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Marine Scientific Research in the Sea Zones Where Claims of Two States for the Exclusive Economic Zone Overlap under the United Nations Convention on the Law of the Sea

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Introduction

The contribution by Prof. Chang-Wee Lee and Prof. Chanho Park raises several important and very interesting points concerning the marine scientific research (the MSR) in the sea zones where claims for the Exclusive Economic Zone (the EEZ) of two countries overlap and, where there is yet no delimitation agreed. The paper by these distinguished colleagues is mainly focusing upon the sea zones that are called as the intermediate/ provisional zones under the Fisheries Agreement between the Republic of Korea (Korea) and Japan in 1998 that entered into force in 1999 (the Fisheries Agrement).

I myself would like to make some brief comments on the following three points that have come to my mind in reading the paper by my Korean colleagues. First, the relevancy of the Fisheries Agreement to the issue of the MSR in the EEZ or in the zones where the two States claim for their EEZ, and where no delimitation is established (hereinafter, I referred to as overlapping zone(s) in case in which no misunderstanding would be expected): second, the rights and duties of "the States concerned" pending delimitation agreements under Article 74, Paragraph 3 of the United Nations Convention on the Law of the Sea (the LOSC) and the incidents in 2006 between Korea and Japan in respect to the MSR in the overlapping zone: third, possible solutions pending delimitation agreements between the States concerned in order to avoid hampering the progress of the MSR that should be common interests of mankind.

1. The Relevancy of the Fisheries Agreement to the Issue of the MSR in the EEZ or in Overlapping Zones

(1) The (Non-) Effect of the Fisheries Agreement on the Third States

Needless to say, the Fisheries Agreement as a bilateral agreement has no legal effect on the third States. Accordingly, the legal status of the sea zones that are regarded as the EEZ of Korea or Japan according to Articles 1 and 2 of the Annex II to the Agreement is not in any legal sense confirmed in relation to the third States by the Agreement and the Annex II thereto. Likewise, the legal status of the zones that Article 9, Paragraphs 1 and 2 apply has legal meaning only between the two party States under the Agreement.

In some, the legal status of the overlapping zones, namely, the intermediate/ provisional zones under the Fisheries Agreement, for the third States is the zones pending the EEZ delimitation.

Based upon such understanding, the third State is arguably demanded to gain permission from all the State concerned when intending to conduct the MSR in the overlapping zones. In international practices the conduct of the MSR by acquiring permission solely from one State concerned when two States have insisted on its jurisdiction over the sea area, the other State protested against such MSR. For instance, the RRS Shackleton, a UK Royal Research Vessel conducted the MSR off Turkish waters under permission granted solely by Turkey. Since the sea area of was part of six mile territorial sea claimed by Greece, Greek authorities confiscated the Shackleton's equipment, documents, and others. (This incident is dealt with by Montserrat Gorina-Ysern, *An International Regime for Marine Scientific Research,* p. 275 et seq.)

(2) The Possible Relevancy of the Fisheries Agreement to the Issue of the MSR in the EEZ or the Overlapping Zone between the Two Parties

Regarding the two overlapping zones to which Article 9, Paragraph 1 or Paragraph 2 is applied, according to Articles 2 and 3 of the Annex I to the Agreement, the two Parties have an obligation of cooperation for the purpose of avoiding the threat upon the preservation of marine living resources in the overlapping zones. The cooperation should be realized in accordance with the Paragraphs 1 to 5 of both Articles, and the contents were reproduced succinctly in the Paper by my Korean colleagues.

The definition of the MSR under the LOSC is not given, but it is classified to the following two types: first, A-type of the MSR is the MSR that purports to make progress in the acquisition and accumulation of scientific knowledge solely for peaceful purposes and for the purpose of the interests of the all mankind; second, the B-type of the MSR is the MSR that has some impact upon the exploration or

exploitation of natural resources, or that involves drilling or use of explosive devices and so on.

