Japan's Arrangements with South Korea and China for the Development of Oil and Gas in the East China Sea: A Memorandum*

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Introductory

The idea of joint development of offshore oil and gas was introduced in the *North Sea Continental Shelf* cases of 1969 before the International Court of Justice, and was adopted in the Japan-South Korea Joint Development Agreement (hereinafter "*JDA*") of 30 January 1974 for the first time in the history of international maritime boundary delimitation. But the agreement was clearly a political compromise, (1) to the disadvantage of Japan in that the Joint Development Zone (hereinafter "JDZ") is located entirely on the Japanese side of an hypothetical median line.

Japan-South Korea Joint Development Agreement

A brief history

The South Korean Government was quick to ratify the agreement in December, 1974. South Korea had had its legislation, *Submarine Mineral Resources*

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* This is an abridged version of a paper filed with the Centre for the Sea and Maritime Law of the Faculty of Law of the National University of Hanoi, Vietnam, and was presented as a discussion paper at the Roundtable, *Maritime Boundary Delimitation and Possibilities of Joint Development in East and Southeast Asia*, co-sponsored by The Aichi University Institute of International Affairs and the Centre for the Sea and Maritime Law of the Faculty of Law of the National University of Hanoi, Vietnam, held on Kurumamichi, Nagoya, Campus of Aichi University on 29 November 2009.

(1) *See*, for a detailed description of the Japan-Korea negotiations, Takeyama, Masayuki, "Japan's Foreign Negotiations over Offshore Petroleum Development: An Analysis of Decision-Making in the Japan-Korea Continental Shelf Joint Development Program", in Friedheim, R. L. et al. (eds.), *Japan and the New Ocean Regime*, Boulder, Colorado: Westview Press, 1984, pp. 276-313. A testimony by the Director-General of the Asian Affairs Bureau of the Ministry of Foreign Affairs at a meeting of the House of Representatives Standing Committee on Foreign Affairs in April, 1977 bears witness to the compromising nature of the agreement. *See Official Records of the House of Representatives Standing Committee on Foreign Affairs* (in Japanese), meeting on 22 April 1977, p. 23.

(2) *Submarine Mineral Resources Development Law*, Law No. 2184, promulgated on 1 January 1970; *Enforcement Decree of the Submarine Mineral Resources Development Law, Presidential Decree* No. 5020, promulgated on 30 May 1970; and *Enforcement Regulations of the Submarine Mineral Resources Development Law*, Regulations of the Ministry of Commerce and Industry No. 343, promulgated on 6 May 1971.

Development Law, as early as 1970,[2] and leased some sea-bed areas to some international oil majors some parts of which overlapped those sea-bed areas leased by the Japanese Government to some Japanese oil exploration companies and led on to the conflict between the two countries.[3] Japan delayed ratification until June, 1978 when it came up with a most detailed law, *Ad hoc Law concerning the Development of Petroleum and Inflammable Natural Gas*[4] (hereinafter "*Ad hoc Law*"). This at last brought the 1974 agreement into force on 22 June 1978.

Structure of the agreement[5]

An interesting feature of the Japan-South Korea agreement is the conclusion of the operating agreement between the concessionaires one each from the parties. The operating agreement must provide for these matters:

(a) details relating to the sharing of natural resources and expenses in accordance with Article IX;
(b) designation of operator;
(c) treatment of sole risk operations;
(d) adjustment of fisheries interests; and
(e) settlement of disputes.[6]

One operating agreement is concluded with respect to each subzone to avoid complex questions that could arise otherwise.

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(3) *See* Takeyama, *supra* note 1. *See* also Park, Choon-ho, "Joint Development of Mineral Resources in Disputed Waters: The Case of Japan and South Korea in the East China Sea", in Valencia, Mark J. (ed.), *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development*, Oxford, etc.: Pergamon Press, 1981, pp. 1335-1341.

(4) Its official title is *Law for Special Measures for the Development of Oil and Inflammable Natural Gas Resources in Order to Implement the Agreement Regarding Joint Development of the Southern Part of the Continental Shelf Adjacent to Japan and the Republic of Korea*. For a brief description of this *Ad hoc Law*, the reader is conveniently referred to Miyoshi, Masahiro, "The Japan-South Korea Agreement on Joint Development of the Continental Shelf", in Valencia, Mark J. (ed.), *Geology and Hydrocarbon Potential and Possibilities of Joint Development*, New York, etc.: Pergamon Press, 1985, pp. 545-548.

