A Legal Assessment of the Joint Resources Development in the East China Sea Between China and Japan

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Abstract. The disputes of the joint development of energy resources in the East China Sea between China and Japan have not been solved yet. Since China and Japan are the largest two energy consumers in Asia, both of them worry about the shortage of energy supply, which constitutes an important part of energy security. After the process of bilateral talks from 2004 to 2008 negotiations, the parties achieved the first step in conducting joint resource development in the disputed areas. Neither UNCLOS nor the 2008 Consensus have provided legal authority for joint resources development. Diplomatic dialogues would be helpful to realize joint resource development in the East China Sea. Cooperation is the best way to mitigate the tensions between two countries and could benefit both of them.

Introduction

Due to historical factors, vagueness of the articles, and the profit-oriented interpretation of the UNCLOS (The United Nations Convention on the Law of the Sea, 1982), there are many conflicts between China and Japan, such as sovereignty over the Diaoyu Island, maritime demarcation, the development of resources in the East China Sea (ECS), and the issue of the declaration of the Air Defense Identification Zone. In the past they have arrived at agreements in order to manage tensions in four areas: in 1978 and 1996 over the issue of Diaoyu Island, in 2001 over the issue of marine research and in 2008 over the issue of gas and oil exploration, the disputes have not been solved yet. In this paper, I will not discuss the sovereignty disputes, but only focus on the possibility and prospect of the joint development of energy resources in the ECS and assess joint resource development from legal perspective, as well as analyze the influence on the energy security in China and Japan.

The Status quo of Energy Security in China and Japan

In order to maintain the energy sustainability, the two main concerns for each country are energy security and emission reduction. [1]

China

As of the end of 2013, China has surpassed the US as the world’s largest net importer of petroleum, which accounts for more than one-fourth of global oil consumption growth in 2015. At the same time, natural gas consumption in China has also rapidly increased. Moreover, China is a heavily coal-consuming country as the world’s top coal producer, consumer and importer. However, since coal is such a polluting energy source, to alleviate air pollution, the Chinese government currently uses natural gas as a clean alternative for the coal and oil, and has set a target to raise the use of non-fossil fuel energy consumption to 15% of the energy mix to ease the country’s coal-dependence. [1] The IEA figures demonstrate that China is increasingly dependent on the imports of oil and natural gas. According to the analysis of EIA, as a developing country Chinese oil and natural gas demand will continue growing in the near future. [2]

Japan

Japan is ranking in the third place in the crude oil imports, and is the world’s largest importer of liquefied natural gas (LNG), which relies on heavily due to its lack of domestic energy sources. In 2012, Japan produced 17 kb/d of crude oil, which was equals close to 0.3% of total consumption, meaning almost all Japanese oil consumption comes from imports. As for gas, natural gas production in indigenous Japan accounted for about 3% of its domestic natural gas demand, and is still increasing, implied Japan will continue to depend on natural gas imports for the foreseeable future. The IEA figures indicate Japan’s heavy dependence on energy imports.

Today, China and Japan, as the largest two energy consumers in Asia, both worry about the shortage of energy supply. The energy supply has been viewed as an important part in energy security. Since 1969, the United Nations Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) issued a report indicating the possibility of hydrocarbon in this area, and both energy consuming countries have since been eager for the energy resources in the East China Sea to help ensure domestic energy security. Without an exact study of the hydrocarbon reserves in the ECS, EIA estimates that the reserves in the ECS equal about 200 million barrels of oil. After more than 3 years of official negotiations, the parties achieved the first step in conducting joint resource development in the disputed areas.

The Process of Bilateral Talks from 2004-2008

The first round of talks between China and Japan occurred on October 25, 2004, in Beijing. Though details were not revealed, the obvious frustration of the Japanese Trade and Industry Minister after the talks revealed that both parties failed to reach an agreement on the issue of joint development. At that time, Japan didn’t even consider the suggestion of joint development. The second round of talks began on May 30th, 2005, in Beijing. This time China proposed a provisional measure pending an agreement on the line of separation of the ECS, but the proposal of joint development would take place only in the areas east of the median line. The third round of talks happened on September 30, 2005, in Tokyo. During this talk, Japan demanded China suspend development work in the disputed areas. In 2005, the Japanese government granted the Teikoku Oil Company the right to explore for oil and gas in the ECS, a move that was strongly opposed by China. Although the talks were unsuccessful, during the talks Tokyo gradually modified its position and became more receptive to the idea of joint development. [2] Finally, on April 11, 2007, China proposed “shelving disputes and joint development,” which Japan refused at first but accepted later, and the two countries agreed they would conduct joint development in accordance with the principle of mutual benefit as a temporary arrangement.

The Principled Consensus was reached on June 18, 2008, after eleven official negotiations during the period of 2004 to 2007, which provided strong political support for breaking up the deadlock of the negotiations. The Consensus is comprised of three parts. The first part outlines a 2,700-square-kilometer joint development zone (JDZ) south of the Longjing field that roughly bisects the median line. They agreed to explore four gas fields in the East China Sea and halt development in other contested parts of the regions. Furthermore, both sides agreed to conduct joint surveys in the area north of Chunxiao and south of the Longjing gas field, and that the joint exploration of the zone would be conducted and developed “under the principle of mutual benefits.” The second part of the Consensus that China welcome Japanese legal persons participated in the development of the existing oil and gas field in Chunxiao according to the relevant laws of China. The third part of the Consensus calls for a treaty to implement the agreement.[3] An important point is that the JDZ is a small polygonal area, including parts of the uncontested to the west side of the median line Japan claimed.[4] Therefore, the success of the Consensus can be attributed to the China’s compromise in agreeing to incorporate the median line into the final project.[3]

Legal Basis Concerning the Joint Development of the Energy Resources under the UNCLOS

Firstly, the ECS is a semi-closed sea. According to Article 122 the definition of enclosed or semi-closed seas is, “...a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.” Article 57, about the Breadth of the EEZ, stipulates that coastal states have the right to declare its EEZ not exceeding 200 nautical miles. However, the widest part of the ECS is only 360 nautical miles. Therefore, the exclusive zones of China and Japan in the ECS constitute the so-called semi-closed seas.

