Evaluation on 30 Year－Korea・Japan Fishery Relationship and the necessity of Conversion of Regime*

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Introduction

The year of 1995 is the 50th anniversary of independence of Korea. And 30 years have passed since normalization of diplomatic relations between Republic of Korea and Japan by conclusion of a treaty on the basic relationship together with 4 detailed agreements including a fishery agreement.

In accordance with the conclusion of Fishery Agreement between Korea and Japan in 1965 (hereafter referred to as 1965 Fishery Agreement)[1], extreme fishery dispute between the two countries of 20 years after the independence of Korea came to an end and the aspects of fishery relations became stabilized in appearance. But both countries being the geographically opposite states, historically-inconvenient fishery relationship did not thoroughly clear up even by that agreement.

From the Korean viewpoint, the 1965 Fishery Agreement started as an interim treaty to prevent the Japanese fishermen's one-way plunder of Korean coastal fishery resources. As we know, the 1965 Fishery Agreement was based on the ground of originally unequal conditions of fishing industries of the two countries, and also concluded by the binational political consideration of those days.

For the last 30 years, however, a new international legal regime of the sea was established by the United Nations Convention on the Law of the Sea of 1982[2] and also there occurred substantial

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1) Since 1945, this was the first intergovernmental fishery agreement as for Korea, and the third one as for Japan following the International Convention for the High Seas Fishery of the North Pacific Ocean of 1952 and the Russo-Japanese High Seas Fisheries Agreement of 1956.

2) 1982 United Nations Convention on the Law of the Sea was entered into force on 16 November 1994.

changes on the fishery circumstances besides capabilities of the two countries. Accordingly, the 1965 Fishery Agreement should be fundamentally reappraised because a lot of parts of the agreement do not satisfy the present situations.

Furthermore, rearrangement of the existing fishery relations between the two countries is needed not only for the reorganization of the law of the sea regime but also for the conservation and management of the almost depleted fishery resources in the Northeast Asian sea region. For this purpose, it is required to reconstruct a friendly amd reasonable fishery relationship in the future.

This paper analyses the main substance and legal nature of the 1965 Fishery Agreement, and evaluates its practice for 30 years, and aims to suggest a desirable direction of future development.

Main Substance and Legal Nature of the Agreement

1) Concluding Process of the Agreement

The postwar fishery relations between Korea and Japan started in an extremely stressful manner, and the situation continued untill the normalization of diplomatic relations in 1965. From the very beginning the bilateral relations in the fisheries issue-area were fraught with deep-rooted national sentiments between two countries. When, in January 1952, Korean Government issued the[Presidential Proclamation of Sovereignty over the Adjacent Sea] claiming Korea's sovereign jurisdiction over the sea areas extending 20 to 200 miles from its coastlines, Japan flatly rejected such claims. Within what came to be known as the Peace Line, Korean Government claimed sovereign jurisdiction over the preservation, protection, conservation, and utilization of all the natural resources retained in the adjacent sea areas.

The Presidential Proclamation came in anticipation of the return of Japanese fishermen to the fishing grounds around the Korean Peninsular once they were free from the restrictions of the MacArthur Line which had been established by the Supreme Commander for the Allied Powers(SCAP) in 1945 forbidding Japanese fishing vessels to operate beyond the Line[3]. And also

3) During the occupation period from 1945 to 1952, Japan was unable to exercise its sovereignty. And its economic activities, including fishery and shipping, were placed under the Allied Powers' control. Japanese coastal navigation was strictly controlled for security reasons from 20 August to 14 September 1945, and coastal fishery was restricted to areas within the MacArthur Line from 27 September 1945 to 25 April 1952(Tsuneo Akaha, "Muddling through successfully : Japan's poster - war ocean policy and future prospects", *Marine Policy*, Vol. 19 - 3, 1995, p.173).

the Presidential Proclamation was followed by the municipal legislation, the Fishery Resources Protection Act of 1953 to implement the Proclamation of 1952. The enforcement by Korean Government of the new law involving seizure of foreign fishing vessels and detention of fishermen found in violation of the law. As a result, 326 Japanese fishing vessels had been seized and 3,904 Japanese fishermen detained until 1965[4]. Japan protested what it considered were unlawful acts on the grounds that the Presidential Proclamation and the accompanying domestic legislation ran counter to the principle of high seas freedom that had long been established in the international law and also that they were inconsistent with the basic principle of international cooperation for the development and protection of high seas living resources[5].

A bilateral committee had been set up in February 1952 to discuss the fishery problems between both countries. It was one of several committees established to conduct negotiations for the eventual normalization of diplomatic relations. No sooner had the committee begun its work than it became evident that the respect claims of the two governments were irreconcilable. Japan proposed that two governments establish and implement on an equitable basis joint measures to maintain a maximum sustainable yield(hereafter referred to as MSY) of the fishery resources of mutual interests, that the trawl and dragnet fishery be banned for a specific time period in those areas where scientific evidence might warrant such action, and that a joint committee be astablished to conduct a scientific survey and research concerning conservation and effective utilization of fishery resources of mutual concern. On the other hand, Korea proposed that such measures as were proposed by Japan be established on the high seas outside the Korean fishery zone, beyond and adjacent to its territorial sea. Japan understood that the proposal of Korea was clearly intended to establish the legitmacy of its jurisdiction within the Peace Line.

As discussed above, both proposals were so far apart that there was no possible ground for agreement, and the negotiation was suspended soon. The second round of talk in May and June 1952, the third in October 1953, the fourth in October 1958, and the fifth in October 1960 all failed in dissolving the issue of the extent of Korean maritime jurisdiction. What further complicated the already strained fishery relations between two countries was the establishment in September 1952 of the Clark Line inside the Peace Line by the United Nations Forces Headquarters as part of their Korean War efforts[6] In October 1961, the Korean Government

4) Sigeru Oda, *Marine Resources and International Law*, 1971, p. 196.

5) Choon – ho Park, *East Asia and the Law of the Sea*, Seoul National University Press, 1983, pp. 145~149.

