

ENDING NAVAL CLASHES ON THE NORTHERN LIMIT LINE AND THE QUEST FOR A WEST SEA PEACE REGIME

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Notwithstanding the June 2000 Pyongyang Summit Declaration, the June 2002 naval clash in the West Sea between North and South Korean naval forces once again demonstrated the precarious nature of the armistice regime and peace and security on the Korean peninsula. But the incident also provides an opportunity for confidence building with the benefit of existing “rules of the road” based on the Law of the Sea. This article probes the immediate cause of the clash—the lingering dispute over the status of the Northern Limit Line (NLL), unilaterally promulgated by the United Nations Command in August 1953—and the political interests of the parties today that stand in the way of a resolution. If the two Koreas are genuinely committed to reconciliation, these differences can be resolved through negotiation, thereby preventing future incidents. A line that was drawn more than a half-century ago for an entirely different purpose should no longer be allowed to fester as a source of conflict, thereby retarding the peace process.

Key words: Northern Limit Line, Korean War Armistice Agreement, West Sea, inter-Korean reconciliation, UN Command

Introduction

The Significance of the NLL

While the political destiny of the Korean peninsula has been closely linked historically to a geography that unhappily intersects with the political and security interests of its larger regional neighbors, more recently, the waters surrounding the peninsula in the West Sea (*Map 1*) have been the scene of continuing armed conflict between the two Koreas themselves. The conflict is over a line—the Northern Limit Line (NLL)—that was drawn at the end of the Korean War a half century ago as a seaward extension of the military demarcation line (MDL) separating the two sides.¹

The reason for this line lay in the need to prevent South Korean forces from venturing north in violation of the July 1953 Korean War Armistice Agreement that South Korean President Syngman Rhee had refused to sign. Scant attention was given to defending the five small islands awarded to South Korea since their status was specified in the armistice and at the time, North Korea did not have a navy worthy of the name.² Politically, the line—officially promulgated on August 30, 1953, more than a month after the armistice was signed—also reflected disagreement during the proceedings between North and South Korean negotiators over a three- or a twelve-nautical mile limit. To settle the matter, the United Nations Command (UNC) unilaterally designated the NLL at mid-channel between these islands and the North Korean-controlled Ongjin peninsula, enveloping it in an arc and thereby preventing normal egress.³ (See *Map 2*.)

Paradoxically, a line whose original purpose was to prevent Southern incursions into the North has been transformed into one of military control to prevent *Northern* ships, vessels, and

1. The MDL divides the demilitarized zone (DMZ) at the 38th parallel into a northern and southern section, each 2 kilometers wide.
2. See the Korean War Armistice Agreement, Article II, Section 13b, July 27, 1953. The islands from northwest to southeast respectively are Paengnyong-do, Taech'ong-do, Soch'ong-do, Yonp-yo-yolto and U-do). Although Rhee agreed to abide by the armistice, the United States, in its capacity as UN Command authority, was taking no chances.
3. UN Command statement, August 30, 1953.

Map 1. Northeast Asia and the Korean Peninsula

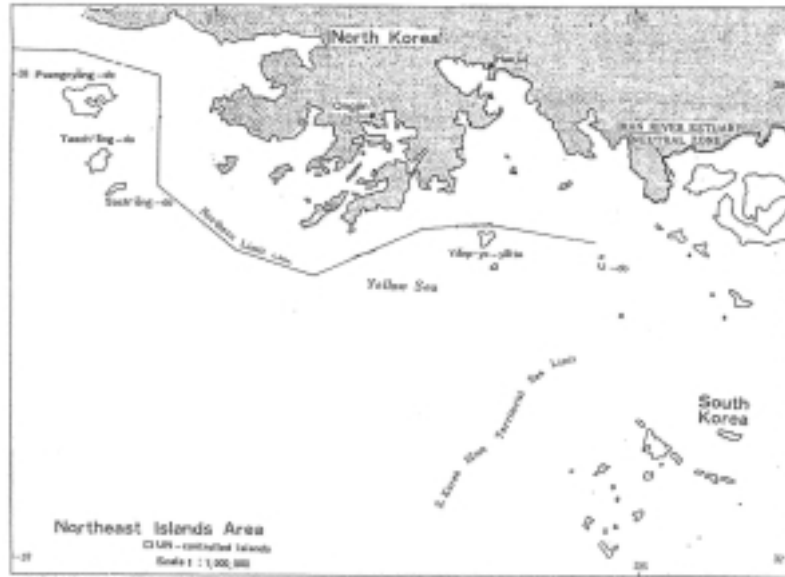


Source: The New York Times Atlas of the World (New York: Random House, 1992).

Note: Area of incidents circled.

craft from going south. For South Korea, it constitutes a de facto boundary that has kept the North's fishing fleet at bay and its naval forces bottled up. Seoul's resolve in enforcing the line has periodically been tested, particularly during blue crab fishing

Map 2. Northeast Islands Area: Northern Limit Line



Source: U.S. Government.

season (June-September), when the potential for escalation is at its greatest. Indeed, two major clashes in the space of the last four years—both before and after the 2000 Pyongyang summit—have claimed more than a score of lives on both sides.⁴

An additional complicating factor has been the subsequent adoption under the 1982 UN Law of the Sea Convention (LOS)—to which both Koreas are signatories—of a twelve-nautical mile

4. The first major incident occurred on June 15, 1999, resulting in one North Korean vessel sunk and thirty dead. South Korean forces sustained seven minor injuries. The most recent incident on June 29, 2002 was more deadly, leaving five South Korean naval personnel dead, nineteen wounded, and one boat sunk. The North has also admitted to fatalities, approximately thirty killed or injured according to South Korean estimates. For a detailed discussion and analysis of these incidents, see Jon Van Dyke, Mark C. Valencia, and Jenny Miller Garmendia, "The North/South Boundary Dispute in the Yellow (West) Sea," *Marine Policy*, No. 27 (2002), pp. 143-46.

limit in lieu of a three-nautical mile limit that was the previous norm.⁵ While South Korea benefits from the former, denying North Korea equivalence can only be justified on the basis of military exigency, and while the threat from the North Korean navy is real enough,⁶ Seoul has yet to make a convincing case of a substantially increased threat stemming from a small adjustment southward in the line in keeping with international law.