(5) The sub-sections that follow, "***Structure of the agreement***", "***Expenses for exploration and exploitation***", "***Applicable law－'operator formula'***", "***Other legitimate activities on the high seas***", "***Sole risk operations***", "***Financial provisions and tax***", "***Settlement of disputes***", and "***Safety and protection of the marine environment***", are based on Miyoshi, Masahiro,"Licensing and Related Legal Issues in the Japan-South Korea Joint Development Agreement of 1974: Possible Implications for ASEAN Countries", paper presented at a meeting of the ASEAN Council on Petroleum (ASCOPE) Legal Committee Training Course in Bandung, Indonesia, 15-18 February 1993, reproduced with some amendments in *Hokei Ronshu* (Aichi University Faculty of Law Journal of Legal and Political Sciences), No. 132 (July 1993), pp. 6 -17.

(6) *JDA*, Art. V, para. 1.

Applicable law － "operator formula"

It appeared extremely difficult for the Parties to agree on what law should be applied to the JDZ. They studied the idea of dividing the JDZ into two areas of jurisdiction, but this would have given the impression that their jurisdictions were geographically fixed, and consequently would have been inadmissible in view of the guiding principle of the Agreement that the issue of sovereign rights should be put aside. Thus they devised the "operator formula" or the law of the operator's country in a given subzone in Article XIX of the Agreement.

Admittedly the choice of the applicable law is made in an operating agreement, contract of a private nature between the concessionaires, but this is not put into force unless and until approved by the Parties' governments. A unique characteristic of this formula is that the operator for that subzone shifts from one concessionaire to the other as and when the exploration phase turns into the exploitation as a result of a "commercial discovery" of natural resources, and that the applicable law shifts from one to the other accordingly. This can cause some complications especially if the same personnel are involved in the two consecutive phases of operation. Fortunately, however, there appear to be no radical differences between the relevant Japanese and Korean laws, and at the time of the conclusion of the *JDA* it was agreed that with respect to legal gaps of serious concern to the Parties, they should hold consultations with a view to agreeing on a co-ordinated set of rules and principles.(7)

Other legitimate activities on the high seas

The customary international law of the continental shelf requires that legitimate activities in the superjacent waters should not be unduly affected by exploration and exploitation of submarine resources. What in fact matters in the JDZ is fisheries. The provision for fisheries interests was included in Article XXVII of the Agreement against Korea's initial opposition in favour of the traditional Japanese consideration for the fishing industry in the area. Thus it was agreed that an operating agreement should include a clause providing for "adjustment of fisheries interests".(8)

In approving an operating agreement, the Japanese Minister of International Trade and Industry must consult with the Minister of Agriculture, Forestry and

(7) I recall an interesting episode of my experience in Bangkok in 1985 when a third workshop was held there on hydrocarbon potential and possibilities of joint development in Southeast Asian seas. There came three lawyers from Australia, and in a private conversation with me at coffee break they wondered at this "operator formula" which I explained in my presentation on the Japan-Korea precedent for joint development. In retrospect those Australian lawyers would have been involved in the negotiations between Australia and Indonesia that were subsequently to result in the "Timor-Gap Joint Development Agreement" of 1989.

(8) *JDA*, Art. V, para.1(d). *Cf. Ad hoc Law*, Art. 21, para.1(3), with a slight different wording: "Matters relating to adjustment with the fisheries industry".

Fisheries on the "adjustment of fisheries interests".

Settlement of disputes

The Agreement has a normal dispute settlement structure. If a dispute fails to be settled by diplomatic negotiations, it is to be referred for decision to an arbitration board composed of three arbitrators (*JDA*, Art. XXV, paras. 2, 3). The arbitration board may, at the request of either Party, issue a provisional order in urgent cases before an award is handed down (*JDA*, Art. XXVI, para. 4).

Safety and protection of the marine environment

The Parties exchanged Notes pursuant to Article XX of the Agreement under which they undertake to prevent collisions at sea and to prevent and remove pollution of the sea that may arise from activities relating to exploration or exploitation. The Notes have detailed provisions for such measures as will be necessary to prevent collision or prevent and remove pollution.