6) The purpose of the Clark Line was establishment of a defense zone adjacent sea area of the Korean Peninsular, and it was eliminated on August 27th following the July 27th 1953 Ceasefire Agreement between the North and South Korea.

agreed to resume overall negotiations and the Fishery Committee met for a sixth round of talks. In the beginning of 1962, when the two governments had moved closer on other issues, particularly on the question of Japanese War reparations, the main focus of the negotiations shifted to the fishery relations between two countries. In December 1962, Japan offered a compromise : 1) Japan would recognize a 12-mile Korean high seas fishery zone in which Korea would exercise the same rights over fishing as it did in its territorial sea ; 2) Korea would recognize and permit continued Japanese fishing in the outer 6-mile area of the fishery zone for 10 years after the bilateral agreement went into force ; 3) within this area, fishing vessels of both countries would be subject to the enforcement jurisdiction of their respective governments ; 4) Japan would possess the right to establish a fishery zone according to the same conditions as in the first part of the proposal[7].

The Korean Government argued that fishery conservation measures were necessary not only within the 12-mile limit but also beyond it in view of the worsening resources situation caused by Japanese fishery and that the Geneva Convention of 1958[8] recognized the special interests and preferential fishery rights of coastal states. Korea pointed out that the Convention for the High Seas Fishery in the North Pacific Oceans and the Japan-Soviet Fishery Agreement also provided for the preferential rights of the coastal states concerned and that the same rights should be recognized for Korea. But Japan responded by stating that a 12-mile fishery zone was the maximum compromise that she could accept. When Korea submitted a proposal that included a provision for a 40-mile fishery zone of Korea, the Japan could not accept it even though it was clearly less extensive than the area under the 1952 Presidential Proclamation. Subsequent talks could not dissolve the issue and the negotiation was again suspended in April 1964.

At the end of 1963 the foreign ministers of both countries came to an abstract agreement on the following three subject matters ; 1) early conclusion of fishery agreement, 2) equitable application of measures for the conservation of fishery resources to each country, 3) Japan's cooperation for fishery development of Korea. In accordance with the above agreement talks made great progress. The seventh round of talks were resumed in December 1964. Following further discussions at the

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7) This proposal was similar to the 6+6 proposal that had been unsuccessfully put forth by Canada and the United States at the Geneva UNCLOS Ⅱ in 1960. According to this scheme, foreign nationals who had been fishing for 5 years or more in a newly established fishery zone would be allowed to continue fishing in the zone for another 10 years.

8) The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, adopted at the UNCLOS Ⅰ. This Convention required states parties to it to agree upon measures to conserve the fishery resources of the high seas : in certain very limited circumstances it gave a coastal state the right unilaterally to adopt conservation measures for areas of the high seas adjacent to its territorial sea (Arts. 6 and 7).

working level, both Governments finalized the agreement in June 1965. Together with other agreements dealing with the bilateral relations and the status of Korean residents in Japan, the Fishery Agreement was ratified by each country and went into force on 18 December 1965. At the same time, a private-level fishery agreement that dealt with the safety of fishing operation by both nationals went into force.

2) Main Subject and Legal Nature

The objectives and general principles guiding the 1965 Fishery Agreement between Korea and Japan were stated in its preamble : 1) to maintain a MSY of fishery resources for mutual interests ; 2) to contribute to the conservation and rational development of the resources ; 3) to respect the principle of high seas freedom ; 4) to eliminate the causes of fishery conflict ; and 5) to cooperate for the development of fishing industry mutually.

According to the 1965 Fishery Agreement, both countries recognized each party's right to establish fishery zones up to 12 miles from its baseline[9]. Outside the Korean fishery zone were established "joint regulation zones", in which the two governments would take provisional measures to control the number and size of fishing vessels[10].Japanese fishing vessels in the joint regulation zones were limited to 1,700 in number at any time and 60 tons in size. The Agreement adopted the flag state principle for control and court jurisdiction outside the 12-mile fishery zone[11]. Outside the joint regulation zones were established "joint resource survey zones", in which both governments would conduct scientific surveys to assess the condition of fishery resources in the area[12]. The Agreement established a binational commission charged with the responsibility to discuss and provide recommendation on 1) scientific studies and regulatory measures based on such studies, 2) the delimitation of the joint resource survey zones, 3) provisional fisheries regulatory measures, and 4) matters concerning the safety and order of fishing operation and general procedures for handling accidents involving fishing vessels.

The 1965 Fishery Agreement also obligated both governments to take necessary measures to

9) Art. 1 of the Agreement. Accordingly, on December 12th 1965 Japan established a 12-mile fishery zone applicable only to Korean nationals.

10) Art. 2 and 3 of the Agreement. Accordingly, restrictions applied to Japanese offshore trawlers, bull trawlers, purse seiners, and mackerel angling fishery in the area.

11) Art. 4 of the Agreement. According to the Japanese interpretation, the acceptance of the flag state principle implied the status of the area beyond the 12-mile Korean fishery zone as high seas, thus de facto abolishing the Peace Line.

12) Art. 5 of the Agreement. The joint resources survey zone were defined by the Bilateral Fisheries Commission, established by the 1965 Fishery Agreement, as lying north of 30 degrees north latitute and west of 132 degrees east longitude.

ensure the safety and order of fishing operation and to settle accidents smoothly and expeditiously. Accordingly, a private-level agreement was concluded in December 1965, providing for detailed rules for safe fishing and for the establishment of a private-level binational committee for expeditious resolution of accidents. Dispute settlement procedures were provided for in the Article 9 of the Agreement, and the private agreement established a binational committee to dispose of cases involving Korean-Japanese fishing accidents in the joint regulation zones and surrounding waters. Finally, the official agreement was to be in force for five years following the exchange of ratification instruments between both governments and thereafter for one year after either side notifies the other of its intent to terminate the agreement. Indeed, the bilateral agreement has been extended since 1970.

Thus, the postwar fishery regime between Korea and Japan was established. The prewar and wartime animosities between two countries surrounded the 13-year long negotiations that finally culminated in the 1965 Fishery Agreement.

A Newly Developed Fishery Problem

Korean trawl fishery off the northeastern shore of Japan has increased in the late of 1970s. That was clearly a result of the establishment by North Pacific coastal states of their respective 200-mile exclusive fishery zones (hereafter referred to as EFZ). Until 1977, the year EFZ of USA and USSR went into effect, the Korean trawl fishery off the coasts of Hokkaido was seen as secondary to their more extensive operation in the Northwest Pacific waters. After Korean trawlers lost their fishing grounds to the coastal states jurisdiction, they began fishing operation in adjacent coastal waters of Hokkaido. Outside the control of Japanese fisheries laws and regulations, the Korean trawlers easily outcompteted Japanese coastal fishing vessels that were severely restricted in size and number.

