Sovereign Rivalry between Korea and Japan Fermented by a Distorting Fisheries Agreement

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I. Introduction

The notions of free consent and of good faith and the pacta sunt servanda principle are universally recognized in the Vienna Convention on the Law of Treaties.¹ The Vienna Convention, however, concentrates only on the legal effects and consequences of non-compliance to the accord of a treaty when it prescribes the validity of treaties in part V, section 2, “Invalidity of Treaties”. In most cases, there is the assumption that the accords of a treaty are clearly prescribed and manifestly consented to be bound by the parties.² Arguably, even in those provisions concerning the consent of the parties, it is still reasonable to presume that the real intention of the agreement of an accord is intact and that only some protocol in the expression of consent dealing with issues such as error, fraud and corruption could possibly be flawed. Only in connection with coercion, which clearly deals with the principle of free consent, do we see a definitive position in the Vienna Convention, and then only partially in its two provisions, Article 51 and 52.

In international law, once a treaty is concluded, it binds the subjects even when the will of individual party no longer concurs with the presented legal situation. This essentially is what the principle of pacta sunt servanda is implying. As for the origin and source of this rule, however, there is no simple and clear definition. Various schools of thought have sought to explain it in different ways.³ No matter whether you follow the naturalist theory, stand with extreme positivism, or look for the origin from outside the realm of law⁴, mutual consent of the parties is necessary to constitute a treaty. As a matter of course, a plain and concrete pactum is always the beginning of the corollary to justify the binding force of a treaty.⁵

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⁵ Article 38. Statute of the International Court of Justice, June 26, 1945.
Nevertheless, modern international law doctrine has anticipated that practically, the *pactum* might not be so concrete in so-called, preliminary treaties. Judgments of international courts and tribunals have however accepted the notions of *pactum de negotiando* and *pactum de contrahendo* in particular treaties. In those preliminary treaties the parties should have agreed upon certain points, such as a compliance only to negotiate or an agreement to conclude any prospective agreement. Such mutual consent, no matter how preliminary in nature, and inchoate as any substantive agreement, constitutes a treaty. And such preliminary treaties create due obligations legally bounding the parties; an obligation only to negotiate with a view to concluding a subsequent agreement, or a mutual obligation to conclude a further agreement.

As such, there are a few legal questions which could be raised and answered in relating to the mutual consent principle when completing preliminary agreements.

First question: What would be the legal evaluation if contracting parties failed to reach even a preliminary point of mutual consent in making a treaty? In concluding the 1998 Fisheries Agreement, Korea and Japan failed to reach even the preliminary point of mutual consent and evaded the differences of stance in drafting the treaties, by concealing them with intended ambiguous terms, simply for the purpose of maintaining superficial contractual relations.

Second question: Is a contracting party of a preliminary treaty legally permitted to refuse a fulfillment of obligation in concluding the subsequent agreement with the excuse of an ignorance of law? What would be the reasonable solution in a case where ignorance of the law was mutually discussed and agreed upon between the contracting parties yet later, one party “changes their mind” and no longer wishes to agree with the aforementioned mutually agreed upon ignorance of the law? Should consent to an ignorance of the law

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1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressely recognized by the contesting states;


8 Sonderhoff vs Ministry of Finance *ILR*,44, pp.409, 418.
bind a party to a treaty?

Third question: If a preliminary treaty does not become a definitive agreement, could the treaty still remain valid as a totally different completed agreement?

This paper attempts to introduce these peculiar cases to general academic attention and to review the relevant legal issues of the cases particularly focusing on the 1998 Agreement on Fisheries between Korea and Japan, from the view of the law of the treaties.

II. Island Dispute on the Sovereign Title to Dokdo and the 1998 Fisheries Agreement between Korea and Japan

The 1998 Fisheries Agreement between Korea and Japan

The 1998 Fisheries Agreement between Korea and Japan entered into force on January 22nd 1999.\(^9\)

With the UN Law of the Sea Convention entering into force on November 16\(^{th}\) 1994, Korea and Japan had no choice but to participate in this new charter of ocean law by ratifying this convention as contracting parties early in 1996.\(^{10}\) And as a matter of course, these two nations could no longer find any excuses for refusing to introduce the newly adopted 200 nautical miles Exclusive Economic Zone (EEZ) regime into their surrounding seas.

\(^9\) Negotiations for this Agreement between the two nations began as early as on March 1996. This Agreement was initialized on October 8\(^{th}\) 1998, and concluded on November 28\(^{th}\) 1998, with official signatures at Kagoshima, Japan and entered into force on January 22\(^{nd}\) 1999 with ratifications at Seoul, Korea. For the official texts in Korean and Japanese language of this Agreement, refer to Korea, Ministry of Foreign Affairs and Trade, Treaty Bureau, Tongbuga Haeyangbubryongjip (Treaties and Statutes of Northeast Asian Nations Pertaining to the Law of the Sea), Ilchogak Publishers, 2003.pp.708~735. For the English texts of this Agreement, unofficially translated by the Treaty Bureau, Ministry of Foreign Affairs and Trade, Republic of Korea, refer to;
http://www.kocean.org/sub05/sub01.asp?TableName=b_data2

\(^{10}\) Korea ratified this Convention on 29 January 1996, Japan on 20 June 1996, respectively.
As for the fishing activities in their surrounding seas, Korea and Japan had had a fisheries pact since 1965. However this was nothing more than a *laissez-faire* rule based on the principle of freedom of the High Seas. This obsolete fisheries agreement\(^\text{11}\) was an unequal treaty, which had always unfairly favored Japan.\(^\text{12}\) This treaty lifted and nullified the ban of the Peace Line ("Rhee Line")\(^\text{13}\) which banned Japanese fishermen from entering Korean waters, taking over the role of the MacArthur Line. Upon entering into this 1965 fisheries treaty, a formidable Japanese fishing fleet, far out-numbering and out-powering the sail-fishing boats of Korean fishermen, rushed into Korean waters up to 12 miles from the shore and thoroughly exploited the living resources of the Korean sea area. Annual Japanese catches in the Korean sea area in those years, exceeded far more than three hundred thousand tons\(^\text{14}\).

But the dominance of the Japanese fishermen eroded, when in 1976, the Korean fishing fleet with new boats, equipped with the most advanced fishing gear of the day, swept up into the North Pacific. Unfortunately, and by coincidence at this time, the new Korean ocean fishing fleet suffered early in 1977, as the U.S.S.R. and U.S.A. proclaimed the 200 miles Exclusive Fisheries Zone (EFZ) in their own surrounding seas. As a result, there remained not a patch of the High Seas in the North Pacific for the Korean fishing fleet to work in. Naturally as a result of the U.S.S.R.'s and the U.S.A's actions, the Korean fishing fleet rushed into the Japanese off shore area, still legally open to them up to 12 miles from the shore, in accordance with the 1965 fisheries treaty. As a matter of coincidence, Japan also proclaimed the 200 miles EFZ in 1977, on May 2\textsuperscript{nd}.\(^\text{15}\) However in the application of their EFZ, the Japanese made an exemption to the 200 miles (the Longitude line of 135° East) with regard to the

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\(^{13}\) *Republic of Korea Presidential Proclamation of Sovereignty over Adjacent Seas*, January 18\textsuperscript{th} 1952. (Cabinet Announcement No.14.) For English texts of this Government Declaration, refer to *Diplomatic Manual*, published by Korea, Ministry of Foreign Affairs, 1960. pp.801-802.; For another critical comment on this "Rhee Line", refer to; Dr. Choon-Ho, Park, Ibid. pp.146-47.


\(^{15}\) Law No.31 of 2 May 1977 On Provisional Measures Relating to the Fishing Zone as amended by Law No.83 of 29 November 1977.

nations of the Republic of Korea and the People’s Republic of China. (Fig.-1)

Such self-restraining action on the part of the Japanese Government, was originally promulgated in accordance with the “Japanese Status Quo Policy” aiming to avoid a re-awakening of territorial disputes; namely the Dokdo Island issue with Korea and the Senkaku Islands issue with China. This obsolete policy of status quo, however, was a failure, as Japanese fishermen were incredulous of the situation. This was because as of 1978, almost 60% of coastal states in all of international society had already accepted the 200 miles regime (EEZ or EFZ) as a binding customary rule of international law.

On June 20th 1996, as a precisely coincided action with the ratification of the U.N. Convention on the Law of the Sea, the Japanese Government

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amended its Territorial Sea Law\textsuperscript{17}. In this newly amended municipal law, Japan adopted 165 straight base-lines with 194 reference points, in 15 separated sections, all along its coasts. Previous to this decision, Japan had been the only seafaring state in the Far East, who did not approve of the straight base-line method as the preferable principle of the law of the sea; fearing that it could eventually encourage a tendency of creeping jurisdiction\textsuperscript{18}. In its 1977 Territorial Sea Law\textsuperscript{19}, Japan had adopted only 3 straight base-lines to, surely and conclusively, secure the legal status of Seto Naikai as an “internal water”\textsuperscript{20}. Arguably then, this bold action by the Japanese Government in 1996, to adopt 165 straight base-lines, places Japan in a position whereby they violate the principle of Estoppel, because they had previously severely criticized Korea’s 1978 Territorial Sea Law with regards to the legitimacy of the Korean straight base-lines.\textsuperscript{21}

\textsuperscript{17} Law to partially amend the law on Territorial Sea (Law No.73 of 1996), Official Gazette, Extraordinary Issue No.140, 14 June 1996., p.8.

\textsuperscript{18} The U.S. and Japan had been the two typical developed seafaring countries that refrained from adopting the straight baselines in the world, in spite of the fact that they had some coastlines indented deeply enough and with relevant fringe islands in the immediate vicinity of the mainland. They took this minimalist stance in order to arrest the “creeping jurisdiction claims” of neighboring states. Particularly, the original Japanese stance towards ocean law was extremely conservative. In the 1958 Geneva Conference, Japan was the only Asian country which stuck firmly to the 3 miles territorial sea regime. Even in the 1974 Caracas Conference Japan refused to accept the legal notion of the 200 miles coastal jurisdiction. In 1977, however, Japan changed its stance and adopted the 12 miles territorial sea regime and the 200 miles fishery zone, abruptly but rather quietly. But Japanese residual conservatism and the fear of creeping claims to jurisdiction to ever wider areas of adjacent waters by neighboring countries made Japan very reluctant to employ straight baselines in the calculation of its territorial sea. In the 1977 legislation, Japan used only three straight baselines at Kwanmon and around Shikoku to define the inland sea of Seto Naikai.


\textsuperscript{20} Japan was successful not only in abandoning its stubborn conservative stance sticking to the 3 mile regime, but also to make it a fait accompli that the inland sea of Seto Naikai has the status of internal water, with this law. Kim, Young-Koo, op.cit., p.78.

