Joint Marine Scientific Research in Intermediate/Provisional Zones between Korea and Japan

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1. Introduction

It has been eight years since Korea and Japan concluded a fisheries agreement, establishing a new Northeast Asia fisheries order around the Korean peninsula based on the Exclusive Economic Zone (EEZ) regime. According to the agreement, two intermediate/provisional zones were established in the overlapping zones in the seas of Northeast Asia. This was made possible by the two coastal States' agreement to shelve delicate issues on maritime boundary delimitation during the transitional period. Therefore, many more agreements have yet to be reached on maritime boundaries between Korea and Japan.

While the new Korea-Japan fisheries agreement has entered a stable stage, it is also true that Korea and Japan still face some outstanding issues, which include marine resources management, marine environment protection, marine scientific research, and so forth. Among these, marine scientific research has emerged as the most delicate problem between Korea and Japan since 2006. As marine scientific research is a basic precondition for the management of marine resources and the protection of the marine environment, relevant states are apt to disagree on the conduct of marine scientific research.

Under these circumstances, we wish to examine in this paper the relevant issues regarding joint marine scientific research in the Korea-Japan intermediate/provisional zones. Specifically, we wish to analyze the debate surrounding the legal status of the intermediate/provisional zones, the dual nature of these zones, MSR in international law as well as in Korea, and MSR in the intermediate/provisional zone. Finally an observation is added.

2. Debate on the Legal Status of Intermediate/Provisional Zones

In their new Fisheries Agreement of 1999, Korea and Japan agreed to establish two intermediate/provisional zones, one in the East Sea/Sea of Japan and the other in the East China Sea, thereby shelving maritime boundary delimitation. Article 9, paragraph 1 of the Korea-Japan Fisheries Agreement provides that paragraph 2 of Annex I shall be applied to the areas in the shape of a polygon that links certain coordinates. It also provides that paragraph 3 of Annex I shall be applied to the areas stipulated in Article 9, paragraph 2.

In describing the overlapping zones, Korea and Japan used geographical coordinates in the text of the Agreement instead of mentioning specific names. Korea calls these zones "intermediate zones" while Japan calls them "provisional zones." Moreover, Japan calls the designated zone of the East Sea/Sea of Japan the "North Provisional Zone" and the designated zone of the East China Sea the "South Provisional Zone," hence stressing the provisional nature of the Fisheries Agreement.

In relation to the nature of these designated zones, Japan takes the position that both States manage marine resources jointly in general. Some scholars had maintained the view that joint resources management had been the nature of these two zones since the time of the two countries' negotiations. In particular, since the results of the joint commission's negotiations have a certain impact on the determination of preservation and management measures despite the gaps in the joint commission's powers over these two water zones, they claimed that these water zones were not such where preservation and management measures could simply be enforced according to the individual domestic rules of each State but rather where joint preservation and management measures were expected. The official position of the Japanese Foreign Ministry also confirms that the intermediate zones are all to be seen as joint management zones (*Chosun Ilbo,* September 26, 1998). However, professor Serita Kentaro takes a more reserved position on this view (*Shimano Ryoyuto Keizaisuiikino Kyokaikakutei* -- Sovereignty Over Islands and Delimitation of EEZ).

To the contrary, Koreans have taken mostly the opposite position. In particular, in case of the East Sea/Sea of Japan, where the Dokdo issue is at stake, Korea has employed various interpretations to deny the joint management nature of the intermediate/provisional zones.

This position is supported by Article 2, Annex I of the Agreement, which stipulates enforcement based on the flag state principle. In addition, in comparison with other agreements containing a clause that simply states there shall be no regulations, this provision emphasizes higher standards of the flag state principle. It is also clear that the legislative jurisdiction of each State is exercised separately: in relation to the preservation and management of marine living resources, each State may take necessary measures for their own nationals and ships. However, as the recommendations of the two nations' joint fisheries commission should be respected in the enforcement of such measures, the individual exercise of jurisdiction may be limited. Such a limitation, however, is not so decisive a factor that it would determine these two zones as being of joint management nature.