As accidents and Japanese fishery damage involving Korean trawlers increased, concerned Japanese fishery representatives called for and successfully concluded a private-level agreement with their Korean counterpart in April 1978, providing for basic rules to maintain fishery order and to settle disputes. Hokkaido and Korean fishery representatives have since developed elaborate procedures for dispute settlement. Similar to the arrangements that had been developed with respect to Korean and Japanese fishery in the western and southwestern waters of Japan, a binational private-level committee has been established to dispose of disputes.

In the meantime, governmental action became necessary. In response to Korea's concern on the

deteriorating condition of fishery resources in the sea areas surrounding Cheju-do and the Japan's call for Korean fishing restraint in the northern coastal waters of Japan, in 1980 the two governments agreed to call on both countries' fishermen operating in the sea areas concerned to impose self-restraint on a provisional basis. When trouble continued, the two countries agreed to extend the provisional arrangement and also to further strengthen the regulatory measures in the relevant sea areas.

After the provisional arrangement expired in October 1986, the two countries continued their discussion and agreed on a number of measures a year later. The discussion highlighted several shortcomings of the 1965 which had become apparent as a result of changed situation of Korean and Japanese fishery in each other's coastal waters.

First, Japanese authority understood that the 1965 Fishery Agreement had proved ineffective in controlling the level of Korean fishing effort off Hokkaido. Particularly problematic were the large Korean trawlers that operated in those areas in which Japanese trawl fishery had been banned by domestic laws and regulations. Second, the existing agreement also proved ineffective in regulating the squid angling and pot fishery etc. operating in areas where fishing activities were domestically prohibited by both countries. Third, the flag state principle adopted for the control of violations of the 1965 Fishery Agreement proved ineffective. Furthermore, coastal fishermen in northern Japan began to press their demand for a uniform application of the nation's 200-mile fishery jurisdiction against all foreign fishermen including Korean nationals. On the other hand, fishermen in southern and southwestern Japan continued to oppose a uniform application of the nation's 200-mile regime for fear of losing their fishing grounds in the Korean and P. R. Chinese coastal waters.

Faced with these problems, Japan wanted to revise the 1965 Fishery Agreement and to establish a "fishery resources management zone" in the sea area between two countries where trouble continued. According to the Japanese proposal, a number of each country's fishing vessels would be limited in the proposed zone and, breaking with the past practice of the flag state control and court jurisdiction, the coastal state would enforce control against suspected violators of the new agreement. Japan further proposed that Korean, as well as Japanese, fishermen strictly observe the otter trawl prohibition line off Hokkaido and Japanese domestic fishery restrictions in Japan's western sea areas.

Korea was reluctant to revise the existing bilateral fishery framework. More specifically, Korea argued that the 1965 Fishery Agreement was negotiated as a part of the overall bilateral relations and that, considering the national sentiments of two peoples, time was not ripe for a revision of

the agreement. Korea also pointed out that the flag state principle currently in force was incorporated into the 1965 Fishery Agreement upon Japan's insistence, adding that the coastal state's control against suspected violators might negatively affect national sentiments.

Following a year-long series of talks, in October 1987 both countries agreed on the following measures : ① The Korean trawl fishery would be gradually phased out and by April 1991 would be totally eliminated inside the Otter Trawl Fishery Prohibition Line and in turn Japanese bull trawlers operating around the Cheju-do would be reduced by 50% and the fishing period for the remaining vessels would be cut down by 50% by April 1991 ; ② Korean dragnet, squid angling, and eel pot fishery in Japan's western sea areas would observe strict prohibition by area and period, and Japanese dragnet, squid angling, and coastal fishery would also be subject to prohibition by area and period ; and ③ both countries would strengthen and expand their control of fishing operations in the areas concerned by extending the joint control arrangement then in existence in the joint regulation zones to surrounding areas, including the assignment of officials from both governments on the same patrol boats. The patrol activity by both government's officials in the affected areas was also increased to ten times a year, each lasting a week to ten days.

The impact of the new arrangement was expected to be the most extensive for Korean trawl fishery off the coasts of Hokkaido and for Japanese fishing activities in the western sea areas. Both countries were willing to suffer a lot of losses, however, because the need to reduce their fishing effort in the area against the backdrop of the deteriorating resource situation was recognized not only in Korea but also in Japan.

On the question of whether Japan should apply its 1977 law on the 200-mile EFZ, a simple cost-benefit analysis still indicates that Japan is better off with the status quo, particularly in view of the extensive and lucrative Japanese bull trawl and globefish long-lining fishery off Korean and Chinese coasts. The fisheries officials of both countries believe that two countries cannot set up the exclusive economic zones (hereafter referred to as EEZ) or EFZ regime without terminating the 1965 Fishery Agreement but that the existing agreement should not be terminated until after a substitute arrangement has been found.

Evaluation on 30 Year-Fishery Relationship

1) Provision toward the Development of International Law

The international legal background of conclusion of the 1965 Fishery Agreement were the 1st United Nations Conference on the Law of the Sea of 1958(UNCLOS Ⅰ) and the 2nd United

Nations Conference on the Law of the Sea of 1960 (UNCLOS Ⅱ). Following conclusion of the 1958 Convention on the Territorial Sea and the Contiguous Zone, at the UNCLOS Ⅱ a proposal on the 6-mile of territorial sea and 6-mile of contiguous fishery zone regime by the United States and Canada failed by one vote to obtain the required two-thirds majority[13].

The 12-mile fishery zone was adopted by a large numbers of states since 1960[14], and the development of this practice was such that, in the 1974 Anglo-Icelandic Fisheries Jurisdiction Case, the International Court of Justice had pronounced the 12-mile exclusive fishery zone had become established as a rule of customary international law[15].

Thus it can be said that the 1965 Fishery Agreement was influenced even indirectly by UNCLOS Ⅱ, and it adopted the 12-mile fishery zone regime under the International legal background at that time.

