Current International Legal Issues: Taiwan

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1 Introduction

Taiwan is an island situated 124 miles off the eastern shore of the Chinese mainland and surrounded by the East China Sea, West Pacific Ocean, Bashi Channel, and Taiwan Strait. Owing to its strategic location 725 miles south of Japan and 207 miles north of the Philippines, Taiwan used to play a key role during the Cold War period and was praised as an “unsinkable aircraft carrier” during the Korean War (1950–1953). Taiwan faces several international legal issues including: Taiwan's international legal status (including Taiwan and mainland China relations, also referred to as “cross-strait relations”), concluding international treaties, participating in international organizations, environmental law issues, law of the sea issues, as well as the relationship between international and domestic law. This chapter will introduce those issues which are crucial to Taiwan's practices in international law.

2 International Legal Status

Taiwan's international legal status has been an issue since 1949. In December 1949, due to its defeat in the civil war with the Chinese Communist Party (CCP) between 1945 to 1949, the government of the Republic of China (ROC) retreated to Taiwan while the CCP established the People's Republic of China (PRC) in Beijing. Since then, two Chinese regimes have existed, both of which claim to be the sole legal representative of the whole Chinese people and to be entitled to the territory of the whole of China.

In 1949, Nationalist forces led by Chiang Kai-shek fled to the island of Taiwan and established its administration there while still claiming to be the legitimate government of all of China including the Chinese mainland. At the same time, the Chinese Communist forces led by Mao Zedong, in control of mainland China, established the People's Republic of China (PRC) in 1949, which also claimed to be the legitimate government of China, including the island of Taiwan. It is a fact that both sides of the Taiwan Strait claim to be the representative of China. This can be viewed from their respective constitutions. For example, according to Constitution of the Republic of China, Article 4 stipulates that, “The territory of the Republic of China according to its
existing national boundaries shall not be altered except by resolution of the National Assembly.”

Furthermore, the Preamble of the Constitution of the People’s Republic of China states that:

Taiwan is part of the sacred territory of the People’s Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.

The United Nations had become the central battlefront on the matter of the sole representation of China during the 1950s and 1960s. Since the United Nations General Assembly passed Resolution 2758 in 1971 that recognized the PRC as “the only legitimate representative of China to the United Nations” and to expel the representatives of Chiang Kai-shek from the United Nations, Taiwan faced growing isolation from the international community. Currently in 2019, only 16 countries have official diplomatic relations with Taiwan.\(^1\)

However, Taiwan (ROC) has not vanished from the international community. It still retains official diplomatic relations with those 17 countries as well as close economic relations with most members of the international community. As a result, particular “unique” international legal issues concerning Taiwan’s status are present. For example, agencies of foreign governments, such as the American Institute in Taiwan, operate as de facto embassies of their home countries in Taiwan, and Taiwan operates similar de facto embassies and consulates in most countries under the nomenclature of the “Taipei Representative Office” (TRO) or “Taipei Economic and Cultural (Representative) Office” (TECO).

### 3 International Treaties

As far as the capacity to conclude agreements or treaties is concerned, every state possesses this capacity.\(^2\) Statehood is an important element in obtaining such capacity. According to the International Law Commission’s Commentary, the term “State” used in Article 6 of the Vienna Convention on the Law of Treaties “with the same meaning as in the Charter of the United Nations, the

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1 These countries are Belize, Eswatini, Guatemala, Haiti, Holy See, Honduras, Kiribati, Marshall Islands, Nauru, Nicaragua, Palau, Paraguay, Saint Lucia, St. Kitts and Nevis, St. Vincent & the Grenadines, and Tuvalu.

2 The Vienna Convention on the Law of Treaties, Article 6 provides that “[e]very state possesses capacity to conclude treaties.”
Statute of the Court, the Geneva Convention on Diplomatic Relations; i.e. it means a State for the purpose of international law.”

Under such circumstances, Taiwan’s capacity to conclude international agreements is restricted if other parties consider Taiwan not to be a state. In the case of a bilateral agreement, a non-recognising state could refuse to negotiate with Taiwan. In multilateral agreements, the non-recognised state will be regarded by non-recognising states as incompetent to conclude a multilateral treaty. Due to its recognition of the PRC, the UK refused to regard the signature by the ROC government to the International Sugar Agreements of 1953 and 1958 as valid on behalf of China. The UK issued the following declaration: “At the time of signing the present Agreement I declare that since the Government of the United Kingdom does not recognise the Nationalist authorities as the competent Government of China.”

