從中日東海油氣田紛爭淺談重疊海域「共同開發」之國際法性質

A Case Study on Conflicts on East China Sea Gas Field Between Mainland China and Japen-- Discussion on Joint Development on Overlapping Economic Zone in Viewpoint of International Law

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壹、前言

中國與日本自2004年5月以來，針對東海油氣田紛爭進行多次磋商，近來日本提議共同開發「日中中間線」以西之春曉等4個具爭議性的氣油田，中國不僅拒絕提供日方有關開發中4個油氣田的地下結構資料，且提議共同開發的範圍是釣魚台列嶼周邊和東海北部日韓共同大陸棚附近的油田，因中國並不承認日本在東海主張的「日中中間線」，而以大陸礁層自然延伸論為理由，主張兩國東海境界線應在琉球海溝，成為雙方在東海油氣田爭議的問題所在。值得探討者，重疊海域油氣資源之「共同開發」（Joint Development）的主張是否具有強制性？在國際法上之性質為何？本文分就國際條約法、司法判決、國家實踐等方面，加以說明。

貳、「共同開發」之國際法基礎

一、條約國際法及國家實踐之觀察

（一）雙邊海域劃界協定[註1]

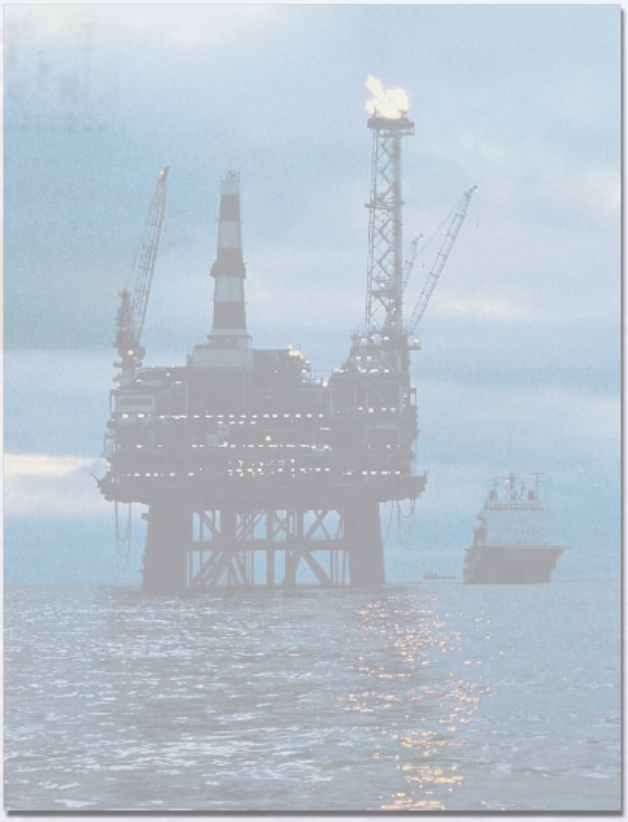
學者將共同開發之歷史發展分為三個階段：一為「產生階段」（1958年至1969年），有5個共同開發協定。二為「發展階段」（1969年北海大陸

Part I.Foreword

Since May, 2004, a number of negotiations between Mainland China and Japan have been held to solve the conflicts on East China Sea Gas Field. In the process of negotiation, Japan proposed to jointly develop four controversial gas oil fields including Chun Xiao Oil Field, which are located in the west of middle line. Mainland China not only refused to offer underground structural data regarding the said four oil fields to Japan, but also declared the area to be jointly developed are referred to the gas fields around Diaoyutai Islands and near the continental shelf, co-owned by Japan and Korea and saturated in the north of East China Sea. Since the middle line claimed by Japan is not accepted by Mainland China, it excused by Natural expansion of continental shelf and declared the line dividing China and Japan on East China Sea Ocean shall be on Ryukyu Trench. Such a declaration resulted in the major disputes on East China Sea gas field between two states. Although

