
THE “NORTH KOREAN” SHIP AND U.S. SPY PLANE INCIDENTS

Similarities, Differences, and Lessons Learned

Mark J. Valencia and Ji Guoxing

Both the downing in 2001 of a U.S. military reconnaissance intelligence plane off China and Japan’s violent pursuit of a suspect boat that ultimately sank have raised the issue of the rights and limits thereto of foreign vessels and aircraft navigating in or over the 200 nautical-mile Exclusive Economic Zones (EEZs) of coastal states.¹ As technology advances, misunderstandings regarding such activities and resultant incidents will increase. And since September 11, 2001, many nations, and certainly the United States, have increased their scrutiny of both military and commercial aircraft and ships approaching from near and far. The 1982 U.N. Convention on the Law of the Sea provides for

- a 12-nautical mile (nm) territorial sea where coastal states retain sovereignty over most activities and where only *innocent* passage is allowed, that is, passage which is not “prejudicial to the peace, good order, or security of the coastal state”;
- a 200-nm EEZ where coastal states retain sovereign rights over resources and related activities, but maritime powers retain most of their navigational freedoms; and

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1. See Ji Guoxing, “Rough Waters in the South China Sea: Navigation Issues and Confidence-building Measures,” *Asia Pacific Issues* 53 (East-West Center, August 2001); Mark J. Valencia, “Japan’s Rights and Wrongs in the ‘North Korean’ Boat Incident,” *Japan Times*, January 10, 2002, p. A-19; Hugo Restall, “Examining Asia: Containing North Korea, Normalizing Japan,” *Asian Wall Street Journal*, January 2, 2002.

- the high seas, beyond the EEZ, where navigational and other “freedoms” are unrestricted.

The Convention came into force on November 16, 1994. All Northeast Asian countries except North Korea are parties.

On April 1, 2001, a U.S. reconnaissance plane collided with a Chinese jet fighter over China’s EEZ about 70 miles southeast of Hainan (see Figure 1). In the ensuing controversy over who was to blame, the United States argued that the aircraft was enjoying freedom of navigation over “international waters.” However, China claimed that such freedoms are not absolute, and that such foreign aircraft flying over its EEZ should abide by China’s laws and “refrain from activities which endanger the sovereignty, security and national interests” of the coastal country. China further demanded that all such spy flights cease.²

Then in late December, Japanese coast guard vessels pursued and fired at a 100-ton suspect ship of unknown origin, which then sank in China’s EEZ (see Figure 2).³ Although Japan later said it was a North Korean smuggling or spy ship, and implied that it sank itself, North Korea denied any link to the ship and argued that the attack and sinking were piracy and “unpardonable terrorism.”⁴ Japan responded that it was within its rights to use force to stop a vessel that refused to comply with orders to stop for inspection, and that the forced sinking was an act of self-defense.

On the face of it, these are two seemingly isolated and unrelated incidents. But they do have several similarities. Both incidents involved spying or possible spying in or over another country’s EEZ. Both resulted in loss of property and life, and stimulated political controversy. And both coastal countries—China and Japan—argue that such surveillance activities in (or over) their EEZs are unfriendly acts. Most important, both incidents raised questions of international law regarding the rights of the coastal state versus those of foreign boats and airplanes in EEZs.

