, possibly making bilateral solutions contradictory and conflicting with one another. For instance, interplay occurs between various bilateral fishery relations in East Asia. Korea-Japan fishery relations have implications for Sino-Korean and Sino-Japanese fishery relations because the three states

share the same maritime area and marine resources. Under these circumstances, the chances of bilaterally agreeable boundary delimitation seem slim at best.

As a result, many states have found the regional level of organization to be an appropriate response to the challenges of delimiting maritime boundaries and managing ocean resources (Andresen 1989; Chircop 1989; Haas 1992, 2000; Vander Zwaag and Johnston 1998). Some arrangements have been independent in the sense of being created within a region, while others have operated under the auspices of broader global regimes. The list of substantive issues has been extended to include living and non-living resource management, scientific research, maritime transport, military activities, environmental protection, and more broadly defined regional economic cooperation (Saunders 2001: 3-4). Yet seen in comparative regional perspective, East Asia has the most pronounced “organization gap” in the area of regional maritime cooperation.

Against this backdrop, Section II quickly reviews three prominent island disputes between South Korea and Japan, Japan and China, and China and Vietnam, respectively. Each of these unsettled sovereignty questions is one of the most fundamental barriers to better bilateral relations. Nevertheless, none of the sovereignty issues have completely prevented maritime cooperation from taking place in other areas. Section III examines major aspects of international maritime regimes established by the 1958 Geneva Convention and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Especially the UNCLOS regime contains legal guidelines for mediation and settlement of disputes concerning the territorial sea, contiguous zone, EEZ, and the continental shelf. After summarizing key East Asian states’ maritime baselines and boundary delimitation principles, Section IV critically assesses extant practices of sharing disputed maritime space in East Asia and highlights potential areas of maritime cooperation. Finally, Section V concludes by outlining the ways in which harmonious regional and multilateral solutions can be devised.

II. Island Disputes and Their Implications for Maritime Cooperation in East Asia

The enduring island disputes in East Asia can be characterized in various ways, but four features are particularly important: (1) despite the frequent resort to the past to justify their contemporary claims to contested territory, most disputes originated in colonial times during the late nineteenth and early twentieth centuries, often exacerbated by the arbitrary map-making of colonial powers and exploited by postcolonial nationalists; (2) in contrast to other

parts of the world, few disputes have been formally resolved, and very few target states, whose territorial claim is challenged by revisionist states, recognize the existence of disputes at all, preventing claimant countries from engaging in negotiations; (3) a periodic pattern exists in the iteration of disputes, repeating between initiation, escalation, and de-escalation, if not termination; and (4) nevertheless, recurring crises have rarely increased the levels of escalation and hostility beyond control.¹

The Dokdo/Takeshima issue first emerged in the 1950s when South Korea established its *de facto* control over the islands. In the first half of the 1960s, the island question continued to serve as one of the most contentious bilateral problems, threatening to wreck the conclusion of the South Korea-Japan normalization treaty in its final stage of negotiations. The sovereignty question surfaced again in the late 1970s when the Japanese government proclaimed new exclusive fishing zones in the East Sea/Sea of Japan. After a relatively calm interlude, the sovereignty question flared up again in 1996-1998 when South Korea and Japan both demonstrated unusually hard line territorial and maritime policies. In 2004-05, the island dispute seriously strained the relationship between Seoul and Tokyo, as demonstrated by the controversies over South Korea's Dokdo postage stamps and Japan's designation of "Takeshima Day." The latest flare-up in July 2008 followed Japan's renewed claim to the disputed islands in a new guideline for junior high school teachers and textbook publishers. The conflict between Seoul and Tokyo over the islands is a textbook case of East Asian maritime disputes, in which a chain of responses and counter-responses have led to the present stalemates.

The Senkaku/Diaoyu dispute has unfolded in several distinct rounds of diplomatic clashes in the postwar period. The Chinese had not clearly challenged the Japanese claim to the islands until 1968 when a high potential of oil and gas deposits were found in the vicinity of the islands. The diplomatic spat over the islands intensified when the U.S. agreed to return them to Japan in 1971 along with the Okinawa Islands. This very first dispute in 1968-1971 was followed by four successive rounds of challenge-the-status-quo in 1978, 1990-91, 1996-97, and 2004-05. The dispute over these small and uninhabited islands appears paradoxical. China is the world's most populous country and the third largest in land area. Japan is the world's second largest economy and one of the largest maritime countries. Furthermore, the two East Asian giants have forged closer economic ties since their diplomatic rapprochement in 1972, currently making them one of the most important economic partners for each other.

¹ For more details, see Koo 2009a.

Certainly a pragmatic consideration of national interests would suggest more cooperative behavior. However, there is a huge disconnect between the economic and political relations of China and Japan. The so-called “cold politics and hot economics” has thus become a defining feature of Sino-Japanese relations.

Finally, a number of military and diplomatic skirmishes have marked the South China Sea, but the most important bilateral disputes have taken place between China and Vietnam over the Paracel and Spratly Islands. In the eyes of China and Vietnam, the offshore island disputes have not been an isolated issue from the very beginning. Since its gradual initiation in the 1950s, the Paracel and Spratly dispute has evolved through three violent rounds of clashes in 1974, 1978-79, and 1987-88. In contrast to other East Asian island disputes, military action had been a viable option to resolve the sovereignty issue in the South China Sea. Yet once China and Vietnam normalized both state-to-state and party-to-party relations in 1991, their relationship began to improve with increasing economic and political ties.

