

SEABED PETROLEUM IN THE EAST CHINA SEA:

LAW OF THE SEA ISSUES AND THE PROSPECTS FOR JOINT DEVELOPMENT

MIYOSHI MASAHIRO

Faculty of Law
Aichi University, Japan

Undefined Boundaries

China's increasing demand for oil in the recent years and Japan's perennial very heavy dependence on imported oil drive the two countries to explore for sources of supply of oil, and the potential oil deposits in the East China Sea has emerged as a desired source. However, there is a great difficulty in any attempt to develop the potential deposits: the boundary lines between the continental shelf areas appertaining to the two countries remain undefined due to the conflicting territorial claims to the Senkaku Islands around which the potentially oil-rich sea areas lie.

As jurisdiction over a sea area derives from sovereignty over the land territory facing it, the point of departure in discussing offshore oil exploration or exploitation is who owns a given land territory facing the sea, whether it is a continent or an island. Only

when it is clear who owns the land territory, is it possible to delimit the sea area adjacent to it. As a matter of fact Japan had had sovereignty over the Senkaku Islands over a long period of time before China began to claim its sovereignty over them in the early 1970s. The official position of the Japanese Government is that Japan has maintained its undisputed sovereignty over the Islands over so long a period that there is no territorial dispute with China over the Islands.

Under these circumstances there is at present no prospect of delimiting the continental shelf areas and the exclusive economic zones between the two countries, nor prospect of exploring or exploiting sea-bed oil resources, in the sea areas surrounding the Senkaku Islands. Theoretically, however, there can be a possibility of such exploration or exploitation on the condition that the two countries can agree to put aside the sovereignty issue for some time in favor of a joint development scheme. In this paper an attempt will be made to see if there is such a possibility of joint endeavor between the two countries.

The Senkaku Issue

A series of geological surveys conducted in the Yellow and East China Seas under the auspices of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) of the United Nations Economic Commission for Asia and the Far East (ECAFE) in October-November, 1968 reportedly showed promising signs of oil reserves in the sea areas around the Senkaku Islands. Spurred by this research finding and based on the 'natural prolongation' doctrine propounded by the International Court of Justice in its judgment in the *North Sea*

Continental Shelf cases of 20 February 1969, South Korea began to lease sea-bed areas for oil exploration in the north-eastern part of the East China Sea which overlapped some Japanese oil companies' interests. When Japan and South Korea, together with Taiwan, were having talks as to how the maritime boundaries should be delimited in the East China Sea, involving the overlapping claim areas, China made its first official protest in its morning radio broadcast on 4 December 1970. In February, 1971 China repeated its protest during what was called the Japanese-Chinese "memorandum of understanding" trade negotiations. It made a further protest on 30 December 1971 by publishing a number of historical or legal grounds for its claim to the Senkaku Islands ("Diao-yu" Islands in Chinese).¹

The basis of China's claim is mainly historical: its nationals discovered the islands and its sovereignty over them remained uncontested over many hundreds of years. Briefly stated, its historical grounds are as follows:

First, the Ryukyu Kingdom (now Okinawa) had tributary relations with China from the 14th to the mid-19th century, and China sent investiture missions to Ryukyu to legitimize new kings some twenty times during this period. These missions used the Diaoyu Islands as navigational aids and some of their reports referred to the islands by that name;

Secondly, in the mid-16th century the Ming dynasty established a coastal defense system against the then active Japanese pirates or smugglers (*wako* in Japanese). The documents and maps concerning this system included the Diaoyu Islands within the coastal defense area of China;

Thirdly, fishermen from China fished in the sea areas surrounding the islands from ancient times and used them for shelter in bad weather; and

Fourthly, Empress Dowager Tsu Hsi issued an Imperial edict in 1893 to award three of the islands to a private person for collecting medical plants there.²

The Japanese position is, by contrast, based more on the modern rules of international law on the acquisition of territory, although it does not deny the relevance of historical grounds. The most important thing from this point of view is the claimant's will to appropriate a given territory. From all the historical documents relied upon by China, it seems rather difficult to infer that China had an unambiguous will to appropriate the Senkaku Islands if it has evidence of having repeatedly used them as navigational aids over hundreds of years. Stability in legal relations between sovereign States requires that the claimant maintain its sovereignty over a territory in such a manner as will not allow any external interference in its ownership. Otherwise a territory may be appropriated by another claimant who comes later with an ambition to deprive the original owner of its ownership – an instance of the 'rule of capture'.

