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A Maritime Demarcation Dispute on the Yellow Sea

*Republic of Korea**

Kim Young-koo**

1. What is the “Northern Limit Line”?

The Northern Limit Line (“NLL”) refers to the maritime demarcation line on the Yellow Sea between North and South Korea. As a unilateral act, the United Nations Command (“UNC”) set this line right after the end of the Korean War which took place from 1950 to 1953.

It was the critical cause of heated debates on setting the military demarcation line on the sea area in the course of armistice negotiation. Although the two sides could not come to a decision on the maritime ceasefire line, the parties agreed in Article 2, Section 15 of the Korean Armistice Agreement which states that “[a]ll opposing naval forces shall respect the waters contiguous to the De-militarized Zone and to the land area of Korea under the military control of the opposing side.”¹ Accordingly, it was only possible that

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¹ “Agreement between the Command-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers, on the other hand, Concerning a Military Armistice in Korea.”

UN Doc. S/3079. For the original text, see DOCUMENTS ON INTERNATIONAL AFFAIRS 1953, at 386-405.

the demarcation of the sea area occur after the land demarcation line, virtually ignoring the authority of UN Forces in both air and sea. This can be seen as the result of the negotiation tactics put forward by the North. To implement the abovementioned article, UNC had to retreat its forces from all islands and waters, which were under its control. The sea area controlled by UNC covered from the Estuary of *Yallu* River in the west: Latitude 41°51' N, and that of *Tuman* River in the east; Latitude 39°35' N, all the way down to the 38th parallel. Based on this agreement, the UN Commander-in-Chief designated NLL to the west and the Northern Boundary Line (“NBL”) to the east of the Korean peninsula as the geographical limit of the UN armed forces air and naval operation.

Map 1 Northern Limit Line²



Among the general parts of the Armistice Agreement,³ the cease-fire line is indispensable factor for the continuation of suspending on-going armed hostilities.⁴ NLL and NBL were recognized as the *fait accompli* cease-fire lines to both sides of the Korean sea area. If a party to this agreement trespasses these lines, the party would denounce or recommence hostilities immediately.⁵

² Available at <http://www.google.com>

³ The general parts of armistice agreement are as follows: ① the suspension of hostilities; ② effective date and time; ③ duration; ④ demarcation line and neutral zone; ⑤ prohibited acts; ⑥ prisoners of war; ⑦ return of civilians and commercial intercourse; ⑧ consultative machinery; and ⑨ miscellaneous politico-military matters See THE LAW OF LAND WARFARE: U.S. ARMY BASIC FIELD MANUAL (1956), paras. 487-488.; Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. (1956) at 888-900. There is no rule or custom manifesting the provisions which should be included in an armistice. Clunet, *Suspension D'armes Armistice, Preliminaires de Paix*, 46 JOURNAL DU DROIT INTERNATIONAL PRIVE 173 (1919); FAUCHILLE, *TRAITE DE DROIT INTERNATIONAL PUBLIC* 326 (8th ed. 1921).

⁴ THE HAGUE CONVENTION (IV) RESPECTING THE LAW AND CUSTOMS OF WAR ON LAND (1907), Annex Regulations, art. 40.

⁵ THE 1953 KOREAN ARMISTICE AGREEMENT, art.1, sec. 7 & art. 2. secs. 13, 15.

2. What is the validity of North Korean claim on NLL?

Since October 1973, North Korea trespassed NLL. North Korea crossed NLL more than 43 times between October and November of that year. Due to this violation of the agreement on the demarcation line, the validity of NLL naturally became an issue of dispute. The most critical point at issue was the dispute over the jurisdiction of the sea area along NLL, which covers the five western coastal islands.⁶ As the 1953 Korean Armistice Agreement does not include in its provision a clear definition of the sea demarcation line, North Korea attempted to break this *status quo* line by sending patrol boats to intentionally trespass this line.

