Maritime Delimitation Issues in the Northeast Asia: China's Policy and Practice

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Contents

1. **Diplomatic efforts in settling boundary issues with neighboring countries**

1.1. Land boundaries: Mostly done in the 1990s, especially:

- **Vietnam: agreement:12/30/1999**
- **Russia (west part): 09/03/1994**
- **Russia (east part) agreement:05/16/1991;**
  supplementary agreement:10/14/2004;
  supplementary protocol: 07/21/2008 (finalized the 4300 km boundary with Russia)

Sources: 陆地边界条约及协定汇编http://www.fmprc.gov.cn/chn/pds/wjb/zzjg/bjhysws/bhfg/t556660.htm

1.2. Maritime boundaries: many remain unsolved

- **Vietnam: Beibu Gulf Delimitation Agreement (12/25/2000)**
- **South China Sea: declaration on a code of conduct (ASEAN and China, 2002)**
- **North Korea: Joint Development Agreement (2005)**
- **East China Sea: the "Principled Consensus" with Japan (06/18/2008)**

→ **See also other practical arrangements pending EEZ delimitation: Fisheries Agreement with Japan (1997) and ROK (2000)**

→ **China-ROK Joint Statement of July 4, 2014: to start maritime delimitation talk in 2015; a consensus between the two countries that there is no territorial dispute between them.**

2. Policies implied

2.1. Boundary stability is essential for China in creating harmonious international (regional) environment for its peaceful rise (development) >>维稳(maintaining stability)

- **evidenced in the efforts in the past 20 years on land boundaries;**
- **ostensibly discarded the "naturalist" position (Jacques deLisle 1998) regarding boundary/territorial issues -- especially evidenced in the case of boundary agreements (east) with Russia**

2.2. Maximizing national interests: the logic of “peaceful rise” >>维权 (upholding rights)

- maritime boundary issues seem to be more difficult to handle: national interests awakened: natural resources, national security interests etc.

→ Searching for instruments (peaceful means) to achieve policy ends

3. International law's role in achieving the policy ends

3.1. National Interests

- Post-war legal order in general is regarded as beneficial to China's economic development (WTO etc., no unequal treaty argument post-1949, see also Jacques deLisle, 2000, p.273)

- National interests can be ensured and safeguarded in the process of international law making (Climate Change)

3.2. Stability

- **Arrangements of boundaries/territory with IL basis will make them more acceptable to Chinese public opinion (expressed via internet etc.); otherwise danger of instability will be triggered by nationalist ideology (e.g., the May Fourth Movement)**

- **IL basis will also facilitate other parties ratification of arrangements for boundaries/territory by their legislatures (subject to constitutional structures) and thus promoting regional stability**

- **Political compromises sometimes leave seeds for future confrontations (e.g., the China-U.S. Joint Communiqués etc.)**

3.3. others (Geo-political etc.)

- less space for diplomatic manipulation when the opposite party has similar capacities--political, economic and military power.
- eases worries of small countries in the region.

4. Potential and Limit

- **Deng's "we should also strengthen our study of international law." (1979) and the founding of Chinese Society of International Law in February 1980**
- **The Newly-established Department of Boundary and Ocean Affairs**
- **…….**

  - **more confident/ today regarding IL:**
  - **with newly certain "might"; contrast with past suspicious attitude to IL, 'If there is right without might, the right will not prevail.' (LI Zhaojie, 2001, p.317)**
  - **elites with more international experience and perspectives, understanding normativity of IL.**

However, while China will no doubt follow substantive rules of international law in resolving maritime disputes with neighboring coastal states; it does not mean that international judiciary means would be the only option for dispute settlement

- **Lack of legal culture/tradition**
- **Problems of capacity building**
- **…**

Part 2.