But even if these islands that gave rise to the NLL were not occupied by South Korea, it would still be necessary to resolve the issue of access by the two Koreas to their adjacent territorial seas and respective exclusive economic zones (EEZ's),⁷ the 200-nautical mile wide zone extending beyond the territorial sea in accordance with the LOS. In brief, in cases where adjacent perpendicular coastlines overlap, it is common practice under international law for the two adjacent states to delimit and often share the EEZ, as Japan and South Korea have done in the East Sea/Sea of Japan. They do so by drawing a straight baseline from their respective coasts. In addition, appropriate adjustment is normally made for islands.⁸

In the past, any such changes have required extensive bilat-

5. With the adoption of the UN Law of the Sea Convention in 1982, it has become state practice to regard the twelve-mile limit as the norm.
6. North Korea's West Sea fleet consists of six battle groups, dozens of submarines, 420 torpedo boats, patrol ships, and fire support boats, eighty of which operate out of Sagot point on the Ongjin peninsula. Ground-to-ship *Silkworm* missiles are also stationed at Tungsangot Point, also on the Ongjin peninsula. See Van Dyke, Valencia, and Garmendia, "The North/South Boundary Dispute," p. 147.
7. Article 15 of the 1982 LOS Convention states that "Where the coasts of two states are opposite or adjacent to each other, neither of the states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial seas of each are measured."
8. It is a well-established principle of the Law of the Sea that adjustments for islands, while appropriate, should not be disproportionate, particularly "if located far from the mainland of the state owning them if, given effect, would command maritime space that intrudes into the continental shelf of another state." Brice M. Cladgett, "Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea," part I, Covington and Burling, Washington, D.C.

eral negotiation or adjudication by the International Court of Justice (ICJ). For example, in the *Gulf of Maine* case between the United States and Canada, a boundary adjustment was made that took into account adjacent baselines as well as a small mid-channel island.⁹

The Benefits of a Negotiated Settlement

Clearly, however, there is a major difference in relations between neighboring states at peace and those in a state of suspended hostilities. In addition, neither Korea is likely to accept the jurisdiction of the ICJ, which requires the approval of both parties. Each party then risks being bound by a judicial outcome adverse to its interests. By contrast, both sides would benefit from a negotiated solution that would open the way to lowering tensions and expanding fisheries cooperation.

Bureaucratic and interest group politics would figure prominently in such negotiations. Of the three ministries directly involved on the South Korean side, the Ministry of National Defense (MND) has been the most rigid, although, in contrast to its refusal to discuss any change in the status of the NLL following a naval clash in 1999, the statement issued after the June 2002 incident demonstrated a greater receptivity to dialogue (see note 18). At the same time, it would be reasonable to expect the Ministries of Unification and Maritime Affairs (MOMAF) to exercise a moderating influence provided the North also demonstrated flexibility, such that any modification of the NLL elicited a tangible *quid pro quo* in terms of reciprocal fishing rights north of the line.

Notably, the two Koreas have already reached agreement on civilian shipping between ports in North and South, although they have not yet signed it. (A sea-lanes agreement at the March 26-29, 2003 ministerial talks in Pyongyang that were cancelled as a result of South Korea's decision to send non-combat troops to Iraq is now likely to be deferred pending the resolution of the crisis over North Korea's nuclear-weapons program.)

As in negotiations over the NLL itself, the relative priority of reconciliation versus security is critical. If successfully imple-

mented, the establishment of sea lanes between the two Koreas would be a major step forward in strengthening prospects for establishing an intra-Korean maritime zone (as proposed in a later section).

Finally, the capacity of fisherman cooperatives and other fishing interests in the South to exert political pressure on the MOMAF must be factored into the negotiating equation. Apart from security considerations, these groups strongly oppose sharing lucrative crab fishing areas with their northern counterparts without comparable access to fishing areas north of the NLL. To bring them on board, as with South Korean public opinion more generally, North-South cooperation must be perceived as proceeding on a transparent and reciprocal basis.

Beyond domestic political and international legal considerations, however, lies the Janus-faced character of the NLL itself—both a cause of contemporary clashes and the consequence of prior conflict. While the intention of the armistice signatories a half-century ago was “to make possible a final peaceful settlement and the creation of a united, independent and democratic Korea,”¹⁰ today, those charged with maintaining the NLL view the Korean War as ongoing. They frequently assert, “we are at war, there is only a truce.” Rather than see the virtues of adopting a flexible position now, these conservative interests prefer to relegate a resolution of the NLL to an indefinite future as part of a new peace regime for the peninsula.

A more pragmatic question is whether such negotiations should be conducted independently, in the context of economic cooperation and/or confidence-building measures, or tied directly to the Korean War Armistice Agreement itself. The real advantage of separate negotiations is in avoiding the complexities inherent in replacing the old cold war structure now in place on the peninsula with a new peace regime. Under the provisions of the 1991 North-South Basic Agreement, a North-South demarcation line identical to the MDL on land also commits both parties to recognize the areas under the other's administrative control at the time the armistice was signed. But negotiation of a final maritime boundary is left open. Indeed, a protocol to

9. *International Court of Justice Reports*, vol. 1984 (1984), p. 247.

10. “UN Command Special Report on Korean Armistice,” *Department of State Bulletin*, August 24, 1953.

Article 10 states that “the South-North sea-demarcation line shall continue to be discussed in the future,” while providing that “the sea non-aggression zones should be identical with those that have been under the jurisdiction of each side until the present time.”¹¹ Additionally, principles constituting “rules of the road” for conducting such negotiations are contained in the Law of the Sea Convention.

In short, the prospects for success would be greatly enhanced by focusing solely on fishing rights, maritime cooperation, and a final, mutually acceptable West Sea maritime boundary to replace the NLL. In addition, a positive outcome could serve as an important confidence-building measure in itself, both furthering inter-Korean reconciliation as well as the joint exploitation, conservation, and management of the rich fisheries resources of the West Sea. By contrast, a comprehensive attempt to replace the Armistice Agreement itself is to set sail on uncharted waters.¹²

The Political Positions and Stakes of the Parties

The controversy over the NLL and the military clashes it has engendered evoke the national interests of three states. For the United States, the issue is not the legality of the line itself but the violations of the armistice triggered by clashes over the line. The U.S. Secretary of Defense, Donald Rumsfeld, has charged that North Korea has violated the armistice, a charge reiterated by the UN Command.¹³ Yet the armistice agreement makes no mention of the NLL. Rather than focusing on the reasons for the clashes, Washington has emphasized the practicality and effectiveness of respecting present arrangements, most recently voiced by a State Department spokesman, Philip Reeker, at the time of the June 2002 incident: “We urge the DPRK to recognize the practicality of

11. See Basic Agreement, Chapter 2, Article 11 that reads as follows: “The South-North demarcation line and areas for non-aggression shall be identical with the Military Demarcation Line specified in the Military Armistice Agreement of July 27, 1953 and the areas that have been under the jurisdiction of each side until the present time.”
12. See the section below, “What Would a Management Regime Look Like?”
13. *Joongang Ilbo* (Seoul), July 3, 2002 and *Hankuk Ilbo* (Seoul), July 2, 2002.