But the 1965 Fishery Agreement failed to accept the law of the sea regime which was repidly developed since 1973[16]. The examples among newly developed international ocean regime by the 1982 United Nations Convention on the Law of the Sea are settlement of 12-mile breadth of the territorial sea and 200-mile EEZ regime, recession of the freedom of high seas fishery, transition of the international management system for fish stocks, and accentuation the necessity of international cooperation, etc.

A. Fishery Zone

The Article 1 of the 1965 Fishery Agreement recognized the right of establishment of fishery zones up to 12 nautical miles from the baseline within which both states parties can exercise the fishery jurisdiction exclusively. In these sea areas both states parties can reserve the fishery right for their own nationals and the coastal state can exercise the regulation and court jurisdiction against the fishing vessels of the other party who violated its fishery right.

13) O'Connell, D. P., *The International Law of the Sea*, Vol. 1, Clarendon Press · Oxford, 1982, pp. 163~164.

14) 12-mile fishery zone was adopted by the major maritime states, for example, Australia, Canada, England, Norway, USA, USSR, and embodied in the Anglo-Norwegian Fishery Agreement of 1960, Anglo-Icelandic Fishery Agreement of 1961, and European Fisheries Convention of 1964.

15) Churchill, R. R. and Lowe, A. V., *The law of the sea*, Manchester University Press, 1985. p. 201.

16) Japan enacted the Law of Provisional Measures Relating to the Fishery Zone on 2 May 1977(Law No. 31), encouraged by the general trend that a number of coastal states had begun to regulate their own 200-mile zones, whether it be EEZ or EFZ. According to the Enforcement Order of 17 June 1977 of this law, the main provisions of the law relating to the control of foreigners do not apply to the nationals of Korea and China. And, at the same time, the establishment of fishery zones as such is not permitted in some areas of the Eastern Sea and the East China Sea. These exceptions were established on a reciprocal basis *vis-a-vis* the two countries in the Law of Provisional Measures Relating to the Fishery Zone and its Enforcement Order(Tadao Kuribayashi, "The United Nations Convention on the Law of the Sea and the Japanese Municipal Laws", *The Law of the Sea : Problems from the East Asian Perspective*, Law of the Sea Institute, University of Hawaii, 1987, p. 318).

The 1965 Fishery Agreement provides that a coastal state who adopts the straight baseline must discuss with the other party(Art. 1-1), and Korea adopted the straight baselines in the western and southern coasts through the Exchange of Note Relating the Straight Baseline of 22 June 1965. But the adoption problem of straight baseline surrounding the Cheju-do failed to agree and only the outer limit of Korean fishery zone was declared.

However, the Article 1-1 of the Agreement must be made void because the compulsary subject of discussion between the states parties concerned on the adoption of straight baseline is not authenticated by the 1982 UN Convention on the Law of the Sea and also the straight baseline can be established by a coastal state unilaterally[17].

Thereafter Korea and Japan extended the breadth of territorial sea up to 12 nautical miles by the Laws of Territorial Sea of 1977 respectively, on that account the actual profit or special significance of the 12-mile fishery zones were lost already. Furthermore, the more extensive legal status of EEZ than that of EFZ made the 12-mile fishery zone regime be out-of-date. For that reason the fishery zones of the 1965 Fishery Agreement must be coincided with the territorial sea of the Law of Territorial Sea.

B. Joint Regulation Zones

The concrete fishery regulatory measures within the joint regulation zones are restriction on the number and the size of engaging fishing vessels, on the mesh size of fishing gears, on the candlepower of fish-luring lights of purse seiners, on the standard amount of annual total catch, and on the identification of fishing vessels.

The upper limit of the standard amount of annual total catch by the dragnet, purse sein and mackerel angling fishery within the joint regulation zones for each state party is prescribed as 150 thousand metric tons in the Agreed Minute[18].

Inconsistencies of this regime can be summarized as follows ;

Firstly, notwithstanding the great change of the amount of fishery resources together with epoch-making development in the fishing gear and fishing method as well as in the capability of fishing vessels, the standard amount of annual total catch has been fixed. Moreover, it is found that the total catch regulatory method is not desirable for rational conservation and management of fishery resources. And also it is not coincided with the doctrine of United Nations Convention on the Law of the Sea which is using the system for resources management by species.

17) ICJ made the same adjudication upon the Anglo-Norwegian Fisheries Case of 1951.

18) 10 percents of up-and-down variableness was endowed, but the reported annual total catch never exceeded at all.

Secondly, the sovereign right which must be properly exercised over the marine resources by Korea as the coastal state is denied by the joint regulation zone regime in the adjacent sea region. Namely, it is against the doctrine of United Nations Convention on the Law of the Sea not to admit the preferential right of the coastal state in this zone.

Thirdly, it became not to be practical setting limits to dragnet, purse sein and mackerel angling fishery for regulatory objective fishery in the zone. In stead of disappearing of mackerel angling fishery squid angling, trawl, stow nets, off-shore trap, and globefish long-lining fishery were remarkably activated thereafter. However these kinds of fishery are not being included among the regulatory objective fishery yet.

Fourthly, the regulatory measures of both states parties for the purpose of rational conservation and management of fishery resources in the joint regulation zone does not creat any legal binding force for a third state without its consent[19].

Under existing circumstances the rapid expansion of P.R. Chinese fishery capability brings about some serious troubles in this zone as shown in the <Table 1>.

C. Enforcement of Regulation and Jurisdiction

Exercise of the right of regulation(e.g., detention and inspection) and jurisdiction for violator outside the fishery zone including the joint regulation zone is fully based on the flag state principle. This means that the regulatory measures against the violator can only rely upon very passive methods such as mutual notification, joint patrol, mutual on-board supervision and mutual furnishment for inspectors' convenience.

This regulatory method was adopted by the insistence of Japan whose fishery capability was superior by far in comparison with Korea at the time of agreement conclusion. But 30 years passed, the fishery capability of both countries became almost even at present.