\textsuperscript{21} During the negotiation of the fisheries treaty between Korea and Japan in early 1960s, steep compromise was recorded after very strong arguments relating to drawing straight baselines for the Exclusive Fisheries Jurisdiction Zone around Cheju Island. This compromise of 1965 with regard to Cheju Island’s baselines, was faithfully respected in enacting Korean Territorial Sea Act in 1977, and its Enforcement Decree in 1978.


Should it not still be protected, the confidence and good-faith of Korea towards the articulated rationale of clearly and unequivocally announced stance in the part of Japan relating to the ocean law system, like the breadth of the territorial sea or the straight baseline method? Does not this Japanese minimalist stance once firmly emphasized to induce such compromise constitute an Estoppel?

Kim, Young-Koo, op.cit., p.86.
Further more, Japan’s coastline in many locations does not meet the legal and geographical conditions as defined in the LOS Convention required for applying straight baselines. For the most part, the waters enclosed by the new Japanese straight baselines, do not have the close relationship with the land, but rather reflect the characteristics of the territorial sea or High Seas. In these areas it would be appropriate to use the normal baseline, the low-water mark.\(^{22}\)

On the grounds of this new municipal law, on January 1\(^{\text{st}}\) 1997, Japan began to capture Korean fishing boats in the “internal waters” delineated with the exaggerated Japanese straight baselines, which were obviously High Seas areas beyond 12 miles from the former normal baselines.\(^{23}\)

All those actions attempted hastily by the Japanese Government were solely designed to soothe the dissenting Japanese fishermen. In late 1997, the tensions between the two nations in the troubled waters culminated to the point of crisis. The only remedy for this situation seemed to be the immediate introduction of the EEZ regime, a sustainable exploiting system managing and conserving the living resources of this troubled waters.

Making things much worse, however, is the fact that Korea and Japan have long had a territorial dispute competing for the sovereign title of a forlorn rock islet –Dokdo /Takeshima- in the middle of the Sea of Japan/East Sea.\(^{24}\)

Without settling this historically deep rooted territorial dispute, any delineation of maritime jurisdiction boundary could not be feasible. And it is clear that prior

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\(^{22}\) Limits in the Seas, No.120. Straight Baselines and Territorial Sea Claims; Japan.(April 30, 1998) U.S. Department of State Bureau of Ocean an International Environmental and Scientific Affairs, p.5.

\(^{23}\) Interestingly enough, on August 15th 1997, a Japanese district court turned down the appeal of prosecution in the case of violation of the Foreign Fisheries Regulation Law by the captured Korean fishing boat, No.909 Daesung-Ho, on the grounds that treaties concluded by Japan and established laws of nations shall be not only faithfully observed but also accepted as having a superior status to that of Japanese municipal law.


Nevertheless, the Japanese Constitution, Article 98, para. 1 strongly implies that Japanese municipal law can not override an internationally agreed agreement. Anyway, the judgment of this district court was eventually deserted by the High Court of Nagasaki the next year.


\(^{24}\) Dokdo (known also as “Liancourt Rocks”, or “Takeshima” in Japan) are forlorn rocky islets, with a land area of 0.187 square kilometers. These islets are located 87 kilometers (about 47.4 nautical miles) from Ullung-Do (known as “Dagelet”), a prominent Korean island, in the middle of the East Sea/Sea of Japan.

to the delimitation of a mutually consented EEZ boundary, no introduction of the EEZ regime could be implemented in this troubled sea area. In other words, the 1998 Agreement on Fisheries between Korea and Japan could have been properly made and done, only after settling the island dispute and completing the mutually consented delimitation of maritime jurisdiction in the surrounding seas including the Sea of Japan/East Sea.

Settling the island dispute, however, particularly as far as this historically deep rooted issue of Dokdo Island dispute is concerned, is obviously a formidable task which could never be solved quickly. Consequently completing the delimitation of the EEZ boundary in the Sea of Japan/East Sea between Korea and Japan seemed an almost impossible job to negotiators of either party at that time. So instead, the representatives of the two governments seemed to evade the aforementioned logical prerequisites in introducing the EEZ regime, in the course of negotiating and drafting the treaty.  

They did not settle the island dispute and did not have any mutually consented boundary line of the EEZ in the Sea of Japan/East Sea when they made the 1998 fisheries agreement. They tried to enter into a provisional arrangement of a practical nature, instead. Generally speaking, their approach to make the fisheries agreement with provisional properties seemed quite normal, thus far. States unable to reach agreements easily on maritime boundary, may decide to establish provisionally, zones in all or part of the areas where their EEZs overlap; in which fishery resources are to be jointly exploited and managed. Without such joint exploitation zones, unilateral fishing activities in such grey area cannot be properly regulated and eventually encourage the

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25 It was the Japanese that originally insisted on evading all those formidable legal prerequisites; looking to come to a genuinely provisional arrangement just for managing the fisheries issue by setting aside the sovereign title competition for Dokdo/Takeshima Island since late 1995. Korea branded this proposal as an outrageous idea. Korea was so reluctant to accept this proposal that they did not even try to scrutinize the legal validity of this suggestion. But on June 23rd 1996, at the Korea-Japan Summit meeting in Cheju Island Korea, the head of the Korean Government, President Kim, Young-Sam accepted this idea abruptly forced by a substantial diplomatic burden. The diplomatic onus pressing President Kim, came from his emotional statement towards the then Prime Minister of Japan, Mr. Hashi Moto. President Kim statement that he would “teach him the basic code of conduct” was in response to Mr. Hashi Moto’s declaration that “Japan will promulgate its 200 miles EEZ from Takeshima”. This heated diplomatic environment eventually drove President Kim to yield to the persistent Japanese “suggestion”, to abandon the original Korean Government’s stance, “delimitation first, fisheries pact later”. So precisely speaking, it was not the representatives, but the Korean President himself that decided to abandon the logical prerequisites in making this fishery treaty.


26 Article 15., Annex Ⅰ, Para. 1. 1998 Agreement on Fisheries between Korea and Japan., : Article 74, Para. 3., 1982 U.N. Law of the Sea Convention,
over-exploitation of the living resources.\textsuperscript{27}

The contracting parties’ concerns in concluding the provisional fisheries agreement in a rather hasty fashion, however, were far more keen and desperate than just the prevention of the eventual over-exploitation of the living resources in the disputed area. In particular, the practical and immediate concern of Korea, thoroughly brain-washed with the Japanese “worst case scenario”, was to prevent possible physical collisions in the East Sea/Sea of Japan between the fishermen of both countries. Japan, by unilaterally abrogating the 1965 fisheries pact with Korea on January 22\textsuperscript{nd} 1998, eventually gave Korea a one year time limit for entering into a new fisheries pact with Japan. Japan threatened Korea with a worst case scenario, arguing that the Dokdo/Takeshima Island dispute could turn out to be an international crisis which would inevitably lead to international judicial procedures. The Japanese pointed to possibility of physical collisions between the fishermen of both countries, as a sure consequence of Korea’s failure to enter into consecutive treaty with Japan within the “one year” time limit. This was the rather desperate and hasty circumstances into which this provisional fisheries agreement was concluded; with a faithful pursuance of Japan’s strong “suggestion” that dealing with the fisheries agreement as separated from the sovereign jurisdiction matter in relating to Dokdo Island Issue, was just a technicality. The new Agreement on Fisheries entered into force on January 22\textsuperscript{nd} 1999, exactly one year to the day after Japan unilaterally announced the abrogation of the old fisheries treaty.

\textbf{Island Dispute on the Sovereign Title of Dokdo Island}

Practically from the outset, the prime issue at stake in the 1998 Fisheries Agreement between Korea and Japan was the sovereign title to the forlorn rock islets, Dokdo/Takeshima (Liancourt Rocks), rather than the issue of introducing the 200 miles EEZ regime managing and preserving the living resources in the troubled waters of the East Sea/ Sea of Japan.

As for the sovereign title of the forlorn rock islets, Dokdo Island (Liancourt Rocks), Japan has established persistent, but not so persuasive, legal theories in asserting sovereign title to the islets with inadequate, insufficient

historical records and evidence. In contrast, the Korean ability to refute each of the Japanese contentious points seems to be fairly well organized with clear legal reasoning, thus far.

During the Japanese colonial rule, Korea was not in a position to exercise effective control over this island. However, Japanese colonial control over the concerned islands had never been legally recognized as an effective occupation, but only as a militarily sustained “belligerent occupation”. Therefore any Japanese legal title over Dokdo/Takeshima Island to be renounced, on the occasion at the end of the Second World War, had not been constituted \textit{ab initio}.\(^{28}\)

As soon as the belligerent Japanese occupation ended with Japan’s defeat in the Second World War, Korea immediately resumed an impeccable sovereign control over this island.\(^{29}\) On June 22\(^{nd}\) 1965, in exchanging


\(^{29}\) ① On September 2nd 1945, the day of Japanese unconditional surrender, Japanese control over all Korean territory including control over Liancourt Rock/Dokdo, was explicitly expelled by the occupying Commander, U.S. General MacArthur.

② As early as 1946 and even before it was inaugurated as an independent republic, Korea asserted effective control over this island and the sea adjacent to it, by taking advantage of the MacArthur Line. Korea seized 104 Japanese fishing boats and arrested 1,252 fishermen in the sea area adjacent to Dokdo, west of the MacArthur Line, in the period from 1946 to 1952.

③ On August 16th 1947, a Korean patrol ship, named the “Dae-Jon Ho” visited this forlorn islet with a scientific investigation team on board, intent on exploring Ullung Island and Dokdo. The science research group was dispatched by the Korea Alpine Society. They landed and executed about 2 weeks’ of scientific research investigation on Dokdo and Ulleungdo. This was the beginning of 4 scientific research investigations dispatched by Korea to these islands until 1981. As a display of effective control over Dokdo, it seems suffice that even a single visit by a government vessel and the landing of groups of science research teams to this islet provide evidence for the continued and peaceful exercise of Korean state authority.