Then, the question is whether the obligation of cooperation under Articles 2 and 3 of the Annex I to the Fisheries Agreement should be applied to the MSR conducted by each of the two Parties in the overlapping zones.

Certainly it could not be denied that the MSR concerning the situation or status of marine living resources has close relation to the preservation of marine living resources provided under Articles 2 and 3 of the Annex I. However, the obligation of cooperation under these Articles is so abstract and it is realized in accordance with the paragraphs 1 to 5 of each Article. These Paragraphs oblige the two Parties mainly to take conservation and management measures for their own people and vessels, to respect the recommendation given by the Joint Committee established under the Agreement, and to notify the measures taken by the one party to the other Party. Judging from these contents of the obligation of cooperation it does not necessarily have direct relation to the issue of the MSR. Therefore, regarding the issue of the MSR in the overlapping zones, the two States are subject to the relevant rules of general international law, and especially those under the LOSC since the two States are parties to it.

Now, I am moving into the relevant rules in the LOSC regarding the rights and duties of the States concerned in cases of MSR in the overlapping zones.

2. The Rights and Duties of "the States Concerned" Regarding the MSR to be Conducted in Overlapping Zones

(1) The Rights and Duties of "the States Concerned" under Article 74, Paragraph 3 of the LOSC

Article 74, Paragraph 3 of the LOSC obliges the States concerned to 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, in a spirit of understanding and cooperation. Such arrangement shall be without prejudice to the final delimitation.

As for the meaning of the obligation "not to jeopardize or hamper the reaching of the final agreement", it would form an example of a violation of this obligation with significant possibility for the one party of the States concerned, for instance, to persistently refuse the offer of cooperation or the offer of commencement of negotiation for that purpose by the other party.

In addition, to understand the contents of the obligation to make every effort to enter into provisional arrangement and the final agreement, due to lack of enough suggestion by Article 74, Paragraph 3 itself, it may be so helpful to consult the decision rendered by the International Court of Justice (the ICJ) in the Aegean Sea Continental Shelf Case, at the stage of Request for the Indication of Interim Measures of Protection, in 1976. This is because the case relates to the MSR to be conducted and being conducted by one party of the State concerned in overlapping zones, and also because the requirements for rendering interim measures may give important suggestions to the duties of the States concerned in respect to their behavior in overlapping zones pending final delimitation agreement

The dispute in this case concerned the MSR conducted and being conducted by Turkey in the overlapping zone situated between it and Greece. The ICJ declared as the requirements for ordering interim measures the risk of irreparable damage and anticipation of the future judgment.

The former requirement does not need further explanation. The latter requirement substantially means that if the MSR concerned has a risk of being prejudice to the realization or implementation of the future judgment, interim measures should be indicated. In terms of the duties of the States concerned under Article 74, Paragraph 3 of the LOSC, the obligation not to jeopardize or hamper the reaching of the final agreements, the implication of the Aegean Continental Shelf Case is that pending the final agreement, the States concerned should obtain from doing anything that would be prejudice to the realization or implementation of the final agreement, or prejudice to the very significance of the final agreement.. For instance, as for the sovereign right of coastal States of the EEZ over marine living resources, to unilaterally conduct the MSR regarding status and situation of marine resources in overlapping zones without any prior notification or prior consultation with the other party is among the acts that can be prejudice to the realization or significance of the final delimitation agreement. In addition, to unilaterally give permission to the third State to conduct the MSR in the overlapping zone concerning the resource status and situation, and to gain the information from the result of the MSR does so, too. Even regarding the MSR that does not effect upon the sovereign right of coastal States over marine living resources in the EEZ, such unilateral acts would raise tension between the States concerned, and so, jeopardize or hamper the reaching of the final delimitation agreements.

Based upon these understanding of the obligation of the States concerned in

respect to their behaviors in overlapping zones, some analysis will be given to the incidents in 2006 regarding the MSR conducted and to be conducted by Korea and Japan respectively in the overlapping zone, and their results.