the NLL by keeping its craft north of the line.”¹⁴

Further, although the United States has sidestepped the issue of negotiations, officials have privately admitted that the best way to resolve the issue would be for the two Koreas to negotiate a new line that would lessen the likelihood of future clashes.¹⁵ Nevertheless, there is no overt indication of U.S. pressure on Seoul in this direction, despite the fact that the UN Commander, a U.S. four-star general, has ultimate responsibility for preserving security along the NLL and MDL alike. Here, the fear of undercutting the South Korean position vis-a-vis the North is paramount. Washington is also on guard against attempts by Pyongyang to lure it into direct negotiations over the NLL in an effort to sideline the South, although the operative paragraphs of the 1991 Basic Agreement recognize the two Koreas as the relevant interlocutors in pending territorial issues apart from the DMZ itself.¹⁶

By contrast, the two Koreas have staked out diametrically opposite positions. Ever since the early 1970's, the North has consistently refused to accept the NLL, although only twice have military clashes turned violent and resulted in the loss of life.¹⁷ At the same time, however, it has been more aggressive in sending fishing boats over the line as blue crab catches have become more lucrative during the June-September fishing season. It would appear, therefore, that the prime motive for forays south of the NLL is economic gain rather than a military show of force, a conclusion echoed in a recent study for the East-West

14. BBC World, Asia-Pacific, “South Korea Resolute on Sea Border,” September 2, 2002.
15. Conversation with U.S. Flag Officer, Seoul, Korea, September 2002.
16. See Basic Agreement, chapter 2, Article 11 that reads as follows: “The South-North demarcation line and areas for non-aggression shall be identical with the Military Demarcation Line specified in the Military Armistice Agreement of July 27, 1953 and the areas that have been under the jurisdiction of each side until the present time.”
17. CNN.Com/World, “North Korea Accuses South of Surprise Navy Attack,” June 30, 2002, online at www.cnn.com/2002/WORLD/asiapcf/east/06/30/korea.battle. Also see John Barry Kotch and Michael Abbey, “Stop Shooting and Start Talking,” *International Herald Tribune*, July 12, 2002; Kotch and Abbey, “Remove Major Source of Inter-Korean Naval Clashes,” *Japan Times* (Tokyo), July 13, 2002; and Commentary, *Korea Observer*, vol. 33, No. 3 (Autumn, 2002), pp. 495-501.

Center by Jon van Dyke and Mark Valencia. The authors note that “these clashes are the result of a dispute over the location of the maritime boundary coupled with intense competition for a valued resource”¹⁸ They go on to say:

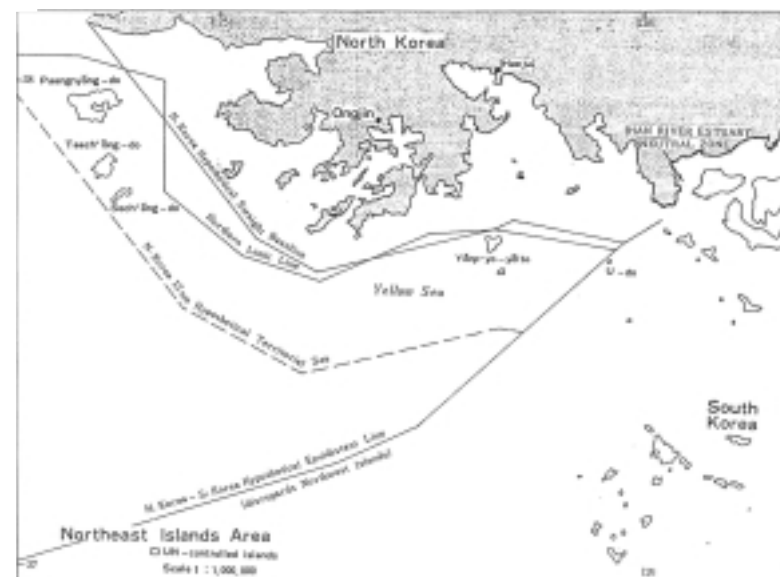
The immediate cause of the June 1999 clash was the concentration of valuable Blue crab south of the NLL and a consequent sharp increase in the frequency of both South and North Korean vessels crossing the NLL to catch crabs [and] ever more frequently accompanied by North Korean naval vessels.

The result has been “a free-for-all with both North and South naval vessels trying to control their own fishing boats while simultaneously guarding against attack.”¹⁹

In a strongly worded North Korean White Paper on the NLL delivered to the UNC in the wake of the June 2002 clash, Pyongyang reiterated its demand for negotiations, labeling the NLL an “illegal and brigandish line drawn by the U.S. on our sacred territorial waters,” without our consent and in violation of international law.²⁰ The report further asserted that the United States and South Korea had admitted the line’s illegality, skewing statements made by former U.S. officials and other researchers to suit its own propaganda purposes.²¹ In addition, while recognizing South Korea’s right to the five islands surrounding the Ongjin peninsula, it strongly refuted Seoul’s claim to the waters surrounding those islands under existing international law (see *Map 3*).²²

South Korea’s position on the NLL is the mirror image of the North’s. In a White Paper issued at the time of the first naval clash in 1999, the MND claimed that the NLL was the final maritime boundary and only negotiations to ratify it were acceptable.²³ However, the most recent White Paper issued by the

Map 3. The NLL and Alternative Maritime Boundaries



Source: U.S. Government.

South Korean MND in June 2002 put the emphasis on the two Koreas as the appropriate interlocutors, while softening its stance on the status of the existing NLL as a final maritime border. This White Paper stated that “a new sea demarcation line must be established through South-North discussions and, therefore, the NLL is not the subject of negotiations between the U.S. and North Korea or the UNC and the North.”²⁴ This is a significant shift in the Seoul’s position and should be exploited to the full in the form of a counter-offer to the North’s proposal (see *Map 4*).

What has been missing in all these statements and counter-statements, however, is the distinction between a violation of

18. See Van Dyke, Valencia, and Garmendia, “The North/South Boundary Dispute,” p. 148.

19. *Ibid.*, p. 157

20. “DPRK/CPRF Releases White Paper Rejecting NLL,” *Korea Central Broadcasting Station* (Pyongyang), August 1, 2002.