④ On September 16th 1947, the U.S Air Force under the authority of Supreme Command for the Allied Powers (SCAP) stationed in Japan, designated Dokdo as a Training Bombing Range. Apparently, this military decision was based on a simple consideration that this island was absolutely uninhabited, located far from the coast. This innocent but erroneous military judgment could never be construed as any indication of the legal stance of SCAP that this island belonged to Japan not to Korea, as illicitly asserted by Japan. The U.S Air Force executed test bombing operations over the designated Training Bombing Range three times during the period from 1947 to 1952. Among these bombing operations, the bombing incidence of June 8th 1948 claimed 16 casualties, heavily wounding 6 Korean fishermen, with 23 Korean fishing boats destroyed. The U.S. Government indemnified a stingy compensation for the injuries, loss of lives and property damages. There was another bombing incidence on September 15th 1952. The U.S. Government did not seem to give any full-fledged formal apology to Korean fishermen or to the newly inaugurated Government of the Republic of Korea in connection with such erroneous military bombing incidences that claimed so many lives and caused so much damage. But at least they admitted their responsibilities and accepted the Korean Note Verbale, asserting Dokdo as part of Korean territory, and requesting the U.S. Government to take necessary steps in order to prevent any recurrence of such incidences. Eventually the bombing range designation was withdrawn by the U.S. Government.
diplomatic notes, the Japanese Government accepted the Korean Government’s stance that “[t]here is no sovereign disputes pertaining to Dokdo, and no Dokdo issue shall be addressed in any form in the bi-lateral agreements between Korea and Japan”. 30 The Korean Government had earned this meaningful

These tragic incidents, at least clarified a couple of meaningful legal points.
First point: These incidents prove that well before the inauguration of the Korean Government on August 15th 1948, Dokdo had been occupied, and controlled by Korean people continuously and peacefully.
Second point: Korean assertion of sovereign title to Dokdo was never denied, challenged or amended by SCAP or the United States Military Government in Korea at any time during these unfortunate incidents. The United States Federal Government which should have reported all those proceedings by the U.S. Military Government in Korea and SCAP in Japan, indemnifying due compensations and accepting the responsibilities to the government of Republic of Korea, in relating to the tragic incidents from the erroneous U.S. Air Force bombing, gave a full recognition to the Republic of Korea on January 1st, 1949, by issuing the following statement:

On December 12. 1948, the United Nations General Assembly adopted a resolution approving the conclusions of the report of the United Nations Temporary Commission on Korea…declaring that …. there has been established a lawful government, the Government of the Republic of Korea, having effective control and jurisdiction over that part of Korea,…which has been recognized as the only legal government in Korea ….

It was on the basis of that U.N. resolution that the U.S. Government promptly thereafter extended full recognition to the Government of Republic of Korea…


It seems a natural matter of course that such U.S. Federal Government’s full recognition of the Republic of Korea, should include the recognition to the exclusive title of the Government of the Republic of Korea to control Dokdo, the spot of the tragic incidents.

5 On August 15th 1948, more than 3 years before the entry into force of the San Francisco Peace Treaty, the Government of the Republic of Korea was inaugurated. Effective at midnight this day, the United States Military Government in Korea ceased to exist and the Government of the Republic of Korea took over the functions of Government. All functions of government authority, such as exercising the exclusive control over the territory including the appertaining islands were transferred to the Government of the Republic of Korea from the American military government. Reminded of the fact that Japanese control over this islet had been completely and explicitly expelled by the occupying Commander on September 2nd 1945, and the fact that Korea had exercised effective control on this islet ever since then, there is no reason to exclude Dokdo from the legitimate land territory subjected to the effect of transfer of government function. In other words, on the day of the inauguration of the Republic of Korea, Korea’s impeccable sovereign control over Dokdo was reaffirmed and officially resumed.

6 On January 18th 1952, just a few months before the entry into force of the San Francisco Peace Treaty, the Government of the Republic of Korea promulgated the “Presidential Proclamation of Sovereignty over Adjacent Seas” (Peace Line or “Rhee Line” Declaration). Dokdo was included within these lines. This Korean action could be legally deemed as an explicit asserting of sovereign control over Dokdo Island, towards the international society. Such Korean assertion of sovereign title over Dokdo was not denied or challenged by any nations except Japan.


acquiescence through a painful ordeal of confrontation with the Japanese demanding that Korea either abandon their sovereign title to Dokdo or accept an 8 hundred million dollar “claim-fund” from the Japanese. It would be safe to say that the Korean sovereign title to Dokdo, at stake at the time was defended owing to the ability of then President of Korea, Mr. Chung-Hee Park to fulfill the prime responsibility as a supreme leader of the nation to defend national integrity, at the price of immediate political interests.

Perhaps this discernment and sense of responsibility exercised by the late President Park, could be an impressive contrast to the recklessness committed by President Young-Sam Kim who accepted Japan’s technical “suggestion” of dealing the fisheries matters separately from the sovereign disputes of Dokdo Island, in making the 1998 Fisheries Agreement without due scrutiny. Also there is the astuteness demonstrated by President Dae-Joong Kim who expedited the pending procedures to make this fisheries agreement with Japan, by blindfolding and taking advantage of the former President’s fatal mistake, only to propel his own ambitious political goals, in declaring “the Partnership with Japan.”

31 On February 15th 1952, a bi-lateral talks to normalize the diplomatic relations between Korea and Japan had begun. This Korea-Japan Normalization Talks continued for about 13 years with no tangible results until Korean Government decided to accept a few impudent and unreasonable conditions insisted by Japanese side and make the unequal treaty, 1965 Fisheries Agreement along with the problematic 1965 Treaty on Basic Relations between Korea and Japan. On June 22nd 1965, in spite of the obstinate, strong protest of the opposition party, and suppressing angry student demonstration by mobilizing the martial and police force, Korean Government signed these two treaties. One of the apparent reasons why Korean Government forced to propel concluding the endlessly dragged bi-lateral talks with Japan by accepting the unequal, unreasonable treaties was to obtain “the claim-funds” of 8 hundred million dollar from Japan For over-all arguments about “compensation fund”, refer to; Kenichi Takagi, “Rethinking Japan’s Postwar Compensation: Voices of Victims”, Chapter One: Arguments on Postwar Compensation. http://www.global-alliance.net/SFPT/Takagi

32 Kim, Young-Koo, Youngtow. Ijkwoniumye Wyikee (The Korean Territorial Sovereignty to Dokdo Island at Crisis), Dasom Publishing Co. 2006. p.22.


34 In early February 1998, for the newly elected President, Mr. Dae-Joong Kim, the political situation was worse than ever to realize his ambitious political goal of declaring a “Partnership with Japan.” He was shrewdly sensible enough to acknowledge that something was wrong with the provisional accords thus far concluded by the former government in Korea-Japan fisheries negotiation at the time. He wanted a quick solution to the problems associated with the fisheries agreement. President Kim found an ally in Dr. Choon-Ho Park, Judge of the International Tribunal for the Law of the Sea. As “an official member of the Consultation Committee for the Ministry of Maritime Affairs and Fisheries”. Judge Park assured and reassured the government that “in dealing [with] the fisheries matter separated from the sovereign dispute of Dokdo, this fisheries treaty has nothing to do with Korean territorial sovereignty of Dokdo, what so ever.” Dr. Park’s assurance encouraged Korean scholars to begin alleging the surprising and strange theory as that the fisheries jurisdiction should always, as a legal principle, be separated from the regime of
With such a meaningful record of Japanese Government's acquiescence, Korea had managed to maintain exclusive territorial control over these islets until this sovereignty issue was put again at stake on the occasion of signing the 1998 Fisheries Agreement.

Figure 2: Two Provisionally Arranged Zones

territorial sovereignty of the islets or rocks located in the common fisheries zone. Under the guarantee of the international judge’s assurance, this treaty was initialized on October 8th 1998, signed on November 10th 1998, and ratified on January 22nd 1999, with no interruption, in an expedited manner.


III. Intended Ambiguity in the Accord of Provisionally Arranged Zone in East China Sea

The contracting parties of the 1998 Agreement on Fisheries, Korea and Japan, agreed to make two provisionally arranged zones in the area where their EEZs overlap, one in the middle of the East Sea/Sea of Japan\textsuperscript{36}, another in the East China Sea, below Cheju Island, Korea\textsuperscript{37}. (Fig.-2)

Article 9 Para. 2 of the 1998 Fisheries Agreement demarcated the Provisionally Arranged Zone in the East China Sea\textsuperscript{38} (Fig.-3)

![Map of Provisionally Arranged Zone in East China Sea](image)

*Figure 3: Provisionally Arranged Zone in East China Sea*

Actually this provisionally arranged zone is defined with a curious and

\begin{itemize}
\item[36] 1999 Agreement on Fisheries between Korea and Japan, Article 9, Para. 1.
\item[37] 1999 Agreement on Fisheries between Korea and Japan, Article 9, Para. 2
\item[38] Article 9 Para. 2
\end{itemize}

Of the zone surrounded by the following lines, provisions of Annex 1, Paragraph 3 shall be applied to the zone north of the southernmost parallel of the exclusive economic zone of the Republic of Korea.
problematic modifying clause, like, “the zone north of the southernmost parallel of the exclusive economic zone of the Republic of Korea.” This point is not nearly clear enough as an expression of treaty provision. Why didn’t they, the drafters of the treaty delineate the southern limit of the zone with a concrete and plain parallel line? The southernmost land territory of Korea is Mara Island, which is located 2.8 nautical miles south from Cheju Island (Quelpart). So the southernmost parallel of the exclusive economic zone of the Republic of Korea shall be the parallel of 29° 53’ Northern Latitude. If both contracting parties agreed to this interpretation, the vagueness of the treaty provision might be tolerated. But from the outset of entry into force of this treaty, Korea has insisted this shall be the parallel of 29° 53’ Northern Latitude\(^{39}\), while Japan has marked the southern limit of the zone with the line of 30°43’50” Northern Latitude, in official charts\(^{40}\). (Fig.-4)

![Figure 4: Korean assertion vs Japanese assertion](image)

Figure 4: Korean assertion vs Japanese assertion

Obviously there was no mutual consent with this matter between Korea and Japan. They did not reserve the elaboration of this matter in the form of a

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\(^{39}\) Chart No.836, *Korea to Taiwan*, Published Dec. 1999 by the National Oceanographic Research Institute, Ministry of Maritime Affairs and Fisheries, Republic of Korea.

\(^{40}\) Fishery Chart No.210, *Nagasaki to Xiamen*, Published in Tokyo, March 18\(^{th}\) 1999 by the Maritime Safety Agency, Japan.
preliminary agreement to be concluded in further agreement or an agreement to be negotiated further in detail. Only for the purpose of maintaining some form of superficial contractual arrangement, Korea and Japan just gave up to arrive even at the preliminary point of mutual consent. The differences of stance in delineating the zone were concealed with intended ambiguous terms deliberately drafted in the treaty provision.

What would be the legal ramifications of such a lack of mutual consent in this fisheries treaty? Strictly speaking according to the principle of *pacta sunt servanda*, the accord between Korea and Japan in relating to the Provisionally Arranged Zone in the East China Sea is null and void *ab initio*. Whether such a fundamental flaw in relating to the consent of the parties could bring a complete invalidity of the whole agreement should be reviewed further in some forensic manner. It should be remembered however, that there is a traditional lack of appropriate procedures for the invalidation of treaties in international law, and the practical conclusions to cope with this peculiar situation at hand do not seem to be easily available or clearly defined.

At least, however, it seems quite clear that even before the procedures\(^\text{41}\) to declare invalidity of the treaty, or the citing of fatal defects in relating to mutual consent were advanced by either of the contracting parties, no binding effects of any provision in this treaty could be forced or asserted as being related to the *provisions* in the Provisionally Arranged Zone in the East China Sea. Because there was no concrete and plain *pacta*, no binding force could result from the *provisions*. Furthermore, these *provisions* are a deliberately manipulated concealment of the lack of mutual consent. As clarified by the old Latin proverb, *ex injuria jus non oritur*, no legal title should be generated on the ground of such a breach of the rule of law.