In the International Registration of Trade-Mark (Germany) case, the judgment of the court also made this point clear that “[i]n relation to other States which do not recognise it as a subject of international law, such an entity cannot be a party to a treaty. . . .” Hence, under the circumstances of non-recognition, it is difficult for Taiwan to conclude agreements with other states. Nevertheless, Taiwan is still able to accede to certain agreements with functional purposes. For instance, in the context of the WTO, Taiwan acceded to the Agreement Establishing the World Trade Organization and became a member of the WTO in January 2002 under the name of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).  

4 Participation in International Organizations

Apart from acceding to the WTO, Taiwan also participates in other international organizations. Its participation in regional fishery management

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3 Yearbook of International Law Commission 192 (1966).
4 Majorie Whiteman, 2 Digest of International Law 53–54 (1963); 6 International and Comparative Law Quarterly 302–03, 508–09 (1957).
5 International Registration of Trade-Mark (Germany) Case, 28 International Law Reports 82 (1959). See also Oppenheim’s International Law 199 (Robert Jennings & Arthur Watts eds., 1992).
6 Agreement Establishing the World Trade Organization, Article xii Accession: “1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.”
organizations (RFMOs) is an example. In the absence of an effective centralized authority in dealing with the matters of international fisheries, the establishment of regional fisheries organizations are probably a better alternative to secure sustainable conservation and management of transboundary marine resources. Such regional fisheries cooperation involves efforts by states to overcome collective action problems related to the use of shared and common fish stocks. This cooperation arises when two or more states concerned identify a shared problem or goal which requires a common and co-operative solution. Such cooperation is often formalized through bilateral or multilateral agreements establishing principles, rules, procedures and institutional organizations for the implementation of cooperation between the parties. In many cases these agreements are institutionalized by the formation of RFMOs.

Taking the Inter-American Tropical Tuna Commission (IATTC) as an example, on May 31 1949, the United States and Costa Rica signed the “Convention for the Establishment of an Inter-American Tropical Tuna Commission.” The 1949 IATTC Convention entered into force on March 3, 1950 when the IATTC was established. It is one of the oldest RFMOs in the world. In 1998, it was decided that the IATTC and the 1949 IATTC Convention should be modernized to take into account recently adopted international instruments, such as the 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement (UNFSA)\(^7\) and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Therefore, an Ad Hoc Working Group to Review the 1949 Convention was established.

Although there were few Taiwanese fishing vessels in the East Pacific Ocean or in the convention area of the IATTC during the 1980s and 1990s, Taiwan had been invited to participate in the IATTC meetings since 1973 with “observer” status under the name of “Taiwan” or “Taiwan (Republic of China).” As a result of its presence and the consequent concern regarding Taiwanese fishermen operations in the East Pacific Ocean and to enhance conservation and management of tuna resources, the ROC government expressed its willingness to participate more directly in the work of the IATTC. Most of the Working Group delegates accepted that it was both practical and important to ensure Taiwan’s participation in the IATTC framework. In other words, Taiwan’s participation was not an issue per se, however, it was benefit of its status and capacity that was in debate.

\(^7\) See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm/.
In June 2003, the Working Group recommended to the 70th Meeting of the IATTC that a new convention, the Antigua Convention,⁸ be adopted. According to the Convention, the status of Taiwan is as a “fishing entity,” by which the Antigua Convention takes a similar approach as the 1995 UNFSA. A mutatis mutandis modality was used to confer rights and obligations to fishing entities. Therefore, Taiwan as a fishing entity will be able to enjoy all the rights and obligations stipulated in the Antigua Convention on an equal footing with other members of the Commission. Taiwan's participation issue for the IATTC was resolved such that Taiwan will be able to participate in this RFMO in the capacity of a fishing entity and with an organizational status as a member of the Commission under the designation of Chinese Taipei.

5 Law of the Sea Issues

a Maritime Claims in the East China Sea

The East China Sea is a semi-closed sea, with a total area of around 482,000 square miles, bordered by the Yellow Sea to the north, the South China Sea and Taiwan to the south, Japan’s Ryukyu and Kyushu islands to the east, and the Chinese mainland to the west. Scientific research shows there are potentially abundant oil and natural gas deposits. This has made the East China Sea to become one of the flashpoints in the East Asian region.