Accordingly, it is lawfull to conduct joint regulatory and flag state jurisdiction for the agreement violator because the legal status of outside the fishery zones of both countries as well as the joint

<Table 1> The recent status of violation of Korea's jurisdictional waters by P.R. Chinese fishing vessels

Year	1989	1990	1991	1992	1993	1994
Total	192	359	1,112	994	1,059	2,706
Territorial Sea	-	70	250	226	90	337
Fis. Res. Protection Line	192	289	862	768	969	2,369
Captured	-	-	-	15	17	17

(Source ; The Korean National Fisheries Administration)

19) Art. 34, Vienna Convention on the Law of Treaties of 1969.

regulation zone is defined as high sea by the law of the sea[20].

D. Legal Power of the Joint Fishery Commission

The Korea-Japan Joint Fishery Commission is a permanent organ established by the Article 6 of the 1965 Fishery Agreement to achieve the aim of Agreement. The Commission has played its role as a central organ for subjects of discussion relating the fishery agreement between two countries.

But its competence is very limited to the recommendational function without any executive power. Accordingly, the Commission was inefficient for the agreement operation such as regulatory measures in the joint regulation zone or scientific survey activities in the joint resource survey zone.

In addition to the above matters, there were a lot of issues to be solved by the 1965 Fishery Agreement system. For instance, the confronted problems were incompliance with the other party's fishery prohibition area by the both countries' fishermen, unbalanced punishment by states parties against the offenders, regulation problem in the vicinity of the South and North Korean demarcation sea areas, and reasonable search and rescue problem for the fishing vessels involved in maritime perils, etc[21].

2) Change of Circumstances for Fishery

What was the experience of both countries' fishermen affected by the post-1965 fishery regime ? A number of important developments have taken place since 1965 and occasionally threatened to destroy the stability of the bilateral fishery regime.

The first such development was the establishment of 12-mile territorial sea by both countries and of 200-mile EFZ by Japan in 1977. At the time Japan was considering extension of its fishery jurisdiction from 12 to 200 miles, fishermen in the western and southwestern parts of the country were fearful that such a move would prompt Korea and P. R. China to establish their EFZ, forcing them out of their traditional fishing grounds in their neighbors' coastal waters. Japanese fishing operations in the East Sea, East China Sea, and Yellow Sea were quite extensive compared with foreign fishing in its own coastal sea areas.

The Japanese Government had to respond to the western and southwestern Japanese

20) The same principle was accepted in the 「Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks」 which was concluded on 4 August 1995.

21) Byung-hwa Rhyu, *Northeast Asian Region and the Law of the Sea*, Jinsung-sa, 1991, pp. 105~115.

fishermen's concern. Tokyo decided to exempt, as a provisional measure, the East China Sea, the Yellow Sea, and the west of 135 degrees east longitude as well as Korean and P.R. Chinese nationals from the provisions of the 1977 law establishing the 200-mile EFZ. As a result, the 1965 Fishery Agreement upon which the 12-mile fishery zones based had practical effect only in limited areas of the sea surrounding the Tsushima Islands where both countries retained the 3-mile territorial limit[22].

Another development, which has affected and continued to affect the stability of the post-1965 bilateral fishery regime was modernization and expansion of Korean fishing activities just outside the 12-mile territorial sea of Japan. Increasing domestic food demands and coastal environmental deterioration resulting from the rapid industrialization and urbanization in Korea have forced its coastal fishery to move offshore and into distant waters in search of new fishing grounds.

The Korean coastal and offshore fishery which accounted for 87% of the total production in 1965 had dropped its share to 46% in 1993, while that of distant-water fishery increased from 1% in 1965 to 22% in 1993 as shown in the <Table 2>.

The Korean offshore fishery today comprises large and medium-sized mechanized dragnet, purse seine, and trawl fishery. These fishery, as well as Japanese fishery, that is operated in the joint regulation zones are subject to an array of constraint. Korean fishery in the zone doubled its production in the mid-1970s and have further grown, while the fish catch of Japan has gradually declined since 1976 as shown in the <Table 3>. As a rsult, the fish catch of Korea in the zone far exceeds that of Japan today.

<Table 2> Comparison of fish catch and fishery foundation by country and year

Item	Unit	Korea			Japan			Proportion(Jpn/Kor)	
		1965(A)	1993(B)	(B/A)	1965(C)	1993(D)	(D/C)	1965	1993
Total fish catch	1000M/T	636	3,336	5.2	6,908	8,666	1.3	10.9	2.6
Offshore catch	1000M/T	554	1,526	2.8	4,778	6,103	1.3	8.6	4.0
Distant-water catch	1000M/T	9	741	82.3	1,604	1,121	0.7	178.2	1.5
Portion of offshore catch	%	87	46	0.5	69	70	1.0	0.8	1.5
Number of fishing vessels	×1000	51.1	87.5	1.7	381.1	344.8	0.9	7.5	3.9
Mean tonnage of f. vessels	tons	4.0	10.5	2.6	5.7	6.2	1.1	1.4	0.6
Ratio of power-driven vessel	%	15.0	83.3	5.6	57.0	99.6	1.7	3.8	1.2
Number of dragnet		448	585	1.3	764	87	0.1	1.7	0.1
Number of fishermen	×1000	546	207	0.4	612	298	0.5	1.1	1.4

Source ; Korean Fisheries Yearbooks & Japanese Fisheries Yearbooks

22) The Korean Government is going to extend the breadth of territorial sea to the intermediate line in the sea area of Korea Strait through revision of the Territorial Sea Law of 1977.

<Table 3> **Comparison of fish catch by country in joint regulation zone** (Korea/Japan, unit ; M/T)

Year	Total catch	Large-dragnet	Medium-dragnet	Purse seine
1966	44,806 / 52,748	30,378 / 23,456	11,295 / 7051	3,133 / 22,241
1971	57,117 / 55,787	27,433 / 24,344	11,199 / 2,297	18,485 / 29,164
1976	113,781 / 52,516	38,020 / 24,541	17,458 / 2,931	58,303 / 25,044
1981	147,835 / 28,352	61,422 / 8,235	24,000 / 1,207	62,413 / 18,910
1986	148,976 / 22,774	53,940 / 5,763	1,655 / 983	93,381 / 21,028
1991	71,232 / 26,701	16,792 / 2,809	454 / 374	43,003 / 23,518
1993	86,687 / 27,322	16,317 / 3,480	122 / 197	66,646 / 23,645

Conclusion

The 1965 Fishery Agreement between Korea and Japan failed not only to perform the rational conservation and management regime of fishery resources in the agreement area but also to embrace the developing maritime jurisdiction regime such as the territorial sea regime, the EEZ or EFZ regime, the high sea and the continental shelf regime. Furthermore, by maintaining the provisional structure of agreement without any fundamental transformation for last 30 years, it suffered a severe inconsistency with the developing international law of the sea regime.