In order to limit the joint commission's role in resource management in the intermediate/provisional zone in the East Sea/Sea of Japan, a technical provision was provided, stating that the commission's recommendations, not decisions, should be respected. However, there was an animated discussion on the meaning of Article 2, paragraph 2, which stated that the "recommendations of the joint commission should be respected" in Korea. This provision was provided so that Korea may maintain the legal nature of the intermediate/provisional zone in the East Sea/Sea of Japan as that of the high seas.

Many Korean scholars claim that, because jurisdiction in the East Sea/Sea of Japan's intermediate zone is exercised individually upon the state's own nationals and ships, it is similar to the flag state regime -- that is, a way of exercising jurisdiction over one's own ships in the high seas. However, since Korea and Japan did not abandon their right to exercise jurisdiction over third states, the intermediate zone does not qualify as the high seas. Therefore, the position of those Korean scholars who are in favor of the Korea-Japan Fisheries Agreement is that the nature of the intermediate/provisional zone in the East Sea/Sea of Japan is a provisional fisheries zone similar to one in the high seas. However,

with regard to the intermediate/provisional zone in the East China Sea, Koreans recognize its joint management nature. This is because there are no such disputed islands like Dokdo.

When states conclude a fisheries agreement reserving boundary delimitation, the relevant zones are divided into gray zones and white zones depending on their legal effects. The most representative treaties related to gray zones include the Provisional Fisheries Agreement in the Barents Sea between Norway and Russia of 1988, the Agreement Concerning Extension of Fisheries Jurisdiction in the Kattegat between Denmark and Sweden of 1977, and the Fisheries Agreement between Venezuela and Trinidad and Tobago of 1985. Examples of treaties on white zones include several agreements concluded between Sweden and its neighboring states in 1978, when Sweden expanded its fisheries jurisdiction in the Baltic Sea.

However, through an objective interpretation of Article 15 -- the disclaimer clause -- and the fundamental nature of the Agreement, the Korean government would be able to maintain the status quo of the Dokdo issue. In this light, one can say the Korean government's position that Dokdo is Korea's inherent territory will not be affected in any way by the Agreement.

Of course, Japan's position, which is exactly opposite that of Korea, will also not be affected by the Agreement. Therefore, Japan is expected to continue reiterating its previous claims of sovereignty over Dokdo. This has been confirmed by the Japanese foreign minister's response to the Diet earlier (Nobukatsu Kanehara and Yutaka Arima, "NEW FISHING ORDER - - Japan's New Agreement on Fisheries with the Republic of Korea and with the People's Republic of China," *JAIL*, No. 42, the International Law Association of Japan, 1999, p. 10).

3. Dual Nature of Intermediate/Provisional Zones

Even if one were to accept the joint fisheries zone nature of an intermediate/provisional zone, the joint management nature does not directly affect the sovereignty over disputed islands. This was clearly observed in the ICJ judgment on the Minquiers and Ecrehos Case of 1953. Hence, instead of attaching too much importance to the complicated

interpretations of the Fisheries Agreement provisions text or to how the overlapping zones should be rendered, an objective interpretation of the treaties and the principles and rules of international law could be a more efficient and meaningful approach.

There are numerous overlapping water zones in the Korea-China Fisheries Agreement and the Japan-China Fisheries Agreement, the latter of which is similar to the intermediate/provisional zones in the Korea-Japan Fisheries Agreement. Korea, China, and Japan designated two specific zones in the three bilateral fisheries agreements, calling them intermediate zones, provisional zones, and transitional zones, respectively, either by mutual consent or unilaterally.

The overlapping zones in Northeast Asia could be summarized as follows: First, in principle, each overlapping zone is a joint fisheries zone where related states may conduct fishing activities together. However, in some of the water zones, joint fisheries do not necessarily include joint management or joint regulation. Second, in principle, ships and nationals are subject to flag state jurisdiction in each of the water zones. Third, a relevant party state's jurisdiction applies to a third state which is not a party to the agreement. Fourth, such water zones are operated provisionally until boundary delimitation is completed. If there is little possibility of mutual consent, however, these zones may continue to exist for a long time, with the exception of transitional zones. Fifth, it is possible for related states to have differing interpretations over overlapping zones that include disputed islands. Therefore, these water zones may be seen as bifocal zones which make related states' dual interpretations possible.