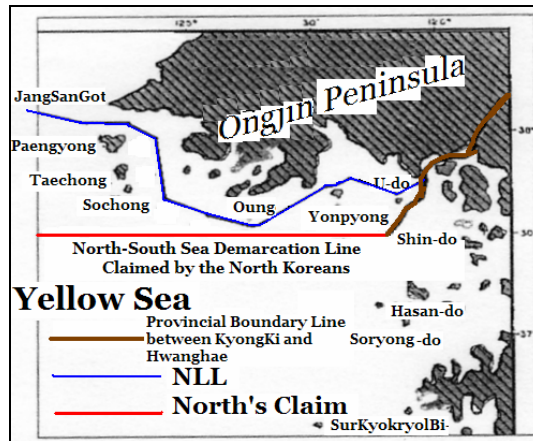
At the 346th Military Armistice Commission Meeting held on December 1, 1973 convened for the purposes of discussing the so-called “Western Sea Incidents,” North Korea asserted that NLL should not be the sea demarcation in the Yellow Sea area between the two parties of the Korean Armistice Agreement. North Korea based its argument on the fact that NLL was a line that was unilaterally designated by the UN Commander in Chief. As a gesture of completely disregarding the already crystallized *status quo* boundary line, North Korea proposed a hypothetical extension line stretching extended parallel to the latitude from the end of the provincial boundary line between *Whanghaedo* province and *Kyonggido* province.⁷

Map 2 The North Korea's Hypothetical Extension Line proposed in 1973⁸

⁶ They are as follows: Paengyong-do, Taechong-do, Sochong-do, Yonpyong-do and U-do.

⁷ The 346th meeting of the Military Armistice Commission(Dec. 1. 1973) at 9 & 12; The 347th meeting of the Military Armistice Commission(Dec. 24. 1973) at 36. See THE MILITARY ARMISTICE COMMISSION MEETING RECORDS (available only in Korean).

⁸ Kim Young Koo, *An Empirical Analysis on Korean Government's Policies managing the Dokdo Island and NLL Issues*, p.263. Map-3 (2008)



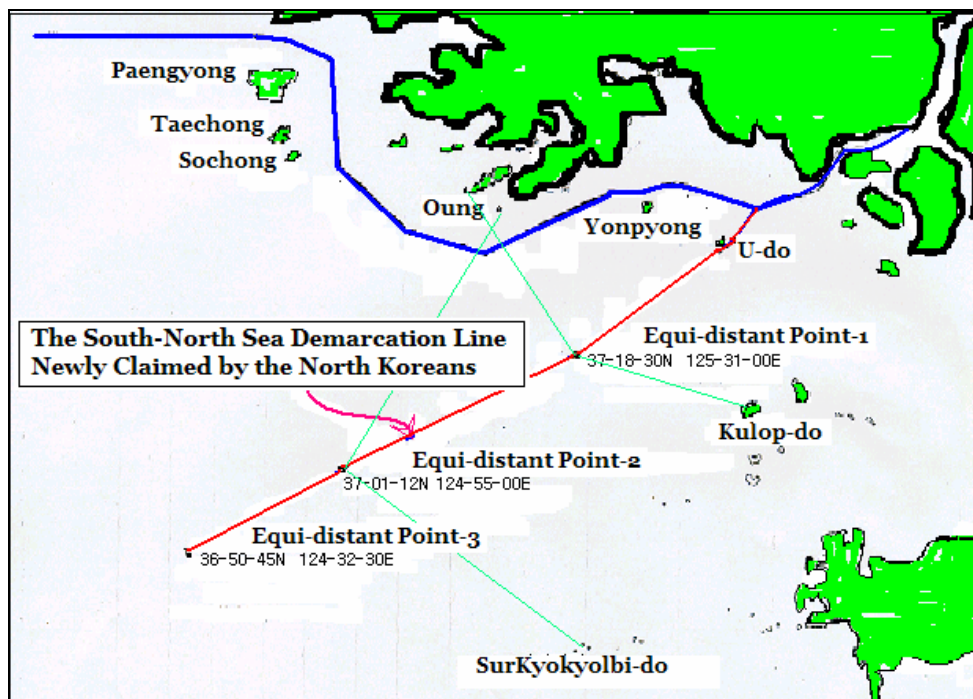
Such a far-fetched assertion from North Korea, demanding prior authorization to enter the vicinity of the five western islands brought about serious debates. What brought North Korea to dispute the validity of NLL after the 20-year's silence after the ceasefire? First, after 20 years, North Korea had substantial naval forces against South Korea. Second, the U.N. Conference on the Law of the Sea might bring North Korea to raise a quasi-legal question on this maritime border. At that time, however, South Korea did not acquiesce North Korea's appeal on this issue.