As summarized above, disputant states have engaged in varied patterns of diplomatic and military behaviors when dealing with these island disputes. In many cases, one can find examples of the aggressive use of military force and/or intransigent bargaining strategies. From this perspective, the reality in maritime East Asia does not bode well for a joint effort by concerned parties to promote mutual cooperation, as the island disputes continue to serve as potentially explosive bilateral irritants. Yet in other cases, military inaction and accommodative diplomacy are equally evident. In particular, the fishery relationship has served as a catalyst in fostering bilateral cooperation in delimiting, albeit provisionally, maritime space in spite of thorny sovereignty issues. Many states with conflicting maritime boundary claims have thus far chosen to defer delimitation of their maritime boundaries by forming cooperative arrangements in which they jointly develop natural resources in the disputed area. These arrangements have significantly reduced political tensions in the disputed areas, if not resolving the sovereignty question *per se* (Groves 2005: 83).² In the

² Joint development zone (JDZ) either of the continental shelf or for fishing purposes is a popular form of provisional measure throughout the world. In many cases, JDZs are established along sections of a boundary in order to bypass disputed areas. The principles of joint development appear straightforward, but its implementation can be quite complicated, especially when the area in question has not been previously developed. There are significant variations in today's JDZs, but most fall into one of three basic models identified by the British Institute of International and Comparative Law (BIICL) (Groves 2005: 84): (1) each state retains authority to license its own nationals (or other licensees selected by the state) to operate within the joint development zone, with

following two sections, I turn to the further exploration of international maritime regimes and provisional measures to share disputed maritime space between East Asian states.

III. International Legal Foundations for Delimiting Maritime Space

Mare Liberum vs. Mare Clausum

In the history of the law of the sea, the UNCLOS sprang from longtime battles between the concepts of *mare liberum* and *mare clausum*. Sometimes it appeared that *mare liberum* had won the battle. However, the 1945 Truman Proclamation on the Continental Shelf tilted the subtle balance towards *mare clausum*, as the most powerful state in the early postwar period claimed the jurisdiction over the natural resources of the subsoil and seabed of the continental shelf extending from its traditional coastline. In the wake of this development and in light of the growing interest in offshore exploration of hydrocarbon resources, the 1958 Geneva Conventions provided legal foundations for the territorial sea and contiguous zone, the high seas, fishing and conservation of the living resources of the high seas, and the continental shelf. The concept of *mare clausum* culminated in the adoption of UNCLOS in November 1994, significantly reducing the space of high seas (Kim 2004: 17; Donaldson and Williams 2005: 137).

The major innovation in the UNCLOS was the creation of EEZ, which combines sovereign rights to the continental shelf with sovereign rights over the water column beyond the territorial sea. It resulted from a compromise between those who wanted more control over offshore areas and those who wanted to retain as large an area as possible as high seas. According to UNCLOS Article 57, a coastal state can claim an EEZ extending up to 200 nautical miles (nm) from the baseline. Within this zone, the coastal state has “sovereign rights”—as compared to “sovereignty”—to explore, exploit, conserve, and manage the natural resources, whether living or non-living, of the water column, sea floor, and the seabed. A coastal state also has jurisdiction in the EEZ with regard to building and maintaining artificial islands, conducting scientific research, and protecting the marine environment (Article 56(1)). However, a coastal state cannot restrict freedom of navigation within the EEZ, flight above it, or the laying of submarine pipelines or cables through it (Article 58(1)).

provision for compulsory joint ventures between these licensees; (2) a joint authority with licensing and regulatory powers manages development of the resources on behalf of both states; and (3) one state manages development of the resources on behalf of both with the other state’s participation limited to revenue sharing and monitoring.

Article 76(1) of UNCLOS defines a coastal state's continental shelf as "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." Regardless of the physical extent of the margin, state jurisdiction "shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 meter iso-bath, which is a line connecting the depth of 2,500 meters" (Article 76(5)). The rights of the coastal state over the continental shelf are inherently the same as in the EEZ: "sovereign rights for the purpose of exploring it and exploiting its natural resources" (Article 77(1)). Yet these rights "do not affect the legal status of the superjacent waters or of the air space above those waters" (Article 78(1)). Unlike the EEZ, which must be claimed, rights over the continental shelf exist ipso facto and do not need to be declared (Article 77(3)).

In the context of East Asia, the already complex maritime space has become much more complicated since the claimant states began ratifying the UNCLOS in the mid-1990s and then subsequently claimed their respective EEZs and continental shelves. In addition, the adoption of straight baselines for territorial seas and other maritime zones has made the already daunting task of delimiting maritime boundaries much more difficult.

Baselines and Delimitation Lines under the UNCLCS

As stipulated in the UNCLOS, maritime boundaries are measured from two types of baselines. UNCLOS Article 5 defines "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." However, states with the coastline being "deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity" are allowed to employ "straight baselines" as long as the drawing of straight baselines does "not depart to any appreciable extent from the general direction of the coast" (Article 7 (1) and (3)). These guidelines notwithstanding, the letter, if not the spirit, of the provisions for straight baselines is ambiguous at best. This ambiguity has in turn encouraged many states to adopt straight baselines, even where the basic conditions are not met.

On top of this, there has been a constant tension between the “equidistance” approach and the “equitable” principle in the history of the law of the sea. The UNCLOS chose to avoid any clear reference to either principle, thus providing insufficient guidance for delimiting maritime boundaries. UNCLOS Article 15 specifies that in the absence of “historic title or other special circumstances,” a maritime boundary between adjacent states will follow “the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured.” However, this equidistance principle only applies to the delimitation of the 12 nm territorial sea. The equidistance line is not referred to at all in either Articles 74 or 83, which defines delimitation of EEZ and continental shelf, respectively. Instead, they simply state that delimitation “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.” This is a significant departure from Article 6 of the 1958 Geneva Convention, which used the same terminology as UNCLOS Article 15 for maritime boundary delimitation.³ However, the UNCLOS fails to clearly define what constitutes an “equitable solution” in determining maritime boundaries (Kim 2007: 73-6).