If the legal nature of a relevant water zone is obscure or if it is difficult to state clearly what the applicable water zone is, there are many instances where party states to treaties deliberately fail to mention these issues to allow room for independent interpretations. One can say that the intermediate/provisional zones stipulated in the fisheries agreements between Korea, China and Japan fall into this category.

By the way, it should be noted that Japan has taken this kind of position several times in its conclusion of previous fisheries agreements. For example, the number of states claiming their territorial seas or fisheries zones up to 12 nautical miles increased after 1960, and most

bilateral fisheries agreements at the time targeted up to 12 nautical miles. This notwithstanding, Japan did not accept the 12 nautical miles in the several fisheries agreements it concluded in 1967 and 1968. For example, Japan was vague on the applicable water zones in its bilateral fisheries agreements with the United States, New Zealand, Mexico, and Australia. It was hence possible for the party states to have individual interpretations according to their own interests when executing the treaties. Japan's recognition of a 12-nautical-mile fisheries zone in its fisheries agreement with Korea in 1965 remains the only exception thus far.

4. MSR under the 1958 Geneva Conventions

The development of international law on marine scientific research has paralleled the rapid development in ocean science and technology and the widening of coastal States' sovereignty and jurisdiction over the sea. Until the middle of the twentieth century marine scientific research within maritime zones under coastal State sovereignty was conducted on the basis of ad hoc arrangements with the coastal State. The freedom of scientific research outside the territorial sea was regarded as an expression of the freedom of the high seas.

Technological and scientific advances following the Second World War led the international community to introduce controls on marine scientific research, first in the 1958 Geneva Conventions. The High Seas Convention recognizes the freedom of the seas without specifically mentioning the freedom of marine scientific research. Nevertheless, marine scientific research was generally regarded as a freedom of the high seas. The Convention on the Territorial Sea and Contiguous Zone did not provide marine scientific research. But it has been widely accepted that the consent of the coastal state must be given to the research because the territorial sea is subject to the sovereignty of the coastal state.

The first specific reference to marine scientific research in general international treaty law appeared in the Continental Shelf Convention. The Continental Shelf Convention provides that the consent of the

coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. But in the case of pure research on the continental shelf, consent should not be normally withheld if the various conditions were complied with.

5. MSR under the 1982 LOS Convention

The United Nations Convention on the Law of the Sea establishes the comprehensive set of rules on marine scientific research by States and international organizations. It provides a framework for international cooperative action based on bilateral or multilateral arrangements. It also defines the rights, obligations and duties of States in the different zones of maritime jurisdiction. As far as high seas are concerned, marine scientific research is stipulated as a freedom of the high seas. Research in the territorial sea may be conducted with the express consent of and under the conditions set forth by the coastal State. All research in the Exclusive Economic Zone and on the continental shelf requires the consent of the coastal State, but there is distinction between pure and applied research. In the case of pure research, consent must be given in normal circumstances. But in the case of applied research, the coastal State has discretionary authority whether to give its consent or not.

This is a basic framework concerning the regime of the marine scientific research in the 1982 Law of the Sea Convention. However, the Convention does not provide a definition of the term 'marine scientific research'. Some explains this is mainly due to the fact that the discussions at the Conference were extremely complicated. At the negotiations of the Third United Nations Conference on the Law of the Sea, there has not only been a revival of the debate over freedom vs control of oceanic research. The developed states with advanced research capabilities have advocated unrestricted freedom of research on the ground that increased knowledge of the oceans is vital to the enhancement of mankind's welfare in general. Developing coastal states are suspicious of the underlying motives of developed states.

Anyway marine scientific research is, generally speaking, any study and experimental work designed to increase human knowledge of the marine environment. And a distinction must be made between 'marine scientific research' and 'hydrographic survey'. The demarcation between the two may be difficult, but worthwhile since the provisions of Part XIII of the LOS Convention do not apply to hydrographic surveying. The US Department of State defines the hydrographic survey as a survey having for its principal purpose the determination of data relating to bodies of water. A hydrographic survey may consist of the determination of one or several of the following classes of data: depth of water, configuration and nature of the bottom; directions and force of currents; heights and times of tides and water stages; and location of fixed objects for survey and navigation purposes.