Secondly, the coastal states in the semi-closed sea have the obligation to cooperate with each other. Under Article 123 of the UNCLOS, China and Japan as the countries bordering the semi-closed ECS have the cooperation obligation. However, the article only mentioned the exploitation of living resources, excluding the non-living energy resource, meaning that when it comes to the exploitation of energy resources, we should find a legal basis in the chapter regarding continental shelves rather than the EEZ. According to the definition of the continental shelf under Article 76 and Article 77, which stipulates that a coastal state has the right to explore and exploit its natural resources, and here the rule indicates that the natural resources including mineral and other non-living resources. In terms of the above articles, the subject in development activities should be States. Although there are many oil companies taking part in the exploration of resources, they need approval from states, which also shows the subjectivity of the States.

Thirdly, “joint development” is just one choice under Article 83 of the UNCLOS. Article 83 stipulates the delimitation of the continental shelf is to achieve an equitable solution. Since the word “joint development” is not directly stipulated in any articles under the UNCLOS, some scholars maintained, a joint resource agreement is considered the “provisional arrangement of a practical nature” under the Article 83 of the UNCLOS, which means the joint resources development is an international obligation of the parties.” In my view, the parties don’t have the obligation to exploit resources jointly under the UNCLOS because there are many provisional measures available, and joint resource development is just one of them. The states have the obligation to make every effort to enter into provisional arrangements, but the provisional arrangements could come in many forms, including joint resource development, or the invitation of a third party as a mediator to solve the dispute. Moreover, there is no legal authority indicating that joint development has conformed to an international customary law, which is not a compulsory obligation of states. The main purpose of joint resources development is to shelve territorial sovereignty disputes to explore energy resources together. Joint development as a provisional arrangement always has a time limit. Many scholars have agreed that Article 83 under the UNCLOS contains the direct legal basis for joint development.

The Legal Nature of the 2008 Consensus

Different scholars hold many different opinions regarding the legal nature of the 2008 consensus. A Chinese scholar thought the Consensus as a whole should be regarded as a treaty, but that not all of the provisions in the Consensus create legal obligations.[5] An international scholar argued that the Consensus is not legally binding as the Consensus is not a treaty, and China and Japan have not agreed that the arrangement should be binding according to the text of the arrangement.[6] The Consensus is not a binding informal instrument either, from the form of the title and the circumstances of the Consensus.[6] In my view, the 2008 Consensus is not a formal international treaty. The Consensus came from eleven rounds of political conversations, and the parties did not try to establish legal relations between them, since they wanted to enter into future negotiations to conclude a necessary treaty.[5] The nature of the Consensus is simply that of a political arrangement, which needs further stipulations.
New Developments and the Future Prospects

Both China and Japan claim sovereignty over the Diaoyu Island in the ECS. In September 2010, the Japanese Coast Guard sent the captain of a Chinese trawler that collided with Japanese patrol ships in waters off Diaoyu Islands to prosecutors in Okinawa Prefecture. The news that the Japanese government purchased the islands from a private Japanese owner further strengthened the tensions between China and Japan in September 2012. Both parties sent military drones and vessels, to the disputed area to implement military deterrence. Plus, the issues concerning the leaders of Japan’s visit to the Yasukuni Shrine, as well as misrepresentation in Japanese textbooks of events during World War II caused a surge in nationalism. Conflicts occurred between China and Japan after the 2008 JDZ Consensus, which stopped the implementation of the Consensus and the further negotiation concerning the JDZ.

The increasing demand for oil and gas supplies in China and Japan, and instability in exporting countries might make the two governments increasingly reluctant to share natural resources. Taking the status quo of Chinese and Japanese energy security into consideration, the disputes over energy are naturally more severe. From the above analysis, the Consensus on joint resource development is non-legal binding, and under the UNCLOS, states don’t have the obligation to explore energy resources together. There are many scholars that believe that any agreement reached on the issue of the development of the resources will be inherently unstable and continually threatened by nationalist flare-ups over the unresolved sovereignty of the Diaoyu Island.

When it comes to the role of international law in the settlement of the joint resources development issue on the ECS. Carlos Ramos-Mrosovsky argued that the UNCLOS is so unclear, it cannot be adapted to all situations. He therefore recommended the parties negotiate a convention on the “Law of East Asian Seas.” He also argued that the best solutions to the world’s resource conflicts may lie outside of the legal sphere. Furthermore, the efficient development of nuclear, solar, and other alternative fuel sources has the potential to reduce the demand for hard-to-extract oil and gas undersea, which would reduce the number of resource competition driven disputes. In my view, since China’s increasing demand for energy resources, whether Japan agrees or disagrees with joint development, China will explore the energy resources in the ECS.[3] Thus, it is impossible for the parties to make a legal commit on the issue of joint development. Diplomatic dialogues would be helpful to realize joint resource development in the ECS. Competition is a zero-sum game. With the development of new concepts like “non-territorial,” “global governance,” “interdependency” and “regional cooperation,” these new ideas are widely accepted as new theories of geopolitics, which could create win-win situations. Cooperation is the best way to mitigate the tensions between two countries.

References