About 20 years later, this question arose again in the course of discussing the protocol provisions for Article 11 of the 1992 South-North Basic Agreement.⁹ At the Military Subcommittee, North Korea challenged the legitimacy of the *fait accompli* cease-fire line. Article 11 of the Basic Agreement provides that: "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." As laid down in Article 11, "the areas that have been under the jurisdiction of each side until the present time" should be interpreted as identical with the present NLL. It would be based on the spirits of the Basic Agreement that the two Koreas are supposed to respect political entity of each party as well as *fait accompli* jurisdiction area under the "special interim relationship". In accordance to this article, NLL is deemed to be the most relevant demarcation line on the Yellow Sea. However, refusing to fix

⁹ The Agreement on Reconciliation, Nonaggression, and Exchanges and cooperation between the Republic of Korea and the Democratic People's Republic of Korea on December 13, 1991 (*hereinafter*, "1992 South-North Basic Agreement").

the sea demarcation line, North Korea resumed to its persist position on the “provincial boundary line” assertion¹⁰ in 1973.

Map 3 A New Demarcation Line proposed by North Korea¹¹



North Korea initiated the naval confrontation against South Korea by crossing NLL in June 1999. The primary purpose of North Korea at that time was resumed the dispute on NLL through continuous military confrontation in the buffer zone. In September 1999, North Korea released a special communiqué “on proclamation of the Military Demarcation Line on the Yellow Sea.” It was followed by the “navigation order” around the five western costal islands in March 2000. Both measures were intended to defy the current NLL. This time, however, the position of North Korea on the “provincial boundary line” fully modified. The proposed line was “not parallel to the Latitude,” but it protruded deep into the gulf of *Kyonggi* which blockades the forefront of Seoul.

¹⁰ The sea demarcation line on the Yellow Sea area between the two parties of the Korean Armistice Agreement should be the hypothetical extension line extended parallel to the Latitude from the end of the provincial boundary line between *Whanghaedo* province and *Kyongkido* province.” See Korean Ministry of National Unification, PROCEEDING MINUTE OF SOUTH AND NORTH MILITARY SUB-COMMITTEE, 5th Sess. Map 1 (June 19, 1992).

¹¹ *Supra* note 10, at 266/MAP 4.

In that case, the sea demarcation line should be an extension from the end of the provincial boundary line between *Hwanghaedo* province and *Kyonggido* province. The line connects some arbitrary equidistant points between the corresponding islands.

3. What are the legal problems in the position of North Korea?

The newly designed sea demarcation line of North Korea seems to adhere to the general principles of international maritime law regarding sea boundary that applies to ordinary adjacent States. However, due to the fact that both Koreas are under the “special interim relationship,” the simple equidistance criteria prescribed in the United Nations Convention on Law of the Sea cannot be the standard to regulate the delineation of sea boundary between the two Koreas.¹² Since assertion by the North Korean seemed to be based on the interpretation of the Korean Armistice Agreement, it is only logical that the starting point of the analysis to reach a fair judgment for this dispute should be interpretation of the relevant provisions in the Korean Armistice, namely, Article 2, Section 13 paragraph (b), which reads:

Within ten days after this Armistice Agreement becomes effective, withdraw all of their military forces, supplies, and equipment from the rear and the coastal islands and waters of Korea of the other side. If such military forces are not withdrawn within the stated time limit, unless there is a mutually agreed and valid reason for the delay, the other side shall have the right to take any action which it deems necessary for the maintenance of security and order.

The term “coastal islands” refers to those islands which, although occupied by one side at the time when this Armistice Agreement becomes effective, were controlled by the other side on June 24, 1950. However, provided that all the islands lying to the north and west of the provincial

¹² UNCLOS, art. 15.

