

## Legal and Strategic Implications of ROK-PRC Maritime Delimitation Talks

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### Current *Modus Operandi* in the Yellow and the East China Seas

Immediately after ratifying the United Nations Convention on the Law of the Sea (UNCLOS) in 1996, South Korea and China proclaimed exclusive economic zones (EEZs) in the Yellow and the East China Seas where the width between the nearest coasts of the two countries is less than 400 nautical miles (nm). The two parties had held fourteen rounds of talks on delimiting their EEZs and continental shelves until the meetings abruptly ended in 2009.

There are therefore no maritime boundaries on which the two countries agree upon as of yet. Instead, the overlapping areas have been governed by provisional joint fishing zones established in June 2001. However, it is increasingly becoming clear that the provisional fishery regime alone cannot resolve growing tensions over China's illegal fishing activities in South Korean waters as well as in the joint fishing zones. In 2015, for instance, the South Korean authorities seized 568 Chinese fishing boats and arrested 114 Chinese fishermen for fishing illegally in South Korea's EEZ. It is believed that these figures are only a tip of the iceberg of illegal, unreported, and unregulated (IUU) fishing by the Chinese nationals in the Yellow and the East China Seas.

The two sides have no territorial disputes at sea, but make rival claims over a submerged rock (known as *leodo* in South Korea and *Suyan* in China), which

lies 149 kilometers southwest of South Korea's southernmost island of *Marado* and 247 kilometers northeast of the nearest Chinese island *Tongdao*. Both sides agree that the rock cannot generate any maritime zones including territorial waters and EEZs, but argue that it belongs to their respective EEZs. South Korea runs an ocean research station on the rock, while China extended its air defense identification zone in 2013 to include the area over the rock.

After years of procrastination, Chinese President Xi Jinping and South Korean President Park Geun-hye agreed to resume maritime delimitation negotiations in 2015 during their summit meeting in Seoul in July 2014. Any further delay of the ultimate delimitation of maritime boundaries would be unpalatable to both sides. Beijing hopes that the delimitation talks with Seoul will show its commitment to a peaceful resolution of maritime differences without relying on third party arbitration. For its part, Seoul can no longer turn

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a blind eye to the growing damages of IUU fishing to the livelihood of South Korean fishermen.

As per the new diplomatic momentum, the two sides have held two rounds of talks thus far, the first in Seoul on December 22, 2015 and the second in Beijing on April 22, 2016. Details of the talks are not available due to their sensitivity and classification, but both meetings seem to have ended with no substantial progress.

In what follows, we review the key agendas, both legal and practical, and then assess their strategic importance in the context of East Asian maritime disputes. We also discuss the normative aspects of boundary delimitation with some cautious notes on the possibility of a successful conclusion to the delimitation talks.

### Legal and Practical Bones of Contention

One of the major innovations of the UNCLOS was the creation of EEZs, which combine coastal state's rights to the continental shelf with its rights over the water column beyond the territorial sea. According to the UNCLOS provisions, the coastal state enjoys "sovereign rights" on the natural resources in its EEZ and continental shelf but only has "jurisdiction" on other matters such as the control over artificial islands and structures, marine scientific research, and the protection and preservation of the marine environment.

However, there is a growing concern about the "territorialization" of international ocean spaces, as an increasing number of coastal states want more control over their EEZs and continental shelves. As such, there are multiple legal "bones of contention" associated with the UNCLOS itself.

To begin with, the adoption of straight, rather than normal, baselines for territorial seas and other maritime zones has made the already daunting task of delimiting maritime boundaries much more difficult. The letter, if not the spirit, of the UNCLOS provisions for straight baselines is ambiguous at best. This ambiguity has encouraged many coastal states to adopt

straight baselines, even where the basic conditions are not met. Baselines for territorial waters are not automatically adopted for the purpose of boundary delimitation of EEZs and continental shelves. But the former can still set a reference point for the latter, usually in a provocative way.

In addition, UNCLOS Article 121 stipulates that offshore islands can have their own exclusive economic zone and/or continental shelf as long as they can sustain human habitation or economic life of their own. However, even those islands capable of generating EEZs and/or continental shelves can have no or limited effect on the determination of baselines for EEZs and continental shelves. There remains a significant difference between South Korea and China over each other's valid base points and baselines as there are several problematic rocks claimed as islands and submerged features situated far from the shore.