Implications of the Japan-South Korea arrangement

For the tremendous efforts they made to settle the dispute over potential oil and gas by an agreement on joint development for a period of 50 years, the two countries have seen a disappointing outcome over the past 30 years: no oil or gas production. What the Japan-South Korea Agreement of 1974 has done is the production of a lot of PhDs on joint development, as the late Judge Park Choon-ho of the International Tribunal for the Law of the Sea once said in one of his legendary jokes.

The first round of exploration work over a period of eight years came to an end on 17 May 1987 when the duration of the exploration right expired.[9] As a result of a series of consultations for a review of the allocation of the nine subzones and test-drilling obligations, the two Governments exchanged Notes on these matters on 31 August 1987, and re-divided the JDZ into six subzones of more or less even size. The drilling obligations were eased from eleven to seven in the light of the international crude market situation.

The JDZ as defined by the *JDA* is located entirely on the Japanese side of the hypothetical median line. This is an outcome of the negotiations, to be sure, but was in fact virtually based on the assumption that the "natural prolongation" doctrine constituted the basis for not only title to the continental shelf but also for its boundary delimitation. But the truth is that it was the correct basis for title only.[10] It is regretted in retrospect that the negotiators, especially those on the

(9) *JDA*, Art. X, para. 2, provides that the duration of the "exploration right" is eight years from the date of entry into force of the operating agreement, unless the "exploitation right" is established during the period of the exploration right.

Japanese side, did not have due regard to this reading of the ICJ judgement.(11)

Widely misinterpreted as something absolute at first, this doctrine of "natural prolongation" was to be modified in the subsequent cases of continental shelf boundary delimitation before the ICJ and some arbitral tribunals.(12) It seems to be established now that title to the continental shelf is not only the natural prolongation of the land territory of the coastal State but also the distance of 200 nautical miles from the baseline where the natural prolongation does not extend to that distance.(13) If the 1974 *JDA* was erroneously based on the "natural prolongation" doctrine, it may be said *a fortiori* today, based on the accumulated case law on the continental shelf boundary delimitation, that in the East China Sea where the breadth is less than 400 nautical miles, the basis of title to the seabed is the distance from the baseline. This implication would have much impact on Japan-China controversy over title to the seabed, and consequently its boundary delimitation in the same East China Sea.

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(10) Unlike most international lawyers of the day all over the world, a young scholar discerned the correct rationale of the doctrine as propounded by the ICJ in the *North Sea* cases of 1969. His interpretation of "natural prolongation" is worth quoting extensively:

> "... when read in the context of the complete opinion, it becomes manifest that the passages which contain the 'natural prolongation' principle consistently deal not with the North Sea controversy but with the Court's elucidation of the theoretical understructure of continental shelf doctrine in general .... Such passages bear little relevance to the precise issue before the Court, but are merely preliminary steps in the Court's deductive process, establishing such fundamental notions as that of the coastal State's intrinsic right to sovereignty over the shelf *per se*. At no point in the opinion is it even hinted that the 'natural prolongation' principle supplies a means or method for determining what portion of, or even where, the particular continental shelf at issue may be subject to a particular coastal State's jurisdiction."

Terr, Leonard B., "The 'Distance Plus Joint Development Zone' Formula: A Proposal for the Speedy and Practical Resolution of the East China and Yellow Seas Continental Shelf Oil Controversy", 7 *Cornell International Law Journal* 56-57 (1973). As its publication date shows, this article was published one year before the conclusion of the *JDA* of 1974.

(11) I was away in London (from September, 1973 to August, 1975) when the *JDA* was concluded in January, 1974, and had no way of having access to the information about the negotiations prior to the *JDA*. However, I introduced Terr's paper in my short presentation at the first workshop on joint development in Honolulu, Hawaii in 1980. *See* Miyoshi, Masahiro, "Some Comments on Legal Aspects of Precedents for Joint Development", in Valencia, *supra* note (3), p. 1361.

(12) *See Anglo-French Continental Shelf arbitration of 1977*; *Iceland/Norway (Jan Mayen) Continental Shelf conciliation of 1980*; *Tunisia/Libya Continental Shelf case of 1982*; *Gulf of Maine case of 1984*; *Guinea/Guinea- Bissau Continental Shelf arbitration of 1985*; *Libya/Malta Continental Shelf case of 1985*; and many more cases of maritime boundary delimitation that have followed to date. For a brief analysis of the weakening status of "natural prolongation" in the case law, see Miyoshi, Masahiro, "Some Thoughts on Maritime Boundary Delimitation", paper presented at the *International Conference: Towards a Framework for the New Order of the Sea*, Seoul, Korea, October 24-25, 2006, and included in, Hong, Seoung Yong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, The Hague: Martinus Nijhoff, 2009, pp.107-118.