As such, Annex I Para. 3 of this 1998 Agreement on Fisheries between Korea and Japan should be *legally void*. And also Annex II Para. 1 and 2 of this 1998 Agreement on Fisheries between Korea and Japan should be deemed *as void* as far as they are logically linked with Article 9 Para. 2.

Given the issue of the validity of a treaty, what should be the due evaluating response of international society to the willful violations of the canon of straight-forwardness on the part of both contracting parties of this Agreement? Could we find any persuasive excuses to tolerate such stark

violations of the principle of *bona fides*? As far as any plausible explanations for this peculiar case were hardly justifiable, neither the Korean side (retarded with a desperate haste driven by false Japanese threats), nor the Japanese side (illicit in its apparent animus to manipulate treaties with an easy partner), can be free from the criticism that they both ignored their responsibilities, governed by the principles of international law.

Hopefully the learned circle of international law scholars can find an answer through open and fair discourse, reasonable enough to expel such simple and quick criticism against the impeccably civilized and law-abiding countries like Korea and Japan.

### IV. The Distortions of Law of the Treaties in Concluding Provisionally Arranged Zone between Korea and Japan in the middle of the East Sea/ Sea of Japan

Article 9 Para. 1 of the 1998 Fisheries Agreement defines the Provisionally Arranged Zone in the middle of the East Sea/ Sea of Japan. (Fig.-5)

**Geometrical Accords**

Article 9 Para. 1 has no curious or problematic expression. It is clear enough as an expression of treaty provision. This time, the manner of defining the Provisionally Arranged Zone as a geometrical polygon, no matter how unusual looking a shape it might have, is clear and plain enough, compared with the one described formerly in the East China Sea. So at least, as far as the geometrical accord in delineating this polygon is concerned, it appears that no differences of stance were concealed by a deliberately manipulated draft.
As a matter of fact, these clear accords in view of geometrical delineating have been concluded through a prolonged and thorny path of nerve-wracking political transactions between Korea and Japan.\footnote{Ki-Suck, Ahn, “New Fisheries Agreement: We won in the battle, but were defeated in the war.” \textit{Shin Donga}, December 1998. Donga Ilbo Daily Publication.; \url{http://www2.donga.com/docs/magazine/new_donga/9812/nd98120030.html}}

\section*{1. 35 miles’ span of “exclusive jurisdiction”}

A certain span of littoral sea area considered as an EEZ off the coast of a state’s mainland, is under the exclusive jurisdiction of said state. Such exclusive jurisdiction is a basic criterion in delineating a provisionally arranged zone in an area where the EEZs of neighboring states overlap. On September 3rd 1997, China and Japan arrived at an accord for their 1997 Fisheries Agreement; to make this span of “exclusive jurisdiction” 52 nautical miles\footnote{Young-Koo, Kim, \textit{Korea and the Law of the Sea}, Hyosung Publisher, 1999. pp.421~22.; \textit{Hankook Ilbo Daily, Chosun Ilbo Daily}, September 4\textsuperscript{th} 1997.}. In contrast, during the process of negotiating their 1998 Fisheries Agreement, Korea and Japan came to an accord to make this span of “exclusive jurisdiction” just 35
nautical miles. As one important factor in the delineation of the provisionally arranged zone, this 35 miles’ span of “exclusive jurisdiction” came to accord between the two contracting parties in early September 1998.

2. Addressing Dokdo/Takeshima Island

The Korean Government accepted Japan’s strong “suggestion” of dealing the fisheries agreement separately from the sovereign jurisdiction matter in relating to the Dokdo Island issue. This effectively means that both countries ignored the presence of this troubled islet in the middle of the East Sea/Sea of Japan for the sole purpose of concluding their fisheries agreement. This detail has an impressive geometrical meaning in delineating the provisional arranged zone; in that both countries abandon the alleged right to apply the 35 miles’ span of “exclusive jurisdiction” from Dokdo Island. Curiously enough, this meaningful abandonment was accepted by both countries as a natural premise for concluding the treaty, specifically in delineating the provisionally arranged zone in the middle of East Sea, from the very beginning of the negotiation without any ado. This particular point has immediately been accepted almost as a fait accompli, and has never been presented as an agenda for specific discussions in the entire course of negotiations.

In accepting this logical premise, however, both countries have formidable difficulties in sustaining the consistency of their respective legal positions in asserting sovereign title to Dokdo Island.

Japan expressed its opposition to Article 121 (3) during the negotiation of the 3rd U.N. Conference on the Law of the Sea. As for the regime of island, Japan has maintained a consistent policy; that any small islet, no matter whether it is inhabitable or not, whatever elevation, size and geological character it might have, shall be entitled to have not only territorial sea, but also EEZ and Continental Shelf. So, in so far as Japan is alleging that Dokdo

Island is a legitimate part of Japanese territory, Japan should not abandon the alleged right to apply the 35 miles’ span of “exclusive jurisdiction” from Dokdo Island. But Japan did abandon it. Still, Japan does not seem ready to change its consistent policy in relating to the regime of islands, nor to retreat from its assertion of sovereign title to Dokdo Island.

In contrast to Japan, Korea has not clarified its stance in relating to the regime of islands during the discussion of Article 121 (3) in the 3rd U.N. Conference on the Law of the Sea. With regard to the problematic proviso, Article 121 (3) of the aforementioned LOS, Korea does not have any consistent record of insisting that small islands should also be entitled to have EEZ and Continental Shelf. For the Korean Government, in a desperate hunger for plausible excuses in abandoning the alleged right to apply the 35 miles’ span of “exclusive jurisdiction” from Dokdo Island, Article 121 (3) of the U.N. Convention on the Law of the Sea must have seemed like a timely “savior.” The truth remains however, that Korea did abandon the alleged right to apply the 35 miles’ span of “exclusive jurisdiction” from Dokdo island without any ado.

We are left with a curious question: Can Article 121 (3) of the U.N. Convention on the Law of the Sea really be a plausible excuse in abandoning the alleged right to apply the 35 miles’ span of “exclusive jurisdiction” from Dokdo Island? It was neither a plausible nor reasonable excuse for the Korean case, with Dokdo located in the middle of the East Sea/Sea of Japan, a relatively congested ocean space less than 400 miles wide, even though it has still been controversial. The Korean Government made it very clear that Dokdo should

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47 Jon Van Dyke defended Korean stance citing some meaningful opinions to support it. ….. Two distinguished commentators have stated directly 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. Douglas M. Johnston and Mark J. Valencia, Pacific Ocean Boundary Problems Status and Solutions 113 (1991). Jon M. Van Dyke, “Who Owns Tokdo/Takeshima? Should These Islets Affect the Maritime Boundary Between Japan and Korea?”…Draft Script September 23rd 2004. p.28. No matter what the original intentions of the writer were, this material electronically appeared on the homepage officially operated by Korea, Ministry of Marine Affairs and Trade, being widely distributed and frequently quoted; http://www.kmi.re.kr/english/data/publication/1-1.pdf.

As for an island to be entitled to have an EEZ, it should be able to sustain an economic life of its own (une vie économique propre). An economic life in this sense is not expressly limited as to refuse “any help from outside.” Some valuable hydrocarbon resources, newly harvestable fisheries in its surrounding sea, or even a profitable gambling casino attracting curious travelers with its exquisite sceneries whose exploitation could sustain an economy sufficient to support the civilized life in the island through the purchase of necessities from external sources, would successfully meet the required conditions of this Article 121, Para.3 of the 1982 U.N. Convention on the Law of the Sea. : Jonathan I. Charney, “Rocks that Cannot Sustain Human Habitation.” AJIL, Vol.93. No.4, pp.866–68.

It is frequently cited to defend Korean stance that U.K. denounced its claim to EEZ from Rockall
be considered as a legitimate base point in negotiating the EEZ boundary line between Korea and Japan at the 5th Maritime Boundary Negotiation convened in Tokyo in June 2006. But they did not give any due explanation how this basic stance could be compatible with the Korean position to abandon the 35 miles’ “exclusive jurisdiction” from Dokdo island when it delineated the peculiar looking polygon of the provisionally arranged zone for the 1998 Fisheries Agreement.48

3. The eastern and western limits of the zone

The eastern and western limits of the zone are Longitudinal Lines - 131°40.0′E (j-k line in Fig.-5) and 135°30.0′E (g-f line in Fig.-5), respectively. As for the eastern limits of the zone, the two contracting parties did not have any significant problem in arriving at an accord, so far as they simultaneously abandoned the right to apply the 35 miles’ span of “exclusive jurisdiction” from Dokdo/Takeshima, for this was a natural tangent line of the 35 miles circle of the “exclusive jurisdiction” from Ullung-do (Dagelet).49

But as for the western limits of the zone, Korea assertively stuck to the Longitudinal Line, 136°00. E, while Japan insisted that this should be the Longitudinal Line, 135°00. E. The two respective conflicting assertions had formidable influences, which were not so much logical as face-saving50. The concluded compromising point of agreement was eventually to become the Longitudinal Line; 135°30. O′E. A timely and resolute political decision for this

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48 The Korean Government explained that this accord was another meaningful result earned by Korea in overcoming the difficulties of persuading Japan in its propaganda materials.

49 The Korean Territorial Sovereignty to Dokdo Island at Crisis, Dasom Publishing Co. 2006. pp.77~83.

50 Korean assertion; The western limits of the provisionally arranged zone should be secured at least as far as the Longitude Line, 136°00. E, to make this zone include the “Daehwa-Twae” (“Yamato Tai” in Japan). In addition to this, this line is the limit where the 200 miles Korean EEZ could reach from Dokdo.
compromise was initiated by high ranking officials of Japan.\textsuperscript{51}

\textbf{4. Adjustment of the northern boundary line.}

The primary concern in concluding the northern boundary line of the zone was eventually concentrated on the dilemma of how to divide the “Yamato-tai” (“Daehwa-Twae” in Korean) between Korea and Japan. This shallow water area (average depth 280~400 meters) which is located at the north-eastern tip of the zone, almost in the center of the Sea of Japan has been well known to Korean and Japanese fishermen as a favorable fishing ground for catching red squid. Korea already has another northern boundary line here, with North Korea (Latitudinal Line; $38^\circ 37,00'$ N). North Korea has already had an alleged “50 miles Military Boundary Zone” above this line since August 1, 1977.\textsuperscript{52} Theoretically, Korea and Japan have never recognized the North Korean 200 mile EEZ which was declared on August 1\textsuperscript{st} 1977 or the 50-mile Military Boundary Zone which were promulgated simultaneously. Practically, it seems that a theoretical stance is one thing; however, making a fisheries zone agreement over this northern boundary line (Latitudinal Line; $38^\circ 37,00'$ N), between (South) Korea and Japan is another matter altogether. As for the agreement zone for this fisheries agreement between Korea and Japan, the area above line of the Latitudinal Line; $38^\circ 37,00'$ N, was not originally considered.