6. MSR in Korea

Let us go to the marine scientific research in Korea. In 1995 Korea enacted the Marine Scientific Research Act to prescribe the procedures necessary for conducting marine scientific research by any foreigner or international organization and to strive toward advancement in marine science and marine technology through efficient management and publication of research data(Art. 1).

Marine scientific research is defined as the act of a research or exploration of seabed, its subsoil, water column and air space(Art. 2).

General principles for the conduct of marine scientific research are provided in article 4 as follows: marine scientific research shall be conducted exclusively for peaceful purposes and with appropriate scientific methods and means compatible with relevant international conventions; it shall be conducted in such a way as to avoid any unreasonable interference with other legitimate uses of the sea; it shall be conducted in compliance with relevant international law adopted in conformity with the United Nations Convention on the Law of the Sea including all regulations for the protection and preservation of the marine environment.

The research in the territorial sea in Korea may be conducted only with the permission from the Government of Korea(Art. 6). On the other hand any foreigner who wishes to conduct marine scientific research within the maritime jurisdiction beyond the territorial sea of Korea shall be obtain the consent from the Government of Korea(Art. 7 para. 1). Difference between permission and consent can be found in the fact that there is no time limit in granting a permission, but the consent to be granted will be decided within four months from the date on which the research plan is received.

The Act provides that the consent may be withheld if the research plan falls under the following cases: where it directly affects the exploration and development of natural resources, whether living or non-living; where it involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment; where it involves the construction, operation or use of artificial islands, installations and structures in a jurisdiction beyond the territorial sea of Korea; where it involves inaccurate contents of a research plan or the foreigner who has submitted the research plan has failed to perform obligation to Korea in connection with the marine scientific research conducted under this Act; where a government agency and nationals of a foreign country that rejected, without justifiable reasons, the marine scientific research of the national and the government agency of Korea submit a research plan(Art. 7 para. 4).

The marine scientific research may be suspended if: it is not conducted in conformity with the research plan; some obligations provided in Article 10 fail to be performed; the Minister of National Defense requests the suspension for the purpose of performing military operations(Art. 12 para. 1). The Act provides the termination of marine scientific research if: it falls under the significant change in research project prescribed by the Presidential Decree; the failure to perform the some obligations fails to be rectified within some period; the termination is requested for the purpose of peace, public order and security of Korea(Art. 12 para. 2). Suspension and termination of research in Korea seem to be generally confirmed to the LOS Convention, but suspension for military purposes

and termination for the purpose of peace, public order and security need to be considered carefully.

7. MSR in the Intermediate/Provisional Zone in the East Sea/Sea of Japan

Some problems about the attempt of scientific research of Japanese coast guard in the EEZ of Korea especially around Dokdo in 2006 had better be reconsidered in this context. At that time Korea protested strongly that Japanese attempt could violate the law of Korea. This problem may be difficult to consider because of the problem of Dokdo. But before judging whether it could be permitted legally or not, we have to examine the content and purpose of Japanese attempt.