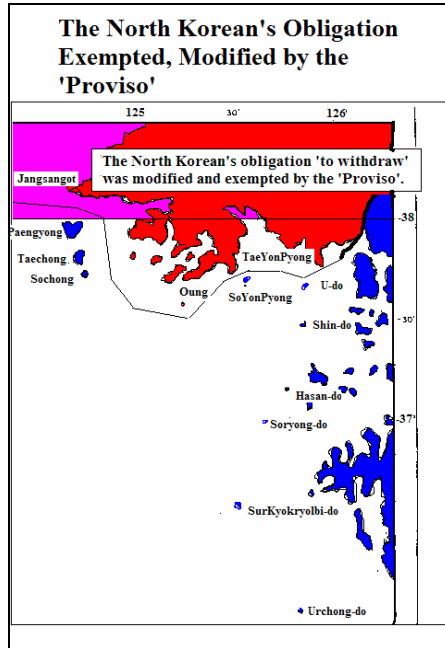
boundary line between *Whanghaedo* province and *Kyonggido* province shall be under the military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, except the group of islands including *Paengyong-do* (37°58'N, 124°40'E), *Taechong-do* (37°50'N, 124°42'E), *Sochong-do* (37°46'N, 124°46'E), *Yonpyong-do* (37°38'N, 125°40'E), and *U-do* (37°36'N, 125°58'E), which shall remain under the military control of the United Nations Commander-in-Chief.

It is the general rule that a treaty shall be interpreted in good faith in accordance with the ordinary meanings given to the terms.¹³ Any special meaning which is established by a proviso shall be confined to that particular part of provision as well as interpreted as modifying supplement based on above-mentioned primary text. As the primary text provides: “[...] both opposing sides shall withdraw all of their military forces from the rear and the coastal islands and waters within 10 days after the entry into force of the armistice agreement,” the term “coastal islands and waters” of this text should be interpreted to indicate those occupied and controlled by the other side on June 24, 1950. As a result of this interpretation and based on the principles of *uti possidetis*, North Korea should have withdrawn its military forces from all the islands and waters located below the 38th parallel. Further, the United Nations Command should have withdrawn its military forces from those islands and waters located above the 38th parallel within 10 days after the Armistice Agreement entered into force as long as such obligations are not exempted by any modifying proviso.

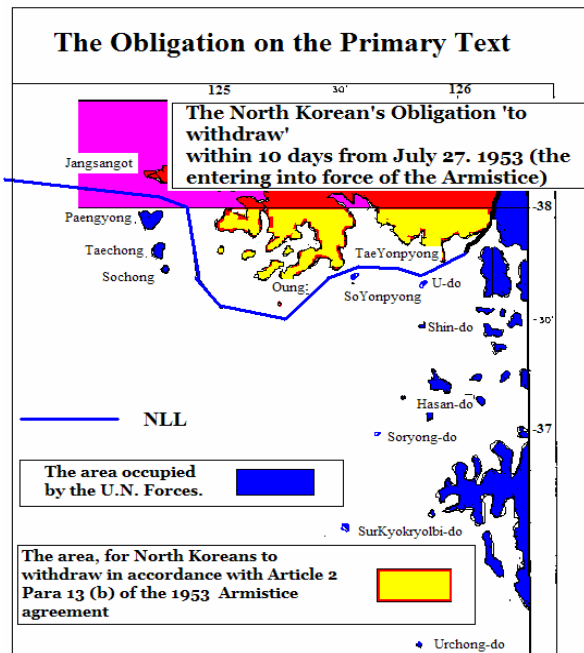
The most important point at issue of this provision is that the 38th parallel is still the main reference line in the process of demilitarization. This formula coincides exactly with the original stance of North Korea based on the principle of *status quo ante bellum*.

¹³ Vienna Convention on the Law of Treaties of 1969. art. 31.