Not-with-standing the original settings, Korea strongly insisted in the final stage of the negotiations that any part of “Yamato-tai” obviously located above this northern boundary line between North and South Korea must be included within the provisionally arranged zone, which means that it should not be left to become a part of the Japanese EEZ.

After dramatic transactions between the high ranking officials of Korea and Japan which proceeded intensively from September 22\textsuperscript{nd} to October 7\textsuperscript{th} 1998,\textsuperscript{53} the Japanese finally agreed to delineate the g-h, and h-i lines.\textsuperscript{54}

\textsuperscript{51} The Key person who initiated this compromise was the then Japanese Prime Minister Obuchi Geicho. Ki-Suck, Ahn, op. cit.

\textsuperscript{52} For the map and an explanatory information of the North Korean Declaration of the 50 mile Military Boundary Zone, refer to Kim, Young-Koo, Korea and the Law of the Sea, Hyosung Publishers, 1999. pp. 458~461 (Fig.-7-11); Choon-Ho, Park, “The 50-mile Military Boundary Zone of North Korea,” 72 AJIL (1978) 866~875.

\textsuperscript{53} Korean President Dae-Joong, Kim paid an official visit to Tokyo on that day for the summit meeting to declare “A New Japan-Korea Partnership towards the 21\textsuperscript{st} Century.
respectively, allocating half of “Yamato-tai” to be included in the arranged zone.\(^55\)

### An Appraisal of the Geometrical Accords

This 1998 Fisheries Agreement between Korea and Japan does not refer specifically to the absence of a commonly agreed upon boundary as being its *raison d’être*. Never-the-less, this Agreement was obviously designed and settled as called for in Article 74, Para. 3 of the UN Convention on the Law of the Sea, pending final determination of the maritime boundary. And arguably, the obvious reason why the final boundary delimitation is still pending in this sea area between Korea and Japan is because of the sovereign dispute over Dokdo Island. The fact that Korea and Japan concluded this Agreement with the provisionally arranged zone could actually be the official confirmation of the fact that Korea and Japan have sovereign dispute over Dokdo Island. But the official stance of the Korean Government on this matter is that:

"Dokdo is historically, geographically, and according to international law, an integral part of Korean territory. As far as Korea has kept physical presence upon it and has been practicing all the rights in and around Dokdo, the issue of Dokdo cannot be a sovereign dispute." \(^56\)

Essentially then, the Korean government is stating that as far as they are concerned, there is no dispute. But clearly however, there is. The actions of the Korean Government in dealing with the Japanese regarding Dokdo, in the 1998 Fisheries Agreement are in stark contradiction to their official stance, as quoted above. The Korean Government does not seem prepared to make any plausible explanations for this. The government of Korea could have made their official

\(^54\) Article 9 Para. 1. (g). point 38°37.0’N 135°30.0’E; (h). point 39°51.75’N 134°11.5’E; (i.) point 38°37.0’N 132°59.8’E

\(^55\) The key person who decided the important Japanese concessions to desperate Korean contentions was the then Japanese Prime Minister, Mr. Obuchi Geicho. ; Ki-Suck, Ahn, op. cit.

position: “The Dokdo issue cannot be a dispute”. Needless to say, their position may well be no more than a diplomatic assertion, apparently taking into account the strategic considerations for an international negotiating arena. Strategic considerations have to be taken account, however, within their own limits and concerns. And this “diplomatic assertion” has no longer had any logical relevance to reinforce the Korean Government’s strategic considerations upon conclusion of this fisheries agreement.

The Provisionally Arranged Zone in the middle of the East Sea/Sea of Japan, usually denominated as, the “intermediate zone” by the Korean Government could be drafted to the shape as it appears now, but only on the geometrical pre-condition that both parties, Korea and Japan simultaneously and equally give up the “exclusive jurisdiction” of Dokdo Island. The titles of both contracting parties to claim “exclusive jurisdiction” of Dokdo Island are logically incompatible with each other. And as a matter of logical course, the assumed titles of both contracting parties to abandon “exclusive jurisdiction” of Dokdo Island are logically incompatible with each other, too.

Could the two logically incompatible titles be simultaneously and equally executed? This would naturally, be impossible. So the geometrical pre-condition to draw the polygon is obviously at odds with the basic principle of legal logic. In other words this geometrical outline is unlawful. The only possible remedy to make this unlawful premise a feasible reality, is that the two contracting parties, \textit{in concert}, presume that the titles to those “exclusive jurisdiction” from the Dokdo Island are compatible with each other. This scenario would be the only legitimate option in delineating the polygon. Is it possible for Korea and Japan to actually do this? The answer is affirmative; as long as they do this in concert as prescribed by \textit{consensus tollit errorem}. But what does it actually mean for Korea and Japan? Essentially this means that they agree to an acquiescence of each other’s assertion of sovereign title to Dokdo Island.

For Korea, the “presumed” legitimate owner of Dokdo Island, this scenario is obviously viewed as inappropriate, absurd, and wrong. However, for Japan, the assertive contender in this dispute, this development substantially enhances the Japanese legal position in asserting their sovereign title over Dokdo Island. This is arguably why the Japanese seem willing to accept the “sacrifice” of yielding on two resolute concessions; so as to retain the
geometrical accords of this unusual looking zone.57

**Theoretical Accords of Fisheries Regime: the Grey Zone Agreement**

Since even before the LOS Convention entered into force, quite a number of international fishery treaties have been made to prescribe with the provisional arrangements referred to in Article 74 (3) of the LOS Convention. It is submitted that such provisional arrangements can be classified in order of comprehensiveness and effectiveness as: (1) grey zone agreements, (2) light grey zone agreements, (3) white zone agreements and (4) miscellaneous agreements.58 It was Judge Manner, Chairman of NG-7 of the Third U.N. Conference on the Law of the Sea who, in 1978, initially classified the degrees of provisionally arranged zones in such a manner.59 Professor Churchill further developed Judge Manner’s view into more fully fledged systematic classifications. Generally speaking though, these grey, light grey and white provisionally arranged zones should not really be deemed with any individuality. The classification of these colored zones is a symbolic analysis; strictly adhering to a spectrum of how intensively the regulating measures of an EEZ regime are being enforced in the conservation and management of living resources in an overlapping (presumably “disputed”) area, where no boundary has yet been agreed. However, Professor Churchill has not suggested any clear analytical criteria to evaluate the order of comprehensive effectiveness in each of those colored zones.

The provisionally arranged zone in which the regulating measures of the EEZ regime are most faithfully adopted and enforced, almost as in a normal EEZ, could be classified as a grey zone. Normally in a grey zone, the area of the zone is clearly defined.

Within this defined area the regulatory measures of out-put control, such as the total number of allowable catches and the number of allocated quotas to each contracting party, are determined annually, as in the typical case

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57 Supra Note 52.
59 Statement made by the Chairman of NG-7, Judge Manner, on 12 September 1978. Conf. Doc. NG7/23
of the Grey Zone Agreement of 1977, between Norway and the USSR. The regulatory measures of in-put control (e.g. the maximum number and horse power strength of fishing boats and restrictions concerning fishing gear) are also stipulated and should be observed by all vessels fishing in the area.

In the grey zone agreement, the nature of title in the jointly utilized area is supposed to be clearly articulated, due to the special condition that the boundary delimitation has not been agreed upon. In the typical case of the 1977 Grey Zone Agreement between Norway and the USSR, the agreement provided that both parties had a right to exercise jurisdiction only in respect to their own flagged ships, and not in respect to vessels of the other party. Jurisdiction over fishing vessels of a third state was to be exercised by whichever party had licensed such vessels.

In view of the above-mentioned criteria of classification, how should the Provisionally Arranged Zone between Korea and Japan be categorized? In answer such an important question, a number of factors need to be considered.

1. Is the area of the zone clearly defined?

The area of this “intermediate zone” between Korea and Japan is 92,710.9 km², delineated clearly as a polygon shape. It has a far more accurately defined area in comparison with the area of concern in the 1989 Agreement between Denmark, Iceland and Norway concerning Capelin Stocks in the Arctic waters between Greenland, Iceland and Jan Mayen Island. The agreement between the northern European countries named above, dealt with an area that was less than precisely defined, and as such, it was accordingly classified as a light grey zone.

2. Are the regulating measures of the EEZ regime conserving and managing the living resources faithfully, as adopted and enforced in this provisionally arranged zone?

In this fisheries agreement between Korea and Japan, it is provided that

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61 Ibid.
64 Churchill, op. cit., p.47
the regulatory measures for conservation and management of living resources within this defined area shall be consulted, recommended, respected and observed by both parties. This is obviously a “preliminary agreement”, (a *pactum de contrahendo*) which is supposed to be concluded in the future by the Korea-Japan Joint Fisheries Committee. However as far as the basic framework of this fisheries agreement is concerned, within the regulating measures of the EEZ regime, there already exists the stipulation to conserve and manage the living resources of this provisionally arranged zone.

Is the nature of title in the jointly utilized area duly articulated?

The nature of title in the “intermediate zone” is clearly articulated in that each party may exercise jurisdiction only in respect to its own flagged ships, without any jurisdiction over vessels of the other party. There is, however, no directive in this treaty about jurisdiction over fishing vessels of a third state.

Theoretically, the Provisionally Arranged Zone in the middle of the East Sea/Sea of Japan, agreed upon by both Korea and Japan, could be classified as a grey zone (as specified in Article 74 Para. 3, of the LOS), pending final determination of the maritime boundary. So technically, the 1998 Fisheries Agreement between Korea and Japan could be classified as a “grey zone agreement”.

In a grey zone agreement, TAC (total allowable catches) and allocated quotas for specific fish stocks within the defined area are usually determined annually by the joint fisheries committee, while other regulatory measures of input control (e.g. the maximum number and horsepower strength of fishing boats and restrictions concerning fishing gear) and some other regulatory measures of out-put control (i.e. the harvesting rate of each contracting party specified as a percentage - % - of the TAC) are prescribed directly by the provisions of the fisheries treaty. But in this treaty, all matters and decisions on the conservation and management of living resources are left entirely to the joint fisheries committee.

Arguably then, the 1998 Fisheries Agreement between Korea and Japan could rationally be referred to as a “preliminary agreement”.

An Appraisal of Theoretical Accords of the Fisheries Regime
In relation to the theoretical accords of the fisheries regime in concluding this 1998 Fisheries Agreement between Korea and Japan, other curious and problematic things occurred well before this treaty came into force.