IL in Managing Unsettled Maritime Issues: Good Faith and Reciprocity in a Dynamic Process of Dispute-Settlement

1. **Why a Dynamic Process: substantive and procedural issues**

a. **Substantive issues**

- **“intentional ambiguity” of the treaty text (UNCLOS) : political compromise/package deal; scientific uncertainty**
- **Dynamic nature of law of the Sea: The “Grey Zone”: Contiguous zone; EEZ; CS; for example:**
- **The ambiguous EEZ/CS delimitation clause (art.74, art.83)**

UNCLOS76.1

"The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

>> a matter of interpretation: Natural Prolongation vs. Distance Criterion

- **Art.83**

"1. The delimitation of the continental shelf between States with opposite or adjacent coasts 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.

…

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, 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."

- **Moreover, there is obvious complexity when maritime delimitation necessarily involves a concurrent territorial dispute:**

→ Requires prudent political decisions and sophisticated legal techniques for peaceful settlement of disputes (especially when the delimitation dispute concurrently involves territorial dispute, e.g., the Diaoyu/Senkaku dispute between China and Japan)

b. Procedural issues

a. Some basic consideration

- **Rule of Law in IR has been maintained by auto-interpretations in diplomatic interactions rather than formal judicial process**

Y. Onuma, "ICJ: An Emperor without Clothes?", *Liber Amicorum JudgeShigeru Oda* (Ando et.al., ed.,Kluwer Law International 2001)

- **UN Art.33.1 provides great discretion for the states to chose what they like in peaceful settlement of their disputes, in an order of "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."**

→ In general international law, there is no obligation for the States to go to the court for dispute settlement unless they agree to do so;

b. China's preference regarding delimitation dispute: negotiation, joint-development

- **China's policy on maritime jurisdictional disputes: "Setting Aside Disputes and Pursuing Joint Development"**

- **June 1979: the Chinese government officially proposed to the Japanese government through diplomatic channels that China was willing to jointly develop resources in the waters of the disputed Diaoyu/Senkaku Islands. It is the first time that China formally articulated the policy;**

- **since then, it has been maintained as a proposal confronting complexity of maritime jurisdictional disputes (especially those concurrently involve territorial disputes)**

This policy shall be firstly reviewed under general international law on peaceful settlement of disputes, bearing mind that China is bound by Article 2(3) and Article 33(1) of the Charter of the United Nations (the UN Charter).

- negotiation is *de facto* prior to other procedures;

- Free choice of procedures in practice may stay at the level of negotiation only;

- binding decisions from UNSC is legally impractical if without consent from a permanent member state

New Challenge by UNCLOS dispute settlement mechanism: compromissory jurisdiction

But when "compromissory clause" is set into a treaty as part of the deal, by considering that interests and benefits from membership is overwhelming, China has to take the "compromissory clause“ as it, for disputes concerning “interpretation and application” of that treaty, subject to limitations and exceptions if any therein. The Chinese practice in two important fields:

- **WTO: 137 cases since acceding in December 2001**

→no distance anymore? YES, china is no longer rigid with respect to judicial procedures in the trade related issue area;

- **UNCLOS: no challenge until quite recently,**

The UNCLOS context (UNCLOS dispute settlement (Part XV)

- **There is no doubt that judicial procedure is compulsory to Party States for them to settle disputes;**

- **However, judicial procedure (including Annex VII arbitration) is subject to certain conditions: permits Party States to exclude disputes regarding maritime delimitation→ UNCLOS art.298**

Article 298.1. (a) (i) [*Optional exceptions to applicability of section 2*]

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles …

Declaration made pursuant to art.298 in August 2006:

The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.

- **In sum:**

- state-state negotiation is a default/primary route in settle/resolve maritime/concurrent territorial disputes, and mostly on provisional arrangements

- there will be a “long and winding road”, and therefore need guidance in steering this dynamic process.

2. Good Faith and Reciprocity for “Provisional Arrangements” prior to Delimitation：

- At first glance, as merely a possible product under the obligation to negotiate in good faith, it seems that the provisional arrangement can be in any form or with whatever contents of which the countries in dispute can agree.

