

CONTINENTAL SHELF DELIMITATION IN THE YELLOW SEA

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In a recent book on the Korean question, an American commentator points out the importance of seabed petroleum deposits in the Yellow Sea for both the Republic of Korea (hereinafter, "ROK") and the Democratic People's Republic of Korea ("DPRK").¹

East Asia (mainly, China, Japan, and the two Koreas) and will then venture some proposals for cooperative arrangements for the joint exploration for and exploitation of oil resources in the Yellow Sea.

Japan and Seabed Boundary Delimitation

With respect to the principles and rules applicable to the delimitation of the continental shelf and the exclusive economic zone, the Japanese government has consistently relied on the principle of equidistance. Japan's adherence to the equidistance principle is reflected in the relevant domestic legislation. Thus, Article 1(2) of the 1996 Japanese Law on the Exclusive Economic Zone and the Continental Shelf defines the outer limit of the exclusive economic zone (hereinafter "EEZ") as "the equidistance line (if a different line is agreed on between Japan and a foreign state, that line)" when the 200 nautical mile line as measured from the baseline extends beyond the equidistance line. Article 74 of the 1982 UNCLOS makes no mention of the equidistance line and only provides that "[t]he delimitation of the exclusive economic zone ... shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution". In contrast, Japanese law puts forth the principle of equidistance as the mandatory rule of delimitation and delimitation based on other criteria effected by agreement is regarded as an exception.³ The provision appears to be

based on the idea that there exists a high degree of similarity between the equidistance/special circumstances rule as provided for in Article 15 of the 1982 Convention and the equitable principles as articulated in Articles 74 and 83 of the

The ROK position on the principles and rules to be applied in its adjacent seas is sometimes criticized as being inconsistent.⁵ In fact, the Chinese government has criticized its ROK counterpart for adopting both methods and applying whichever is most advantageous.⁶

The seabed areas of the Yellow Sea constitute a single continuous continental shelf in contrast to the East China Sea where the Okinawa Trough exists. Therefore, there is little likelihood that China could succeed in challenging an equidistance line as being inequitable.⁷ From the standpoint of Article 74 of the 1982 UNCLOS providing for equitable principles, on which China itself places a great reliance, one could justify the ROK position by arguing that equidistance (as no more than a technique employed to achieve an equitable solution)⁸ and natural prolongation (as title and a relevant circumstance) are subordinate to the umbrella principle of equity. Also, state A is not necessarily bound to apply the principles adopted in its maritime boundary treaties with state B in relation to other states.⁹

However, the evolution of the international jurisprudence on maritime delimitation law seems to impact on the ROK position. On the doctrinal side, there is an argument that with the introduction of a new concept of continental shelf under the 1982 UNCLOS the Okinawa Trough could not be accorded any significance and that Japan is

entitled to extend its continental shelf beyond the Trough.¹⁰

China and Seabed Boundary Delimitation

In stark contrast to Japan, the Chinese government has been an ardent proponent of equitable principles and has persistently denied the customary law status

other, the continental shelves of which connect together, shall jointly determine the delimitation of the limits of jurisdiction of the continental shelves through consultations

with equitable principles.¹⁵

Now the question is how the Chinese position on the principles and rules of maritime delimitation is applied to the Yellow Sea and the East China Sea. In the former, the Chinese side tries to avoid the application of the equidistance principle by invoking various geological or geomorphological features of the sea. The official position of China is still not clear in this regard. However, various geological or topographical criteria have been suggested by a number of scholars and researchers. Thus, a description of the seabed topography, such as the fact that a smooth gentle slope (1:26,000) from the west meets the steep and less regular slope (1:6,000) from the east in an axial valley two-thirds across on the Korean side of the Yellow Sea, or the fact that the eastern third of the sea is floored by sand originating from the mountains of Korea while the rest (2/3) on the western side is floored by clay discharged by the two rivers of China, i.e., the Huanghe and the Yangtze,¹⁶ is cited with approval as the basis of title.¹⁷ Also, China may have hoped to argue that the continental shelf in the Yellow Sea is a prolongation of the Chinese landmass in an eastward direction and not a prolongation of the Korean peninsula westwards.¹⁸

In the East China Sea, China is taking almost the same position as it takes toward Korea. In relation to Japan, it puts forth the principle of natural prolongation of

UNCLOS III negotiations.