Meanwhile, there has been a debate on the relationship between the 'equidistance' approach and the 'equitable' principle in delimiting overlapping ocean space beyond territorial waters. UNCLOS Articles 74 and 83, which define delimitation of the EEZ and continental shelf, respectively, state that delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

South Korea has proposed the 'equidistance-relevant circumstances' delimitation method that an equidistance line should be drawn first and then adjustment and modification should be made where appropriate. However, China has reportedly refused South Korea's proposal, arguing that the first step in delimiting maritime jurisdiction is to list and balance all the relevant factors and then move on to the next step of drawing the boundaries.

Indeed, equity has emerged as a significant feature of maritime boundary delimitation in the context of the enclosure movement in the contemporary law of the sea regime. Although no mandatory approach



to delimitation exists in international law, there is a growing legal consensus that the “equidistance-relevant-circumstances” delimitation method is more desirable and applicable. Most notably, the International Court of Justice’s delimitation decisions favor an equidistance line based on ‘relevant factors’ such as the comparative lengths of the coastlines, in order to achieve an ‘equitable solution’ as mentioned above.

In its 2012 ruling on the boundary delimitation of the EEZ and continental shelf between Myanmar and Bangladesh in the Bay of Bengal, the International Tribunal for the Law of the Sea reaffirmed this delimitation method: after drawing the provisional equidistance line, Bangladesh’s “manifestly concave” coastline was found to be a “relevant circumstance” which necessitated adjustment of the tentative equidistance line. The Tribunal noted that concavity would not always be considered, but “...when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.”

It should be noted that China does not always stick to the equitable principle, as illustrated by its adoption of equidistance lines for the boundaries with Vietnam in the Gulf of Tonkin. Of course, the Sino-Vietnamese case cannot be easily replicated in other parts of the region. China and Vietnam had engaged in decades of institutionalized cooperation before the 2000 boundary and fishery agreements between the two countries. Most notably, the first fishery agreement between China and North Vietnam was signed in 1957 and it contributed to the stable governance of bilateral fishery relations. Furthermore, China had a weaker legal position and historical claim over the Gulf of Tonkin. The boundary regime that had been agreed on by China and French Vietnam in 1887 remained stable until the 1970s.

Nevertheless, the Sino-Vietnamese agreements can be used as a benchmark for South Korea-China negotiations. Vietnam tried to support its claim with

the fact that it has longer coastlines in the area. However, China did not recognize the Vietnamese claims and the boundary line for the EEZ was eventually drawn in light of the equidistance principle, although special circumstances existing in history and in law were considered so as to make some adjustments where appropriate.

### Strategic Implications

In the new millennium, China has aimed to become a maritime power capable of projecting naval capabilities beyond the so-called first island chain. It has challenged the existing maritime order established and governed by American hegemony on the one hand, and the international law of the sea regime on the other. It has also made it very clear to its neighbors that it would not yield or compromise when it comes to maritime sovereignty.

China’s assertive maritime policy has in turn motivated the U.S. to rebalance toward Asia. The thrust of the U.S. pivot to Asia has been on the maritime dimension. The Obama administration has resumed its freedom of navigation operations in the South China Sea by sending destroyers through waters claimed by China. In an action-reaction cycle, China believes that U.S. intervention has intensified maritime disputes in Asia, and rejects the U.S.’ pivot to Asia as a disguised containment strategy against China.

However, China faces a dilemma where its aggressive responses to the U.S. engagement are encouraging its neighbors to form an even tighter alliance with the U.S. Furthermore, the Arbitral Tribunal established pursuant to the UNCLOS has ruled that it has jurisdiction over some of the questions submitted by the Philippine government vis-à-vis China’s ‘excessive’ claims in the South China Sea. Despite its strong opposition to the Tribunal’s jurisdictional decision, China’s historical claim to the entire South China Sea will be legally challenged and critically assessed, possibly undermining



China's normative influence. For China, the worst-case scenario is that other claimant countries in the Asia-Pacific will follow suit and challenge China's claims through international legal bodies.