IV. Sharing Disputed Maritime Space in East Asia

Baselines and Boundary Delimitation Principles

South Korea The Territorial Sea Act of 1977 adopted straight baselines as well as normal baselines for measuring the breadth of the territorial sea of South Korea. With regard to the validity of the straight baselines of South Korea, none of its neighbors have challenged them except for the area between the mainland Korea and Jeju Island, which lies between the Korea Strait and the northern East China Sea (Park 1983a: 139-42). In August 1996, the South Korean government promulgated the Exclusive Economic Zone Act in accordance with the UNCLOS. The 1996 Act provides “the EEZ boundary shall be established by agreement

³ In many cases, the equidistance line has proven to be inappropriate for establishing a fair and equitable maritime boundary. In the 1969 North Sea Continental Shelf cases, the ICJ discovered that the concave nature of the coastlines of the Netherlands, Germany, and Denmark would leave Germany with only a small patch of maritime space if equidistance lines drawn from the coastlines were applied. In this and other cases, the ICJ found that strict equidistance lines might have distorting effects on delimiting maritime boundaries unless special circumstances such as history, geography, culture, and so forth were not properly considered (Donaldson and Williams 2005: 142).

with the relevant States on the basis of international law.” However, Article 5(2) of the Act indicates that the South Korean government would use a “median line” as a geographical limit in exercising its sovereign rights in the absence of delimitation agreed on with its neighbors. As will be discussed again below, it is not clear whether and to what extent a unilateral median line pending an ultimate delimitation of the EEZ/continental shelf boundary is consistent with the UNCLOS provision of Article 74(3), which remains silent in this regard (Kim 2004: 171-6).

Japan The Japanese Law on the Territorial Sea of 1977 adopted the method of straight baselines along with normal baselines for measuring the breadth of the territorial sea. The 1996 Law on the Exclusive Economic Zone and the Continental Shelf of Japan amending the territorial sea and EEZ under the 1977 Act further extended this practice. Although the 1996 Law is nested within the UNCLOS, the provisions for straight baselines and median lines for boundary delimitation remain highly controversial. Immediately, South Korea lodged a strong protest that Japan’s newly adopted straight baselines could not be applied to fishery relations based on the 1965 bilateral agreement. For South Korea, the Japanese delimitation of EEZ boundaries was not acceptable, either. The new Japanese legislation upholds a unilaterally drawn equidistance line when there is no agreement (Kim 2004: 181-4; Kim 2007: 62-5).⁴ Unmistakably, it sparked off a diplomatic spat with South Korea to which prior notice had not been given. Although the 1965 fishery agreement contained a compulsory arbitration clause, neither side asked for third-party arbitration. The Japanese authorities began arresting South Korean fishing vessels by applying the newly adopted straight baselines and median lines. The dispute had thus gone from bad to worse until the two parties finally concluded a new fishery deal in late 1998.

China Through the 1992 Law on the Territorial Sea and the Contiguous Zone, China confirmed its position on a 12 nm territorial sea, while establishing a contiguous zone. The 1992 legislation employed the method of straight baselines for measuring the breadth of the

⁴ With regard to the delimitation of EEZ, it provides “... where any part of that line [i.e., 200 nm line from the baseline] as measured from the baseline of Japan lies beyond the median line..., the median line (or the line which may be agreed upon between Japan and a foreign state as a substitute for the median lines) shall be substituted for that part of the line” (Quoted in Kim 2004: 183). An identical provision is found in Article 2 of the law on the delimitation of the continental shelf. In the meantime, the provisions of Articles 74(3) and 83 of UNCLOS place primary emphasis on the cooperation and mutual restraints between relevant states in the absence of an agreed boundary.

territorial sea. However, it was not until 1996 that the Chinese government specified its straight baselines by issuing the Declaration on the Baselines of the Territorial Sea of the People's Republic of China. The Chinese declaration sparked off protest from neighboring states. Vietnam has strongly protested against the Chinese straight baselines around Hainan Island and the disputed Paracel Islands. South Korea challenged the legality of some of the Chinese baselines drawn in the Yellow Sea and the East China Sea where South Korea is also a coastal state. Due to local concerns about a potentially negative impact on the Chinese fisheries industries, the Chinese government delayed the promulgation of the Act on the EEZ and the Continental Shelf until June 1998 (Kim 2004: 184-8). With regard to the delimitation, the Act provides equitable principles: "...Conflicting claims regarding the exclusive economic zone and the continental shelf by the People's Republic of China and States with opposite and adjacent coasts shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimitating the areas so claimed" (Quoted in Kim 2004: 187).

Vietnam In response to China's proclamation of straight baselines, Vietnam promulgated a straight baseline system, but has not yet claimed any baselines for its coast on the Gulf of Tonkin. Presumably, the Gulf of Tonkin close to the Vietnamese side is considered Vietnam's historic waters, and there was thus no need for a baseline for its allegedly internal water. However, China does not recognize the Vietnamese claim of historic waters in the Gulf, requiring clear baselines and delimitation lines as well. With respect to delimitation of EEZ in the Gulf of Tonkin, the critical island is Bach Long Vi Island, which lies approximately in the middle line of the gulf. If both China and Vietnam prefer to apply the equidistance principle to the delimitation of the Gulf, then the problem of whether this island should be given a full or partial consideration requires careful management (Zou 2005: 82-3).