The width of the East China Sea is less than 400 nautical miles between the littoral states with the immediate implication that the presence of two 200 nautical miles exclusive economic zones creates the circumstances of having no areas of high seas in the region. Furthermore, littoral states’ extension of their maritime jurisdiction inevitably creates overlapping claims and areas. This would lead to disputes over the exploration and exploitation of fishery and hydrocarbon resources, as well as the control of strategic areas. Some of the developments in the region are making the situation much worse. There has been a ceaseless sovereignty dispute over the Diaoyutai Islands between China, Japan, and Taiwan for decades, but the center of the dispute seems to be the need for living resources or non-living resources. According to a 1968 research report, “Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea” (also known as Emery Report), there is

⁸ See Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (also known as “Antigua Convention”), http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf.
indication that “[s]ediments beneath the continental shelf and in the Yellow Sea are believed to have great potential as oil and gas reservoirs. . . . The shallow sea floor between Japan and Taiwan appears to have great promise as a future oil province of the world” which has inflamed the conflict among the littoral states.

The disputes in the East China Sea can be divided into two parts: one is the sovereignty dispute over the Diaoyutai islands; and the other is the delimitation of the maritime areas surrounding those islands. Both parts are so entangled with one another that it is difficult to find a solution.

In terms of the sovereignty issue, the ROC government asserts that the Diaoyutai Islands are an inherent part of the territory of the ROC that fall under the administrative jurisdiction of Daxi Village in Toucheng Township, Yilan County, Taiwan. Whether looked at from the perspective of history, geography, geology, practical use or international law, the Diaoyutais are indisputably an inherent part of its territory.

The ROC claims that its continental shelf is based on the natural prolongation principle. This position could be seen from the reservation made by its Legislative Yuan in 1970 when it decided to ratify the 1958 Geneva Convention on the Continental Shelf. The reservation states that:

With regard to the determination of the boundary of the continental shelf as provided in Paragraphs 1 and 2 of Article 6 of the Convention, the Government of the Republic of China considers:

1. that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of the natural prolongation of their land territories; and
2. that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.

Such claim was also expressed in its 1998 Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China, Article 2(3) which provides that “[t]he continental shelf of the Republic of China is the submarine area that extends beyond its territorial sea through the natural prolongation of its land territory to the outer edge of the continental margin.”

It is well known that the ROC, the PRC and Japan all claim sovereignty over the Diaoyutai Islands, which are situated on the edge of the continental shelf extended from the Chinese mainland and Taiwan. From the ROC and PRC perspective, the natural prolongation is the principle to be used in deciding the limits of the continental shelf. In such case, the limit of the continental
shelf in the East China Sea is to be located in the central part of the Okinawa Trough.

b. Maritime Claims in the South China Sea

The littoral States surrounding the South China Sea claim sovereignty over all or part of the islands, rocks, reefs, or sandbanks in the area. The ROC and the PRC governments have essentially identical positions toward the legal status of the geographical features in the South China Sea because they draw on the same historic evidence and practices.

In 1947, the ROC Ministry of the Interior's subsequent proposal to the central government to "temporarily transfer jurisdiction of the islands to the ROC Navy" was approved. In addition, an official map titled "Map of the Location of the South China Sea Islands" was released that showed the Pratas Islands, Macclesfield Bank, Paracel Islands, and Spratly Islands within the 11 dotted U-shaped lines.

A closer examination of the map titled "Map of the Location of the South China Sea Islands" shows that there are 11 intermittent dotted lines encompassing most of the islands and islets in the South China Sea. The series of lines starts from the estuary of the Bei-Lun River, which is the boundary river between China and Vietnam. The first two segments go through the middle part of Tonkin Bay. The third and the fourth segments are located between Vietnam and the Paracel Islands as well as the Spratly Islands, respectively. Then, the fifth and the sixth lines take a circumgyration back toward the north. At the southernmost point, the lines include the James Shoal, which is claimed as the southernmost territory of China. The position of the seventh and the eighth lines are in the middle between the Spratlys and the north coast of Borneo as well as Palawan Island. The last three segments could be treated as a subseries of the U-shaped lines because they represent the continuation of the previous lines and they also imply a maritime division between Taiwan and the Philippines. It is reasonable to conclude that the median line principle was applied in making the U-shaped lines. This presumption can be clarified by the seventh segment, which not only demonstrates the division between Spratlys and Sabah (the northern part of Borneo), but also shows a delimitation between the Philippine Balabac Island and the Malaysian State of Sabah with a short side segment connected with the seventh one.