The Korean Government’s excuses and explanations for accepting this fisheries agreement with Japan were essentially to do with an understanding that this agreement would not have any effect on Korean claims of sovereignty over Dokdo, or the final delimitation of the boundary between the two countries in the East Sea/Sea of Japan. Many international law scholars and theorists, both domestic and foreign, joined in the Korean Government's excuses and explanations. All those exquisite theories submitted by them did not seem to save the anxieties of the Korean people pursuing the plain corollary of international law. As a "presumed" legitimate owner of the concerned island, Korea is supposed to keep the effective control of that island. In international law, the effective control should be "continuous", peaceful and an open display of the government authority. To make an effective control a continuous one, Korea should never acquiesce to any contender's challenging assertion against its sovereign title to this island. Any possible construction that a Korean

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Korea, Ministry of Foreign Affairs and Trade, , Shinhaniluobhybijung (New Fisheries Agreement) November 25th 1998.;

Korea Ministry of Marine Affairs and Fisheries, Explanation Material for the Fisheries Agreement with Japan, December, 1998.;


Lark-Jung, Choi, Hanilouphybijongeun Pakidoeyeryahana (Should the Korea-Japan Fisheries Agreement be abrogated?), Saechang Publishers, 2002. ※ Lark-Jung, Choi was the Secretary General of the Planning, Programming and Budgeting Bureau, Ministry of Marine Affairs and Fisheries, at the time when he published this material.; Hae-Woong, Chung, “EEZ regime and Korea-Japan Fisheries Agreement,” Seoul International Law Journal, Seoul International Law Academy, Vol.6. No.1. May. 1999, pp.18~20. ※ Hae-Woong, Chung was Director, International Legal Affairs Division, Treaty Bureau, Ministry of Foreign Affairs and Trade, at the time when he presented this paper.


acquiescence to the Japanese sovereign title assertion can be comprehended from this Agreement shall never be tolerable.

Truly, there seemed to be no comprehension in the government, and in the minds of the Korean people, as to how Dokdo could not be considered part of Korea. Arguably, Korea has maintained effective control over Dokdo continuously and peacefully as per the corollary of international law. It is clear in Korea that there is no foreseeable way for Koreans to comprehend any acquiescence to Japan over sovereignty claims of Dokdo. As such, the dispute over Dokdo has received an enormous amount of coverage in Korea, leading to nation-wide sentiment, and outrage. The possibility that entering into this 1998 Fisheries Agreement with Japan, somehow means that Korea has allowed a Japanese sovereign title assertion to Dokdo, is inexplicable and totally unacceptable to Koreans.

The Korean representatives to the bi-lateral talks, negotiating for the settlement of the 1998 Fisheries Agreement, seemed to be well aware of possible repercussions to any relinquishment of Korean claims to Dokdo. While they accepted the given conditions of negotiation, such as accepting Japan’s strong insistence that dealing with the fisheries issue separate from the sovereign disputes of Dokdo Island was just a technicality, and decided to evade logical prerequisites, (i.e. settling the island dispute and completing the mutually consented delimitation of EEZ boundaries), they still tried to acquire some tangible guarantee of protection to Korea’s exclusive control of Dokdo.

However, because they accepted the particular geometrical precondition in delineating the polygon of the “intermediate zone”, with logically inevitable assumption that Korea and Japan agree to an acquiescence of each other’s assertion of sovereign title to Dokdo; it appears their logical span of choices to get any possible guarantee in securing the exclusiveness of Korean control of Dokdo, was not abundant.

68 Supra Note 29.
69 Kim, Young-Koo, “Shall Korean Title to Dokdo be deteriorated?”, [Special Text], Hankook Ilbo Daily, November 1st 1997.
Manuscripts by same writer:
“New Korea-Japan Fisheries Agreement”, [Current View], KyoseoShinmun (Professor’s Newspaper), November 9th 1998.;
In concluding the theoretical accords of the fisheries regime, Korea insisted three meaningful points to protect the exclusiveness of Korean control of Dokdo.\(^{70}\) Regrettfully, however, the three points proposed by the Korean Government to allay concerns relating to the possible deterioration of exclusive Korean sovereign title to Dokdo in the course of the joint management in the “intermediate zone”, have eventually been revealed to be legally unsustainable and accordingly, inappropriate.\(^{71}\)

The first point was the insertion of a “non-binding clause” into the resource regulating provisions in the “intermediate zone”. Article 12 of the 1998 Fisheries Agreement between Korea and Japan, provides that the Korea-Japan Joint Fisheries Committee shall recommend\(^ {72}\) resource regulating measures in the “intermediate zone” as stipulated under Article 9, Para. 1, but these measures will be decided\(^{73}\) in the zone of the East China Sea, as stipulated under Article 9, Para. 2. By creating such a distinction, along with addressing provisions of the nature of title so that each party may exercise jurisdiction only in respect to its own flagged ships, Korea (precisely, the Korean Government’s representatives) believed that joint management of the living resources could be successfully denied, at least in the “intermediate zone”. They (the Korean Government in promoting their position) maintained that by adopting this non-

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\(^{70}\) Gag-Soo, Shin, *Hanilubbyjungyoy Jonghabpyonggawa Dokdoyongyoukwon* (Review of Korea-Japan Fisheries Agreement and Sovereign title to Dokdo) Korea Maritime Institute, *Grand Forum Reviewing the Korea-Japan Fisheries Agreement and Sovereign Title to Dokdo*, January 28\(^{th}\) 2005. The Text of the Paper appeared on the official Homepage presented by Korea Ministry of Foreign Affairs and Trade. [http://www.mofat.go.kr](http://www.mofat.go.kr) Actually this paper seems to be written on around August 2001 to defend Korean Government’s legal stance when the writer of this paper was the Secretary of Treaty Bureau, Korea Ministry of Foreign Affairs and Trade, judging from the fact that he stated in this paper that the number of contracting parties of UN Convention on the Law of the Sea was 137. (The 137\(^{th}\) ratification by Madagascar was registered on 22\(^{nd}\) August 2001.)


The Korean Government is still insisting that this agreement does not have any effect on the claims of sovereignty over Dokdo or the final delimitation of boundary lines between the two countries in the East Sea/Sea of Japan with the slim protection of guarantee securing the exclusiveness of Korean control of Dokdo armed with the (absurd) “three legal points” insisted and succeeded to be inserted into the provisions of the treaty, in their “domestic propaganda materials”. *Haniloeubbyjungkwa Dokdoyoungyoukwon* (Korea-Japan Fisheries Agreement and Korean territorial sovereignty to Dokdo) [http://www.dokdo.momaf.go.kr](http://www.dokdo.momaf.go.kr) Interestingly enough, this material is prepared and presented by the Cyber Dokdo Ocean Agency, a propaganda bureau directly affiliated with the Korean Minister of Marine Affairs and Fisheries. The Director of the Agency is Dr. Choon-Ho, Park, the Judge of ITLOS.

\(^{72}\) Article 12 Para. 4. 1998 Korea-Japan Fisheries Agreement

\(^{73}\) Article 12 Para. 5. 1998 Korea-Japan Fisheries Agreement
binding expression (“to recommend” as distinctive from “to decide”) with regard to the “intermediate zone,” the legal character of the arranged zone could remain as a High Seas area rather than as an EEZ\textsuperscript{74}.

Such a scenario could not be legally sustained however, because the overlapping area is an EEZ, irrespective of the color of the zone regime the contracting parties agreed to. It seemed that they simply could not approve the notion that this treaty is a “grey zone agreement.”\textsuperscript{75} Needless to say, the concern was the possible deterioration of the exclusive Korean sovereign title to Dokdo in the course of the joint management in the “intermediate zone”\textsuperscript{76}.

However, after reviewing the relevant rules of the fisheries regime in a grey zone, the discussion over the usage of particular vocabulary does not affect the legal meaning with regard to the addressing provisions of the nature of title, that each party may exercise jurisdiction only in respect to its own flagged ships. It goes without saying that addressing the nature of title in such a way is nothing but an instrumental necessity to introduce the resource regulating measures in the zone where boundary lines have not been agreed. Arguably then, the theoretical accords of the fisheries regime with relation to the “intermediate zone” were concluded by Korea under erroneous beliefs.

The second point to protect the exclusiveness of Korean control of Dokdo was the intentional deletion\textsuperscript{77} of a prescription concerning potential


\textsuperscript{76} This resolute concern of the Korean Government to avoid the joint management in the “intermediate zone” could be named as a practical precaution to protect the exclusive Korean sovereign title to Dokdo; exaggerated and stubborn in an insistent manner, but absurd and wrongful in a legal sense. Precisely speaking however, this point should be distinguished from the theoretical stance of the Korean Government, i.e. the apparent contradiction to avoid the joint management, which is implied and elaborated later in the domestic judicial decision of the Constitutional Court of Korea with regard to the joint utilization activities outside of the territorial sea, 12 miles from Dokdo, but inside the “intermediate zone”, that any manner of joint conservation or joint management of the living resources, would never deteriorate Korean sovereign right to territorial waters of Dokdo. Judicial Decision of the Constitutional Court of Korea. March 21, 2001; New Agreement on Fisheries between the Republic of Korea and Japan Case[13-1 KCCR 676. 99Hun-Ma 139, 99Hun-Ma 142, 99Hun-Ma 156, 99Hun-Ma 160 (consolidated), March 21, 2001]

\textsuperscript{77} Annex Ⅰ, Para. 2, Sub-Para (e). 1998 Korea-Japan Fisheries Agreement
warning actions by one contracting party calling attention to fishing vessels of other States violating the regulating rules set by the Joint Fisheries Committee. Such a provision is manifestly provided in both the 2001 Korea-China Fisheries Agreement\textsuperscript{78} Article 7 Para. 3 and the 1997 China-Japan Fisheries Agreement\textsuperscript{79}, Article 7 Para. 3.

However, once again after reviewing the relevant rules of the fisheries regime in a grey zone, it is obvious that by deleting of the prescription of the “warning action of calling attention” the basic framework of the joint management of living resources in this fishery treaty could not be denied. In conclusion, it is clear that this seemingly pertinent deletion does not make any legally meaningful difference to the execution of joint management of living resources in a grey zone.

The third and final point inserted to protect the exclusiveness of Korean control of Dokdo, was the intentional deletion\textsuperscript{80} of the clause, “quantitative managing action”. The clause of “quantitative managing action” is manifestly provided in both the 2001 Korea-China Fisheries Agreement, Article 7 Para. 2 and the 1997 China-Japan Fisheries Agreement, Article 7 Para. 2. The so-called “quantitative managing action” means that regulatory measures of out-put control such as, the total number of allowable catches (TAC), allocated fishing quotas, and the harvesting rate of each contracting party be specified as a percentage - % - of the TAC. Again, reviewing the relevant rules of the fisheries regime in a grey zone, the deleting of this particular prescriptive expression, “quantitative managing action” from Annex I, Para. 3, Sub-Para. (b) in the 1998 Korea-Japan Fisheries Agreement, does not legally deny any part of regulatory measures of out-put control in a grey zone agreement. A very simple literal interpretation of the relevant articles of the 1998 Korea-Japan Fisheries Agreement itself would make the case crystal clear. Article 12 Para. 4, provides that the Joint Fisheries Committee shall consult on and make recommendations about the matters on specific conditions of fishing as stipulated in Article 3. Among the conditions stipulated in Article 3, fishing catch quotas are explicitly prescribed. Therefore, regardless whether such a specific prescriptive expression, “quantitative managing action” is deleted from Annex I, Para. 3,

\textsuperscript{79} Ibid., pp.691-700.
\textsuperscript{80} Annex I, Para. 3 Sub-Para. (b) 1998 Korea-Japan Fisheries Agreement
Sub-Para. (b) or not, the regulatory measures of out-put control shall be a predominant part of the treaty to be duly executed.