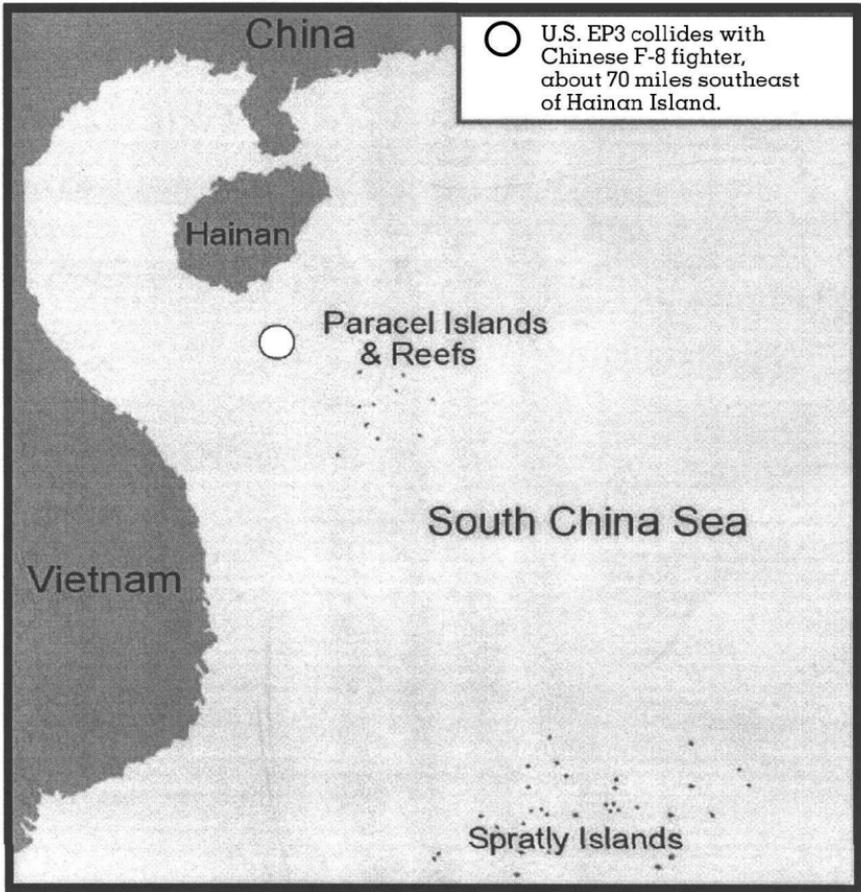
But there are many important differences as well. In the North Korean case, the Japanese coast guard initially thought the boat was a Chinese fishing boat fishing illegally in its EEZ.⁵ The ship was flying what initially appeared

2. “China: USA ‘Violates International Law’ in Plane Collision,” Xinhua, *BBC Monitoring Asia Pacific–Political*, London, April 4, 2001.

3. “Japan All Out to Rescue Crewman, Identify Vessel,” Jiji Press English News Service, December 23, 2001.

4. Teruaki Ueno, “North Korea Suspected of Stepping Up Drug Smuggling,” Reuters, January 10, 2002; “Clash at Sea Sparks Verbal Shots—North Korea Calls Encounter ‘Brutal Piracy, Unpardonable Terrorism,’” *Asian Wall Street Journal*, December 27, 2001.

5. “Crisis Center Left in Dark over Spy Ship Case,” *Daily Yomiuri*, December 31, 2001; “Japan Says Unidentified Ship Pretended to Be a Chinese Fishing Boat,” *BBC Monitoring Asia Pacific–Political*, London, December 26, 2001.

FIGURE 1 *Spy Plane Incident*

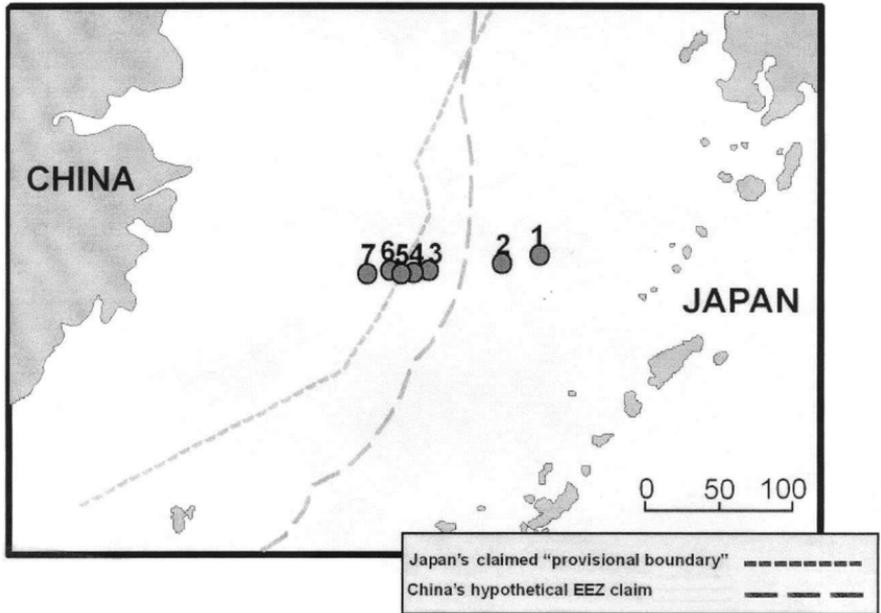
SOURCE: Compiled by authors, incorporating selected information from various sources, including *Asahi Shimbun*, *Sapio*, and <Sina.com>.