The Agreement has been maintained under the dominated circumstances of the deep-rooted national sentiments between the two countries rather than by its rational practice, for instance, the operational manner of the joint regulation zone.

In the meantime, there occurred remarkable alteration of circumstances such as the expansion of Korea's fishery capability and development of distant-water fishery, the failure of rational conservation and management on the offshore fishery resources, the introduction of advanced fishing technology and the improvement of performance of fishing vessels, the rapid expansion of P.R. China's fishery capability and the decline of Japan's fishery activities etc.

On the other hand, under existing circumstances, the offshore and coastal fishery for Korea and Japan became more important in accordance with the decline of distant-water fishery. And so far as the 1965 Fishery Agreement system is maintained, both countries, as the coastal states, have no legal competence to control the access of third parties because the legal status of the sea region outside the 12-mile fishery zone.

As we discussed above, the 1965 Fishery Agreement system contributed to the normalization of fishery relationship between Korea and Japan at the early stage. But under the altered state of affairs, no more efficiency of the system can be expected as an effective fishery resources conservation and management regime for the Northeast Asian sea region.

For these reasons, it is an appropriate opportunity for Korea and Japan to convert the existing fishery relations into modernized law of the sea regime. Namely, both countries must extend the maritime jurisdiction through establishment of the EEZ or EFZ and must exercise the rights and perform the duties for the resource management in the capacity of coastal states. Furthermore, Korea, Japan, P. R. China and Russia must set up a regional joint management organization which will perform the conservation and management role for the transboundary fish stocks in the Northeast Asian sea region, where the integrated ecosystem management is needed. And the legal basis of the regional joint management organization is the Article 63-1 of 1982 United Nations Convention on the Law of the Sea.

<요 약>

韓-日漁業關係 30년의 評價와 體制轉換의 必要性

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머 리 말

제2차 세계대전 종료와 더불어 한반도가 일본으로부터 분리 독립된 후 현재까지의 50년은 어업분야에 있어서 20년간의 敵對關係와 30년간의 協力關係로 구분된다. 1965년에 韓日漁業協定이 체결됨으로써 그 이전에 양국간에 있었던 극단적인 漁業紛爭은 일단 종식되고 외형상으로는 안정상태에 진입했던 것으로 볼 수 있다. 그럼에도 불구하고, 한일 양국은 바다를 사이에 둔 인근의 對向國家로서 어업분야의 불편한 관계가 완전히 해소된 것은 아니었다.

현행의 韓日漁業協定은 양국 관계의 역사적인 유물로서, 일본 어업세력의 일방적인 한반도 연안자원 침탈을 방지하고자 하는 것이 한국측의 목적이었고, 일본으로서는 가능한 한 한국의 漁業資源 保護線 즉 平和線을 철폐하고 넓은 公海帶를 둠으로써 어업의 자유를 누리고자 하는 것이 목적이었다. 즉, 韓日漁業協定은 원초적으로 양국간의 불평등한 어업 입지를 바탕으로 하고, 당시의 정치적인 작용에 의하여 성립된 조약이었다. 따라서, 어업질서의 유지나 어업자원의 보존관리를 통한 생산의 지속성 확보보다는 양국의 국민감정에 의하여, 법률적 타당성보다는 정치적 절충에 의하여 운영되어 온 것이 사실이다. 물론, 이 해역에 있어서의 합리적인 자원관리가 결과론적으로 성공적이지 못했다고 해서 이 협정이 양국의 수산업 발전에 기여한 바를 과소 평가하거나 부정하는 것은 아니다.

1965년 韓日漁業協定이 체결될 당시는 1958년의 海洋法에 관한 제네바 협약 체제하에서 3～12해리의 領海와 公海의 2원적 체제로 해양이 관리되던 시기였지만, 30년 후인 현재는 유엔 海洋法協約의 성립에 따라 12해리 領海-200해리 EEZ-公海의 3원적 체제로 전환됨과 동시에, 公海漁業 自由의 근본적 변질, 어업자원의 심각한 감소, 한-중-일 3국의 어업능력의 현저한 상대적 변화와 같은 韓日漁業協定 체제 내외적인 중대한 사정의 변경이 생겼다. 따라서, 1965년의 韓日漁業協定은 상당 부분 현실과 괴리되는 결과가 초래되었을 뿐만 아니라, 특히 이들 동북아 3국은 1980년대 중반 이후부터 국제적으로 公海漁業이 위축됨으로써 沿近海漁業을 더욱 중요시하지 않을 수 없게 되었다.

한편, 현시점에서 한일 양국간의 어업관계를 現實國際法에 비추어 재정립하는 것은 동북아 海洋法秩序 개편의 기초가 됨과 동시에, 이 지역의 고갈된 어업자원을 회복하고 보존하는 데 있어서 필수적인 절차가 아닐 수 없다. 그렇기 때문에 기존의 韓日漁業協定의 효용성을 검증하고 필요하다면 그것의 대체체제로의 전환을 신중하게 검토하여야 할 시점이라고 판단된다.

韓日漁業關係 30년의 評價

1) 國際法發展에의 對應未備

韓日漁業協定 성립의 중요한 국제법적 배경은 1958년과 1960년에 개최되었던 제1차 및 제2차 유엔 海洋法會議였다. 12해리 漁業專管水域制度를 채택한 것은 그 회의의 간접적인 영향을 받았던 것으로 볼 수 있지만, 1973년부터 진행된 제3차 유엔 海洋法會議와 그 이후의 海洋法 발전 추세는 수용하지 못하였다.

① 漁業專管水域의 意味喪失

협정 제1조는 양 당사국에게 領海基線으로부터 12해리까지 어업 관할권을 배타적으로 행사할 수 있는 漁業專管水域 設定權을 인정하였다. 양 당사국은 이 수역 내에서의 漁業權은 자국 어민을 위해서만 유보할 수 있고, 그 권리를 침해한 타방 어선에 대해서는 연안국이 단속 및 재판 관할권을 행사한다.