Notwithstanding the Korean Government’s legal errors, it is obvious that there were logical reasons for the Korean Government to agree to this fisheries treaty with Japan. Without remedying the concerns relating to the possible deterioration of exclusive Korean sovereign title to Dokdo, no agreement to this fisheries treaty with Japan would be tolerable. Obviously there is an undercurrent of dissatisfaction here, and as such, Korea has stubbornly refused to further the preliminary agreement into a completed treaty.

During the more than eight years since this treaty entered into force, no regulatory measures in the “intermediate zone” have been consulted on, nor recommended by the Korea-Japan Joint Fisheries Committee. It has been additionally agreed that any action to conserve and manage the living resources in the “intermediate zone” shall be determined by each of the contracting parties, separately and individually. To prevent and to dissolve fishery grievances between the two countries in the “intermediate zone”, the National Federation of Fisheries Cooperatives of Korea, and Japan Fisheries Society, shall actively cooperate. This policy of mobilizing the private sector in the “intermediate zone” has been confirmed every year by the Korea-Japan Joint Fisheries Committee.

In view of the law of treaties, the 1998 Korea-Japan Fisheries Agreement is maintained as a preliminary agreement. Fully completed and mutually consented agreement has never been duly concluded for this treaty. The Korea-Japan Joint Fisheries Committee has convened every year, but they have never discussed the core issues to conserve and manage living resources in the arranged zone. They have only consulted on and decided the allotted fishing quotas available to each other’s fishermen with access granted to each other’s EEZ every year.

Allocating the fishing quotas giving access to the other States’ EEZ was an important issue to buffer the shock in introducing the EEZ regime into the East Sea/Sea of Japan, because in 1996, the Korean catch (220 thousand tons) in Japanese waters was twice the Japanese catch (less than 90 thousand tons)

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81 Korea, Ministry of Marine Affairs and Fisheries,“Results of Korea-Japan Fisheries Negotiation”. Press Release (December 23rd, 2000).
in Korean waters. In 2002, three years after the entry into force of the agreement, the allocated quotas giving access to the other States’ EEZ officially became even (89,773 tons). Consequently, since 2002, even this abnormal function of the treaty as a provisional agreement, called for in Article 74 (3), has no longer had any justification whatever. But even since 2002, the Korea-Japan Joint Fisheries Committee has convened every year to allocate the fishing quota giving access to each other’s EEZ, as if these were the most important and the only raison d’être of this provisional fisheries agreement.

<table>
<thead>
<tr>
<th>Series of the Passing Years</th>
<th>Year</th>
<th>Korean Fishing Boats in Japanese EEZ</th>
<th>Japanese Fishing Boats in Korean EEZ</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Standard fishing quotas in accordance with pre-accorded reduction rate</td>
<td>Actually allocated Fishing Quotas</td>
</tr>
<tr>
<td>1</td>
<td>1999</td>
<td>150,000</td>
<td>149,218</td>
</tr>
<tr>
<td>2</td>
<td>2000</td>
<td>120,000</td>
<td>125,197</td>
</tr>
<tr>
<td>3</td>
<td>2001</td>
<td>90,000</td>
<td>99,773</td>
</tr>
<tr>
<td>4</td>
<td>2002</td>
<td>60,000</td>
<td>89,773</td>
</tr>
<tr>
<td>5</td>
<td>2003</td>
<td>80,000</td>
<td>80,000</td>
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<tr>
<td>6</td>
<td>2004</td>
<td>70,000</td>
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<td>7</td>
<td>2005</td>
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<tr>
<td>8</td>
<td>2006</td>
<td>63,500</td>
<td>63,500</td>
</tr>
<tr>
<td>9</td>
<td>2007</td>
<td>60,500</td>
<td>60,500</td>
</tr>
</tbody>
</table>

Table 1: Allocated Fishing Quotas for the Access to Other State’s EEZ

By indulging in a “no remedy, no treaty” attitude, could Korea refuse to enter into further agreements which are prescribed and anticipated? This is an interesting question given that the articulated provisions of the preliminary agreement with the excuses that those three insisted upon points to protect the exclusiveness of Korean control of Dokdo, have eventually turned out to be unlawful, absurd and accordingly inappropriate.

Generally speaking, ignorance of law cannot be excused, as the old Latin proverb says, Ignorantia legis neminem excusat. Such an ignorance of law

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cannot be any excuse to refuse to fulfill an obligation to enter into a prescribed and anticipated further agreement. When the situation based on the ignorance of law was mutually discussed and agreed upon, as an explicit premise for one party of the treaty to further the agreement, it should be assumed that this formed an essential basis of the party’s consent to be bound by the treaty, and consequently could be a premise to invalidate the treaty.\textsuperscript{84} In this particular case of legal error, however, Korea could not successfully sustain the assertion that protecting the exclusiveness of Korean control of Dokdo had been mutually discussed, agreed and formed an essential basis of Korea’s consent to be bound by the treaty.

Korea has never claimed, nor does seem willing to claim in the foreseeable future, the invalidity of the whole agreement on the grounds of such a vaguely assumed theory. In other words, Korea has never admitted that the three points that were insisted upon to protect the exclusiveness of Korean control of Dokdo, have eventually turned out to be unlawful, absurd and accordingly inappropriate. Korea has simply refused, without any further explanations, to further the preliminary agreement into a completed treaty. Japan has virtually accepted such Korea’s position, and has refrained from invoking any treaty obligations associated with the preliminary agreement.

Such a peculiar situation could not be duly explained without a sophisticated understanding of the reality game of the Dokdo Island dispute between Korea and Japan. This 1998 Fisheries Agreement between Korea and Japan, with a prominent legal construction that Korea and Japan mutually acquiesce each other’s assertion of sovereign title to Dokdo Island, enhances substantially the Japanese legal stance in asserting their sovereign title to Dokdo Island, as it is. For Japan, as a “self-assertive” contender against Korea, the “presumed” legitimate owner of Dokdo Island, there is no need to force Korea to claim the invalidity of the whole agreement on whatever ground.

Not-with-standing the absurdness of this disguised and distorted provisional agreement, it appears that the universally accepted view among the learned circle of Korean society is that this is a well balanced solution for resource management in the waters between Korea and Japan, and the only possible, practical choice to prevent any possible anarchic conflicts between the fishermen of Korea and Japan.\textsuperscript{85}

\begin{footnotesize}
\begin{itemize}
\item Article 48 Para. 1, 1969 Vienna Convention on the Law of Treaties
\item Jin-Hyun Paik, “Analysis of International Negotiation : The Case of Korea-Japan Fishery Negotiation”
\end{itemize}
\end{footnotesize}
This view was confirmed by the decision of the Constitutional Court of Korea\(^6\). This decision of the supreme court of Korea is final and binding, as far as the domestic realm of the Korean legal system is concerned. However, the judges of the supreme court of Korea ignore the fact that their decision can never be a final and binding judgment with regard to international law\(^7\). So this decision by the supreme court of Korea was inappropriate in view of procedural law and consequently does not have any sense in substantive merits.

The ratio decidendi of the decision could be found in the following summary descriptions of the decision.

The Agreement in this case is a fisheries agreement, and is not directly related to the territorial rights within the exclusive economic zones. Although the Agreement distinguishes an exclusive economic zone from a neutral zone\(^{sic}\) (obviously means “intermediate zone”), the neutral zone\(^{sic}\) is formed between the two countries by yielding a proportion of EEZ to their coastal lines from a median line that would have to be drawn in case a mutual argument on the EEZ is not made. In this light, it can be concluded that interests of both countries have been duly reflected in the instant Fisheries Agreement. An exclusive economic zone is an independent entity from the territorial waters, and this is the same for a neutral zone\(^{sic}\). Therefore, although Tokdo\(^{sic}\) (obviously means Dokdo) may be inside the neutral zone\(^{sic}\) under the Agreement, the Agreement is not directly related to the territorial claims to Tokdo\(^{sic}\). Thus, complainants’ argument that their right to territorial waters of Tokdo\(^{sic}\) and the exclusive economic zone has been violated by the instant Agreement lacks a basis.\(^8\)

There are two meaningful points in the ratio decidendi whereby the

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\(^6\) Judicial Decision of the Constitutional Court of Korea, March 21, 2001; New Agreement on Fisheries between the Republic of Korea and Japan Case: Case No. [13-1 KCCR 676, 99Hun-Ma 139, 99Hun-Ma 142, 99Hun-Ma 156, 99Hun-Ma 160]

\(^7\) Article 27. 1969 Vienna Convention on the Law of Treaties

\(^8\) Ibid. B. Summary of the Decision’, ‘id 10’, ‘section 1’.
court reiterates the Korean Government’s assertive proposals.

The first point is that the

.....‘intermediate zone’ is formed between the two countries by yielding a proportion of EEZ to their coastal lines from a median line that would have to be drawn in case a mutual argument on the EEZ is not made. .....In this light, it can be concluded that interests of both countries have been duly reflected in the instant Fisheries Agreement...

The court admitted the fact that Korea and Japan simultaneously and equally gave up the 35 miles “exclusive jurisdiction” to delineate the polygon of ‘intermediate zone’ had been “a well-balanced action and that the interests of both countries have eventually been duly reflected.” These findings from the Korean supreme court judges seem to come from their critical lack of knowledge about the basic theories of international law. Arguably, they just did not understand that this “well-balanced action,” (i.e. the simultaneous and equal abandonment of both party” sovereign claims) could, in a legally binding sense, mean the simultaneous acquiescence of both Korea and Japan’s assertions of sovereign title.

The second point refers to the supreme court’s decree that

.....Although Dokdo may be inside the “intermediate zone” under the Agreement, as far as the territorial sea, 12 miles from Dokdo is not directly affected by this Fisheries Agreement, for the Agreement is only related to EEZ, but not directly related to the territorial sea, the sovereign right to territorial waters of Dokdo would not be deteriorated in any manner by the Agreement.

As the obvious corollary of this assertion, the supreme court’s decision also implied that joint “utilization” activities outside of the territorial sea area, 12 miles from Dokdo, but inside of the “intermediate zone”, in any manner of joint conservation or joint management of living resources, would never weaken Korean sovereign title to Dokdo.