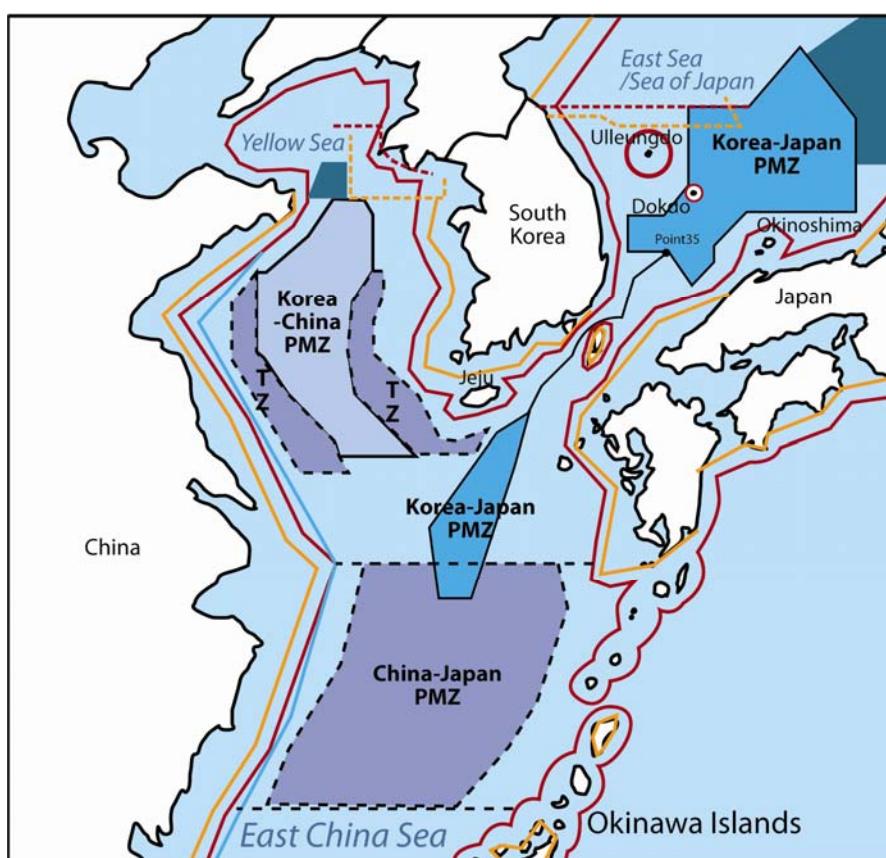
Provisional Measures between South Korea and Japan

Since its inception, the delimitation of maritime space between South Korea and Japan has revolved around two distinct areas: the East China Sea with hydrocarbon potentials and the East Sea/Sea of Japan with thorny fishing and territorial issues.

In 1974, South Korea and Japan signed an agreement between the Republic of Korea and Japan concerning the establishment of boundary in the northern part of the continental shelf adjacent to the two states. The two parties thus agreed on the delimitation in the western

channel of Korea Strait/Tsushima Channel, i.e., the north of the East China Sea, and the south of the East Sea/Sea of Japan on the basis of the equidistant line. More notably, the two states agreed on a JDZ in the northern continental shelf of the East China Sea. Without much diplomatic wordplay, they could agree on applying the equidistance principle in drawing the boundary in the East China Sea. As illustrated in Map 1, however, the boundary line stops at Point 35 leaving vast areas of the East Sea/Sea of Japan undelimited. Presumably, the Dokdo/Takeshima issue was the main reason for the incomplete delimitation (Park 1983c: 131-3; Kim 2004: 190-2).

Map 1. Provisional boundary measures in Northeast Asia



The fishing issues in the East Sea/Sea of Japan have been much more complicated than the joint development in the East China Sea. The 1965 fishery agreement between South Korea and Japan defined 3 nm territorial waters around the Dokdo/Takeshima Islands, the 12 nm exclusive fishing zone, and jointly controlled waters.⁵ Yet neither the Peace Line nor the

⁵ After acrimonious and intermittent negotiations for 14 years, South Korea and Japan finally signed the Treaty on Basic Relations and four other agreements—including the fishery agreement—in

sovereignty over Dokdo/Takeshima was clearly mentioned in the treaty documents.⁶ Therefore, it became a strange form of establishing duplicate fishing rights over the same area and an unofficial, tacit agreement was reached to allow the Japanese fishing on occasion within the 12 nm limit of South Korea (Kajimura 1997: 466-73).

In the 1970s, however, the new global trend towards *mare clausum* outdated the practice under the 1965 fishery agreement that allowed foreign fishing immediately outside a coastal state's 12 nm exclusive fishing zone. As of 1965, few distant-water fishermen of South Korea were technically capable of operating within the coastal and offshore waters of Japan, but in the 1970s the South Korean fishing vessels became much more active in the waters off the Japanese coast with improved power and fishing equipment. The proclamation of 200 nm fishing zone by the Soviet Union in 1976 ignited fishery disputes between South Korea and Japan because the South Korean distant water fishing vessels that had lost their fishing ground in the Soviet zone in the Northwest Pacific began to swamp the coastal areas of Japan's Hokkaido. In response to the Soviet proclamation, Japan proclaimed its own 200 nm exclusive fishing zone in 1977. However, Japan decided not to enforce it against South Korea and China in the waters beyond the 12 nm from its coasts because of the extant fishery agreements, which allowed the freedom of fishing under the flag state jurisdiction in the area beyond 12 nm from the coasts (Park 1983a: 146-7; Kim 2007: 62).

For both parties, the stakes of maritime boundaries were high. Because the existing maritime regime in the East Sea/Sea of Japan favored it, South Korea had no intention to replace the 1965 fishery agreement. Japan's newly announced exclusive fishing zone would eventually no longer provide South Korea with the exemptions allowed under the old maritime and fishing regime. In the 1980s, the so-called "autonomous fishing operation regulation measures" were adopted in the waters around South Korea's Jeju Island and Japan's Kyushu and Hokkaido. Yet this scheme failed to completely keep bilateral fishery disputes at bay, partly because some of the South Korean fishing vessels did not faithfully comply with the autonomous measures.

Tokyo on June 22, 1965.