(13) *See* Art. 76, para. 1, of the UN Convention on the Law of the Sea.

Japan-China Arrangement for Joint Operations of 2008

On 18 June 2008 the Governments of Japan and China issued a brief joint press release on "Co-operation between Japan and China in the East China Sea". It is worded as follows:

> "Japan and China, through serious consultations based on the common awareness of the two leaders attained in April, 2007 and the new common awareness of the two leaders attained in December, 2007 to make the as yet undelimited East China Sea a sea of peace, co-operation and friendship, have agreed to co-operate without jeopardising their respective legal positions, and have made the first step forward. They will continue to make consultations in the future."(14)

The joint press release has two instruments of understanding: one is the "Understanding on Joint Development between Japan and China in the East China Sea", and the other the "Understanding on the Development of Oil-Gas Field *Shirakaba* (known as *Chunxiao* in Chinese)".

The first "Understanding" states as follows:

> "The two sides shall proceed the following as the first step of joint development in the East China Sea.
>
> 1. An area of the sea surrounded by a series of straight lines connecting the points the geographical co-ordinates of which are specified as follows shall be the joint development zone:
>
> (1) 29° 31' N 125° 53' 30" E
> (2) 29° 49' N 125° 53' 30" E
> (3) 30° 04' N 126° 03' 45" E
> (4) 30° 00' N 126° 10' 23" E
> (5) 30° 00' N 126° 20' 00" E
> (6) 29° 55' N 126° 26' 00" E
> (7) 29° 31' N 126° 26' 00" E
>
> 2. The two sides select such an area or areas as they agree upon within the above-mentioned zone through joint exploration and on the basis of the principle of reciprocity, and jointly develop the selected area or areas. Specifics will be determined by mutual consultation.
> 3. The two sides shall make efforts to conclude, at an early date, a bilateral agreement necessary for the implementation of the above-

(14) Unofficial translation by this author from the official Japanese text.

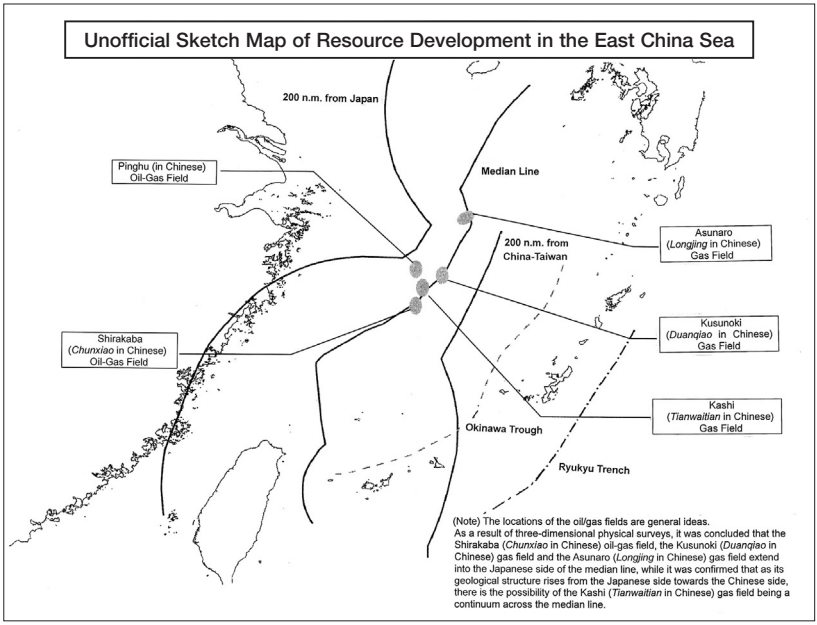
mentioned development through their respective domestic procedures.

4. The two sides shall continue consultations to realise joint development in other areas in the East China Sea as soon as possible."(15)

The second "Understanding" states as follows:

"The Chinese company welcomes the participation of Japanese companies in the exploitation in the *Shirakaba* (known as "*Chunxiao*" in Chinese) oil-gas field in its possession in accordance with the Chinese law on international co-operation in the development of offshore oil resources.