to be to Japanese coast guard pursuers a People's Republic of China (PRC) flag and was equipped with lamps for squid fishing. Indeed, even when the pursuing coast guard vessels opened fire on the ship, they still thought the vessel was a Chinese fishing boat.⁶

This incident was further complicated by the lack of an EEZ boundary between Japan and China in the East China Sea, and indeed indirectly raised

6. "Troops May Be Sent to Capture Unidentified Ship—Japanese Defense Chief," *ibid.*, London, December 22, 2001.

FIGURE 2 *Ship Incident*



Timeline of Ship Incident

1. **1:30** Japanese Self Defence Force P3C patrol plane locates an "unidentified ship."¹
2. **6:20** Maritime Safety Agency (MSA) plane sights the unidentified ship approximately 240 km northwest of Amami Island.
3. **12:48** MSA vessel *Inasa* sights the unidentified ship.
13:12 *Inasa* orders the ship to stop, but it runs away.
4. **13:52** *Inasa* gives warning.
5. **14:30** The unidentified ship crosses the "provisional line."
6. **14:36** *Inasa* fires first warning shots in the air. Total of five warning shots until 15:17.
15:17 *Inasa* fires first warning shots into the water.
16:16 *Inasa* fires to the stern, hitting the target.
17:23 *Mizuki* fires on the ship and hits.
17:24 Unidentified ship on fire.
17:26 It stops approximately 393 km northeast of Amami Island.
17:53 The fire stops and the ship resumes escape.
18:52 *Kirishima* forces its way close to the unidentified ship.
7. **18:53** The unidentified ship stops approximately 400 km northeast of Amami Island.
21:42 The ship starts moving again.
22:00 *Amami* and *Kirishima* sandwich the ship from both sides.
22:09 The unidentified ship opens fire against *Amami*, *Kirishima*, and *Inasa*. Three coast guard officers injured from the shooting. *Inasa* fires back.²
22:11 The unidentified ship explodes.
22:13 The ship sinks.
22:17 15 crew of the ship thrown out to the ocean.
23:45 All disappear.

SOURCE: Ibid. to Fig. 1.

¹ In Japanese, *fushinsen* (suspicious ship); in Chinese, *bumingchun* (unidentified ship).

² The Japanese side considers this to be the first fire out of "self-defense." Previous shots considered to be warning shots.

this sensitive issue. Japan recognizes the median line between the Ryukyu Islands and the Chinese mainland as a provisional EEZ boundary.⁷ But China does not recognize this line, and negotiations on the boundary are stalemated. As long as there is no agreed boundary, jurisdiction there is uncertain.

The Japanese coast guard vessels began pursuing the ship in Japan's claimed EEZ.⁸ In all, some 25 ships joined the chase. During the pursuit, the closest coast guard vessels fired more than 590 rounds, some of which hit the ship. Four Japanese coast guard vessels finally surrounded it in China's EEZ, i.e., beyond the line Japan recognizes as the provisional boundary. The crew of the suspect ship then fired back with small arms and shoulder-launched rockets, the coast guard vessels retaliated, and, after an explosion, the suspect ship sank, with the loss of all 15 hands.⁹ Japan is now attempting to raise the vessel, presumably to prove it was of North Korean origin. The ship is within China's EEZ, and any activities that might harm the environment require China's approval.¹⁰

According to the 1982 U.N. Convention on the Law of the Sea, which has been ratified by both Japan and China, a nation can board, inspect, and arrest a foreign ship within its EEZ to ensure compliance with its laws and regulations.¹¹ Under that Convention, Japan has the right of hot pursuit if it suspects a vessel has violated its relevant EEZ laws.¹² Although the basis for the Japanese coast guard's order for the vessel to stop for inspection is unclear, the suspect vessel did fail to stop as ordered. Further, the limits on the use of force in such situations are vague, and there are precedents for such extreme measures. For example, Russian border patrol boats and aircraft frequently fire on vessels, including Japanese vessels, illegally fishing in Russian-claimed waters.

7. "Japan Asks China to Abide by Maritime Notification Accord," *ibid.*, London, December 26, 2001; "South Korea Daily on 'Complicated' Issues Surrounding 'Mystery Ship'," *ibid.*, London, December 26, 2001.