⁶ On January 18, 1952, upon the impending abolition of the MacArthur Line, the Syngman Rhee government (1948-1960) declared the Peace Line (or Rhee Line) to include the disputed islands within South Korean territory, as well as to delineate the zone of maritime defense and fishing in South Korea's favor. This delimitation ran 60 nm on average from the South Korean coast and 170 nm at its farthest point. The Peace Line effectively excluded Japanese fishermen from some of the richest fishing grounds in the East Sea/Sea of Japan, and was taken by Japan as the equivalent of declaring war against Japan (Park 1983b: 62).

In the 1990s, the local fishermen and their patrons within the ruling Liberal Democratic Party in Japan began to take the initiative for abolishment of the 1965 agreement and establishment of a new fishery agreement with South Korea. In August 1996, the two states opened negotiations aimed at drawing EEZ delimitation lines, but the negotiation process was rocky at best. The Japanese officials proposed separating EEZ delimitation from the revision of the fishery agreement in order to promptly conclude the latter. Also, they suggested setting up a temporary joint fishing zone around Dokdo/Takeshima and shelving the sensitive problem of delimiting each other's EEZs around the islands. After hard negotiations, the two parties reached a new fishery agreement in September 1998 on the basis of modified 35 nm exclusive fishing zones of each state and establishment of joint fishing zones outside the exclusive fishing zones (Bong 2002: 101-2; Kim 2004: 251-3; Kim 2007: 62-3).

Article 9 of the new fishery agreement does not clearly mention the two joint fishing zones, leaving their official names undecided. The South Korean government favors the term "middle zones" or "intermediate zone," whereas the Japanese government prefers the term "provisional zones" probably in order to highlight the fact that the related area is in dispute. An important consideration in shaping the joint fishing zones was the equitable principle. Yet a more important implication of establishing a joint fishing zone in the East Sea/Sea of Japan is whether this provisional arrangement can be considered as a precedent where Dokdo/Takeshima is not used as a base point for either party. An immediate answer to this question appears to favor South Korea's position. As illustrated in Map 1, some part of the median line between Ulleungdo and Dokdo/Takeshima, which could have been argued by Japan in the delimitation negotiation is located to the west of the joint fishing zone, i.e., in South Korea's EEZ, whereas the median line between Dokdo/Takeshima and Japan's Okinoshima is well within the joint fishing zone (Kim 2004: 254-7).

In sum, the new fishery agreement substantially altered the maritime order in the East Sea/Sea of Japan. First, both governments agreed to apply the "coastal state" principle to illegal fishing within their respective EEZs. Concerning the width of the EEZ, South Korea accepted the Japanese delineation of 35 nm from the baseline of territorial waters. To resolve the problem of overlapping EEZs, both South Korea and Japan agreed to provisionally delimit their overlapping EEZs based upon the 1974 maritime boundary agreement. In particular, both sides agreed to set up two joint fishing zones: one in the East Sea/Sea of Japan around Dokdo/Takeshima and the other in the East China Sea near Jeju. Yet the

solution to the Dokdo/Takeshima problem left ample room for confusion and diverse interpretations because the legal status of the joint fishing zone around Dokdo/Takeshima was not clearly defined.

Provisional Measures between Japan and China

In the East China Sea, China argues that the boundary with Japan should be set at the natural prolongation of the continental shelf—that is, along the outer edge of the continental shelf on the northern side of the Okinawa Trough.⁷ China prefers the application of proportionality in relation to Japan because it has a much longer coastal line in the East China Sea. The substantial part of the Japanese coast in the area is formed not by the coasts of Japan proper but by the dispersed chain of Ryukyu Islands. Conversely, Japan argues that the maritime boundary should be determined along the equidistance line between the two states. In the absence of an agreement, Japan unilaterally declared an equidistance line despite China's protest. Japan considers all waters east of this unilaterally proclaimed line as part of Japanese territory.

Since the late 1960s the exploration of seabed hydrocarbon resources in the East China Sea has marked the thorny Sino-Japanese relations. In the wake of the Senkaku/Diaoyu flare-up in 1978, Deng Xiaoping proposed that China and Japan jointly explore the oil and gas deposits near the disputed islands without touching on the sovereignty issue. However, national pride, yearning for energy supply, and ultranationalist public pressures all pushed both the Chinese and Japanese governments to depart from such a conciliatory approach.

Much of the recent tension in the East China Sea dispute between the two states has revolved around Beijing's decision to explore oil and gas in the Chunxiao field, which is located only 4 km inside the Chinese side of the EEZ boundary claimed by Japan. Japan argues that the Chinese exploration will siphon off natural gas resources that might straddle the equidistance line.⁸ Although lying slightly to the north of the maritime area affected by

⁷ The East China Sea is relatively shallow, with water depths of less than 200 meters except in the Okinawa Trough along the Japanese coast. The seabed slopes gently from the Chinese coast until it drops abruptly into the Okinawa Trough whose depth reaches 2,716 meters at its deepest. China holds that the Okinawa Trough, which does not follow the Japanese coast closely, proves that the continental shelves of China and Japan are not connected, and that the Trough serves as the boundary between them ("East China Sea" and "Okinawa Trough" in Wikipedia. http://en.wikipedia.org/wiki/East_China_Sea; http://en.wikipedia.org/wiki/Okinawa_Trough. Accessed 10 February 2009).