The Governments of Japan and China confirm this, and shall make an effort to agree and conclude necessary Exchange of Notes at an early date. The two sides shall take necessary domestic procedures to conclude the Exchange of Notes."(16)



(15) Unofficial translation by this author.
(16) Unofficial translation by this author.

There is a sketch map of the two oil-gas fields attached to these two "Understandings". The map has no drawing of the median line as claimed by Japan, but it is understood to run just a few kilometres south of *Shirakaba* field and run through the joint development zone to the north. The size of this second joint development zone is roughly twice as large as that of Lake Biwa, the largest lake in Japan near Kyoto. In terms of potential gas reserves, however, the total amount of estimated exploitable reserves in the East China Sea would be something like 180 million barrels (if converted into crude oil), far less than an estimated total reserve of 9,520 million barrels in Sakhalin fields I and II to the north of Hokkaido.(17) In a sense the recent arrangement with China may have been aimed at its psychological effects that it could boost business between the two countries.(18)

A brief history of negotiations(19)

The whole history of the Japanese-Chinese dispute, and the Japanese-Korean dispute for that matter, in the East China Sea dates back to the seismic survey by the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP), a sub-organ of the UN Economic Commission for Asia and the Far East (ECAFE), in 1968 which allegedly identified a treasure trove of untapped seabed oil and gas reserves.(20) The CCOP survey report kindled enthusiasm for further exploration of the seabed in the sea area involving Senkaku Islets, making China aware of is need to claim sovereignty over these islets, over which it had kept silence for hundreds of years in its claim to sovereignty. In 1970 it started claiming its jurisdiction over the sea areas in which Japan and South Korea had begun negotiations for boundary delimitation and eventually a joint development zone. Thus it promulgated a *Law of the Territorial Sea and the Contiguous Zone* in 1992, in which it states that Senkaku Islets (known as "Diaoyu" in Chinese) belong to China, a completely new claim totally unknown to Japan because of its long silence in the past hundreds of years.

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(17) A high official at the Natural Resources and Energy Agency of the Ministry of Economy, Trade and Industry reportedly said that the East China Sea is not very attractive in terms of resources. *The Asahi Shimbun*, 19 June 2008, p. 2.

(18) Both Japanese and Chinese business circles seem to welcome this recent development for its possible positive effects on the business relations of the two countries. *Ibid*.

(19) This section on history is based on Yarita, Susumu, "Toward Cooperation in the East China Sea", paper presented at an international workshop, *Seabed Petroleum in the East China Sea: Geological Propsects, Jurisdictional Conflicts and Paths to Cooperation*, in Beijing in April, 2004 co-sponsored by Woodrow Wilson International Center for Scholars and the China Institute of International Studies, and reproduced in Harrison, Selig S.(ed.), *Seabed Petroleum in Northeast Asia: Conflict or Cooperation*, Washington, D.C.: Woodrow Wilson International Center for Scholars, 2005, pp. 23-26.

(20) Emery, K. O., "Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea", 2 *CCOP Technical Bulletin* 41 (1969).

Japan and China started in the mid-1980s and had since continued negotiations off and on for a possible joint development of gas fields in the East China Sea. In 1985 Japan Petroleum Exploration Co., Ltd. (JAPEX) and China discussed the concept of joint operations in the East China Sea, while Teikoku Oil separately proposed to the China National Offshore Oil Corporation (CNOOC), the Chinese Government's nominee to negotiate with Japan's counterpart on possible joint operations in the East China Sea, that joint seismic shooting be undertaken to determine the geological prospects. Thus in the period of the 1980s and 1990s the negotiations were held intermittently on inter-governmental as well as inter-oil company levels.

Then came the start of development of the *Shirakaba* (*Chunxiao*) Gas Field by China in August, 2003. This pressed the Japanese Government seriously to tackle the problem, opening official negotiations with the Chinese Government on a Director-General's level. In July, 2005 the METI granted Teikoku Oil the right of test drilling in the disputed area just south of the Chinese-operated gas field, against which China lost no time in lodging a protest. In February, 2006 the Japanese Minister of Economy, Trade and Industry made an official visit to China and offered a proposal for joint development of the gas field, which however was rejected by the Chinese side. In April, 2007 the Chinese Prime Minister came to Japan and agreed with the Japanese Prime Minister to work out specific ideas for joint development by the autumn of the same year. This was followed by the Japanese Prime Minister's visit to China in December, 2007 during which it was agreed that efforts be made for the settlement of the issue by the time of the Chinese President's planned visit to Japan in the spring of 2008. Thus in May, 2008 the two leaders met in Japan and "made great progress" in making arrangements for joint work in the gas field.[21]