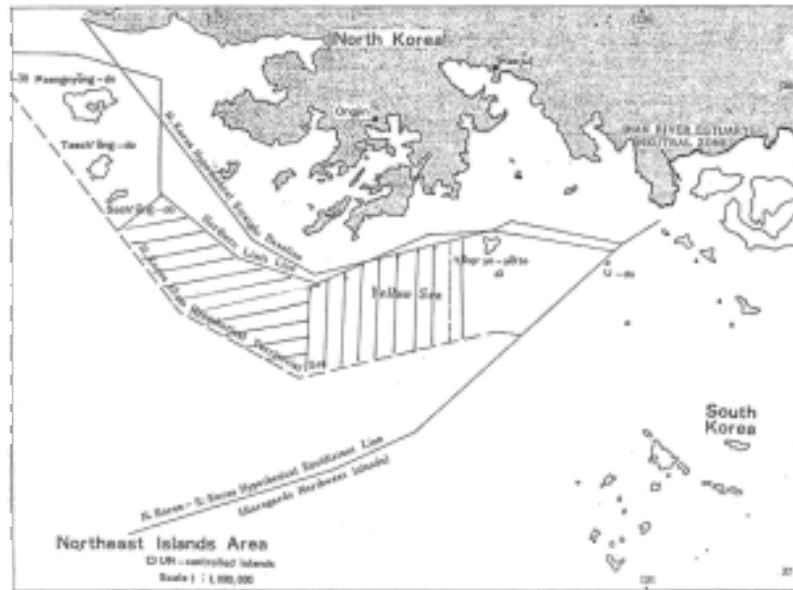
21. *Ibid.*

22. *Ibid.*

23. Ministry of National Defense, “The Republic of Korea Position on the NLL,” Arms Control Bureau, August 1999, Summary of Position, p. 2.

24. “The Republic of Korea Position on the NLL,” Ministry of National Defense, August 2002, p. 24. The conclusion states that “a new sea non-aggression demarcation must be established through South-North discussions and, therefore, the NLL is not the subject of negotiations between the US and the North or the UNC and the North.”

Map 4. Adjusted Northern Limit Line



Source: U.S. Government.

the armistice, which occurs whenever there is an exchange of fire between the Korean War combatants, and the NLL itself, which is an extension but not an integral part of the armistice. Further, the distinction between a line of military control and a final maritime boundary is the difference between the armistice that currently exists and the hoped-for peace treaty or peace regime that will someday replace it, reflecting the ambiguity of the peninsula's no-peace, no-war reality.

At the same time, what is keeping the NLL off the North-South agenda is the North's refusal to negotiate over the issue, since the NLL was drawn by the U.S./UNC representative to the armistice talks, coupled with the South's own reluctance to bring the NLL in line with the twelve-mile nautical limit under current international law, which has practical advantages that would require North Korean concessions in return. While it is true that a U.S. representative drew the line, this was done only after the armistice agreement was signed and only as a military

expedient. Strictly speaking, there is nothing to prevent the two Koreas from taking up this issue, since the NLL is not mentioned in the armistice agreement itself and the U.S. has never raised an objection to the two Koreas taking up the matter in bilateral negotiations (nor could it legitimately do so).

Paradoxically, although the United States is the author of the NLL, it lacks the authority to negotiate a final maritime boundary with the North; that is the prerogative of governmental authority—not the UNC as a military command. According to the LOS, the delimitation of a new line can only be accomplished with South Korean participation (as the adjacent state), a position reflected in the protocol to the Basic Agreement previously cited. At the same time, this has not prevented the U.S./UNC and North Korean representatives from meeting following the 2002 incident to devise procedures to minimize future confrontations over the NLL. Nevertheless, no agreements were announced.²⁵

Although negotiations with the South could only improve the North's access to fishing grounds (assuming that is its intent), Pyongyang remains unconvinced, fearing that bilateral negotiations with Seoul would violate its longstanding strategy of resolving outstanding security issues on the peninsula only with the United States. The North's refusal is matched by the South's reluctance based on alleged security concerns, but the real reason has more to do with the fact that such negotiations would constitute a political "hot potato" for any South Korean government. In reality, the five islands in question are sufficiently distant from the mainland, and North Korean positions along the demilitarized zone (the DMZ) are much closer to Seoul and other major urban centers, that a small change in the NLL is almost meaningless in security terms.

On the other hand, as a political issue, the NLL is seemingly intractable. It would require a major effort to persuade fishermen's cooperatives that they would be no worse off with a line drawn further south in terms of loss of catch, even if offset by reciprocal fishing privileges north of the line, while convincing

25. J.H. Yun, "U.S.-Led UN Command and North Korea Discuss Naval Clash," Associated Press, August 6, 2002; "U.S.-North Korean Military to Meet to Reduce Tensions," *Reuters*, August 12, 2002.

political opponents that the government was not unilaterally capitulating to North Korean demands for a new maritime boundary.

Correspondingly, while eliminating, or at least minimizing, future incidents would appear to be in the interests of both parties, neither appears ready to make it a high enough priority to override the above concerns of doubtful justification and get on with the business of negotiating a fairer, as well as a safer, line.

Although the current nuclear standoff does not augur well for taking the matter up in the immediate future, negotiations for a new line would allow the two Koreas to begin a genuine security dialogue. However, this would also require the North to abandon its traditional position that it is a matter for the United States and North Korea to discuss alone, as armistice signatories—a position the United States has rejected. Should North-South negotiations on the NLL actually take place, the fact that the parties were negotiating a new line would be more significant than its final disposition, since it would signal to the external powers, especially Washington, that Seoul and Pyongyang were capable of conducting negotiations and concluding an agreement on a sensitive security issue bilaterally.

The Position of the Parties Under International Law and Recent Case Law

The NLL may be fine as a line of military control but it is flawed as a final boundary.²⁶ Even as a temporary expedient, it neither supersedes nor invalidates the Law of the Sea. And while South Korea has argued that the line has validity under customary international law because North Korea initially did not challenge it, this is just plain wrong. In fact, Pyongyang has repeatedly challenged the NLL in 1973, 1982, and 1999 for economic reasons as the value of the fishing catch, particularly blue crab, in the area has become more lucrative.²⁷ But equally

26. For a detailed discussion by Professor Jon Van Dyke of the William S. Richardson School of Law, University of Hawaii, of the principles of international law and previous court decisions as they relate to maritime boundaries, the territorial sea, and the EEZ, refer to Van Dyke, Valencia, and Garmendia, "The North/South Boundary Dispute," pp. 150-55.

important, the NLL has no standing under customary international law. To be valid, a principle must have been consistently and regularly applied by a large number of states over an extended period of time, including the state most directly affected, in this case, North Korea.²⁸