Map 4 The North Korean's Obligation to Retreat by the Primary Text¹⁴



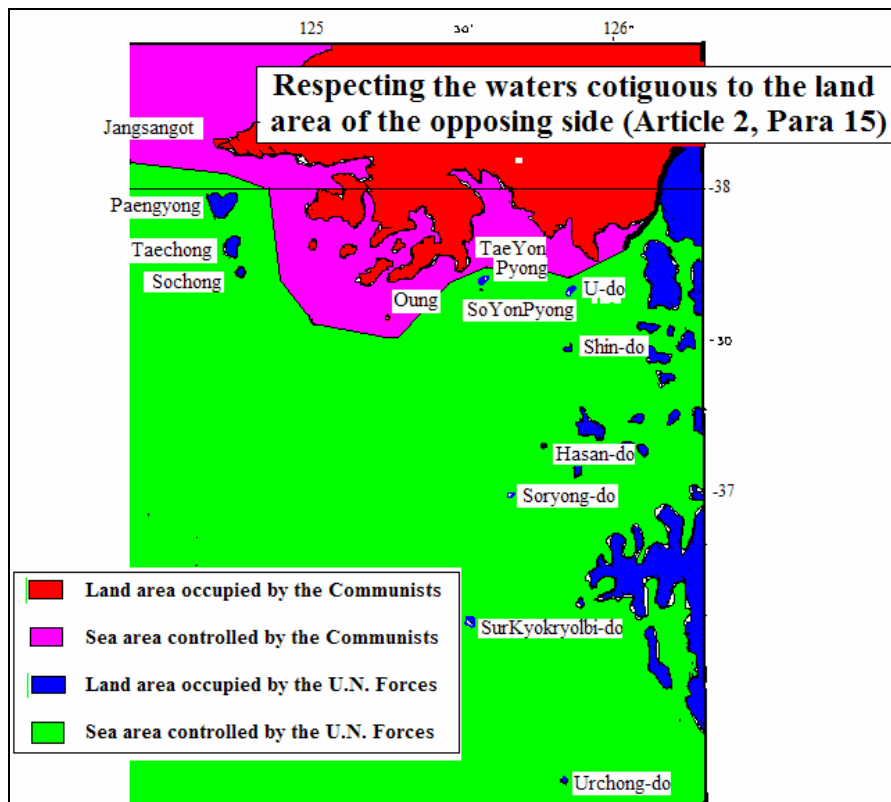
Map 5 The North Korea's Obligation to Retreat: modified, exempted by the Proviso¹⁵



¹⁴ *Supra* note 10, at 280.

¹⁵ *The NLL Issue; Revisited*, in BADA (THE KOREA NAVY LEAGUE MAGAZINE) 17 (Spring 2009)

Map 6 Respecting the waters contiguous to the land area of the opposing side¹⁶



The proviso is the latter part of the clauses of Article 2, Section 13, paragraph (b) following the phrase “provided however.” Adopting the principle of *uti possidetis* by this proviso, only some parts of the North Korea’s obligations to withdraw northwards the respective forces above the reference line of the 38th parallel are to be modified and exempted to the hypothetical “line of contact.” It shall be eventually formed by taking into account the five islands group under the actual control of the UN Command. The five western islands, namely, *Paengyong-do*, *Taechong-do*, *Sochong-do*, *Yonpyong-do* and *U-do* were occupied and controlled by South Korean Army (the 17th Regiment of the First Division) during the armistice talks.

Eventually two negotiating parties reached a compromise regarding the cease-fire line issue. Article 2, Section 13 Paragraph (b) of the Korean Armistice Agreement is the evidence of such accord.¹⁷ The proviso of this regulation

¹⁶ *Supra* note 10, at 283.

¹⁷ U.S. FOREIGN RELATIONS 1143 (VOL.7). See also William H. Vautcher, Jr., *Panmunjum: The Story of the Korean*

would be nothing but an additional clause limiting the exemption of the original obligation of North Korea to retreat.

“All the islands on the west coast of Korea lying south of the above-mentioned boundary line” as laid down at Article 2 Section 13 Paragraph (b) of the Korean Armistice Agreement only refers to “the five islands” which have already been clearly stipulated in the proviso. Therefore, “the above-mentioned boundary line” does not imply any further meanings. Considering the North Korean assertion that the sea demarcation line should be amended to reflect the proposed hypothetical extension line, it can only make a far-fetched assertion, which could not be fully justified. Even with this questionable clause, the marginal line of exempting the communist’s original obligation of retreats shall be the hypothetical “line of contact.” It should be eventually formed by taking into account “the five islands group” under the actual control of the UN Command. This is matter of reasoning particularly in the logic behind the Armistice Agreement.