Unless a claim to territory is corroborated by an act to display the claimant's will to occupy it, it is considered as *terra nullius*, no one's territory. In the understanding of the Japanese Government no such corroboration had been provided by China when it incorporated the Senkaku Islands in the Japanese territory in 1895. The Japanese position was strengthened by the lack of protest on the part of China against their incorporation and the subsequent granting of the lease of one of the Islands to a private person who wanted to gather sea-birds' feather there. Hence the Japanese position that it has had undisputed sovereignty over them, and that there is no territorial dispute over them. It was in this state of things that the afore-mentioned scientific research was conducted by the CCOP in the East China Sea, including the sea areas around the Senkaku Islands in 1968.

Is Joint Development Possible?

Since the Japanese Government denies in principle the existence of a territorial dispute over the Senkaku Islands and yet China has a claim to them as a matter of fact, there cannot be any way of negotiation for a possible delimitation of the boundaries of the sea areas between the chain of Okinawa islands and the Chinese mainland. Can there be any prospect, or at least any possibility, of the two countries coming to terms as to whether there exists a dispute between them over territorial claims?

When it comes to the legal basis of delimitation, much the same thing would happen between Japan and China as took place between Japan and South Korea in the early 1970s: Japan invoked the median line principle while South Korea relied upon the 'natural prolongation' doctrine.

However, assuming for the sake of argument that the two countries can sit at a negotiating table putting aside the formidable issue of territorial sovereignty over the Senkakus, they may possibly be able to devise a joint-management zone for sea-bed development as they have done in respect of fisheries in the Fisheries Agreement of 11 November 1997.³ In doing so, the two countries agreed to shelve the formidable problem of boundary delimitation of their exclusive economic zones. This experience may bear witness to a possibility that they may come to agree to shelve the same problem for the time being in favor of the development of sea-bed mineral resources. But this possibility is not altogether promising, because the 'provisional measures zone' as provided for in the Fisheries Agreement has carefully avoided involving the sea areas of the Senkakus.⁴

Perhaps they were able to work out a compromise on the zone in view of the most pressing needs of their fisheries interests. By comparison, oil and gas, given their less promising potential and huge costs of development, may not be in so pressing a demand as the fisheries resources. In this sense there may be much less incentive to negotiate a compromise zone of joint development in the disputed sea areas around the Senkakus.

Scenario For Joint Development

Is there absolutely no possibility of co-operation for joint development of sea-bed petroleum in the disputed sea areas then? Should Japan and China be able to put aside the formidable and intricate question of sovereignty over the Senkakus in favour of practical demand for oil or gas deposits in the neighboring sea areas, then they could possibly sit at the negotiating table for joint development of those resources. Their willingness for such a scheme would depend on the degree of urgency to which they need oil or gas for industrial or other purposes. This depends in turn on the feasibility and costs of exploration and exploitation.

In addressing this question, one could perhaps turn to the past joint development schemes in various parts of the world to see if one can learn some lessons from them. There are a number of cases in which joint development was hammered out in sea areas where the parties were unable to delimit the boundaries for some reason.⁵

The *Kuwait-Saudi Arabia* agreement on the partition of the Neutral Zone of 1965 devised what might be called an early precedent for joint development in a very broad sense of the term. The two countries had concluded concession agreements with two American oil companies in the late 1940s, and allowed them to work for a common

and co-ordinated program of exploitation without prior boundary delimitation or partition.⁶ Subsequently the Neutral Zone Partition agreement of 1965 delimited an international boundary line, which extended from the land territory to the territorial sea. Beyond the 6-mile limits of the territorial sea, however, the two countries agreed to exercise equal rights “by means of shared exploitation” unless they agree otherwise.⁷ In short, the history up to the agreement of 1965 would seem to show that the two countries were more or less prepared to agree on joint development, although they had kept the Neutral Zone undivided until that agreement.

