

Implications of the Award of the South China Sea Arbitration for Korea and Japan

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In its Award of July 12, 2016, regarding the arbitration instituted by the Republic of the Philippines against the People's Republic of China, the Tribunal, constituted under Annex VII to the United Nations Convention on the Law of the Sea (the "Convention"), considered the lawfulness of certain actions by China that were alleged by the Philippines to violate the Convention.

Among other things, the Tribunal considered whether any of the maritime features claimed by China could generate maritime zones beyond 12 nautical miles under Article 121 of the Convention. Article 121 provides that an island generates an entitlement to an Exclusive Economic Zone (EEZ) of 200 nautical miles and to a continental shelf, but rocks which cannot sustain human habitation or economic life of their own shall have no such extended maritime zones.

Having examined Article 121, the Tribunal concluded that the entitlements of a maritime feature depend on (a) the objective capacity of a feature, (b) in its natural condition, to sustain either (c) a stable community of people or (d) economic activity that is not dependent on outside resources or purely extractive in nature. The Tribunal noted that the current presence of official personnel on many of the features is dependent on outside support and not reflective of the capacity of the features. The Tribunal found historical evidence to be more relevant and noted that the islands in question, more specifically, the Spratly Islands, were historically used by small groups of fishermen, but concluded that such temporary use did not amount to inhabitation by a stable community and that all of the historical economic activities had been extractive in nature. Accordingly, the Tribunal

concluded that all of the high-tide features in the Spratly Islands are legally “rocks” that do not generate extended maritime zones.

Korea and Japan have yet to agree on the EEZ boundary delimitation in the East Sea due to the territorial issue over the Islets called Dokdo. The Islets are legitimately under the sovereignty of Korea, but contested by Japan. However, the real problem that obstructs the boundary delimitation negotiation is the status of the Islets.

Japan nonetheless apparently takes the position that all rocks are capable of generating extended maritime zones beyond 12 nautical miles of territorial seas. A case in point is the Okinotorishima, whose area is likened to that of two king-size beds. In the same vein, Japan claimed that Dokdo, consisting of the two outcroppings, are entitled to generate an EEZ around the Islets in its 1996 declaration. Facing Japan’s bold approach, as the legitimate owner of Dokdo, Korea has no choice but to take the same position. Under such circumstances, EEZ delimitation will be a non-starter.

However, the two countries will be able to solve the delimitation issue if they negotiate in an earnest manner based on the letter and spirit of the Convention and the Award of the South China Sea Arbitration. The Award has many implications for the boundary delimitation issue between Korea and Japan. The Award clearly shows that Dokdo is believed to fail to generate an EEZ because it cannot sustain human habitation or economic life of their own.

In this regard, it should be noted that the late Professor Jon M. Van Dyke aptly suggested that Dokdo should not affect the boundary delimitation and that a guiding principle for achieving the equitable solution stated in Article 74 of the Convention eventually becomes the equidistance line between Korea’s Ullongdo and Japan’s Oki Islands for the EEZ boundary delimitation in the East Sea. This approach is fully justified under principles of international law and a number of precedents.

Against such a backdrop, if Japan drops its previous claims and agrees to this methodology, Korea will be positive in accepting it. Indeed, Korea has historically taken the position that Dokdo should not be considered in drawing the maritime boundary with Japan and should have only a territorial-sea enclave drawn around it.

As a matter of fact, in 1998, the United Kingdom and Ireland signed an EEZ boundary agreement for which “the location of Rockall was irrelevant to the determination of the boundary”. The United Kingdom renounced any claim to an EEZ or continental shelf around its barren granite feature. Such a change of attitude by the United Kingdom will help Japan to reconsider its position.

The early and amicable resolution of the boundary delimitation for an EEZ between Korea and Japan will no doubt contribute to the development of international law and to the promotion of bilateral

relations between the two countries.

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