Indeed, this clause is ambiguous enough to result in many different misinterpretations. The drafters of the Korean Armistice Agreement seemed to have been so much concerned with this complexity. As shown in Map 3 attached to the Korean Armistice Agreement, the drafters further clarified in the “Notes” stating that the purpose of line A-B (provincial border line) is solely to indicate the control of coastal islands on the west coast of Korea. According to the Notes, that line has no other significance.¹⁸

Military Armistice Negotiation, pp.73~81.(1958).

¹⁸ All the islands lying to the north and west of the provincial boundary line(line A-B) between HWANGHAE-DO and KYONGGI-DO shall be under the military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, except the following five islands group as follows.

1.PAENGYONG-DO	Lat 37°58'N, Long 124°40' E
2.TAECHONG-DO	Lat 37°50'N, Long 124°42' E
3.SOCHONG-DO	Lat 37°46'N, Long 124°46' E
4.YONPYONG-DO	Lat 37°38'N, Long 125°40' E
5.U-DO	Lat 37°36'N, Long 125°58' E

The above five islands groups shall remain under the military control of the Commander-in-Chief, United Nations Command. All the islands on the west coast of Korea lying south of the above-mentioned boundary line shall remain under the military control of the Commander-in-Chief, United Nations Command.

Notes: (1) The purpose of the line A-B is solely to indicate the control of coastal islands on the west coast of Korea. This line has no other significance and none shall be attached thereto.

(2) The rectangles which enclose the island groups are for the sole purpose of indicating island groups which shall remain under the military control of the Commander-in-Chief, United Nations Command. These rectangles have no other significance and none shall be attached thereto. See Korean Armistice Agreement, art. 13, para. B(Control of Coastal Islands on the West Coast of Korea)

REFERENCE in MAP-3 attached to the main documents, 『Agreement between the Command-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers, on the other hand, Concerning a Military Armistice in Korea.』 Panmunjom, Korea, July 27, 1953.

Article 2, Section 13, Paragraph (b) of the Korean Armistice Agreement would only be interpreted properly, if there were no other *ulterior motif*. Such misinterpretation would never be sustainable. Despite such unacceptable descriptions, the Article 2 Section 13 Para (b) would be interpreted properly as logically explained above, if the interpretation was not done in bad faith. Such “misinterpretation” of this provision similar to the North Korean’s original assertion would never be sustainable. In North Korea’s recently redesigned claims - still far-fetched and unreasonable - even North Korea abandoned this “misinterpretation.”

4. Conclusion

Considering that “the areas that have been under the jurisdiction of each side until the present time” as laid down in Article 11 of the 1992 Basic Agreement, the most relevant demarcation line in the Yellow Sea should be exactly identical to the current Northern Limit Line. Despite this clear interpretation, settling the NLL dispute cannot be resolved in a simple or obvious legal corollary. Up until 1999, when the patrol ships from the two sides crossed fires, even the UN Command had exercised a very cautious position that the intrusion of NLL by the North Korean patrol boats does not necessarily constitute a violation of the Korean Armistice Agreement, in operating their rule of engagement (“ROE”).¹⁹

The two Koreas disputed again in mid-2009 on NLL. On May 27, 2009, North Korea warned an immediate strike if its ships are inspected on the high seas under a US-led Proliferation Security Initiative (“PSI”). North Korea added that it would not guarantee the legal status of five South Korean islands just southward of NLL. A week later, a North Korean patrol boat crossed NLL and

¹⁹ See Military Armistice Commission, *The Trespassing of the Northern Limit Line by North Korean Patrol Ships’* , May 22nd 1989; *Military Armistice Commission’s Official Opinion for the MND Conference Agenda on May 23, 1989*. See also *U.S. Urges N. Korea to Respect Sea Border with South*, KOREA TIMES. (Sept. 3 1999).

turned back after a verbal warning from a South Korean warship was issued. Consequently, South Korea accused North Korea of trespassing the western sea border.

As the two Koreas are now under the effect of an armistice system, there is no point of differentiating between North Korean patrol crossing NLL and their tanks crossing the DMZ. Therefore, these kinds of illegal border violations should be prohibited. Another naval battle along the maritime demarcation might be extended to full-scale war against North Korea in possession of nuclear weapons. It is urgent for South Korea to control the sea area and further establish strict rules on the peaceful maintenance of NLL. An appropriate way is to send out a firm message to North Korea not to violate the *status quo* of the maritime demarcation.