This simple ruling by the judges of Constitutional Court of Korea is seemingly contradictory to the resolute concerns of the Korean Government.
They keenly look to protect the exclusiveness of Korean control over Dokdo; in such a way that demonstrates an excessively stubborn avoidance of joint management, as evidenced by those absurd legal errors noted earlier. This high court judgment suggests that there is no reason to fear joint management of Dokdo. And arguably, if this judgment were based on sound theory, the whole distorted structure of the 1998 Korea-Japan Fisheries Agreement could be normalized at once. Were those concerns of the Korean Government (that resulted in the three unlawful and illogical adjustments to the Agreement), made to protect the exclusiveness of the Korean Control of Dokdo, and the stubborn avoidance to be involved in joint management, all the results of nothing but unfounded fears?

Generally speaking, establishing a grey zone in which fishery resources are to be jointly utilized and managed, employing mutatis mutandis, the rules of the EEZ regime, does not necessarily create a “condominium” between the (two) concerned parties.⁸⁹ The nature of title in joint utilization is to be addressed by the agreement of the participating states.⁹⁰ There could be several different modes in addressing this matter⁹¹. But would the joint conservation or joint management of the living resources inside the “intermediate zone” never deteriorate Korean sovereign title to Dokdo, in any manner?

In the course of joint utilization and management in a grey zone agreement, any littoral State, who is party to such an agreement, may inevitably and eventually be forced to renounce, or modify their supreme, absolute and exclusive control of people and resources in the arranged zone. In the provisionally arranged zone of a grey zone agreement, reciprocal interventions between the concerned littoral States, which are not anticipated by the sovereign State in its normal exclusive jurisdiction of the EEZ, shall be continuously acknowledged, in due course of pursuing the resource regulating measures. Such accumulated restraint on the part of the concerned State’s sovereignty in the arranged zone, however, shall be without prejudice to the final delimitation. Because such accumulated restraint on sovereignty could be cited as evidence, neither to enhance the sovereign status of one party, nor to

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⁹¹ Hazel Fox et al., Joint Development of Offshore Oil and Gas, British Institute of International and Comparative Law, 1989. p.46.
deteriorate the claims of another party. In short, such accumulated restraint on sovereignty or any limitation to the exclusiveness of either party shall be cured at once, upon the conclusion of the final delimitation, for they have exactly equal value to each other with regard to the title of the EEZ.

But this viable process is only acceptable on the condition that there is no sovereign title territorial dispute in the provisionally arranged zone. With a disputed island in the middle of the provisionally arranged zone, the accumulated restraint on sovereignty and the limitations to the exclusiveness of one State shall not be cured even after the conclusion of the final delimitation. This is because every accumulated restraint on sovereignty and limitations to exclusiveness shall be recorded as apparent evidence to deteriorate the flawless exclusiveness of the genuine owner of the disputed island. The deterioration would proceed even before the settlement of any delimitation of the boundary, because putative exclusiveness of sovereignty of land territory should not be limited or restrained in any manner, in any time.

Essentially, what this means for Korea is that joint conservation or joint management of living resources inside the “intermediate zone” shall eventually and definitely deteriorate Korean sovereign title to Dokdo. Those resolute concerns and actions on the part of the Korean Government (as explored earlier), meant to protect the exclusiveness of the Korean control of Dokdo, were not unfounded fears after all.

The simple ruling by the judges of Constitutional Court of Korea is apparently based on an innocent, but lack of scrutinized, understanding about the law of the sea regime when they proclaimed that “an exclusive economic zone is an independent entity from the territorial waters.” Some may argue that this determination made by the judges’, closely mirrors the strongly urged Japanese “suggestion” that dealing with the fisheries issue separate from the sovereign jurisdiction matter in relation to the Dokdo dispute, was just a “technicality”. As strictly a maritime policy, Korea and Japan could deal with the fisheries issues separate from the sovereign jurisdiction matter in relation to Dokdo, if they agreed so. However, fisheries jurisdiction can never be separated from the sovereign title of a land territory. This is a natural principle of the law of the sea. A maritime policy can neither avoid nor override a principle of the law of the sea. Some Korean scholars, however, have bluntly insisted that a special accord of common fisheries zone does not have any legal effect on the sovereign title to islands located in the common fisheries zone. In other words,
they allege that the matter of fisheries jurisdiction shall always, as a matter of legal principle, be separated from the regime of territorial sovereignty of the islets or rocks located in the common fisheries zone.\textsuperscript{92} This surprising and curious theory of the Korean scholars is used to be re-enforced by quoting a specific paragraph in the decision of the \textit{Minquiers and Ecrehos} case by the International Court of Justice (ICJ) in 1953.\textsuperscript{93}

\ldots Even if it be held that these groups lie within this common fishery zone, the Court can not admit that such an agreed common fishery zone in these waters would involve a regime of common user of land territory of the islets and rocks, since the Articles relied on refer to fishery only and not to any kind of user of land territory...

Perhaps the Korean scholars seem to believe that their own theory could be verified authentically as a legally sustainable one; using this specific paragraph in the decision of the \textit{Minquiers and Ecrehos} case, as evidence to substantiate their claims. However, it appears the Korean scholars’ comprehension of said paragraph is erroneous; maybe because they did not consult the paragraphs in the decision immediately following the specific aforementioned paragraph in the decision of the \textit{Minquiers and Ecrehos} case which states:

\begin{quote}
The Court does not consider it necessary, for the purpose of deciding the present case, to determine whether the water of the \textit{Ecrehos} and \textit{Minquiers} groups are inside or outside the common fishery zone established by Article 3.
\end{quote}

\ldots Nor can the Court admit that such an agreed common fishery zone should necessarily have the effect of precluding the Parties from relying on subsequent acts involving a manifestation


\textsuperscript{93} The Minquiers and Ecrehos case (France vs. United Kingdom) Judgment of November 17th 1953. French Contention (5), (6). ICJ Reports 1953, p.47. at p.50, p.58.
of sovereignty in respect of the islets.

Further, Article 3 of the 1839 Fisheries Pact between The United Kingdom and France decreed that:

"The oyster fishery outside of the limits within which that fishery is exclusively reserved to French and British subjects respectively, as stipulated in the preceding articles, shall be common to the subjects of both countries..."94

In conclusion, it can be suggested that the Minquiers and Ecrehos case by the ICJ in 1953 should not be quoted as a precedent by the Korean scholars who wish to make a specific point with regard to the sovereignty and fishery zone dispute between Korea and Japan. Naturally the specific paragraph of the decision does not carry any meaningful ratio decidendi to judge the 1998 Fisheries Agreement between Korea and Japan. The natural rule that a maritime policy can neither avoid nor override a principle of the law of the sea, would not need such confusion to be comprehended.

V. A Concluding Review

In spite of the questionable theory forwarded from Korean scholars with perhaps more sentiment than sound judgment, the Korean Government does not really seem to believe the Supreme Court’s “wise judgment” declaring that there is no reason to fear and avoid joint management in order to protect the exclusiveness of Korean control of Dokdo. The Korean Government seems eager to maintain an attitude of stubbornness, refusing to advance any agreement to enforce the resource regulating measures in the arranged zone. Japan (the “self-assertive” contender against Korea, the “presumed” legitimate owner of Dokdo) seems prepared to accept the recalcitrant attitude of Korea, by refraining to invoke any treaty obligations from the preliminary agreement to force any

94 Ibid.
further agreement. As such, this fisheries agreement looks set to remain a preliminary agreement, at least for the time being. The question remains then: Can a preliminary agreement survive as a viable treaty without completing the prescribed ‘further agreements’?

In case Japan did not allow the Korean Government’s stubbornness in refusing to enter into further agreement to enforce the resource regulating measures in the arranged zone as prescribed in Article 12 Para. 4, and Annex I, Para. 2, of the fisheries agreement, and decided to invoke the Korean inaction as a material breach of the fisheries agreement as grounds for terminating the treaty, this preliminary agreement could be terminated. But Japan does not seem to have any reason to request that Korea fulfill their treaty obligation to the preliminary agreement, in the foreseeable future. Taking advantage of the procedural limits of the rule of law of treaties in international law, the contracting parties of this treaty, Korea and Japan have transformed this preliminary agreement into a totally different treaty.

This Dokdo Island issue originated from the all-out drive by the Japanese government, to territorialize this island. This drive began right after the end of the Second World War. The only imaginable grounds for this drive were the Japanese government’s insensibility to its shameful history of aggressiveness and colonialism with regard to Korea. Maybe therefore, this issue is a tragic result arising from a Japanese sense of superiority over Korea, which is absolutely groundless and intolerable. Perhaps it could be argued that the true nature of the Japanese objective, in connection with this particular island, is comparable to the greed and violence which caused it to commit the extortion and atrocities during its colonial control of the Korean peninsula in the 20th century. So long as the Japanese government maintains its official stance regarding the Dokdo Island issue, Japan cannot be said to have overcome its obsolete sense of xenophobia and nationalism.

Due to the Korean government’s lack of prudence, logics and policies
rooted in sentiment, the preposterous determination of the Japanese government might eventually be encouraged and freshly re-armed with a brand new legal justification arising from recent proceedings relating to the 1998 Korea-Japan Fisheries Agreement. The indisputable exclusiveness of Korean control of Dokdo shall gradually deteriorate in due course because of the distorted treaty operation of the 1998 Korea-Japan Fisheries Agreement. The fermented proceedings of this distorted treaty shall only aggravate the tension and rivalry between Korea and Japan. What happens as a result of the inevitable rise in tension and rivalry is not something anyone should wish to witness.

Regretfully, Japan seems to be trying to repeat history. Rejoicing with the gala victory in the Russo-Japanese War in 1905, Japanese nationalism irretrievably changed with their humiliated capitulation at the end of the Second World War under the untold sorrow and destruction by the atomic bomb attack in 1945. Rejoicing with the foolish legal errors made by Korea, the easy partner in this fisheries agreement, the newly revived Japanese nationalism could be confronted with an unbearably harsh demand of indemnification for historically unforgivable atrocities committed by Japan during its military occupation of the Korean peninsula, the inhuman cruelties inflicted during the Second World War in connection with the mobilization of young Korean men and coerced comfort-women for the Japanese Army, biological experiments conducted in the notorious 731 Camp, and possibly for the Nanking Massacre, too. A simple axiom from The Art of War, by Sun Tzu tells us that, “If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat.” Without a truthful action of wholehearted repentance, Japan could not genuinely comprehend what it really is in historical reality. And one first step for Japan to know itself is to stop its unreasonable contention about Dokdo.

This worn-out, disguised treaty should be abrogated by the contracting parties not only for the sake of the law of the treaty and respect for the notion of pacta sunt servanda, but also out of a sense of dignity. As civilized and law-abiding countries, Korea and Japan should find more practical and straightforward arrangements to manage this peculiar situation in relation to the fisheries matter and maritime boundary delimitation between Korea and Japan.

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96 A notification for termination of the treaty Article 16 Para. 2. 1998 Fisheries Agreement between Korea and Japan.