Secondly, in its interpretation of the customary international law of maritime delimitation as embodied in the 1969 ICJ cases and the relevant articles (in particular, 74(1) and 83(1) of the 1982), China emphasizes the principle of equitable solution through consultations. This principle is concretized by taking into account and giving due weight to all the relevant factors in a given delimitation case. In contrast to the international jurisprudence's "lionizing" geographical factors to the virtual exclusion of other factors, China takes a more expansive and inclusive view of relevant circumstances to be factored into maritime delimitation, including geological or geomorphological factors and economic factors.

Thirdly, China has attentively followed the evolution or transformation of the international jurisprudence on maritime delimitation. Rather than accepting that this jurisprudence is binding on it, however, China has tried to "localize" or "parochialize" the normative impact of the jurisprudence, *inter alia*, by invoking still widely diverging state practice which China seems to regard as a more authoritative and fundamental source of international normativity. If this strategy of localization or parochialization should prove unsuccessful, it is submitted, it could fall back on the principle of persistent objector and thereby exempt itself from the binding force of the international

jurisprudence.

Fourthly, in trying to confine the normative reach of the international jurisprudence concerning maritime delimitation, China places emphasis on the unique factual matrix of each given delimitation case. In doing so, the principle of equidistance is discounted as a principle valid for a limited category of delimitation or no more than a mere technique which has not attained the same normative status as the principle of equity.

As such, the Chinese position shows a wide discrepancy with the international jurisprudence on maritime delimitation. How is this discrepancy to be explained and overcome? By stubbornly sticking to the principle of equity in defiance of the newly consolidated international “case-law”, does China violate international law? Or is China

analysis, it can be argued that the states in East Asia (especially China), in their efforts to manage or resolve maritime delimitation issues within the region, have room for maneuver even outside the normative framework structured by the ICJ's jurisprudence. Given the wide discrepancy between the (tenable, in the light of the foregoing discussion) position of some states in the region and the jurisprudence of the ICJ and arbitral tribunals, it will be difficult to expect the states concerned to refer their disputes relating to maritime delimitation to international tribunals in the near future.

Continental Shelf Delimitation in the Yellow Sea

South Korea and China

As was pointed above, in the delimitation of the continental shelf in its coastal areas, the ROK government has taken a selective or "eclectic" approach. In contrast, the Chinese government has consistently contended that the principle of equity is the governing principle of the law of maritime delimitation. It persistently denied the customary law status of equidistance since the controversy over the sea-bed boundary broke out in the early 1970s. Various geological or geomorphological criteria relied on by Chinese scholars and researchers in delimiting continental shelf in the Yellow Sea were already discussed above.

In the light of the fact that the seabed areas of the Yellow Sea constitute a single

continuous continental shelf, in contrast to those in the East China Sea, where the

Therefore, it is necessary for China and the ROK to reach consensus on this difficult question of the legal status of islands and rocks in order to articulate a cooperative regime for the exploration and exploitation of the oil resources in the Yellow Sea. Again, international law of the sea is riddled with lots of (intentional) ambiguities in this respect. So it behooves the parties concerned to settle the question among themselves, taking into account all the relevant circumstances existing in a given case. In other

the DPRK is well summarized by an American scholar as follows:

In the past, North Korea had obtained oil from the Soviet Union at subsidized prices. In the early 1990s, when the Russians began demanding payment in hard currency at world prices, China emerged as North Korea's principal supplier of both oil and coal. As China shifted from a net exporter to a net importer of oil, its willingness to finance North Korea's consumption withered, and it too began to demand that North Korea pay full price. The Chinese reversed course, however, once the famine intensified and large numbers of refugees began crossing into China. ... Williams, Hayes, and Von Hippel ["Fuel and Famine: North Korea's Rural Energy Crisis" (Paper presented to the Pentagon Study Group on Japan and Northeast Asia, Washington, 22 October, 1999)] estimate that energy supplies from all sources have fallen more than 50 percent since 1990.²²