The *Iran-Sharjah* memorandum of understanding of 1971 authorized a single oil company to conduct “exploitation of petroleum resources of Abu Musa and of the seabed and subsoil beneath its territorial sea”. Half of the revenue was to be paid by the oil company to each of the two countries.⁸ Although this is a case of joint management of oil exploitation, or revenue sharing, in respect of the territorial sea only, the land territory of Abu Musa Island was disputed between the parties when the Memorandum was prepared.⁹ Can one draw a parallel between this case and the Senkakus because of the existing territorial dispute in arranging a joint scheme?

In the *Japan-South Korea* joint development agreement of 1974, no sovereignty issue was involved,¹⁰ but the claims to sea-bed jurisdiction overlapped in a large measure. While Korea claimed its continental shelf areas based on the ‘natural prolongation of land territory into and under the sea’ doctrine,¹¹ Japan based its position on the median line principle. Put simply, the outcome of the negotiations is the joint development zone where the parties’ claimed sea areas overlapped. Thus one may doubt whether there can

be a parallel between this case and the Senkakus where the sovereignty issue is in the forefront of the dispute.

The *Malaysia-Thailand* Memorandum of Understanding of February, 1979 effected a broad agreement between the two countries for joint development of the continental shelf in a defined zone in the Gulf of Thailand. While they pledged to continue efforts to define continental shelf boundaries under the Memorandum of February, they came to agree on a partial boundary outside the joint development zone in the second Memorandum of Understanding of October, 1979. Then in May, 1990 they agreed on detailed points in implementation of the first Memorandum of 1979. But they do not seem to have serious territorial disputes involving maritime development.

In the *Australia-Indonesia* Treaty on the zone of co-operation of December, 1989, the most elaborate arrangements were made for joint development of oil and gas in three defined sub-zones in the "Timor gap" where there had been no boundary delimitation. Prior to this treaty were two series of boundary lines delimited between the two countries in the early 1970s, except in the "Timor gap" produced by the fact that East Timor facing this part of the sea belonged to Portugal which did not agree with Australia on maritime boundaries. Subsequently Indonesia's acquisition of East Timor made it possible for it and Australia to conclude the treaty of 1989. In the intervening years, due to some international judicial decisions on the continental shelf, there emerged the 'distance criterion' as the basis of title to the continental shelf, and in 1989 Australia would presumably have had to recede from its former position based on the natural prolongation doctrine, which seems to have prevailed in the earlier delimitations during the 1970s. The discovery of oil deposits in the sea areas involving the Zone of

Co-operation would have prompted the negotiations for the 1989 treaty.

The *Malaysia-Vietnam* Memorandum of Understanding of June, 1992 is an “interim arrangement for the purpose of exploring and exploiting petroleum in the seabed in the overlapping area” in the Gulf of Thailand,¹² where the two countries failed to delimit their boundary lines. In a later commercial agreement of August, 1993 between PETRONAS for the Government of Malaysia and PETROVIETNAM for the Government of Vietnam, it was provided to establish an eight-member Co-ordination Committee for the implementation of the skeleton Memorandum of 1992. An interesting feature of this entire arrangement is that as Vietnam was not well prepared for the scheme of co-operation with Malaysia, PETRONAS was to carry out all joint development operations and remit to PETROVIETNAM its equal share of the net revenue free of any taxes, levies or duties, and that perhaps in return for this the petroleum law of Malaysia was to apply in the relevant joint area.¹³

In the *Colombia-Jamaica* treaty on maritime delimitation of November, 1993, the two countries established a joint development zone where they were unable to agree on delimitation, while they agreed partly on delimitation in other sea areas. For Colombia this is the penultimate delimitation agreement among those with its neighbors in the western Caribbean sea. But this is the first such agreement for Jamaica, which is said to have been cautious and conservative in adopting emergent maritime legal regimes.¹⁴