礁層案判決至1994年聯合國海洋法公約生效），有12個共同開發協定。三為「平穩階段」（聯合國海洋法公約1994年生效後迄今），有3個共同開發協定出現。

世界上第一個海洋共同開發協定，為1958年2月22日巴林和沙烏地阿拉伯簽訂關於波斯灣大陸礁層之劃界協定（Bahrain-Saudi Arabia boundary agreement ,22 February 1958），該協定約定沙烏地阿拉伯可開採有爭議的油田，惟應將淨收入二分之一分配與巴林。國家實踐上，有關爭議區的共同開發已有12個案例，其中1960年4月荷蘭與德國簽訂之Ems-Dollard 條約（Ems-Dollard Treaty）及1962年5月之Ems-Dollard 條約補充協議」（Supplementary Agreement between the Federal Republic of Germany and the Netherlands to the Ems-Dollard Treaty, 14 May 1962），解決Ems河口區域主權爭議之模式：擱置兩國在Ems河口區之主權爭議，在跨越兩國臨時分界線之天然氣田附近建立一個資源共同開發區，雙方在各自一側各自行使管轄並進行探勘和開發，其收益及費用雙方平等分享及分擔。其為1969年國際法院「北海大陸礁層案」判決所援引。



two parties have eventually obtained agreement in June 2008, what worth discussing is whether it is a compulsory declaration to joint exploitation of gas resources on overlapping economic zone, what does it stand in view of international laws? In this article, it is expected to interpret this incidence in viewpoints of international laws, case judgments and state practices.

PartII.Basis of international law for joint development

I.The observations of treaties in international law and state practices

(I)Agreements of dividing line between bilateral sea territories[1]

As some scholars announced, historical evolution of joint development are classified to three stages- A. Originting period (1958-1969): five joint development agreements are made; B. Developing period (from 1969's ruling to North Sea Continental Shelf Case to 1994, when United Nations Convention on the Law of the Sea takes effective): twelve joint development agreements are made; C. Stabile period (since 1994, when United Nations Convention on the Law of the Sea takes effective): three joint development agreements are made.

Bahrain-Saudi Arabia boundary agreement, 22 February 1958, is the first joint development agreement to ocean, which stipulates controversial gas fields can be exploited by Saudi Arab under the condition that 50% of net income shall be owned by Bahrain. In practice, there have been 12 cases involving joint development on controversial gas fields, including Ems-Dollard Treaty between the Netherlands and Germany as of April, 1960 and Supplementary Agreement between the Federal Republic of Germany and the Netherlands to the Ems-Dollard Treaty, 14 May 1962, which was

值得注意者，國家實踐上，對於非爭議區之跨界礦藏共同開發，則基於礦藏一體性觀點，在1965年英國與挪威大陸礁層劃界協定（Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the delimitation of the continental shelf between the two countries,10 March 1965）之後，各國在劃界條約或協定中大量出現所謂「單一地質構造條款」（亦稱為「跨疆油礦條款」）：「如果任何單一地質的石油構造或石油油田……跨越分界線……雙方應在經與其特許權持有者進行磋商後，設法尋求就最有效開發石油構造和油田，及分配從中所獲利益之方式，達成協議。」[註2]。

（二）1982年聯合國海洋法公約第74條第3款及第83條第3款「臨時安排」（provisional arrangements）規定

1982年聯合國海洋法公約有關大陸礁層及專屬經濟區制度，對於國際海洋法秩序產生重大變革。海洋法公約所定大陸礁層之定義，除自然延伸外，採取距離標準，其法律概念較地理上大陸礁層為

meant to solve disputes on sovereignty at Ems estuary zone by establishing a jointly developed zone around the natural gas field spreading on the boundary line between two states in spite of the sovereignty disputes on the Ems estuary zone. By doing so, two involved states separately practice jurisdiction on the part of their own, and share profits and cost if any. Such case has been cited by international court in North Sea Continental Shelf Case dated 1969.