It is not a coincidence that China is making conciliatory gestures as well. Resolving maritime differences through bilateral negotiations with South Korea would not only help prevent further diplomatic spats between the two neighbors, but also bolster China's commitment to bilateralism in relation to territorial disputes in the East and South China Seas. China's official statements prove the point. Foreign Ministry Spokeswoman Hua Chunying said in November 2015: "To fairly and properly demarcate the China -ROK maritime boundary through negotiations and consultations is of great significance to upholding tranquility and stability of the relevant waters." She also added that the talks would give "full expression to China's long-standing stance and position to settle maritime disputes with its neighbors through bilateral dialogues on the basis of respecting historical facts and international law."

Beijing also wants to use the delimitation talks in a bid to put a wedge between Seoul and Washington. South Korea and the U.S. are still not ready to agree on the terms and conditions for a strengthened military alliance as well as for an effective system of sanctions against North Korea's nuclear adventurism.

### Short- and Long-term Prospects

Difficult legal issues notwithstanding, the commitments by South Korea and China to the delimitation talks appear solid and sincere. To be sure, there are certain factors outside the maritime domain that might hijack the bilateral talks, as seen in the controversy surrounding South Korea's prospective participation in the U.S.-led Terminal High Altitude Air Defense (THAAD) system. However, there is a greater impetus toward a successful conclusion of the talks,

particularly given China's growing strategic interest in peaceful settlement of maritime boundaries. China will likely be sure to provide 'gifts' to South Korea in order to establish that China's bilateral approach can be an effective substitute for third-party arbitration.

However, this does not mean that the bilateral talks will be a cure-all for all boundary issues concerning South Korea and China. In fact, it is more likely that the talks will achieve partial results rather than a comprehensive agreement. There are two obstacles worth noting.

First, the geographic scope of bilateral negotiations is controversial, as some of the areas are adjacent to North Korea and Japan. If South Korea and China choose to facilitate the conclusion of boundary agreements, both parties will have to limit the scope of negotiated boundaries within the area exclusively belonging to the two countries. Such an approach would eliminate the areas adjacent to the Northern Limit Line (NLL) in the Yellow Sea and the overlapping zone collectively claimed by South Korea, China, and Japan in the East China Sea. For sure, South Korea wants to include Jeodo/Suyan, which is located at 32°07'22.63" North Latitude and 125°10'56.81" East Longitude, in the negotiation agenda. All things considered, negotiated boundaries are most likely to be set somewhere between 37° and 32° North Latitude, where the existing provisional fishing zone in the Yellow Sea lies, leaving vast areas outside the bilateral talks.

Second, boundary delimitation may become as intractable as sovereignty disputes, because government elites are equally constrained by domestic players who hold veto power if elites chose to pursue cooperative approaches to solving these issues. The issue of fishing rights allocation illustrates this point. From South Korea's standpoint, the Chinese position seems to be a tactic for delaying the ultimate delimitation of EEZ and continental shelf and thus allowing its own fishermen's sometimes predatory fishing practices to continue as long as possible. China insists that the current fishing regime be incorporated into boundary agreements. As



noted above, however, the current fishing agreement is not acceptable to many South Korean fishermen as it falls short of dealing with IUU fishing problems caused by Chinese fishermen. If South Korean law enforcement in the Yellow Sea, particularly in the areas near the NLL, continues to be ambivalent, dangerous encounters between South Korean and Chinese fishermen, as seen in the recent seizure of Chinese fishing boats by South Korean fishermen, will increase and possibly escalate into greater tensions.

Finally, in order for their bilateral talks to truly become a regional benchmark case, South Korea and China should work together to include something more than simple national egoism. In the maritime issue area, the lament that coastal states lack effective control over maritime spaces has now been replaced by what critics perceive as excessive claims to, or territorialization of, EEZs and continental shelves. The natural outcome of such excessiveness is the growing risk of conflict. Therefore, the sovereign and jurisdictional rights should be interpreted more strictly. After all, the EEZ and the continental shelf are part of “the high seas adjacent to a coastal state in which that state has certain rights in derogation of high seas freedoms.” South Korea and China should, and can, show together that they can strike the right balance between their sovereign rights and the freedom of the seas. ■

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