Under the circumstances, it is not surprising that the DPRK has recently stepped up its exploratory activities for oil which it had embarked on as early as 1960s, as is well analyzed in a paper submitted for this workshop.²³

of the DPRK was “floating on a sea of oil”.²⁴ At that time, it was reported in the ROK media that the oil reserve at the Seohanman (West Korea Bay) basin was estimated to reach 5-40 billion barrels. It was also reported in 2001 that the DPRK succeeded in producing 300,000 tons of crude oil per year from the Anju basin.²⁵ According to the Korea Trade Investment Promotion Agency, the DPRK exported at least \$10 million of oil to countries such as Japan, China and Thailand. In the light of the fact that the DPRK imported only 389,000 tons of oil in the same year, oil export to the tune of \$10 million could be explained only on the basis of a substantial amount of domestic oil production. Given the highly sensitive nature of the question, both the ROK and DPRK governments have been highly secretive about the exploratory and exploitative activities within the DPRK.²⁶ Once it was expected that the 2001 summitry between the leaders of the ROK and the DPRK would achieve a breakthrough for the North-South cooperation on the development of oil resources within the DPRK.²⁷ However, a serious cooperation for the joint development of the oil resources has yet to be undertaken.

One of the biggest hurdles for the North-South cooperation is the question of maritime jurisdictional limits between the ROK and the DPRK. As is well known, the “Northern Limit Line” which had been unilaterally established by the Commander of

thorny question should be resolved in an amicable and forward-looking way within the framework of the replacement of the present armistice regime by a peace agreement.

The Path to Joint Development

As compared to the situation in the East China Sea, the trilateral (i.e., China, the ROK and the DPRK) or bilateral (i.e., between the ROK and the DPRK or between the DPRK and China) cooperation for the exploration for and exploitation of oil resources in the Yellow Sea has a high “issue density”. It is not just about securing energy resources needed for economic development. It is closely related to the question of alleviating the acute socio-economic crisis now confronting the DPRK. The issue also has a lot to do with laying the groundwork for a close long-term economic cooperation among the parties concerned, in particular between the ROK and the DPRK. If one goes one step further, a smooth and productive conduct of the cooperative regime will go far towards the establishment of a permanent regional system of peace and security.

It is true that the persistence of the North Korean nuclear crisis is a major stumbling block to the emergence of regional cooperative regimes in East Asia.

However, it should be noted that as far as China, the ROK and the DPRK are concerned,

the rivalry and tension of the Cold War period has substantially decreased. If the parties concerned approach the question of oil resources in the Yellow Sea from the perspective of a win-win strategy rather than from that of a zero-sum game, they can resolve a number of difficult questions some of which go far beyond the acquisition of energy resources.

In devising an equitable and amicable resolution of maritime delimitation in the

joint exploration for and exploitation of oil resources.

(d) The parties concerned should devise ways for a smooth and equitable resolution of disputes relating to oil exploration and exploitation.

In moving toward joint development, the following principles should be kept in mind:

(a) The parties concerned should reciprocally make concessions regarding the most difficult question of the principles and rules to be applied in maritime delimitation. In other words, China should not insist on the natural prolongation as its basis of continental shelf claim. In any case, given the geological or geomorphological nature of the seabed in question, it will be extremely difficult to determine the Chinese continental shelf margin. The ROK should reciprocate by dropping its support for the median line. As was pointed out above, the ROK position arguably suffers from the lack of consistency. In other words, given its insistence on the principle of natural prolongation *vis-à-vis Japan*, the ROK will find it difficult to put forth the principle of median line against China as forcefully as it would like to. Since the DPRK appears not to have clarified its position on the principles and rules of maritime delimitation in the Yellow Sea,²⁸

official and final position of the respective parties on the question of maritime

delimitation. China and the ROK can avoid the embarrassment of appearing to back

view expressed in the book and the traditional official position and other circumstances, one could surmise that there is not much discrepancy between this view and the official stance of the Chinese government.

²¹ Park, *supra* note 29, p. 258.

²² Marcus Noland, *Avoiding the Apocalypse: The Future of the Two Koreas* (Washington, DC: Institute for International Economics, 2000), pp. 144-145.

²³ Keun-Wook Paik, "North Korea's Approach for Oil Exploration and Production".

²⁴ See *Korea Times*, 3 November 1998; *Chosun Ilbo*, 2 November 1998; *Monthly Shindonga* (December 1998).

²⁵ *Chosun Ilbo*, 26 May 2001.

²⁶ *Chosun Ilbo*, 4 June 2001.

²⁷ *Chosun Ilbo*, 26 May 2001.

²⁸ In a 1992 international law textbook, it is stated that the decree on the establishment of the 200-mile economic zone of 21 June 1977 provided for the median line where it was impossible to demarcate this zone to its full extent. *Gukje beophak* [The Science of International Law] (Pyongyang: The Kim Il Sung University Press, 1992), p. 116. This fact is also mentioned in a recently published encyclopedia on international law.