Opposing claims of the two countries

Whereas Japan has consistently maintained that the continental shelf boundary should be a median line in a situation of two countries on opposite coasts at a distance of less than 400 nautical miles, as it has done in its relations with South Korea in the past, China has argued as against Japan[22] that the boundary should be at the bottom of the Okinawa Trough as the edge of the natural prolongation under the sea of its land territory. The Chinese claim, however, seems to be losing its weight in the light of the growing jurisprudence of the ICJ and the arbitral tribunals in respect of maritime boundary delimitation.

Under these circumstances, it is hard to imagine the conflicting positions of

(21) *The Asahi Shimbun*, 19 June 2008, p. 2.

(22) China has maintained its position in favour of a median line in respect of the boundary with South Korea in the Yellow Sea.

the two countries to be reconciled in the foreseeable future.

It is here that the provisions of Article 74, paragraph 3 (EEZ), or Article 83, paragraph 3 (continental shelf), of the UN Convention on the Law of the Sea could have a role to play:

> "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, 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."

This is typically a possible joint development scheme in the absence of agreement on the boundary delimitation, as evidenced in the Japan-South Korea agreement of 1974.(23) Within the framework of the recent Japan-China arrangement, the joint operation scheme in the northern gas field is a case in point. In this gas field the Japan-claimed median line runs through, although such median line is not drawn on the sketch map probably because of its political sensitivity that may be felt on the Chinese side.

Implications of the recent Japan-China arrangement

If the northern gas field is a case of joint development in a 'classical' sense of the word, the southern *Shirakaba* gas field is quite another form of joint operations: Japanese participation in the China-controlled gas field. In this case, the Chinese law is applicable within the oil-gas field in question, because the mutual "Understanding" states:

> "The Chinese firm welcomes the participation of Japanese companies in the exploitation in the *Shirakaba* (known as "*Chunxiao*" in Chinese) oil-gas field in its possession *in accordance with the Chinese law on international co-operation in the development of offshore oil resources*." (Emphasis added)

This raises the question of what point there is in Japanese firms participating in the exploitation work which can be started any time by the Chinese firm on its own, without a specified rate of profit accruing to the Japanese side. It is mutually understood, of course, that an implementing agreement is to be concluded in due

(23) *See* generally Miyoshi, Masahiro, *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation* (*Maritime Briefing*, Vol. 2, No. 5), Durham, UK: International Boundaries Research Unit, University of Durham, 1999, pp. 7-29.

course to specify various necessary terms of joint operations, including the rates of profit and costs of production. If a pipeline is to be laid from the rig to the coast of the mainland China, as is likely, then the most Japan could obtain would be a share of the gas produced that will have to be shipped from the Chinese coastal base to Japanese ports. It may then be suspected whether a profitable share could be easily secured in comparison with the gas imports from, say, Indonesia and Sakhalin.

Secondly, there is an important legal aspect of the entire problem. It is the sovereign rights of Japan over the resources, *i.e.*, natural gas reserves on the continental shelf. If the *Shirakaba* gas field extends across the median line to its Japanese side, the exploitation of gas from the Chinese-controlled part of the field is likely to suck out the gas from the Japanese side of the deposit over which Japan has sovereign rights. Technically, this would be a violation of international law, since such sovereign rights were adjudged part of customary international law by the ICJ in the *North Sea* cases in 1969(24) and have since been established as such. It is therefore not only from economic considerations but also as a matter of legal principle that the Japanese side has repeatedly asked the Chinese side to provide their exploratory survey data of the gas field. They nevertheless have refused to do so, thus making it impossible to verify the existence of gas reserves on the Japanese side of the median line.(25)

It looks strange then that China can claim the seabed to the Okinawa Trough, while Japan abstains from claiming its entitlement to the seabed to the median line fully. Maritime boundary delimitation is initiated when the two sides have their respective entitlements which overlap in part. This is the normal motivation for boundary delimitation, with a possibility of joint management of the disputed or overlapping area. In this sense the northern zone of joint development, just south of the *Asunaro* (known as *Longjing* in China) gas field, is a normal diplomatic outcome on a project straddling the median line which implies that a fair balance of compromise was struck between the two countries.