直線基線을 채용하는 경우에는 그에 관하여 타방 당사국과 협의하여야 한다고 규정하고 있는데(협약 제1조 1항), 한국은 일본과의 「直線基線에 관한 交換公文」을 통하여 서해안, 남해안 일대와 동해안의 울산만, 영일만에 直線基線을 채용하였다. 그러나 제주도 주변의 直線基線 채용 문제는 합의하지 못하여 韓國 漁業專管水域의 외측 한계선만 표시하기로 하였다. 하지만, 直線基線 채용시에 이해 당사국과의 협의의무 규정은 유엔 海洋法協約上 근거가 없고, 국가의 일방적 행위에 의하여 直線基線을 설정할 수 있기 때문에 交換公文上의 이 규정은 마땅히 무효화되어야 한다.

그 후 한국과 일본은 1977년에 각각 領海法을 제정하여 12해리 폭의 영해를 갖게 되었기 때문에 12해리 漁業專管水域의 실익이나 특별한 의미는 상실하였다. 그 뿐만 아니라, 유엔 海洋法協約上의 EEZ(排他的 經濟水域)의 법적 지위가 EFZ(排他的 漁業水域)의 그것보다 더 광범위하면서 폭도 200해리로까지 확장되었기 때문에 韓日漁業協定上의 12해리 漁業專管水域은 시대에 뒤떨어진 것이다.

② 共同規制水域制度의 矛盾

협정은 漁業專管水域 외측에 共同規制水域을 설정하고(제2조), 그 수역에서의 어업자원의 지속적인 생산성 확보를 위하여 잠정적인 어업규제 조치를 시행할 것을 규정하였다(제3조).

협정의 부속서가 규정하는 규제조치의 내용은 최고 출어 척수의 제한, 어선 규모와 망목의 제한, 선망어선 집어등의 광력 제한, 연간 총어획 기준량 제한, 어선의 표지 등이다. 合議議事錄에서는 共同規制水域 내에서의 저인망, 선망, 고등어 낚시어업의 연간 총어획 기준량의 상한선을 각 당사국에 대하여 15만 톤으로 하였다. 이와 같은 제도가 갖는 모순점은 다음과 같다.

첫째, 과거 30년간 協定水域에서의 자원량 변동, 어구 어법과 어선 성능의 획기적인 발전이 있었음에도 불구하고, 국가별 총어획 기준량은 고정되어 있었다. 그 뿐만 아니라, 총어획량 규제 방식은 현실적으로 합리적인 자원 보존관리 방식이 되지 못하며, 어종별 자원관리 방식을 채택하고 있는 유엔 海洋法協

約의 이념과도 합치되지 않는다.

둘째, 연안국인 한국이 마땅히 행사해야 할 해양자원에 대한 主權的 權利는 共同規制水域制度에 의하여 부정되고 있다. 즉, 共同規制水域에서의 총어획 기준량을 배분함에 있어서 연안국의 우선권을 인정하지 않은 것은 유엔 海洋法協約의 기본 이념에 위배된다. 그 뿐만 아니라, 황해에 있어서 비연안국인 일본에게 권원을 부여한 것은 現代海洋法原則에 비추어 원인 무효이다.

셋째, 규제 대상 어업을 기선 저인망, 선망, 고등어 낚시어업으로 한정한 것은 현실성이 없게 되었다. 현재 고등어 낚시어업은 행하지도 않는 대신, 새로이 활성화된 오징어 채낚기 어업, 근해 트롤어업, 게통발어업, 복어 연승어업 등은 규제의 대상에서 원천적으로 제외되어 있다. 그러므로 자원에 대한 파괴작용이 심한 어법에 대한 규제가 우선적으로 강화되어야 한다. 그 뿐만 아니라, 協定水域 밖의 公海水域은 어장의 성질상 그 안쪽의 자원과 밀접한 관련성이 있음에도 불구하고, 지나치게 방치되는 결과를 초래하였다.

넷째, 어업자원의 합리적인 보존관리를 위하여 양국이 준수하는 共同規制水域에서의 규제조치는 비당사국인 제3국에게는 법적 효력이 없다. 이것은 중국의 어업세력이 급속히 팽창한 현재에 와서는 중대한 문제로 대두되었다. 이 문제를 해결하기 위하여는 동북아 해역에 EEZ 또는 EFZ 제도를 전면 시행하고, 동시에 한-중-일 3국이 境界往來資源(transboundary fish stocks)의 공동관리를 위한 지역기구를 창설하여야 한다.

③ 團束 및 裁判管轄權의 行使問題

共同規制水域을 포함하여 漁業專管水域 외측에서의 범칙어선에 대한 단속(정선, 임검 등)과 재판 관할권 행사는 船籍國主義原則에 의한다(협정 제4조). 즉, 규제조치 위반에 대하여는 상호 통보, 합동 순시, 상호 승선 감시, 단속 상황 시찰 편의 제공과 같은 매우 소극적인 방법에만 의존할 수 밖에 없다. 이것은 협정 체결 당시 어업세력이 월등히 우월했던 일본의 주장에 의하여 합의된 것이지만, 30년 후인 현재는 양국간의 어업세력이 거의 대등해짐으로써 발생된 문제이다. 그러나 共同規制水域은 물론이고, 양국 漁業專管水域 외측 바다의 법적 지위는 海洋法上 公海이므로, 범칙어선에 대하여는 적극적인 공동단속 방식으로 전환하고, 재판권은 船籍國이 행사하는 것이 마땅하다. 그러나 이 문제는 EEZ 또는 EFZ 체제로 전환함으로써 완전히 해소될 수 있다.

④ 漁業共同委員會 運營의 硬直性

韓日漁業共同委員會는 협정에 명시된 목적을 달성하기 위하여 협정 제6조에 의하여 설치된 상설기관이다. 이 위원회는 양국간의 어업협정에 관련되는 협의를 위한 중심 기구로서의 역할을 해 왔다. 그러나 이 위원회가 갖는 법적 권능은 집행력 없이 권고적 기능만 갖는 매우 한정적인 것이기 때문에 共同規制水域에서의 규제조치나 共同調査水域에서의 활동과 같은 협정 운영에 있어서 효율적이지 못했다는 평가를 받고 있다.