In addition, several important principles of the Law of the Sea come into play, namely, nonencroachment of the territorial sea, the superior claim of the mainland over islands in terms of access to the territorial sea, and equitable distribution, under which neither party to a negotiation should be left empty-handed. Regarding these principles, both Koreas have staked out unreasonable positions. With respect to nonencroachment, the North has put forward a so-called West Sea sea demarcation line running diagonally down from the DMZ, drawn not on the median baseline, as required under international law, but on provincial boundaries that accentuate the slope, cutting off the natural prolongation of South Korean land territory into the territorial sea (*Map 3 and 4*). This line fails because no state can use a system of straight baselines "in such a manner as to cut off access to the territorial sea of another state."²⁹

With respect to the superior claim of the mainland over

27. BBC World, Asia-Pacific, "South Korea Resolute on Sea Border."

28. The famous *Lotus* case (France v. Turkey, Permanent Court of International Justice Reports, Series A, No. 10, 1927), in which the Court refused France's assertion of jurisdiction, is on point. While the flag state generally exercised jurisdiction in criminal matters, the Court found that this did not in itself establish a principle of customary international law; more was required. The case involved a collision between a French vessel and a Turkish freighter, with loss of life on the latter. The Court ruled that it was not binding customary international law inasmuch as "States did not recognize an obligation or duty to abstain from instituting criminal proceedings against flag state crews although they often did so in practice." In addition, the obligation to consistently follow a practice requires that the practice must be consistent and recurring in nature and not episodic. Thus, when the French vessel put into a Turkish port, Turkey asserted jurisdiction on the grounds that it had never accepted this practice and, under customary international law, no such practice existed.

29. Article 7(6) of the 1982 UN LOS Convention sets forth the principle of nonencroachment of an adjoining state's territorial waters when drawing straight baselines.

islands, under present arrangements, the larger Ongjin peninsula is enveloped by five smaller South Korean-held islands less than one-hundredth its size—standing like sentinels at either end of the peninsula that dwarfs them, and blocking access to the territorial sea. What the law requires are “adjustments to take into account the maritime zone of the small surrounding islands but not in such a way as to block access to the territorial sea and the EEZ beyond it” for the larger peninsula.³⁰ In this regard, Jon Van Dyke has noted, “islands do not have an equal capacity with land masses to create maritime zones, nor [do they] command equal strength with an opposing continental area or generate full maritime zones when competing against continental land masses.”³¹ More broadly, land trumps islands in all recent decisions of the ICJ in terms of coastal states’ access to the territorial sea. Thus, for example, only a small adjustment was made for an island in delimiting the maritime boundary between the U.S. state of Maine and the Canadian province of Nova Scotia.³² By contrast, in the *Libya/Tunisia Continental Shelf* case, a large Tunisian island was given half effect in delimiting the continental shelf.³³

With respect to the third principle of equitable adjustment, the ICJ’s reasoning in the *Gulf of Maine* case is directly on point. In that case, the Court ruled that “all the relevant circumstances should be taken into account in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea without encroachment on the natural prolongation of the land territory of the other.”³⁴

Further, in the interests of equitable remedy, courts always allow for each state to have at least some access to the territorial sea and/or EEZ, and, if necessary, to share access with an adjacent state. In the *North Sea Continental Shelf*, Germany was given

a pie-shaped wedge. In the *Gulf of Fonseca*, an undivided condominium was created for Honduras and El Salvador; and in *St. Pierre and Michelon*, Newfoundland was awarded a rectangular corridor that gave it access to the territorial sea beyond the two French-held islands.³⁵ There is, therefore, ample precedent for the two Koreas to apply this principle in negotiations between them.

In this regard, Van Dyke states:

If the two Koreas were independent countries (the meaning of “independence” as used in this phrase can be inferred as equivalent to the absence of a state of armed truce), the NLL probably would not stand as a legitimate maritime boundary under the ‘equitable principles’ because the NLL deprive the North of access to its adjacent sea areas. The NLL sharply limits North Korea’s access to the ocean resources running very close to North Korea’s Ongjin peninsula, and is thus contrary to the principle of non-encroachment because it blocks North Korea’s access to the ocean in this region. Treating the NLL as a permanent boundary does not give credence to these principles.³⁶

But Van Dyke goes on to qualify this statement, noting that while land trumps islands in generating maritime zones, there is no automatic entitlement to a twelve-nautical mile limit, as Pyongyang asserts, where the vital interest of another state is engaged. Thus, “adjustment should be made to take into account a legitimate maritime zone but not in such a way as to block North Korea’s access to the territorial sea and the EEZ beyond it.”³⁷

In effect, both Koreas must compromise with respect to the twelve-nautical mile limit given the existing overlap in their respective territorial sea. One way in which this might be given effect is shown in *Map 4* in which the NLL is adjusted south-

30. Jon M. Van Dyke, “Legal Status of Islands with Reference to Article 121(3) of the UN Convention of the Law of the Sea,” paper, December 19, 1999, pp. 8-11.

31. *Ibid.*

32. *Canada vs. United States, ICJ, International Court of Justice Report*, vol. 1984, p. 247.

33. *Tunisia vs. Libya, International Court of Justice Reports*, vol. 1984, p. 18.

34. See note 7.

35. *North Sea Continental Shelf Case*, International Court of Justice Reports, vol. 1969, p. 3; *El Salvador v. Honduras*, International Court of Justice Reports, vol. 1990, p. 92; *Canada/France (St. Pierre and Miquelon)*, 31 ILM, pp. 1175-6; *Gulf of Fonseca*, ICJ, International Court of Justice Reports, vol. 1992, p. 596.

36. Van Dyke, Valencia, and Garmendia, “The North/South Boundary Dispute,” pp. 153-54.

37. *Ibid.*

ward between Yongpol-do (also written as Yonp-yo-yolto) and Soch'ong-do to conform to the normal twelve-nautical mile limit. This proposal is most closely analogous to the sea corridor created between Nova Scotia and the French-held islands of St. Pierre and Miquelon. It is also consistent with the concept of a flexible rather than rigid twelve-nautical mile limit in other situations of overlap, such as the case of Japan's acceptance of a three-nautical mile limit in the Soya, Tsugaru, Tsuhima, and Osumi straits. In sum, in exchange for a southward sloping NLL, North Korea would be required to accept a three-nautical mile limit around the five South Korean-held islands that would otherwise fall within its twelve-nautical mile limit.

The Negotiating Track

Given the limited prospects for adjudication, the negotiating track offers the only alternative to continued confrontation. And if the issue is ripe for negotiation, as a recent South Korean foreign minister first proposed following the first West Sea incident in 1999,³⁸ it is even more urgent today. But on what basis should negotiations be conducted? The late Professor Jonathan Charney of Vanderbilt Law School has proposed the following five steps for states to follow in reaching an equitable solution:³⁹

First, they [the parties] define the relevant geographical area in dispute. Secondly, they define the relevant areas and coastlines. Third, they spell out all the relevant considerations. Fourth, they develop a provisional line based upon an analysis of the relevant considerations. Fifth, they check that line against some of the considerations to determine whether the line is "radically inequitable" and if so, they adjust it accordingly.