- Even if Article 74/83(3) issues a “blank check” with regard to the terms, form, or existence of a provisional arrangement, the principles of good faith and reciprocity are legal guidance to help countries to prudently draft provisional arrangements.

2.1. Overlapping Claims in Good Faith (basis)

- **The unarticulated premise for the Provisional Arrangements etc.: disputed area <u>with overlapping claims</u> to CS title**

Since para 3 of art.83 stipulates provisional arrangements etc. prior to delimitation, the principle object and purpose of para.3 is to further the provisional utilization of the area to be delimited, (Lagoni,1984, 354). The area for provisional arrangements etc is thus determined by the area for delimitation.

- **The existence of a disputed area with overlapping claims to CS title is *sine qua non* for delimitation (Malcolm D. Evans 1989)**
- **"Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties laying claim…"(North Sea, papa.20, p.22)**
- **Para.3 obligation applies only to those areas about which the governments hold opposing views. (Lagoni,1984,356)**
- **Joint development is a part of provisional arrangements (which encourage exploration in the disputed area), it is made only between states (Miyoshi) and must be restricted in an area of overlapping claims (Lagoni)**
- **Precluding cooperative exploitation with foreign companies under business contracts.**

- **Claims admissible as overlapping claims that constitute the dispute: claims in good faith**

- The parties present their claims by unilateral acts; in doing so, "the parties must have acted in good faith, believing that their action was justified by existing international law" (Lagoni 1984, 356, where he cited sep.op. Jessup in the North Sea case, at 79)

- VCLT art.26, art.31

- Extreme claims: no valid basis in the present corpus of international law or if lacks a reasonable element of proportionality. (Lagoni 1984, 356)

- bona fide claims: used in proposals to LOS Conference

- prima facie claims：a *prima facie* basis (Nakatani, p.5)

- **To make a good faith claim, one must first find *prima facie* basis from the corpus of international law (treaty and customary law), and accordingly interpret it in good faith in order to make the claim as such.**

- **While a *prima facie* source of law and good faith interpretation are the basic elements, (dis)qualifying factors also need to be considered.**

- estoppels;

- **Inter-temporal law ;**
- **"authoritative" interpretations: judicial decisions and writings**

- Others: Resolutions of UNGA； Resolutions of the COPs/MOPs if properly authorized; and decisions by other authorities / international organizations

2.2. Principle of reciprocity

- **The purpose of the provisional arrangements: legal stability**

- **The implication of reciprocity in provisional arrangements (dynamic aspect); a well-balanced treatment of the claims in good faith of each country (while proportionality matters) (static aspect)**

3. Some Remarks on Good Faith and Reciprocity

- **Considering the complexity of the issues of law and fact, it must be admitted that good faith claims are not fixed or definite, but are constructed by the interaction of the parties—including the entire process that extends from negotiating provisional arrangements to settling on permanent joint development or to reaching a final agreement of delimitation.**

- **The first step to bring about the complex interaction will be extremely difficult for the parties to take. In order for the first step to be feasible, the threshold for good faith claims should be set at a minimum standard. It means that, though not to exclude complex issues like interpretation, estoppel, or inter-temporal law, the minimum requirement for such a claim to have a prima facie basis in international law would be sufficient as the underpinning of a provisional arrangement. (therefore be without prejudice to the final delimitation)**

- **By the same token, parties' adherence to the principle of reciprocity can help steer the dynamic process of claim making and negotiation to a result that accords with requirements of proportionality (which does not necessary require that each provisional arrangement be equal or proportional).**

- **Again, to meet the feasibility concern in negotiating an initial arrangement, reciprocity requires that the parties' respective good faith, prima facie claims be reflected in a manner consistent with proportionality. At later stages, observance of the requirement of reciprocity will be vital to maintain stability and to sustain negotiations—often under a set of provisional arrangements that will take adequate account of each side's good faith legal claims and legitimate interests (involving fine legal arguments)—toward a final settlement**

Thank You!