⁸ Despite the absence of a mutually agreed delimitation line, China began explorations in the 1980s with a view to developing natural gas in the Xihu Trough, a region slightly under 200 nm from the

the sovereignty dispute, the Chunxiao issue is closely associated with the Senkaku/Diaoyu dispute. Indeed, if Beijing agrees to a maritime boundary over the Chunxiao area that is anything other than the natural prolongation of its continental shelf, it is likely to jeopardize its claim to the disputed islands.⁹

On top of gas and oil exploration, the fishery issue in the East China Sea has further complicated the delimitation of the maritime space. At the turn of the 1990s, Japan began to more openly defend its sovereignty claim to the islands, while continuing to express a desire to separate the territorial issue from bilateral negotiations over fishery accord and EEZ delimitation. As detailed elsewhere in my work, the year 1996 was a difficult period for the Sino-Japanese relationship, as the ultranationalist elements in Japanese politics undermined the previous consensus on good-neighbor diplomacy with China.¹⁰

In 1997, however, the two states managed to prevent political activities from igniting antagonism in the other side. The immediate payoff was a new bilateral fishery agreement signed in November 1997. The new fishery agreement between China and Japan is a provisional agreement for regulating fishery relations on the basis of an exclusive fishing regime pending the ultimate resolution of the sovereignty issue as well as the delimitation of EEZ.

As illustrated in Map 1, the two states agreed on establishing a jointly controlled provisional sea zone in the East China Sea, between 30° 40' and 27° north latitude excluding areas up to 52nm from both states' shores, while continuing talks to establish their respective 200 nm EEZs. The two sides also agreed to mutually set fishing quotas in their future EEZs

nearest point of the China coast baseline. The development of the Chunxiao gas field, which is the flag ship in the group of seven under development in the Xihu Trough, began in August 2003. The Chinese National Offshore Oil Corporation (CNOOC) and the China National Petroleum Corporation (CNPC) entered into a joint venture agreement in 2003 with America's Unocal and Royal Dutch/Shell for oil development. Although these foreign companies suddenly withdrew in 2004 presumably due to Japanese protests, the Chinese went ahead with drilling on their own, beginning in early 2005 ("Xihu Trough" in Wikipedia. http://en.wikipedia.org/wiki/Xihu_Trough. Accessed 10 February 2009).

⁹ On the one hand, the Chinese position seems to find support in the ICJ's ruling in the case concerning the continental shelf (Libya vs. Malta): "If there exists a fundamental discontinuity between the [continental] shelf area adjacent to one Party and the [continental] shelf area adjacent to the other," the Court said, "the boundary should lie along the general line of the fundamental discontinuity" (ICJ Judgment of 3 June 1985; Quoted in Hsiung 2005). On the other hand, the case of the maritime boundary based on a natural prolongation argument seems increasingly untenable and controversial. While boundaries based on seabed geomorphology were in vogue during the 1960s and 1970s, the ICJ has ruled out geomorphology as a relevant factor in boundary delimitation between coasts that are less than 400nm apart. Thus, it appears that Japan may have the stronger case (Donaldson and Williams 2005: 148-9).

¹⁰ See Koo (2009b: 221-5).

and apply the coastal-state principle to control illegal fishing. Yet it was not until February 2000 that the two states reached an agreement on fishing quotas and fishing conditions in each other's EEZ, and on the fishing order in the waters to the north of the provisional sea zone (Bong 2002: 60-6, 90-1; Kim 2004: 273-6; Zou 2005: 99-100).¹¹

Because the provisional measure zone (PMZ) has implications for the delimitation of the EEZs, it was one of the toughest issues in the negotiation of the fishery agreement in 1997. At the beginning Japan proposed a median line as a provisional fishery line, but China opposed it. Instead, Japan proposed the establishment of a PMZ and it was accepted by China. Yet the size of the PMZ continued to be a focal difference between the two sides. Japan preferred a PMZ with a small as possible size, while China preferred a larger PMZ. Japan proposed that the distance from the PMZ to each other's coast should be no less than 100 nm, but China wanted to reduce it to 24 nm. As a compromise, the distance of 52 nm was determined (Zou 2005: 104).

Provisional Measures between South Korea and China

There is no prominent dispute over islands between South Korea and China. However, it would not be at all easy for South Korea and China to agree on each other's valid base points as there are several problematic islets and submerged features situated far from the shores. As both South Korea and China proclaimed EEZs and the continental shelf in the Yellow Sea and in the East China Sea where the width between the nearest coasts of the two states is less than 400 nm, the need for delimitation of EEZ boundaries has arisen.

In 1996, the two parties launched bilateral negotiations for delimiting their EEZs and continental shelves. The negotiation has yet to be completed. The two states have not narrowed their differences over the principle of delimitation. South Korea insists upon the "equidistance-special circumstances" principles for the boundaries in the Yellow Sea, whereas China argues for the application of "equitable" principles. The South Korean government has proposed that an equidistance line should be drawn first in the Yellow Sea and then adjustment and modification should be followed where appropriate. Yet China has refused such a proposal, arguing that the first step in delimiting maritime jurisdiction is to list

¹¹ In comparison with the 1975 Sino-Japanese fishery agreement, which applied only to the water areas along the Chinese coast and within the *de facto* Chinese EEZ, the new agreement applies to the EEZs of both sides (Zou 2005: 101).

and balance all the relevant factors and then the next step of drawing the boundaries is to be followed (Kim 2004: 206).

From South Korea's standpoint, the Chinese argument would seem a tactic for delaying the ultimate delimitation of EEZ and continental shelf in the Yellow Sea and thus for maintaining its own nationals' sometimes-predatory fishing practices as long as possible. Interestingly, China does not always stick to the equitable principles, as illustrated by its adoption of equidistance lines for delimitation in the Bay of Korea with North Korea and in the Gulf of Tonkin with Vietnam. Ironically, South Korea would still have some difficulty in consistently endorsing the equidistance principle because it might undermine its national interest in the East China Sea where it competes for maritime jurisdiction with China and Japan (Park 1983d: 114-6; Kim 2004: 208).¹²

South Korea and China agreed to bring a new fishery agreement into force in June 2001. It shares some key properties with the new South Korea-Japan fishery agreement: (1) both agreements are consistent with the exclusive fishing regime as defined by the UNCLOS; and (2) both are provisional fishery agreements pending the ultimate delimitation of EEZ and continental shelf boundaries. As shown in Map 1, there is no EEZ boundary drawn between South Korea and China and joint fishing zones were established under two different nomenclatures: the one is called the PMZ and the other Transitional Zones (TZ) (Kim 2004:266-7).