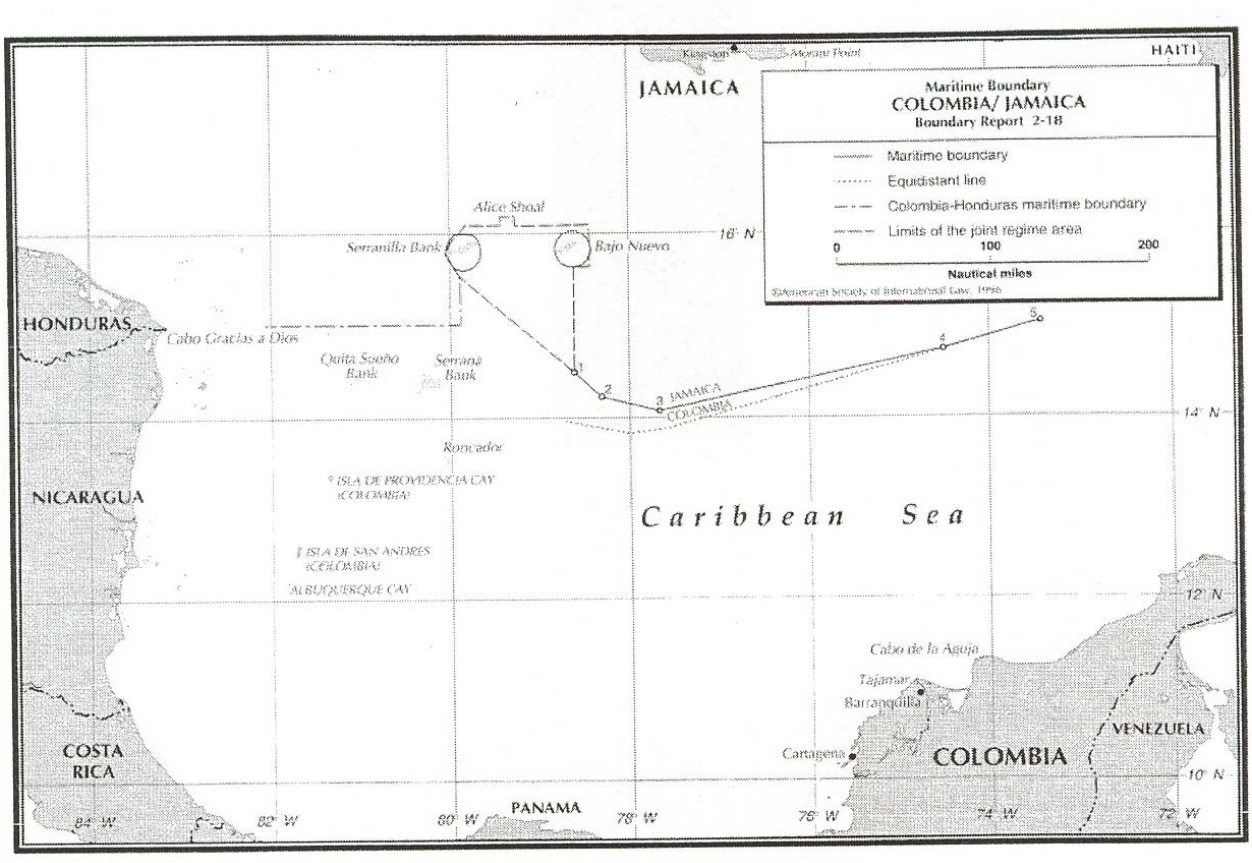
We think this kind of confrontation will happen again in the future because the legal status of a part of East Sea/Sea of Japan between Korea and Japan is not determined clearly. In order to prevent that situation, two governments have to make some kind of arrangements to regulate marine scientific research in the East Sea/Sea of Japan.

8. Observation: International Cooperation

Let us show you some instances of bilateral cooperation in marine scientific research in the troubled waters. One is the joint regime area between Colombia and Jamaica, and the other is the common scientific and fishing zone between the Dominican Republic and Colombia. The Case of Colombia and Jamaica is worth mentioning briefly here. There is a sovereignty dispute over Serranilla and Bajo Nuevo included in limits of joint regime area between Colombia and Honduras. Furthermore Jamaica's fishermen had traditionally fished in the areas adjacent to these cays and banks. Pending the determination of the jurisdictional limits of each country, Colombia and Jamaica agreed to establish 'The Joint Regime Area' to carry out exploration and exploitation of the natural resources, marine scientific research, and so on. Although this

kind of arrangement does not seem to be applicable to solve the situation of Korea and Japan, it may be a good instance to be examined.

As a final observation, we would like to mention that we do not have to react sensitively to the Japanese attempt of marine scientific research around the East Sea/Sea of Japan. Article 241 of the LOS Convention provides that marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources.



Source: Charney & Alexander, International Maritime Boundaries, Vol. III, Martinus Nijhoff Publishers, 1998, p. 2199.