It is noted that “inseparability of minerals” has been the basic viewpoint to judge joint development of minerals derived from non-controversial zone in practice. Following the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the delimitation of the continental shelf between the two countries,10 March 1965, “clause of single geological structure”(also called across-boundary petroleum clause) has been commonly applied to boundary-dividing treaties or agreements.The clause refers to “If any single geological petroleum structure or petroleum field, …… extends across the dividing line …… the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.”[2]

(II) Regulations of § 74.8 and provisional Provisional arrangements of § 83.3 of United Nations Convention On The Law Of The Sea.

Regulations on continental shelf and exclusive economic zone in United Nations Convention On The Law Of The Sea, 1982, makes significant changes to international order on the sea., Pursuant to United Nations Convention On The Law Of The Sea, concept of the continental

廣，即：沿海國的大陸礁層包括其領海以外依其陸地領土的全部自然延伸，擴展到大陸邊外緣的海底區域的海床和底土，如果從測算領海寬度的基線量起到大陸邊的外緣的距離不到二百浬，則擴展到二百浬的距離（第76條第1款）。又公約創設專屬經濟區制度，專屬經濟區範圍為從測算領海寬度的基線量起，不應超過二百浬之海域（第57條）。

由於沿海國在大陸礁層及所主張之專屬經濟區中享有大陸礁層海床及底土之非生物資源主權權利（第56條第1款（a）、第77條第1款），且權利範圍廣闊，勢必造成海岸相向或相鄰的國家間專屬經濟區及大陸礁層之重疊，產生劃界問題。由於各國對於劃界原則之主張不同，海洋法公約僅揭示協議原則，惟迅速達成協議不易，為避免發生重大衝突，第74條第3款及第83條第3款明定，「在達成協議以前，有關各國應基於諒解和合作精神，盡一切努力作出實際性的臨時安排，並在此過渡期間內，不危害或阻礙最後協議的達成。這種安排應不妨害最後界限的劃定。」

雖然公約對於「共同開發」並無明確規範，且前述「臨時安排」的方式亦無具體規定或賦予實質的法律義務。就國家實踐而言，以共同開發方式作為過渡性臨時安排，確實提供了一項具有建設性、務實性、可行性且最為廣泛運用的解決方法，故有論者「臨時安排」規定為共同開發之法律依據。

二、國際司法判決

1969年國際法院「北海大陸礁層案」（North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands)判決中，援引前述荷蘭與德國 Ems-Dollard 條約的實踐，首次引入爭議區共同開發概念，判決指出大陸礁層重疊區域應當依照協議的比例劃分，或在未達成協議下由各方平分。但若有關各方決定對此重疊區域或其中的任何部分實行共同管轄、使用或開發的制度，則應依其決定為據。如存在礦床一體性問題，後一種解決方法（共同開發）尤為適宜。其後，1982年突尼斯與利比亞（Case Concerning the Continental shelf（Tunisia/Libya Arab Jamahiriya））、1985年利比亞與馬爾他（Case Concerning the Continental shelf（Libya Arab

shelf is broader than that defined in geography, it adopts a distance standard besides natural prolongation. That is, The continental shelf of a coastal State comprises the seabed 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(§ 76.1). Besides, The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured(§ 57).

In according to § 56.1(a) and § 77.1, in the continental shelf and exclusive economic zone, the coastal State has sovereign rights of non-living resources of the seabed of the continental shelf , and its subsoil., The rights are extended so widely that overlapping economic zone and continental shelf become the source of conflicts between states with adjacent or opposite coasts. Due to diverse claims on breadth, the convention merely functions as a principle of conciliation. In case efficient conciliation is hardly achieved, as well as major conflicts may take place, § 74.3 and § 83.3 regulates, “for pending agreement, 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.”