The *Argentine-UK* Joint Statement on the Conservation of Fisheries of November, 1990 seems to indicate a point of departure for the two countries slowly to head towards a joint development scheme in the field of oil and gas in the frigid political climate following the Falklands war in 1982. The cautiously worded Joint Statement

noted that nothing in the conduct or content of any meetings between the two countries must be interpreted to mean a change in the position of either country with regard to “the sovereignty or territorial or maritime jurisdiction over the Falklands Islands, South Georgia, the South Sandwich Islands and the surrounding maritime areas”.¹⁵ A series of subsequent British acts, including the Governor’s Proclamation of November, 1991, the Continental Shelf Ordinance of 1991 by the Legislative Council of the Colony of the Falklands Islands and the Offshore Minerals Ordinance of October, 1994, provided a framework for preliminary exploration of the continental shelf within the designated areas. On the other hand, Argentina has claimed the islands well over a hundred years, and continues to pass legislation pertaining to the islands. But the two countries made the Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic in September, 1995, specifying a “Special Area” for “exploration for and exploitation of hydrocarbons by the offshore oil and gas industry” to be carried out “in accordance with sound commercial principle and good oil practice, drawing upon Governments’ experience both in the South West Atlantic and in the North Sea”.¹⁶

It is interesting to note that the UK Government acknowledged that the Joint Declaration would be welcome “as a beneficial factor which will ensure the oil industry and improve the climate for exploration for and exploitation of hydrocarbons in a frontier area”.¹⁷

For some more possible lessons from the past experience, one may have a look at the joint development schemes which were drawn up in addition to boundary delimitations. Such schemes include the *Bahrain-Saudi Arabia* agreement of February, 1958, the *France-Spain* Convention of January, 1974 in respect of the Bay of Biscay, the

Saudi Arabia-Sudan agreement of May, 1974, the *Iceland-Norway* agreement of October 1981, the *Libya-Tunisia* agreement of 1988, and the *Guinea-Bissau – Senegal* agreement of October, 1993.¹⁸ All these cases of joint development were designed on the basis of successful maritime boundary delimitation, to be sure. But one may suspect, perhaps rightly, that there would have been some rationale for a joint undertaking in addition to the boundary delimitation, which would have enabled the parties to develop the desired resources on their side of the boundary line for themselves, except in cases where the resources straddled it.

A recent research paper on international boundary developments reports that there have been several joint development arrangements in Africa. In April, 2003, *Nigeria* and *São Tomé & Príncipe* concluded discussions concerning details of their joint development zone in the north western Gulf of Guinea. The joint development regime was established by a 2001 treaty, but a number of issues remain unresolved.^{18-a} *Angola* and *Democratic Republic of the Congo*, while having an ongoing dispute concerning the as-yet-undefined maritime boundary, reportedly agreed on 19 August 2003 to joint oil exploration in an area referred to as the ‘common maritime corridor’. This agreement, however, did not delimit a maritime boundary, nor outline the specifics of the maritime corridor. No details of the joint exploration regime were reported either.^{18-b}

Looking Ahead

Joint development is not a panacea, but can defuse the intensity of dispute as

experience shows.¹⁹ Although this is not the immediate economic effect, its peace-inducing function would be worth trying.

The Senkakus are barren and uninhabitable islands in the normal sense of the word, and have little value in themselves. What has made them seemingly valuable is the alleged potential of hydrocarbon resources on the sea-bed around them. The interest of the claimants is in the possible economic profit from the potential resources. But they must be exploited within a defined sea area of jurisdiction, and this in turn is derived from the sovereignty over the land territory which faces the sea area in question. Thus the claimants insist on their ownership of the land territory. Consequently, should there be no or little prospect or potential of such resources in the disputed sea areas, the claimants might lose interest in their ownership of the islands. This will all depend on scientific findings in the future.