8. Doug Struck, "Sinking Renews Debate on Japan's Military," *Washington Post*, December 28, 2001; "N. Korea Denies Link to Ship Lost Near Japan," *Washington Times*, December 28, 2001.

9. Doug Struck, "Japanese on Defensive over Sinking of Ship," *Washington Post*, December 28, 2001.

10. United Nations, "The Law of the Sea: United Nations Convention on the Law of the Sea, Part V, Exclusive Economic Zone," Article 56 (bii and biii) (1983) <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm>.

11. *Ibid.*, Article 73(1).

12. *Ibid.*, Article 111 (1, 2, 3).

But there is no Japanese domestic law allowing such use of force in its EEZ.¹³ Only warning shots are permitted. And according to the 1999 Saiga decision by the International Tribunal on the Law of the Sea, the use of force “must be avoided as far as possible, and where it is unavoidable, it must not go beyond what is reasonable and necessary under the circumstances.”¹⁴ The tribunal further concluded that considerations of humanity must apply, and all efforts must be made to ensure that life is not endangered. If the vessel were of almost any nationality other than (presumably) North Korean, firing directly at a suspected illegal fishing vessel, endangering it and its crew, would most likely be considered an overreaction and excessive use of force by the international community. Indeed, imagine the international reaction and the consequences if the vessel and its crew actually had been Chinese, or even South Korean!

Further, this incident occurred partially in disputed waters, and the ship, when initially fired upon, as mentioned above, was thought by the Japanese to be flying the flag of the other claimant, China. Even the *possibility* that it was a Chinese vessel should have dictated moderation in Japan’s response. Thus, it would seem that this use of force, particularly in another country’s claimed EEZ, was out of proportion to the alleged offense. Indeed, China expressed serious concern regarding the Japanese use of military force in the East China Sea.¹⁵

Japan may argue that it was an act of self-defense in response to an “attack.”¹⁶ But the Japanese coast guard vessels were the pursuers and fired first, so it is difficult for Japan to argue self-defense, at least for its actions during the pursuit. And Japan is not at war with North Korea, so prevailing peacetime norms and international law are in effect. Nevertheless, given the current international concern with “terrorism,” proving that the vessel was a North Korean ship attempting to land or retrieve men or material in Japan might bolster a self-defense argument.¹⁷ In late January, it was reported that diplomats from Japan and North Korea had met secretly in China to discuss the incident.¹⁸ Meanwhile, Tokyo is considering including terrorism and

13. “2d Ship Is Linked to Incident Off Japan,” Reuters, December 31, 2001; Kazunori Takada, “Japan Faces Legal Questions over Suspected Spy Ship,” *ibid.*, December 28, 2001.

14. International Tribunal for the Law of the Sea, “Year 1999: The M/V ‘Saiga’ (No. 2) Case, Saint Vincent and the Grenadines v. Guinea,” Judgement July 1, 1999, paragraphs 155–56.

15. “Japan’s Action on Rogue Ship Worries China,” Jiji Press English News Service, Tokyo, December 27, 2001.

16. Peter Landers, “Conflict Shows a Gray Area in Japan Law—Tokyo Weighs Revision to Boost Defense Measures,” *Asian Wall Street Journal*, December 26, 2001.

17. Julian Ryall, “North Korea Accused after Japan Sinks ‘Spy’ Ship,” *The Scotsman* (Edinburgh), December 24, 2001.

18. “Japanese Official Denies Reports of Meeting with North Korea after Ship Incident,” *BBC Monitoring Asia Pacific—Political*, London, January 24, 2002.

emergencies in areas surrounding Japan as causes for defense mobilizations.¹⁹

The U.S. EP-3E Incident Case

The U.S.-China case raises different questions. Military activities in the EEZ were a controversial issue during the negotiations on the text of the 1982 Law of the Sea Convention and continue to be in state practice.²⁰ Indeed, some coastal states, such as Bangladesh, Brazil, Cape Verde, India, Malaysia, and Uruguay hold that other states cannot carry out military exercises or maneuvers in or over their EEZ without their consent.²¹ Their concern is that such uninvited military activities could threaten their national security or undermine their resource sovereignty. However, maritime powers like the U.S. insist on freedom of military activities in EEZs out of concern that their naval and air access and mobility could be severely restricted by the global EEZ "enclosure" movement by which more than 100 coastal states have declared 200-nm EEZs, transferring much of the former high seas area to the EEZ regimes.