2) 兩國의 漁業能力과 基盤의 變化

본문의 <Table 2>는 양국의 어획량과 어업 기반이 30년간 변화한 내용을 비교한 것이고, <Table 3>은 共同規制水域 내에서의 양국의 연도별 어획량을 5년 간격으로 비교한 것이다. 이들 표에 나타난 양국의 어업 능력과 기반의 변화 내용을 요약하면 다음과 같다.

① 30년간 한국의 총어획량은 5.2배 증가한 반면, 일본의 총어획량은 1.3배 증가에 그쳤으며, 1965년 일본의 총어획량이 한국의 10.9배였으나, 1993년에는 2.6배로 그 격차가 좁혀졌다.

② 한국의 연근해어업 생산량은 2.8배 증가하였고, 일본은 1.3배 증가하였다. 또한, 원양어업 생산량은 한국이 82.3배 증가한 반면에, 일본은 오히려 0.7배로 감소하였다. 따라서, 연근해어업 생산량이 총어획량에서 차지하는 비율은 한국에서 0.5배로 감소한 대신, 일본은 변화가 없었다.

③ 어선의 척수, 평균 톤수, 동력화율에 있어서 한국은 각각 1.7배, 2.6배, 5.6배로 증가하였으나, 일본은 각각 0.9배, 1.1배, 1.7배로 큰 변화가 없었다. 특히, 기선 저인망어선의 수에 있어서 한국은 1.3배로 약간 증가한 반면에, 일본은 0.1배로 엄청난 감소 현상을 보인 것은 어업자원의 관리와 관련하여 큰 의미를 부여할 수 있다. 그리고 어업인의 수가 각각 절반으로 감소한 것은 양국의 공통된 현상이다.

④ 共同規制水域 내에서의 양국의 총어획량을 비교해 보면 한국은 2배 정도 증가한 반면에, 일본은 절반 정도로 감소함으로써 대조를 이루고 있다.

맺 음 말

1965년에 체결된 韓日漁業協定은 그 시행과정에서 領海制度, EEZ 및 大陸棚制度, 公海 및 深海底制度와 같은 발전적인 海洋管轄制度와 수산자원의 합리적인 保存管理制度를 수용하지 못한채, 30년간 변형 없이 존속됨으로써 現代海洋法制度와 심각한 괴리가 생겼다. 그리고 共同管理水域의 운영과 같은 협약의 전반적인 운영면에서 합리성보다는 국민감정과 정치논리가 지배하는 형태로 유지되어 왔다. 그러한 과정에서 어업자원의 현저한 감소, 새로운 어법의 도입 및 어선 성능의 개선과 같은 수산업 기반의 변화, 한국과 중국의 어업세력 확장, 일본의 어업세력 위축 등의 근본적인 사정의 변경이 있었다. 이와 같이 韓日漁業協定 체제가 양국간의 어업관계를 정상화하고 초기의 어업 발전에는 기여했지만, 사정이 변경된 현재에 와서는 동북아 해역의 수산자원 보존관리 체제로서 그 효율성을 더 이상 기대할 수 없게 되었다. 따라서, 다음과 같은 두 가지 海洋法上의 해법이 제시될 수 있다.

첫째, 유엔 海洋法協約은 모든 당사국에 대하여 EEZ 설정 의무를 부과하고 있지는 않으므로 한일 양국이 협약에 가입하더라도 韓日漁業協定과 유엔 海洋法協約은 양립할 수 있다. 즉, 韓日漁業協定에 의해 발생하는 당사국의 권리와 의무는 海洋法에 의하여 변경되지 않는다. 그러므로, 양 당사국이 협정을 종료시킬 의사가 없는 한 이 협정은 海洋法協約과는 독립적으로 존속될 수 있다. 따라서, 현재의 韓日漁業協定體制를 부분적으로 개정하여 그대로 존속시키는 것도 하나의 방안이 될 수 있다. 그러나 이것은

현실을 무시한 소극적인 대안일 수 밖에 없다.

둘째, 현행 漁業協定體制의 효율성을 더 이상 기대할 수 없기 때문에 그 대안은 現代海洋法體制로 전환하는 것이다. 즉, 현행 韓日漁業協定을 폐기하고, EEZ 또는 EFZ를 선포함으로써 海洋管轄權을 확대함과 동시에 海洋法上 연안국의 권리와 의무를 충실히 이행하여야 한다. 이와 같은 海洋管轄體制 전환의 필요성은 현재와 같이 양국 사이의 바다에 公海帶를 두고 韓日漁業協定體制를 유지한다면, 제3국의 입어에 대한 통제가 불가능하다. 특히, 한국으로서는 遠洋漁業의 퇴조에 따라 沿近海漁業의 중요성이 더욱 커졌기 때문에, 沿近海漁業의 구조 변화에 있어서 기본 틀이 되는 韓日漁業協定體制의 존폐 문제를 신중하게 검토할 필요가 있다. 그리고 한-중-일 3국이 주관하는 資源管理機構를 설립하여 그 기구로 하여금 境界往來資源의 관리 임무를 수행하게 하는 방안을 강구하여야 한다.

결론으로서, 현재 세계 각 연안국들은 海洋法이 인정하는 연안국의 권리 행사에 만족하지 않고, 公海로까지 그 권리를 확대하고자 하는 노력을 경주하고 있지만, 한국은 영해에 인접한 해양에 대한 기본적인 권리의 행사마저도 소홀히 하고 있는 것이 아닌가 의심스럽다. 이는 한-일, 한-중 관계의 정치적 지리적 특수성 때문이기도 하지만, 現實國際法과 부합되지 않는 韓日漁業協定體制의 존재도 큰 저해 요인인 것으로 볼 수 있다. 遠洋漁業國으로 발전해 온 한국은 원래 연안국이기 때문에 연안국으로서의 권리행사와 의무이행에 충실해야 한다는 국제사회의 법감정에도 주목하지 않으면 안된다. 따라서, 韓日漁業協定을 폐기하고 海洋管轄權의 확대를 도모하기 위한 작업에 착수할 것과 이를 공론화할 것을 제의하는 바이다.