Although the foregoing is likely to be an arduous and time-consuming process, it is now up to the two Koreas to give it practical effect. Short of following in the footsteps of the United

States and Canada and other parties to ICJ adjudication, the two Koreas should settle the issue peacefully on the basis of equitable access to the sea and nonencroachment, guiding principles of the Law of the Sea. As a first step, the NLL should be brought into conformity with international law by rolling it back to twelve miles from the present three-mile limit, between Yonp-yo Tolto (Yonp-yo-yolto) and Soc'ong-do (see *Map 4*), an area in which no islands intrude into maritime zones. This gesture would considerably expand the fishing zone opened to the North's boats without seriously comprising security for the South, while addressing the North's legitimate concerns. At the same time, the three-mile territorial limit around the five South Korean-held islands should be preserved.

In terms of procedure, North Korea should renounce its demand for negotiations with the UNC which first imposed the NLL more than a half-century ago and enter into negotiations with the South. This situation differs from the UNC's delegation of authority to South Korea in order to enter into the current negotiations with the North to complete the re-linking of the severed railroad and roads across the DMZ, since the authority for the two Koreas to conduct negotiations for a new maritime boundary has already been affirmed in the 1991 Basic Agreement. The proper sequence would require the two Koreas to first reach agreement on a mutually acceptable final West Sea maritime boundary and then for the UNC to declare the NLL null and void.

Once such an agreement is successfully accomplished, the Southern EEZ beyond the territorial sea and contiguous zone could be opened to Northern fishing boats and eventually all civilian vessels on a reciprocal basis, giving South Korean fishing vessels access to the North's territorial seas and EEZ. This arrangement would, in turn, open the way for the establishment of a free fishing zone in the West Sea adjacent to the DMZ, eventually extending beyond the western tip of the Ongjin peninsula and contiguous with the Chinese-South Korean maritime boundary (*Map 5*) described below. Ideally, according to Mark Valencia, it would entail "developing the maritime border into a buffer zone where neither navy could enter and then designating it a free fishing and management zone [but] with joint catch limits."⁴⁰

38. Speech by Foreign Minister Hong Soon-young, Seoul Foreign Correspondents Club, June 20, 1999 and "Hong's Remarks on Maritime Border Sparks Heated Debate Between Parties," *Korea Herald* (Seoul), June 21, 1999.

39. Van Dyke, "Legal Status of Islands," p. 8.

Map 5. Provisional and Transitional Korea/China Maritime Zones



Source: Korea Maritime Institute, Michael Abbey.

Toward a West Sea Peace Regime

What would a peace regime in the West Sea look like? What is the proper procedure for achieving it? There are several examples of prior agreements, proposals, and state practice that might serve as a partial model for such a regime. The Indus Treaty delimiting the utilization of water resources between India and Pakistan in Kashmir, informal fishing arrangements currently in effect between China and Taiwan in the strait

40. See Van Dyke, Valencia, and Garmendia, "The North/South Boundary Dispute," pp. 156-57.

between them, and, closer to home, the proposed agreement on rules governing civilian shipping in the Han River Estuary drafted at the time the armistice agreement was signed in 1953, are all useful referents.

Although the Han River never became the maritime highway envisaged by the armistice agreement, it did provide for security in a maritime demilitarized zone (MDMZ) patrolled by teams under the control of the Military Armistice Commission (MAC) and civilian police from both sides. Specific provisions called for strict "rules of the road": maintaining distance from the shoreline of each side (no closer than 1,000 meters); establishing boundary markers; prohibiting physical contact, communication (other than provided for in normal navigation rules), or exchanges of cargo, passengers, or equipment; adhering to regulations and customs between ships, vessels, and craft of the two sides, including markings and flags for purposes of identification; creating registration (information on owner, members of crew, home port, tonnage, length) procedures for vessels in distress; and prohibiting the mounting or transporting of armaments, weapons, or ammunition except for pistols.⁴¹ Most, if not all, of these provisions would be applicable to delimiting a zone in the territorial sea and EEZ.

Precedents in Settling Maritime Disputes During a State of War

The Indus Waters Treaty is an accord that addressed the issue of water sharing at the time of the independence of India and Pakistan from British rule in 1947. The boundary drawn between the two states across the Indus Basin divided a major irrigation project, which resulted in a dispute over water utilization. Despite ongoing hostilities between the two states, it was resolved by treaty through the mediation efforts of the World Bank, superseding the temporary Inter-Dominion Accord of 1948.⁴²

41. Rules for Shipping in the Han River Estuary, and Other Matters, July 29, 1953, Military Armistice Commission Proceedings, U.S. National Archives, Washington, D.C.

One of the key aspects of the accord was the establishment of the Punjab Partition Committee in the 1950s. It became the Permanent Indus Commission a decade later. The committee's purpose was to promote the exchange of data and monitor the implementation of the treaty. According to Naunidhi Kaur, the Treaty "has withstood continuous political threats and three wars between the signatories."⁴³

By contrast, while there is no treaty governing the status of the Taiwan Strait, mutual interest has had an important impact in encouraging China and Taiwan to pursue maritime cooperation on an informal basis, regularizing fishing, navigation, and maritime security. Although Taiwan is not party to the LOS Convention, a function of its political status, it has nonetheless pledged to follow its rules. Significantly, the pattern of navigation, shipping, fishing and pollution control cooperation between China and Taiwan constitutes a "road map" for the two Koreas to follow despite—or because—"the Straits [like the West Sea] are an arena of 'armed conflict' where the only contact has been hostile."⁴⁴ According to Zou Keyuan, tension over illegal and unsustainable fishing highlights the increasing likelihood of military conflict as the two sides try to enforce disputed claims:

Weapons are used by the Taiwanese to deal with Chinese fishermen fishing near Taiwanese-controlled islands, perhaps to deal with the more than 560,000 illegal fishing boats spotted in these waters over a five year period ending in 1998. One of the major issues seems to be two different jurisdictions with no clear demarcation line. [While] Taiwan has promulgated several laws to deal with potential maritime incidents (the 1992 Statute Governing the Relations between the People of the Taiwan Area and the Mainland Area), China does not have any such legislation on the grounds that it might confer recognition of Taiwan as a separate legal entity.⁴⁵

42. "The Indus Waters Treaty" and "The Indus Waters Treaty: A History," Henry L. Stimson Center.

