

Policy Forum 06-37A: Japan and Korea: Between A Legal Rock and a Hard Place

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Essay by Mark J. Valencia

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I. Introduction

Mark J. Valencia, a Maritime Policy Analyst in Kaneohe, Hawaii and Nautilus Institute Senior

Associate, writes, "the maritime boundary cannot be resolved until there is agreement on what to do about the sovereignty of the islands. One possibility would be to enclave the islands in a 12 nm territorial sea circle and to agree on a boundary equidistant between Ullung and Oki islands. This approach would ignore the islets and leave their sovereignty to be determined by a wiser generation."

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II. Essay by Mark J. Valencia

- Japan and Korea: Between A Legal Rock and a Hard Place
by Mark J. Valencia

Officials and the public in Japan and South Korea --- as well as concerned friends, neighbors and this observer--- are breathing a sigh of relief that the two have compromised to avoid a looming confrontation in the Sea of Japan (East Sea in Korea). But that relief may only be a temporary lull before an international legal and diplomatic storm.

South Korea and Japan were (are) involved in a potentially dangerous tussle that surfaced when Japan announced plans to survey the seabed in an area claimed by both as their Exclusive Economic Zone (EEZ). For both South and North Korea, Japan's planned action was a reminder and remnant of its 1910-1945 colonial rule of the Korean Peninsula. Specifically, Japan incorporated the features into its Shimane Prefecture in 1905, the same year that Korea was made a Japanese protectorate. Significant resources are at stake as well. Thus the dispute could have easily turned violent - and still could. Indeed, the compromise expires on 30 June 2006 and if no resolution is reached, confrontation is possible.

Japan's planned survey was apparently motivated by what it perceived as South Korea's intent to register Korean names for submarine features in the area at an upcoming official International Hydrographic Organization conference. It was thought that doing so might enhance the Korean claim to the area. Thus Japan planned to collect bathymetric data to prepare Japanese names as counterproposals.

However at the heart of the dispute are two tiny islets called Takeshima by Japan and Dok Do by the Koreans. Both Japan and the Koreans claim sovereignty over the islets which are located 47 nautical miles east of South Korea's Ullung Island and 86 nautical miles northwest of Japan's Oki Island. The islets appear to be unable to support human habitation without external assistance and arguably have no economic life of their own. Thus according to the 1982 UN Convention on the Law of the Sea (UNCLOS) they should not generate a continental shelf or an EEZ.

South Korea has effectively controlled the islets since 1954. It occupies them and claims a 200 nm EEZ from Ullung Do which includes Dok Do. However, Japan argues that Takeshima can legally generate a Japanese continental shelf and EEZ. Its claim may be motivated by its concern that abandoning such a position might undermine its other claims to ocean space and resources around isolated islets such as the Senkakus in the East China Sea and Okinotorishima. The respective EEZ claims thus overlap and the area of overlap happens to include a rich squid fishery and potential deep water oil and methane hydrates (gas), as well as valuable minerals..

The legal situation is complex and uncertain. Both South Korea and Japan are parties to UNCLOS. But South Korea refuses to acknowledge Japan's claim either to Dok Do or to part of its EEZ. Its

position is that a dispute over Dok Do does not exist because it is indisputably Korean territory. North Korea takes the same position and actually offered to help South Korea defend the islands during the recent confrontation.

According to UNCLOS, marine scientific research cannot be undertaken in another country's EEZ without that country's consent. Since Japan argues that it would be undertaking the survey in its own claimed EEZ, it feels there is no need to obtain South Korea's consent and that announcing its intentions was a simple courtesy. South Korea said it would arrest Japanese Coast Guard survey boats if they began to survey in South Korea's claimed zone. To back up its threat, it dispatched 20 gunboats to the area to conduct high seas seizure drills. But UNCLOS holds that government ships like those of the Japanese Coast Guard have immunity and thus presumably cannot be arrested. To do so could even be considered an act of war.

Also Japan could argue that it is undertaking a *hydrographic survey* not marine scientific research. Some countries like the United States and the United Kingdom argue that hydrographic surveys in another country's EEZ which by definition are generally undertaken to obtain information for the making of navigational charts and the safety of navigation cannot be regulated by the coastal state. Indeed they argue it is an exercise of the freedom of navigation and other internationally lawful uses of the sea accorded by UNCLOS. And UNCLOS also mandates that if countries are unable to agree on continental shelf or EEZ boundaries, the states concerned 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". Thus Japan could try to legally challenge South Korea on any of these bases.

According to UNCLOS and the UN Charter both parties have an obligation to settle disputes by peaceful means. But if one party maintains there is no dispute, then the other must demonstrate that a dispute exists, presumably by diplomatic or ultimately physical means. Indeed Japan is apparently trying to force recognition that there is indeed such a dispute which must be settled according to the "Compulsory Procedures Entailing Binding Decisions" in UNCLOS. And it may well have succeeded. In an attempt to pre-empt this tactic, South Korea submitted a request to the UN Secretary General to exempt the current row from the dispute settlement procedures in UNCLOS.

To avoid compulsory settlement procedures, South Korea could argue that the so-called dispute necessarily involves the concurrent consideration of an unsettled sovereignty dispute over the islets and thus according to UNCLOS is excluded from the procedures. An excluded dispute may be submitted to settlement procedures only by agreement of the parties to the dispute. Assuming South Korean vessels arrest Japanese vessels, South Korea could also argue that the dispute concerns military or law enforcement activities which, according to UNCLOS, are excluded from the jurisdiction of a court or tribunal. Or it could argue that the dispute involves marine scientific research and it has not given its consent for such research in its EEZ. Thus in accordance with UNCLOS it is not obliged to submit to such settlement. Obviously there is a lot of room for legal maneuver and delay on both sides.

The agreed compromise consists of Japan canceling for now its planned survey and South Korea canceling its plan to register Korean names for submarine features near the disputed islets. However, South Korea has said that it is its sovereign right to do so and that *it would indeed do so at an appropriate time* . Meanwhile the two will try to negotiate their continental shelf and EEZ boundaries. Given the political sensitivities and the valuable resources in the disputed area as well as the legal complexities, this dispute is far from over. However, it would be far better for both parties and the region if this explosive issue were settled once and for all.

But the maritime boundary cannot be resolved until there is agreement on what to do about the

sovereignty of the islands. One possibility would be to enclave the islands in a 12 nm territorial sea circle and to agree on a boundary equidistant between Ullung and Oki islands. This approach would ignore the islets and leave their sovereignty to be determined by a wiser generation.

Another possibility would be for Japan to magnanimously agree to Korean sovereignty over Dok Do *provided* that both Koreas agree not to use it as a base point in boundary negotiations, and *provided* that the settlement include a caveat that each boundary issue should be decided on its own merits and that this settlement does not establish a precedent regarding any other unresolved maritime claims of either party.

This could mark the opening of a new chapter in Japan-Korea and even Japan-Asia relations. It would also be commensurate with the weight of the evidence, i.e., the Koreas' strong historical claim to Dok Do, Japan's historical acquiescence to South Korea's claim on several occasions, and South Korea's effective control of the features for more than 50 years. A boundary ignoring Dok Do would also be legally logical in that it is arguably not entitled to an EEZ or continental shelf under UNCLOS. Besides removing this nettlesome issue from regional politics, Japan would be demonstrating that it is benign, reasonable, far-sighted and generous, important qualities for a nation that aspires to regional leadership in the 21st Century.

III. Nautilus Invites Your Responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: napsnet-reply@nautilus.org . Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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