Delimitation of the Gulf of Tonkin

In 1887, just after Vietnam became a French colony, a treaty was signed in Beijing stipulating the boundary between China and Tonkin (French Vietnam). The boundary regime had remained stable until the 1970s. But with the end of the Vietnam War and burgeoning Vietnamese-Soviet relations, the issue of boundary delimitation in the Gulf of Tonkin became a major irritant between Beijing and Hanoi. Vietnam insisted that the 1887 treaty line delimited not only land borders but also the sea boundary in the Gulf. For China, this interpretation was not acceptable because such a line would give two thirds of the Gulf to

¹² When compared to the common fishing zone in the Gulf of Tonkin agreed between China and Vietnam in 2000, the Sino-Japanese common fishing zone is unique in that: (1) the latter is provisional whereas the former is permanent; and (2) the Sino-Japanese fishery agreement chose to shelve the thorny sovereignty and EEZ issues, while the areas near the disputed islands became subject to tight and carefully coordinated common fishing zone. In contrast, the former is connected to the maritime boundary delimitation and the fishery issue was one of the critical considerations during the delimitation negotiation (Zou 2005: 104).

Vietnam. Not surprisingly, intermittent talks did not produce any solution (Valencia 1995: 33-7).

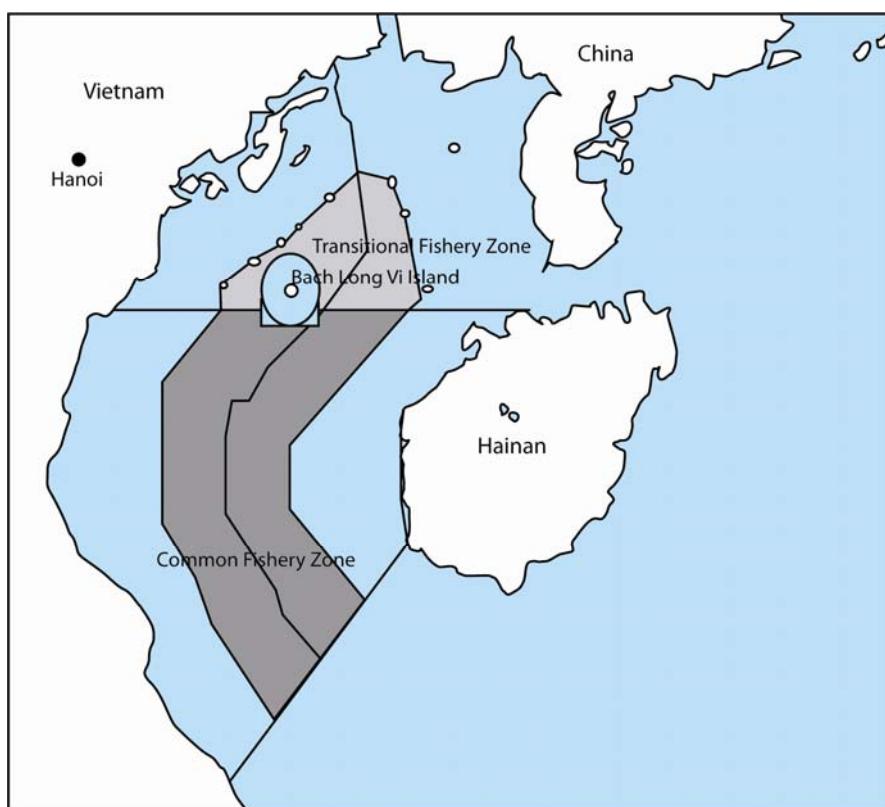
After the adoption of UNCLOS, the dispute over the Gulf of Tonkin became more intensive and complicated. Currently, the control of the maritime space is mainly for the control of natural resources. In particular, the fishing ground in the Gulf has traditionally been important for both states. The first fishery agreement between China and North Vietnam was signed in 1957, leaving the fishing grounds in the middle of the Gulf open to fishermen from both states. Due to the deterioration of the Sino-Vietnamese relationship in the 1970s, the fishery agreement was not amended until the end of 2000 (Zou 2005: 109-10).

With the normalization of their relations, the two states began negotiating the delimitation of the Gulf of Tonkin in the early 1990s. China wanted a package deal including joint fishery management and maritime boundary delimitation of the Gulf. In the early stage of the negotiations, Vietnam refused China's proposal, urging that the boundary delimitation must be resolved first before conservation and utilization of the fisheries can be discussed at the table. It was not until 1998 that Vietnam agreed to discuss the fishery issue in connection with the boundary delimitation in the Gulf. But then Vietnam asserted the principle of natural prolongation to claim its continental shelf in the Gulf. Much to Vietnam's disappointment, this argument was hardly persuasive because China also shares the continental shelf in the Gulf with Vietnam. As a result, the boundary line for the EEZ and the continental shelf was drawn in light of the equidistance principle, although special circumstances existing in history and in law were considered so as to make some adjustments where appropriate (Zou 2005: 78-80, 111-2).