NOTES

¹ Subsequently China promulgated the Law on the Territorial Sea and the Contiguous Zone on 25 February 1992 which provides in Art. 2(2): “The land territory of the People’s Republic of China includes ... Taiwan and all islands appertaining thereto including the *Diaoyu Islands*” (Emphasis added)

² MATSUI Yoshiro, “International Law of Territorial Acquisition and the Dispute over the Senkaku (Diaoyu) Islands”, *The Japanese Annual of International Law*, No. 40 (1997), p. 11. For a more detailed discussion of the historical Chinese sources of information, see OZAKI Shigeyoshi, “Senkaku-Shotou no Kokusaihou-jou no Chii: Shutoshite sono Rekishiteki Sokumen ni tsuite” (The Status of the Senkaku Islands in International Law: Mainly on Its Historical Aspects), *Tsukuba Housei* (Tsukuba University Review of Law and Politics), No. 18, Part 1 (1995).

³ The Agreement entered into force on 1 June 2001. In the Agreement the parties devised a ‘provisional measures zone’ in which the parties may take appropriate conservation measures and quantitative management measures to ensure that excessive development activities will not threaten the maintenance of marine living resources (Art. 7(2)). For an analysis of the agreement, see Miyoshi, Masahiro, “New Japan-China Fisheries Agreement – An Evaluation from the Point of View of Dispute Settlement -”, *The Japanese Annual of International Law*, No. 41 (1998).

⁴ Japan agreed with South Korea to create a ‘provisional zone’ in the Sea of Japan, involving the Takeshima Islets to which the two countries have overlapping territorial claims, although South Korea denies the existence of a territorial dispute.

⁵ See 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.

⁶ Thus the two oil companies signed a joint drilling agreement on 26 June 1956 and a joint operating agreement on 5 February 1960. See Miyoshi, *op. cit.*, p. 7.

⁷ Art. 8(2) of the Agreement of 7 July 1965, *International Legal Materials*, Vol. 4 (1965), p. 1135.

⁸ Para. 4 of the Memorandum of Understanding of 29 November 1971. *Middle East Economic Survey*, Suppl. to Vol. 15, No. 28 (5 May 1972), p. 2.

⁹ To the best of this writer’s knowledge, Abu Musa is still being disputed between the two countries. The Memorandum of Understanding was announced unilaterally by Sharjah in a tense political situation between them. See Miyoshi, *op. cit.*, pp. 10-11.

¹⁰ The joint development agreement was concerned with the southern part of the continental shelf between the two countries. In the northern part, Takeshima Islets were involved and put outside the scope of the continental shelf delimitation.

¹¹ The doctrine of ‘natural prolongation of land territory into and under the sea’ was propounded by the International Court of Justice in the *North Sea Continental Shelf* cases of 1969. *ICJ Reports 1969*, p. 22, para. 19.

¹² Preamble to the Memorandum of Understanding of 5 June 1992.

¹³ Nguyen Hong Thao, “Vietnam and Joint Development in the Gulf of Thailand”, *The Asian Yearbook of International Law*, Vol. 8 (1998-1999), 2003, pp. 144-145.

¹⁴ Nweihed, K. G., “Report No. 2-18: Colombia-Jamaica”, in Charney & Alexander (eds.), *International Maritime Boundaries*, Vol. III, Dordrecht/Boston/London: Martinus Nijhoff, 1998, pp. 2183-2184.

¹⁵ Para. 1 of the Joint Statement of 28 November 1990.

¹⁶ Para. 2 of the Joint Declaration of 27 September 1995.

¹⁷ Para. 4 of the Declaration of the British Government with regard to the Joint Declaration Signed by the British and Argentine Foreign Ministers On Co-operation Over Offshore Activities in the South West Atlantic.

¹⁸ Miyoshi, *op. cit.*, pp. 29-41.

^{18-a} Donaldson and Pratt, *op. Cit.*, p. 504

^{18-b} *Ibid.*, p. 508

¹⁹ Wälde, Thomas, "Financial and Contractual Perspectives in Negotiating Joint Petroleum Development Agreements", in Fox, Hazel (ed.), *Joint Development of Offshore Oil and Gas*, Vol. II, London: The British Institute of International and Comparative Law, 1990, p. 156.