Furthermore, the manner of depicting the dotted lines is the same as the one applied on the map to the national boundaries between China and Vietnam as well as Vietnam and Cambodia. However, the ROC government took a conservative position by using dotted lines in an inconsecutive fashion. The implication for this is possibly to leave room for future negotiations.
Fishery Disputes
Taiwan is a legitimate claimant to the island sovereignty disputes in the East and South China Seas. However, due to problems with Taiwan's international status, a frequent issue that arises is to determine what role Taiwan can play in these important and timely matters. The development of fishery cooperation between Taiwan and Japan is worth giving attention in approaching this question.

In taking into consideration the fostering of regional peace and stability, economic prosperity and the sustainable development of the marine environment, as well as seeking to find a path to coexistence and mutual prosperity, former President Ma Ying-jeou declared the East China Sea Peace Initiative in August 2012 and called on all parties concerned to:

1. Refrain from taking any antagonistic actions;
2. Shelve controversies and not abandon dialogue;
3. Observe international law and resolve disputes through peaceful means;
4. Seek consensus on a code of conduct in the East China Sea; and
5. Establish a mechanism for cooperation on exploring and developing resources in the East China Sea.9

The main points of the Initiative are “shelving disputes and working on joint development”. These ideas also conform to the “provisional arrangement” which is provided in the UNCLOS Article 74(3) on EEZ delimitation and Article 83(3) on continental shelf delimitation. The text reads:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Having a closer look at the wording in the UNCLOS, states in dispute are encouraged to take the following actions:

A. Initiate negotiations in good faith. Under Articles 74(3) and 83(3), the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical

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9 Ministry of Foreign Affairs of the Republic of China (Taiwan), East China Sea Peace Initiative (5 August 2012), https://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A56A5F8AF9E&s=37B41539382B84BA&s=879iCABoBB21333B.
nature. The phrase, “in a spirit of understanding and cooperation”, indicates that the parties concerned should negotiate in a spirit of good faith (or *bona fide*). The obligation to seek agreement in good faith has been defined in many well-established precedents of international law.

B. Self-restraint. Even if the parties fail to reach a final agreement, they still have to restrain themselves from taking any action that would cause the dispute to deteriorate. That is to say, mutual restraint should be exercised pending final agreement or settlement in order not to impede the completion of the final delimitation. Only under such a presumption can the arrangement correspond to the spirit of the provision, not to jeopardize or hamper the reaching of the final agreement.

In addition, two aspects of the provisional arrangements should not be overlooked:

A. Transitional nature: In the interests of international peace, the states concerned shall enter into provisional arrangements so as not to jeopardize or hamper the reaching of the final delimitation.

B. Practical nature: Because the provisional arrangement is of a practical nature, it focuses on practical issues, i.e. utilization of resources, and puts the maritime boundary/jurisdiction delimitation and sovereignty issues aside.

The East China Sea Peace Initiative would be meaningful in the present circumstances because: on the one hand, “promoting joint development” might be a better way to ease the disputes; while on the other hand, it is also important to observe the role that Taiwan could and might play since Taiwan has a position of leverage. The practice of the Taiwan-Japan Fishery Agreement of April 2013 is a good example of the East China Sea Peace Initiative.10

There are some legal points which are noteworthy if the Agreement is to be reviewed thoroughly:

1. A wider “Agreement Application Zone” is designated for fishermen from both sides who may conduct fishing operations without being disturbed by the other side. In other words, this Zone is a joint fishery zone which could accommodate fishery activities from both Taiwan and Japan.

2. Due to heavy fishery activities by Taiwanese and Japanese fishermen and for the purposes of regulating the operation of fisheries, a “Special Cooperation Zone,” located in the south-east corner of the aforementioned

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10 See Taiwan-Japan Fishery Agreement, https://www.mofa.gov.tw/Upload/WebArchive/979/The%20Taiwan-Japan%20Fisheries%20Agreement%20(illustrated%20pamphlet).PDF.
“Agreement Application Zone,” has been designated and is a matter for further discussion by the Taiwan-Japan Fishery Committee. This Committee was set up on 7 May 2013.

3. There is no accord in the Agreement regarding the area of 12 nautical miles surrounding the Diaoyutai Islands. This is a result of shelving the sovereignty disputes and will be subject to future discussion. However, this might be one of the most controversial points causing a lot of discussion and discontent.

The Agreement is a good start for sustaining peace in the East China Sea. It focuses on the fisheries issue and puts aside the sovereignty or delimitation issues, which is a praise worthy move made by both Taiwan and Japan. It is also a putting into practice of the “provisional arrangement” stipulated in the UNCLOS. Nonetheless, there are many matters to discuss and to be developed in the future between the parties concerned.