43. Naunidhi Kaur, "Troubled Waters," *Frontline*, vol. 19, No. 12 (June 8-21, 2002), online at www.flonnet.com/fl1912/19120240.htm.

44. Zou Keyuan, "Redefining the Legal Status of the Taiwan Straits," *The International Journal of Marine and Coastal Law* (2000), pp. 245-68.

45. *Ibid.*

Nevertheless, direct navigation between the two Chinese entities is on the upswing. On January 2, 2001, three Taiwanese vessels made the first direct, legal voyage to the mainland in fifty-one years.⁴⁶ Direct voyages have reduced the administrative overhead of trade in goods between the two countries that currently are shipped via a third country, such as Hong Kong, resulting in savings of over \$250 million a year.⁴⁷ The new arrangement also stands to vastly increase trading volume, already at \$32 billion.⁴⁸ Significantly, while the two Koreas are further along in direct shipping, having already agreed in principle to inter-Korean shipping routes open only to their vessels in their respective territorial seas, and are on the verge of re-linking their severed rail and road lines, the volume and value of current or prospective trade and its impact on economic development are not at all comparable.

Moreover, in the Taiwan Strait, there are increasing signs that the continued growth of the two interlinked economies is becoming as important as security, with Taiwanese and Chinese representatives meeting on the sidelines of the Asia Pacific Economic Cooperation (APEC) and other multinational fora. This is not to suggest that maritime delimitation is imminent, only that the two sides are attempting to reconcile their differences and to find common ground for mutual benefit. Indeed, this is precisely the kind of trend that needs to be encouraged between representatives of the two Koreas in similar fora.

What Do These Precedents Mean for the Future of South-North Maritime Relations?

The Indus Waters Treaty provides several valuable lessons in pointing the way toward reducing South-North maritime tensions. The first, and arguably most important, is that it is an actual treaty negotiated between countries whose relationship has been similarly strained over a roughly parallel time frame.

46. Editorial, *Honolulu Star-Bulletin*, January 3, 2001.

47. Zou, "Redefining the Legal Status of the Taiwan Straits."

48. "Facts & Figures: China's Top Ten Trade Partners in 2001," *People's Daily* (Beijing), February 13, 2002.

The second is that the “good offices” of a third party intermediary, in this case, the World Bank proved critical.

While relations between the two Koreas have also been hostile over an even longer period, they have taken a turn for the better following the 2000 Pyongyang summit, including a program of family exchanges, economic cooperation, sports exchanges, and pledges of peace and reconciliation. In the West Sea, the prime candidate for an intermediary role is China, which enjoys good relations with North Korea (as well as with the South), although somewhat troubled recently over the North Korean refugee problem and difficulties related to the proposed Sinuiju economic zone and Pyongyang’s nuclear ambitions. Moreover, since China shares the West Sea with the two Koreas, it has a direct interest in promoting maritime cooperation in such areas as pollution control, over-fishing, and maritime security. China also has much to gain from promoting a maritime confidence-building regime with a view toward tension reduction in the region.

Fishing is also a major source of conflict in both the Taiwan Strait and West Sea, with authorities resorting to the use of force to protect “their” maritime resources. The principal difference is that in the Taiwan Strait, conflict stems from disputed jurisdiction within the same body of water in the absence of a defined demarcation line, while in the West Sea, it stems from the North’s steadfast refusal to accept the NLL as a maritime boundary. In addition, the cooperative atmosphere prevailing in the Taiwan Strait also provides an additional opportunity for China to spur inter-Korean maritime cooperation, where the same issues top the agenda but the current state of inter-Korean relations makes it difficult for the two Koreas to tackle them on their own.⁴⁹

Despite discussions spanning several decades, China and Taiwan have not reached any formal agreement, although the increasing interconnectedness of economic relations suggests that this is in prospect. Similarly, recent discussion of maritime cooperation at inter-Korean ministerial talks suggests that increased economic cooperation may follow a similar path.

49. “Inter-Korean Talks on Cooperation in Fisheries Agreed to in Pyongyang,” *Korea Herald* (Seoul), October 24, 2000.

Moreover, the high level of South Korean technology, availability of capital, and marketing expertise make Seoul an ideal maritime partner for the North. In the past, the South Korean government has even broached the idea of leasing vessels to the North on a buyback basis, employing furloughed fishermen. Under the plan, the North would ship fish to the South in exchange for a portion of the catch or compensation similar to standard production-on-demand contracts between North and South business entities. A variation of this proposal would have permitted North Koreans to fish in the North on South Korean-leased boats with South Korean crews.⁵⁰

During a bilateral ministerial meeting in Pyongyang in October 2002, the two sides agreed to hold talks on allowing fishing vessels from the South into the North’s East Sea (Sea of Japan) fishing grounds. MOMAF’s draft plan for a South-North fishing cooperation agreement also provides for the exchange of personnel, operational guarantees, and the policing of joint fishing grounds. It further proposes the establishment of a South-North joint committee designed to handle start-up arrangements related to joint inter-Korean fishing ventures.⁵¹ South Korea already imports \$90 million (2001) in fisheries products from the North, up from \$22 million in 1998.

From a strictly economic point of view, there is a real incentive for the North to cooperate inasmuch as technical assistance, technological and management training, and advanced equipment could significantly increase the self-sufficiency of its economy and ensure greater control of its own maritime resources. But Pyongyang’s willingness to forego substantial economic gain in the form of reparations from Japan and less economic assistance from the United States in exchange for abandoning its nuclear program makes it doubtful that it will embrace maritime cooperation.

Nevertheless, the South Korean government has encouraged private individuals and companies to work with the

50. Interview with Park Kyu Seok, former Vice-Minister of the Ministry of Marine Affairs and Fisheries, Seoul, June 12, 2002.

51. “South-North Fishermen’s Accord in Troubled Waters,” *Agence France Presse*, February 28, 2000 and “Inter-Korean Talks on Cooperation in Fisheries,” *Korea Herald*, October 24, 2002.

North's state-run cooperatives, although domestic opposition by fishermen's cooperatives, as well as the poor condition and limited capacity of North Korean processing and freezer storage facilities, have stymied progress to date. Moreover, South Korean companies, such as Daelim, that have entered into fishing agreements with entities in the North, have come away disappointed and unhappy with the experience.

Navigation is also a very important issue for the DPRK. Cargo ships that embark from ports on the West Sea must now travel the full 200 nautical miles out to the high seas instead of passing through the ROK's EEZ, costing extra time and money. Further, inter-Korean trade is shipped via third-country vessels as ROK and DPRK flagged vessels are not allowed to visit each other's ports, except when delivering aid, pending the actual implementation of the sea-lane agreement. Thus, most of the North Korean fishery products that enter the South are first transshipped through China and relabeled as Chinese.