A third point that could be made of the arrangement for the *Shirakaba* gas field is that the Chinese side could be interpreted to have virtually conceded the Japan-claimed median line, at least in so far as the arrangement refers to the "oil-gas field *in its possession*" (emphasis added). Such reference implies the existence of an extension of the same field over which the Chinese side abstains from claiming its jurisdiction beyond an hypothetical median line. The presumed extension *does* lie on the Japanese side of that median line claimed by Japan. The Chinese side did in fact concede, if only for the limited practical purposes of

(24) *ICJ Reports 1969*, p. 39, para. 63.

(25) At the mentioned international workshop in Beijing in April, 2004, *supra* note 19, I witnessed the refusal by the Chinese side of a disclosure of the relevant survey data requested by an official of Uruma Resources Development Co., Ltd.

joint operations in the name of Japanese participation in the Chinese exploitation work, that the gas-oil field might extend across the Japan-claimed median line into its Japanese side. This, coupled with the joint development scheme of another gas field to the north through which the Japan-claimed median line runs, could be interpreted to mean a virtual Chinese concession of the Japanese claim to the median line.(26)

Concluding Remarks

The Japan-South Korea Agreement of 1974, a most detailed legal instrument for the joint development of a vast sea area in the East China Sea supported by elaborate domestic legislation for its implementation, has so far proved unsuccessful in terms of intended production of oil or gas. The Agreement was a product based on the "natural prolongation" doctrine widely recognised at that time.

The recent Japan-China arrangement for two schemes of joint offshore operations is also a political compromise like any other. One is aimed at Japanese participation in the Chinese gas field under the Chinese law, and therefore may not be called a case of joint development in its classical sense. The other is a typical case of joint development as seen from the Japanese side, because it is designed for joint development in a sea area through which the median line runs.

However that may be, the legal aspects of any such arrangement may not be disregarded. When States negotiate, they normally base their positions and arguments on international law, and present their cases in terms of law. Thus what rules and principles of international law are used is important. As far as the law of maritime boundary delimitation is concerned, it has developed through two main channels: the case law and State practice.

As the basis of title to the continental shelf has shifted in its importance from "natural prolongation" to "distance criterion",(27) so the principle of maritime boundary delimitation has likewise shifted from "equitable principles" to "equidistance/median line" principle over the years.(28) The most remarkable in respect of the application of the "equidistance/median line" principle is the *Guyana/Suriname Maritime Boundary Delimitation* case of 2007, a case of

(26) The news of numerous popular protests on unofficial Chinese blogs against their Government's recent deal with that of Japan would seem to bear witness to such interpretation as referred to above in the text. *See*, for example, a news report by Reuters from Beijing, "Demonstrators in China decry gas-field deal", *The Japan Times*, 20 June 2008, p. 2.

(27) The *Libya/Malta Continental Shelf* case of 1985 was the first case clearly to adopt the "distance criterion" as the basis of title to the continental shelf, while conceding that it was so under the influence of the advent of the règime of EEZ. *ICJ Reports* 1985, p. 33, para. 34.

(28) *See* Miyoshi, *supra* note 12 for a more detailed analysis of the application of the "equidistance/median line" principle.

delimitation between the two laterally adjacent coasts in South America, in which the arbitral tribunal concluded that "the geographical configuration of the relevant coastlines does not represent a circumstance that would justify any adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution."(29) This is an *equidistance boundary line pure and simple* in a case of the two coasts laterally adjacent to each other. This would hold true all the more so in a case of two opposite coasts. But this has not come about all of a sudden. It has evolved through the cases over the years. Such tendency of increasing application of the equidistance principle is evidenced in State practice as well.(30)

In view of this recent development of the law of maritime boundary delimitation, caution must be taken in legal reasoning in present-day negotiations over the East China Sea. The law of today must be applied, rather than the law of yesterday.

(29) *Award of the Arbitral Tribunal*, 17 September 2007, pp. 121-122, para. 377.

(30) See Charney, Jonathan I, "Introduction", in Charney and Lewis M. Alexander (eds.), *International Maritime Boundaries*, Dordrecht/Boston/London: Martinus Nijhoff, 1993, p. xlii, where he says:

> "Surprisingly, it appears from the practice that the equidistant (*sic*) line has played a major role in boundary delimitation agreements, regardless of whether they concern boundaries between opposite or adjacent states."