Although the convention does not provide definite regulations to joint development, and the said provisional arrangements lacks substantial rules or legal duties, in view point of a state’s prac-

Jamahiriya /Malta））大陸礁層案判決或法官不同意見中亦提出了共同開發之意見。[註3]

三、「共同開發」原則是否已成為習慣國際法？

條約國際法、國家實踐、國際司法判決均有為數不少之共同開發案例，惟共同開發原則是否已形成習慣國際法，而成為具有強制性之規則？國際法學者意見紛歧，多數仍採否定或保留之看法。[註4]習慣國際法之形成應具備客觀要件（國際慣行存在）、主觀要件（法之確信），然國家實踐之案例並未達一致性或普遍性，且各國並無確信共同開發之實踐係基於履行某種法律義務，又共同開發並非聯合國海洋法公約所定臨時安排之唯一方式，故難謂其已成為習慣國際法。

tice, provisional arrangements of joint development can be a preferable solution which are establishing, available and practical. This explains why some insists on the provisional arrangement as legal stand for joint development.

II. Rulings of International Justice

In North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands) as of 1969, the international court has introduced the concept on joint development in controversial zone first known in the Ems-Dollard Treaty. In accordance with the ruling, delimitation on overlapping continental shelf shall be made based upon an agreement if any, or be shared equally if no agreement is available. However, as a determination to joint jurisdiction, use, or development is reached, the determination becomes the basis. The later is particularly adequate for a solution to inseparability of mineral deposit. Subsequently in 1982 and 1985, rulings or in charge judges reflected distinct opinions in such cases as “Case Concerning the Continental shelf(Tunisia/Libya Arab Jamahiriya)”, “Case Concerning the Continental shelf(Libya Arab Jamahiriya /Malta)”[3]

III.Has principle of joint exploitation become part of international common laws?

Although there have been a great number cases concerning joint development as far as international treaties, state’s practice, and case judgments are concerned, scholars held diverse opinions as to whether principle of joint development has become part of international common law and thus functioned as compulsory rules.[4] In terms of the objective and subjective elements which form international common laws, cases in state’s practice do not attain to consistence and generality. Furthermore, due to the facts that not all states advocate practice of joint development is based upon a legal duty, and joint development is

參、結論

中國自70年代末，即由領導人鄧小平提出「擱置主權，共同開發」原則，解決中國與鄰國之爭議。惟在東海部分，中方在1979年即向日方提出共同開發釣魚台附近海域油氣資源，遭到日方拒絕。近年來春曉油氣田紛爭，分別在2004年10月25日（北京）、2005年5月30-31日（北京）、2005年9月30日至10月1日（東京）、進行三個回合磋商談判，中方藉此舊事重提提議共同開發的範圍是釣魚台列嶼周邊和東海北部日韓共同大陸棚附近的油田，日方則在第三回合談判首次提出共同開發東海「中間線」以西、中方正在開採之春曉、斷橋、天外天、龍井四個油氣田。[註5]可見中日雙方在磋商過程中似乎已達成共同開發之原則性共識，惟對於共同開發之範圍則存有相當大之分歧。2007年9月19日中央社引據日本產經新聞報導，日本針對中國正在日本主張的東海中線附近開發的4個油氣田，向中國探詢負擔一半開發投資資金的可行性，可望在9月21日的中、日兩國局長級官員會談成為正式的議題。報導指出，日方提案的內容包括：1、若日中雙方就開發引用的分擔達成協議，新生產的天然瓦斯的權利雙方各半；2、中國已挖掘的地下資源根據地下結構資料來決定雙方的分配比例，日方部分由中方購取。雙方能否達成協議，抑或提出其他開發方案，仍待觀察。

島嶼主權爭議、各國對於共同開發之範圍或概念的不同理解，均造成爭議海域共同開發之重大窒礙，雖然兩國均有意願和平解決紛爭，惟仍保有各自表述的空間，更顯見共同開發原則尚非具有強制性的國際習慣法。不過，以國際社會合作協商的趨勢，各國紛紛以「共同開發」作為過渡的臨時安排，使得「共同開發」似乎是一個正在發展中的新國際法原則。

(本文作者任職於海巡署法規會)

not the only provisional arrangement regulated by the United Nations Convention on the Law of the Sea, one can hardly assume the principle of joint development become part of international common laws.