The Convention does not address this issue directly. One view is that what is not explicitly prohibited by the Convention is permitted. Because the Convention expressly prohibits intelligence-gathering activities in the territorial sea in Article 19(2) but not in the EEZ, such activities are arguably legal. However, it could also be argued that what is not specified is not authorized.

In judging the issue, two principles need to be kept in mind. One is the Convention's basic principle of maintaining the use of the sea for peaceful purposes. Its Article 301 states that "[i]n exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with principles of international law embodied in the Charter of the United Nations." Article 88 states specifically that ". . . the high seas shall be reserved for peaceful purposes."²²

The other principle is contained in Article 58(3), which states: "In exercising their rights and performing their duties under this Convention in the ex-

19. "Japanese Draws Up Policies for War Contingency Law," *ibid.*, London, January 21, 2002.

20. Francisco Orego Vicuna, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989).

21. Stephan V. Molodtsov, "The Exclusive Economic Zone: Legal Status and Regime of Navigation," in Elisabeth Mann Borgese and Norton Ginsburg, eds., *Ocean Yearbook* 6 (1986), pp. 203-16; Mark J. Valencia, "Law of the Sea in Transition: Navigational Nightmare for the Maritime Powers?" *Journal of Maritime Law and Commerce* 418:4 (1987), pp. 541-54.

22. Boleslaw Adam Bocek, "The Peaceful Purposes Reservation of the U.N. Convention on the Law of the Sea," in Elisabeth Mann Borgese et al., eds., *Ocean Yearbook* 8 (1989), pp. 329-61.

clusive economic zone, States shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law *in so far as they are not incompatible with this Part*" (authors' emphasis). While the latter qualification is a loophole allowing freedom of navigation and overflight, Article 87 states that such freedoms apply in the EEZ *provided* they are exercised with "due regard for the interests of other states in their exercise of the freedom of the high seas."

Although the U.S. has not ratified the Convention, it maintains that the navigational freedoms codified by it are customary international law. Washington points out that China's own law on the EEZ and the continental shelf, promulgated on June 26, 1998, states that all countries enjoy the freedom of navigation in and flying over its EEZ, provided they observe international law and China's laws and regulations.

It is clear from the Convention and customary international law that U.S. aircraft enjoy the freedom to fly over China's EEZ. But it is not clear that such freedom is absolute.²³ Critical questions are (1) are the spy flights a peaceful (non-threatening) act? and (2) do they give due regard to the "interests" of China in its exercise of freedom of navigation and overflight, including its right to monitor and enforce observance of its EEZ laws? In the 12-nm territorial sea, the Convention prohibits any act "aimed at collecting information to the prejudice of the defense or security of the coastal state," because such acts are not considered "innocent" passage.²⁴ What is not "innocent" in the territorial sea may not be considered "peaceful" in the EEZ. China certainly considers the spy missions unfriendly and perhaps even hostile or "threatening" acts.

There is also a question regarding the specific activities undertaken by the U.S. EP-3E plane involved in the incident. EP-3Es are outfitted with high-tech eavesdropping equipment to intercept radio transmissions and other communications signals. It was reported that the plane in question was probably observing signs of Chinese submarine activities by monitoring military communications traffic in the area and was "part of a larger U.S. effort to keep tabs on what the Chinese military is up to in the region, including advances in submarine warfare, intelligence-gathering, and space launch activities." One report even speculated that the U.S. plane was interfering with and altering communications between elements of China's armed forces.²⁵ If true, this would not seem to be a "peaceful" use of China's EEZ.

