Joint Development of Hydrocarbon Resources in Northeast Asia: Recent Developments

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Points to be discussed

A. Practices
1. 1974 JDZ agreement between Korea and Japan: a ‘sterile success’?
2. 2008 Principled Consensus between China and Japan: a cautious and subtle step forward?
3. Hydrocarbon resources in the Yellow Sea: a potential area of conflict or joint development?

B. Analyses
1. Joint development and the duty to negotiate: a ‘teething’ obligation’?
2. Natural prolongation: a life ‘prolonged’?
3. Looking at the bigger picture: coping with the ‘peaceful rise/development’ of China
1. 1974 JDZ Agreement between Korea and Japan

(1) Assessment: “Sterile Success”?

- The late Judge Park Choon-Ho: “the 1974 JDZ agreement has not produced a single drop of oil, but has produced a whole bunch of Ph.D. dissertations.”
- Becker-Weinberg, “a significant improvement of relations between States”
  (echoed by Prof. Hayashi and other commentators)
- It also worked as a model for subsequent JDAs.
(2) Post-1978 overview

(a) 1978 – 1988
   9 drillings leading to no oil discovery

(b) 1989 – 1992
   geophysical surveys at subzones 2 & 4

(c) 1993 – 2000
   suspension of any JD activities

(d) 2001 – present
   resumption of JD activities, but Japan remains reluctant
(3) Problems to be addressed

(a) Joint in form only, not in spirit & substance

(b) Expiry in 2028 (Article 31 of the 1974 Agreement)

(c) Given the PRC’s protest against the JDZ agreement, is there a need for a trilateral approach to the question? (cf. Xiao Jianguo, *Joint Development of Offshore Oil & Gas Across the International Maritime Boundaries* (2005), p. 219)
2. 2008 ‘Principled Consensus’ between China and Japan

(1) Legal nature of the ‘consensus’
   (a) Japan: political agreement
   (b) China
     - Gao Jianjun: “All of these provisions create legal obligations binding the two countries … ” (Ocean Development and International Law vol. 40 (2009), p. 297)
- Zhang Xinjun: “the document exists as a pair of concurrent press releases in two languages, lacking signatures and a date, thus invites doubt about the parties’ intentions to make it binding.” (Ocean Development and IL, vol. 42 (2011), p. 57)
(2) Implications
(a) Growing relevance of equidistance?
   - The JDZ straddles the hypothetical median line.
   (Gao: “agreeing that the block straddles the median line claimed by Japan does not indicate that China has accepted the claims of Japan on maritime delimitation.”  *Ibid.*, p. 294)

(b) relations with Korea
   - possible ‘straw effect’
   - good-faith implementation of the JD agreement
3. Hydrocarbon resources in the Yellow Sea

(1) South Korea - China
- Potential overlap between Korea’s block 2 and PRC’s block 11/34 (explored by Devon Energy)
- Explorations in the early 2000’s by Korea suspended due to the Chinese presence in the area
- 2004: PRC lodges a formal protest to Korea
- 2005: Korean Government decided to suspend explorations in the area
(2) North Korea – China
12 December 2005: Agreement between the DPRK and the PRC on the Joint Development of Offshore Petroleum
4. JD and the duty to negotiate

(1) Becker-Weinberg

“[A]lthough UNCLOS does not establish a pactum de contrahendo, it does nonetheless envisage a pactum de negotiando … : States are bound to negotiate in good faith even when an agreement has not been reached.” (Singapore paper, 17 June 2011)

(2) Articles 74(3) & 83(3): pactum de negotiando
(3) Another source of the obligation in CIL? 1974 ICJ *Fisheries Jurisdiction* case para. 75) “The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; … “

(4) Substantive contents of the duty to negotiate: elaborated in the 1957 *Lac Lanoux* case and the 2007 *Guyana/Suriname* arbitration
(5) Duty to negotiate (in the particular context of maritime delimitation): not a ‘toothless’ obligation any more, but a ‘teething’ obligation: Operationalization of the duty to negotiate

(6) How this development will play out in the specific context of the South China Sea and the East China Sea?
5. Legal Life of Natural Prolongation

Chinese Arguments Reconstructed

(1) 1969 Judgment still the rule of CIL

(2) If not, reliance should be placed on the more original and powerful source of international normativity, i.e., state practice
(3) Reliance on the principle of proportionality

(4) Possible last line of defence: the rule of ‘persistent objector’
6. Looking at the bigger picture

(1) The South/East China Sea question can be characterized as an offshoot or subset of the bigger problem, _i.e._, whether or how to accommodate the rising (or already risen) China?
(2) China Oscillating/Ambivalent (in relation to IL)

At the general level, the PRC accepts IL is an important component of her foreign policy. However, on a deeper level (or in some specific contexts), she has misgivings about IL. This divergence is often expressed as her (strategic) ambiguity about some IL issues.
(3) How to achieve a ‘soft landing’ for China or a peaceful change of IL
- Need for working both at the general level and the specific level of maritime delimitation: Need for Joint Development of an international law discourse that is conducive to the principled accommodation of China
Terima Kasih Banyak!