In December 2000, China and Vietnam officially signed the agreement on fishery cooperation—together with the agreement on maritime boundary delimitation—in the Gulf of Tonkin. The agreement applies both to parts of the EEZs and to parts of the adjacent territorial seas of the two states in the Gulf. However, the cooperation does not affect the sovereignty of the two states over their respective territorial seas and other rights and interests enjoyed by them in their respective EEZs. In order to avoid fishery disputes arising from small boats mistakenly entering each other's territorial waters, both parties agreed to establish a buffer zone. As illustrated in Map 2, the two states have established a common fishing zone where both parties would undertake long-term fishery cooperation in the spirit of mutual benefit, and jointly take measures in relation to preservation, management, and sustainable utilization of the living and non-living resources. This common zone is the first such zone

between China and Vietnam and indicates that the fishery cooperation between the two long-time rivals has entered a new era. With respect to the area near Bach Long Vi Island, the two states agreed to establish a transitional fishing zone considering the sensitivity of the island as a base point for delimiting maritime jurisdiction (Sloreby 2002: 5, Tønnesson 2003, Zou 2005: 111-5).¹³

Map 2. Delimitation lines and joint fishing zones in the Gulf of Tonkin



V. The Future of Maritime Regime Building in East Asia

The delimitation of maritime space has evolved as a potentially explosive bone of bilateral contention in East Asia since the adoption of UNCLOS in 1982. Thorny sovereignty issues notwithstanding, however, the fishery relationship has served as a catalyst in fostering, albeit

¹³ When compared to the common fishing zone in the Gulf of Tonkin agreed between China and Vietnam in 2000, the Sino-Japanese common fishing zone is unique in that: (1) the latter is provisional whereas the former is permanent; (2) the Sino-Japanese fishery agreement chose to shelve the thorny sovereignty and EEZ issues, while the areas near the disputed islands became subject to tight and carefully coordinated common fishing zone. In contrast, the former is connected to the maritime boundary delimitation and the fishery issue was one of the most critical considerations during the delimitation negotiation (Zou 2005: 104).

provisionally, bilateral cooperation in maritime East Asia. It is remarkable that, at a time before the legal regime of maritime zones was established, many East Asian states were able to reach an agreement on fishery management in the 1950s and 1960s.

Yet an uncoordinated web of bilateral agreements on fisheries cooperation can adversely affect third parties and, more broadly, the region as a whole. For instance, as the joint fishing zone agreed between Japan and China overlaps with the one between South Korea and Japan in the East China Sea, there arises a need to address this problem not only at the bilateral level but also at the trilateral one. In addition, a regional fishing organization is needed to regulate overfishing problem that has plagued the region over the past decades.

The delimitation of EEZ and the continental shelf boundaries in the region is much more complicated than fishery negotiations because: (1) it is much more than a twosome game; (2) there are territorial disputes over offshore islands; (3) there are disputes on the baselines and base points; (4) the concerned coastal states do not have common positions on the applicable principles on the delimitation, whether “equitable” or “equidistant”; and (5) the relationship between the boundaries of EEZ and those of continental shelf are ambiguously defined at best.¹⁴

As a result, there is a growing need to move beyond bilateralism, which seems to be a dominant strategy at the moment. This does not mean that third-party arbitration is recommended. Rather, it calls for multilateral regionalism. In order for the maritime boundaries to be completed, a common understanding has to be shared across the region. The adoption of a code of conduct as seen in the South China Sea can be a good start to promote mutual understanding, while maintaining the status quo.¹⁵ The next step for the littoral states would be to multilaterally negotiate the principle of base points and their effects, and then provisional lines and zones can be marked on the map. From there, further negotiations can

¹⁴ The UNCLOS provides for dispute settlement procedures in Articles 73(2) and 83(2). The identical paragraphs provide that if no agreement can be reached within a reasonable period of time, the concerned parties shall resort to the procedures provided for in Part XV (Settlement of Dispute). Yet it is unlikely that East Asian states would ask for third-party arbitration to resolve the delimitation issues.

¹⁵ At their summit in Phnom Penh, Cambodia in November 2002, ASEAN and China signed a Declaration on the Conduct of Parties in the South China Sea, with the aim of preventing conflict and promoting cooperation in the region. During the negotiations for the code of conduct, ASEAN wished to prohibit all occupation of new islands and improvements to existing structures. In the face of strong Chinese opposition, however, the negotiating parties simply agreed to exercise self-restraint in the conduct of activities such as inhabiting presently uninhabited islands, reefs, shoals, cays, and other features. Although this declaration did not establish a legally binding code of conduct, it represents a significant step forward (Tønnesson 2003: 55-62).

be conducted for modifying the provisional lines and zones as required by special circumstances existing in history and in law. As Kim (2004) suggests, in light of designing a new regional maritime order, the intermediate option to suspend without prejudice each side's claims in favor of joint development is conceivable, albeit unlikely in the immediate future. Any settlement of the dispute would have to depend on the prior resolution of the disputants' conflicting territorial claims.

Regional maritime regime building has been successful in Europe as seen in reasonably successful and comprehensive multilateral institutions for the Baltic, the North, and the Mediterranean Sea. In sharp contrast, no comprehensive, multilateral maritime regime has been initiated in the East Asian Seas. Compared to Europe, the process of regional maritime dialogue in East Asia is indeed very young. Nevertheless, multilateral maritime regimes are on the verge of forming due to the lowering of political tension in the region, which is in turn allowing increased communication and connectivity between and among maritime officials and actors. Since the 1990s, the pace of network building, both official and unofficial, formal and informal, and bilateral and minilateral, has grown substantially in the area of maritime environment (Valencia 2001: 141-2).

To conclude, there cannot be an effective maritime regime in East Asia without the full participation of all the major states discussed in this study: China, Japan, South Korea, and Vietnam. As for China, it has successfully avoided appearing too dominant or assertive for the past decade. Yet it still has to make additional efforts to alleviate the concerns of its neighbors with respect to its irredentist ambition. As for Japan, it simply lacks the political will and credibility to serve as a leading goose in forming a multilateral maritime regime. South Korea and Vietnam (and ASEAN states more broadly) could assume a key role, perhaps by offering a bridge role between the two regional giants. In East Asia, the perfect storm of opportunity for more effective regional cooperation in the East Asian Seas may have not arrived yet, but winds of consensus are slowly but steadily blowing that promotion of stronger regional maritime cooperation is vital to common prosperity of the region.

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