23. Vicuna, *The Exclusive Economic Zone*, p. 120.

24. United Nations, "The Law of the Sea," Article 19 (1, 2c).

25. See, *inter alia*, Christopher Drew, "Collision with China, Intelligence Gathering: Listening, Looking: Old Methods Still at Work," *New York Times*, April 14, 2001, p. 6; Elizabeth Neuffer, "This Navy Plane Excels at Eavesdropping," *Boston Globe*, April 5, 2001, p. A26;

One of the purposes of such flights may well be to gather military intelligence that could be used to delineate specific targets in a future armed conflict. Certainly, the very purpose of some intelligence-gathering is to gain an advantage over a potential adversary in times of conflict. If so, are such activities “peaceful” uses of the ocean and, in this case, of China’s EEZ? Or do they threaten force against the territorial integrity or political independence of China? And does a flight that results in a collision between a U.S. plane and a Chinese plane over China’s EEZ give due regard to China’s interests in its *own* exercise of freedom of navigation and overflight in its *own* jurisdictional zone? Moreover, the U.S. itself maintains Air Defense Identification Zones that extend, in places, some 300 miles out to sea and require all civilian and military aircraft to identify themselves and occasionally to follow U.S. official directions. What is good for the goose may be good for the gander.

There are several possible fundamental links between the two incidents. They both involve the issues of freedom of navigation and limits on the use of force in the EEZ. In Japan, there is now a domestic clamor to pass a law allowing such suspect foreign ships in Japan’s EEZ to be arrested and, if they resist, to be fired upon without threat of civil repercussions. A law allowing such actions in Japan’s 12 nautical-mile territorial sea was passed in November 2001.

However, Japan’s promulgation and blanket implementation of such a law for its EEZ could lead to serious incidents with its other maritime neighbors—Russia, South Korea, and China. Japan has frequently detained South Korean boats allegedly fishing illegally in its EEZ, and in late September, a Japanese coast guard vessel even rammed and sank one such boat.²⁶ Moreover, Japan has an ongoing dispute with China concerning Chinese maritime scientific research operations operating in Japan’s claimed EEZ.²⁷ Indeed, China may view Japan’s actions as a warning regarding its scientific surveys in the area of overlapping claims.

Maritime powers like the United States should be wary of any agreement or interpretation that would diminish the freedom of navigation in EEZs around the world.²⁸ Indeed, in the U.S. spy plane incident, the United States argued that such flights in the Chinese EEZ—and, presumably, spy vessel

Glenn Schloss and Mark O’Neill, “Cold War Crash Course,” *South China Morning Post*, April 6, 2001, p. 15.

26. “Japanese Patrol Boat Sinks South Korean Fishing Boat,” *BBC Monitoring Asia Pacific–Political*, London, September 18, 2001.

27. “‘27 ‘Spy’ Ships Operating in Waters Around Japan,” *Daily Yomiuri*, December 21, 2001; “Japan Asks China to Abide by Maritime Notification Accord,” *BBC Monitoring Asia Pacific–Political*, London, December 26, 2001.

28. See Landers, “Conflict Shows a Gray Area.”

movements²⁹—are permitted under the regime of “freedom of the high seas.” So as not to undermine this principle, the U.S. has negotiated bilateral agreements with various countries or, alternatively, sought from the flag state prior permission to stop suspect foreign vessels on the high seas.

Further, the U.S. frequently sends spy satellites and planes over North Korea and shares with Japan the information obtained.³⁰ If Japan tries to argue that North Korean spy boats cannot enter its EEZ, Tokyo would then be in the awkward position of supporting the use of spy satellites and planes to gather intelligence over another country’s EEZ, territorial sea, or even its land area but opposing the right of a country lacking such assets to gather data in a foreign EEZ the old-fashioned way, i.e., via ship.

However, it could be argued that such activities are “scientific research.” According to the Convention, such activities can be carried out in another country’s EEZ only for peaceful purposes and then only with the consent of the coastal state. This has direct bearing on a March 2001 incident involving the *Bowditch*, a U.S. Navy survey vessel that was confronted by a Chinese warship in China’s claimed EEZ in the Yellow Sea and forced to leave.³¹

One major lesson to be learned from these incidents is that there is a gray area surrounding navigation rights, military activities, and the use of force in the EEZ. To prevent serious spill-over effects, a common interpretation of these rights and their limits need to be negotiated among Northeast Asian countries, and perhaps the United States, the sooner the better.

29. For example, as that of the U.S. spy ship *Pueblo*, which was captured allegedly outside North Korea’s territorial waters.

30. “North Korean Radio Says USA Flew over 140 Spying Missions in October,” *BBC Monitoring Asia Pacific—Political*, London, November 1, 2001; James Brooke, “North Korea Calls Japan’s Sinking of Mystery Boat ‘Brutal Piracy,’” *New York Times*, December 27, 2001.

31. See Ji, “Rough Waters.”