Part III.Conclusion

Ever since late 1970s, Xiao-ping Deng held principle of " deferring sovereignty and developing jointly" to settle the conflicts between Mainland China and neighboring states. Yet about East China Sea, Mainland China's proposal in 1979 to jointly exploit gas resource around Diaoyutai Islands was rejected by Japan. Conflicts on Chun Xiao Oil Field have resulted in three negotiations separately launched in Oct. 25, 2004 (Beijing), May 30-31, 2005 (Beijing), and Sep. 30 -Oct. 02, 2005 (Tokyo). During the said three occasions, China re-issued a proposal to jointly develop oil fields saturated around Diaoyutai Islands, as well as those located nearby the co-owned continental shelf in the north of East China Sea. At the third negotiation, Japan proposed joint development to exploit four oil fields which are in the west of the middle line on East Ocean and have been exploited by China.[5] Except for the existing disputes on scope of joint development, it is perceived that two parties seemed to reach a consensus during the negotiating process. As of Sep. 19, 2007, Central News Agency reported that referring to the four oil fields being exploited by China around the East China Sea middle line claimed by Japan, Japan queried Mainland China the possibility to share half of investment in developing costs. The proposal was expected to be included as a formal issue at the chief level mutual conference between China and Japan dated Sep. 21, 2007, according to the source of Sankei Shimbun. tum. Two states finally declare to obtain agreement on June 18,

2008 that mutual cooperation would still go on without affecting profits of their own, and principle of reciprocity must be ensured during the interim period. As for Chun Xiao Oil Field, in which China has invested development, Japan's corporations would be welcomed to participate investment and development programs by China's enterprises as long as China's laws related to foreign cooperation on marine oil and resources.

Sovereignty to islands, and distinct declaration to scope and concept to joint development held by each state both led to magnificent difficulties to joint development on controversial waters. Freedom to maintain claims of their own still existed in spite of intention to peaceful solution between two states. (China never agrees to the "middle line", but only admits Chun Xiao Oil Field is controlled by its sovereignty and surely does not fall into scope of joint development) Such a circumstance reflected evidently the principle of joint development has not become part of international common laws. Rather, as far as the current trend is concerned, joint development is likely becoming a "growing" concept in international laws since all states are tending to see joint development as the provisional arrangement.

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2.For information on state's practice, please visit official website of United Nations: http://www.

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註2、各國國家實踐可參閱聯合國網站http://www.un.org/Depts/los/LEGISLATIONANDTREATIES。另1965年英國與挪威大陸礁層劃界協定第4條：「If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure

orfield which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving there from shall be apportioned.」

註3、國際法院北海大陸礁層案判決第99段：「99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.」詳見http://www.icj-cij.org/docket/files/52/5561.pdf。另參蕭建國，註1，頁73。高之國，註1，頁53。

註4、肯定說為William T. Onorato，高之國等；否定說為R. Lagoni、Masahiro Miyoshi、David M. Ong、余民才、蕭建國等。詳參蕭建國，註1，頁73-74；高之國，註1，頁61-62。

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3.The 99th paragraph of the ruling: "99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit", for more details, please visit http://www.icj-cij.org/docket/files/52/5561.pdf . Others are quoted from reference I, Page73 and reference 2, Page 53.

4.The principle is supported by William T. Onorato and Chi-Kuo Kao, etc. and objected by R. Lagon 、Masahiro Miyoshi、David M. Ong、Jen-Kao Xiao, etc. Please refer to reference 1, page 73-74 and reference 2, page 61-62.

5.Liong-Fu Chung, Issues concerning joint development of oil resources on controversial waters, Concept and Practice of International Law of the Sea, Ocean Press, Beijing, August 2006, Page 198.