While Taiwanese and Chinese maritime cooperation is far from complete, at least they are talking to—*not* shooting at—each other. The two Koreas have not gotten even that far due to factors ranging from domestic politics and the uncertainty of economic gain from joint projects to the North's insistence that the issue of the NLL be addressed first. Yet the time is long overdue for cooperation to replace confrontation in the management of fisheries resources, species regulation, and pollution control in the West Sea.

What Would a Management Regime Look Like?

One possible approach to effectively managing maritime resources, such as the blue crab, that straddle national borders would be to establish a permanent West Sea Resource Management Commission along the lines of the Indus River Commission. The membership would be drawn from the maritime ministry officials and fishery cooperatives of the two sides. It would address the marine resource issues in both their political and technical aspects, including the following:

- preventing over-fishing (through dialogue, education, closures,

- and prohibitions);
- enforcing regulations (through fair, non-political mechanisms);
- rebuilding depleted stocks and determining what constitutes sustainable fisheries;
- designating and conserving essential fish habitat;
- providing a user structure that combines both nations' blue crab fleets and relevant databases;
- standardizing efficient record keeping and reporting requirements; and
- furthering maritime confidence building in the region through technology and capacity building, providing a platform for future joint maritime cooperation.

The second goal is the promotion of research and/or training projects that would result in greater contact among and between individuals and institutions. The further development of environmentally friendly tourist resorts along the lines of Mt. Guemgang would also be desirable. However, the most important and difficult issue the commission would have to address is enforcement. The fact that the North has no coast guard would require the creation of an equivalent entity to carry out patrol duties.⁵²

The Korea-China Provisional Maritime Zone

Agreement on a maritime zone in the West Sea fished by both China and South Korea grew out of annual discussions beginning in the late 1980s and resembles, in many respects, the proposed South-North Joint Fishing Zone.⁵³ However, in the mid-1990s, all three major Northeast Asian countries (China, Japan, and South Korea) declared a 200-nautical mile EEZ in accordance with the LOS, thereby creating overlapping zones

52. For an extended discussion of some possible ways forward emphasizing a functional approach to inter-Korean maritime cooperation, such as a West Sea joint fishing zone, special maritime zones and a maritime protected zone, see Van Dyke, Valencia, and Garmendia, "The North/South Boundary Dispute."

53. Hong Song Gol, Kim Son Pyo, and Oh Soon Taek, "Cooperation and Related Research" (in Korean), vols. 2001-24, Seoul, Korea Maritime Institute, p. 28.

and complicating the negotiations. In September 1997, a committee was formed to seek an interim solution and a provisional zone was ultimately agreed upon to resolve disputes in overlapping areas.

In 1998, a Korean and Chinese Transitional Maritime Zone was created that will eventually become the “wings” on either side of the main Korea-China Provisional Maritime Zone (see *Map 5*). In 2000, the first year that the Korea-China Fisheries Agreement went into effect, Chinese boats in Korea’s EEZ caught 109,600 metric tons (M/T) with a previously negotiated 2,796 vessels while 1,402 Korean vessels caught 60,000 M/T in the Chinese EEZ.⁵⁴ In addition, 2,704 other Chinese vessels were authorized to fish in Korea’s Transitional Maritime Zone,⁵⁵ while an equal number of Korean boats were authorized to fish in the Chinese Transitional Maritime Zone (with some restrictions).⁵⁶ At the same time, the Korea-China Provisional Maritime Zone—the middle zone where the EEZs overlap—is open to vessels of both countries with no apparent catch limit. On January 1, 2005, each state’s transitional zone will become part of that country’s EEZ.

Effective January 1, 2003, the difference in fishing-related charges (fees) paid by both countries is to be gradually reduced over the next three and a half years.⁵⁷ Further, beginning on January 1, 2005, the number of Chinese and Korean vessels fishing in each other’s EEZ will be equalized, at approximately 2,000 vessels each.⁵⁸

In addition to measures for responding to accidents and ensuring safety procedures and security, the Korean Coast Guard is only responsible for enforcing the regulations for Korean boats and the Chinese for Chinese boats. Thus, the only recourse for a Korean patrol that sights suspicious activity by a

Chinese vessel is to alert the Chinese authorities to ensure effective enforcement, which would also be necessary in patrolling a blue crab fishery regime.

In terms of management, the Korea-China Provisional Maritime Zone employs a system of closed seasons in order to control for over-fishing in the West Sea. On a longer time horizon, while there is no agreed date for delimiting the central Provisional Zone, which is likely to remain in force until the maritime boundary issue is resolved, the Transitional Zones—the “wings”—will eventually become part of each state’s EEZ.

Conclusion

In view of the history of clashes that have taken place in recent years, directly traceable to the NLL’s contentious character, the line continues to be a source of extreme tension and potentially dangerous escalation. Unfortunately, for reasons previously noted, the line has not made its way onto the North-South reconciliation agenda, although the present aggravated political atmosphere over the North’s uranium enrichment program and nuclear ambitions has made agreement on the NLL more, *not* less, urgent.

Ironically, a line whose purpose was originally intended to enhance security on the peninsula is now primarily economic in nature. The North’s challenge to the NLL derives principally from a desire to secure a larger share of blue crab that migrate from North to South during the months of June to September, when most of the clashes occur. Additionally, since the unilateral proclamation of the NLL by the UNC in August 1953, international law has evolved. Whereas the three-mile limit was the standard when the armistice was signed in 1953, in 2003, the twelve-mile limit is recognized as the prevailing standard under the Law of the Sea. Thus, it would be more consistent with current state practice to roll back the NLL (for purposes of fishing only) in the designated zone from its present three to a more reasonable twelve miles as an interim measure, pending the negotiation of a final West Sea maritime boundary between the two Koreas.

Finally, a West Sea peace regime is more problematic. It

54. *Ibid.*, p. 38.

55. *Ibid.*

56. *Ibid.*

57. *Ibid.*

58. See Ministry of National Unification, *Peace and Cooperation, White Paper on Korean Unification* (Seoul, 1996), pp.200-207, and “Promotion of Four Party Talks to Establish a Peace Regime on the Korean Peninsula”; *South-North Dialogue in Korea*, No. 65 (May, 1968), pp. 3-36; and Cheju Summit Declaration, April 6, 1996.

could come about as part of an overall improvement in North-South relations, both as a product and payoff of reconciliation across the board. However, to drive the process forward, an increased realization needs to occur that shared maritime cooperation is mutually beneficial, both to maintain the health of the ecosystem as well as to continue to exploit the valuable resources in it.

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