(2) Incidents Regarding the MSR in the Overlapping Zone between Korea and Japan in 2006.

Japan planned its MSR on the waters on the Japanese side from the median line that Japan insists as the delimitation line, and that runs between the Ullung Do Islands and the Takeshima Islands. The MSR is a hydrographic survey to study sea bottom topography in the South-west sea area of Japan Sea. Korea was going to submit changes of undersea feature names on the occasion of the meeting of the Sub- Committee on Undersea Feature Names scheduled in June of 2006. The Japanese government tried to prevent this, and for that purpose it intended to gather scientific information of the undersea features concerned by conducting its own MSR.

As soon as this plan was made public by the Japanese government, Korean government issued a harsh protest. On the 21st and 22nd of April negotiation between the two countries was conducted. In the talks Japan requested Korea to abandon its proposal of changing the names of the undersea features. Korea, in return, insisted that Japan should give up its plan of the MSR. As a result, it was agreed among others that negotiation of the EEZ delimitation would be resumed in due course, which had been discontinued for six years since 2000.

On the 3rd of June, Korea, in its turn, explained to Japan its plan of the MSR which was a sea current survey to be conducted on the waters including the overlapping zone, namely sea areas that lay between the Japanese median line and the Korean median line. Korea on the 5th of July commenced and carried out such a survey. The Japanese government immediately lodged a diplomatic protest and urged its stop on the spot at sea, too.

On the 4th and 5th of September, another negotiation of the EEZ delimitation was conducted. During the talks a joint MSR plan (a plan of a survey of radioactive release into the sea) was discussed and agreed, which was to be carried out in October of 2006.

Since the situation of tension in April and throughout the opportunities of negotiation until September, the Japanese government continued to offer the building of some cooperative schemes for the MSR pending the final delimitation agreement. Actually it persistently proposed a scheme of prior notification system

for the MSR to be conducted in the overlapping zone by one of two parties. This Japanese proposal, however, always resulted in being abortive.

3. Practical Resolutions Pending Final Agreements for Conduct of the MSR in Overlapping Zones

(1) The Possibly Long Time to Be Needed for Reaching Final Agreements in Maritime Delimitation Issues

In many international practices concerning maritime delimitation disputes, it is not at all rare that to reach final resolution takes so much time, even for dozens of years and more than fifty years. When confrontation on the territorial title over islands in the sea zones concerned is involved, it is so difficult for the parties to the dispute to reach final agreements in a short or appropriate time.

Considering this particular nature of the maritime delimitation disputes, to find some solution is keenly needed for the MSR to be conducted especially in overlapping zones during the pending time before final delimitation agreements are concluded. The provisional solution might not be "provisional", since it would apply, in some cases, for dozens of years. In order to respect the common interests of mankind to be realized by the MSR, although every MSR does not necessarily have such contribution, as a general policy it is not appropriate to hamper the progress of the MSR to be conducted in overlapping zones due to the conflict situation between the State concerned.

(2) Joint Conduct of the MSR and Prior Notification or Prior Consultation Procedure

Like in the case of the joint MSR between Korea and Japan in 2006, Joint MSR is a very practical and advisable solution pending the final delimitation agreements.

The joint MSR agreed between Korean and Japan is solely on an ad hoc basis, and, therefore, it establishes neither a continuous cooperative scheme nor provisional arrangements for the MSR on the waters including the disputed sea area.

In comparison, between the People's Republic of China and Japan there is an agreement concluded in 2001 concerning a prior notification system for the MSR on the waters where claims of the two States for the EEZ are overlapping.

Japan has continuously proposed a prior notification system to be applied

between Korea and Japan for the MSR to be conducted especially in the overlapping zone, but until now, no result. As a possible solution and a friendly scheme, prior notification or prior consultation deserves thorough consideration between the two States.