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Author(s): Lee Whiejin

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# THE LAW OF THE SEA REGIME IN NORTHEAST ASIA : ISSUES AND THE WAY FORWARD

## Lee Whiejin

Whiejin Lee graduated from Korea University with BA in Public Administration, and also from Michigan State University with BA in Politics. He received his MA in Law from Seoul National University. He worked as Deputy Director-General in the Treaties Bureau, the Ministry of Foreign Affairs of the Republic of Korea and was seconded to the Supreme Court as advisor on international issues. He served as Ambassador to Papua New Guinea and Consul-General in Sydney. He has published books on diplomacy such as *A Reflection on Life in Diplomacy, Korea and Major Issues in International Law* etc. He lectured at Yeungnam University and Gyeongsang National University.

## Abstract

Reflecting upon the desire to expand the jurisdiction in the sea, the UNCLOS introduced and established the exclusive economic zone, new continental shelf system, and archipelagic waters and agreed upon the width of the territorial sea. In addition, compulsory settlement of international maritime disputes has gone into effect.

Northeast Asian states such as Korea, China, and Japan enacted domestic laws and ratified the Convention in 1996. They concluded fisheries agreements, establishing a tentative legal order on fishery. There remains the task of effecting delimitation at sea. The delimitation does not seem to be feasible over a short term, with such big hurdles as method of baseline and possession of island issue.

Since in the Yellow Sea no delimitation is in effect yet, Chinese vessels' overfishing poses problems to the Korean economic zone. In the East Sea, the Southern Continental Shelf Joint Development Agreement is scheduled to expire in 2028 unless extension is made. Possible conflict seems to be in the offing in East China Sea around the development of natural resources and it may flare up further if endowment of resources is apparent. While continuously ascertaining the position of other states through maritime negotiations and making adjustment to their positions to be consistent with the practice, jurisprudence and the provisions of the Convention, an agreement is necessary to be reached. On occasion, political breakthrough needs to be made through decisions made at the highest level.

**Key words:** Convention on the Law of the Sea(UNCLOS), Exclusive Economic Zone(EEZ), Continental Shelf, Delimitation, Territorial Sea, Sovereignty

## INTRODUCTION

The UN Convention on the Law of the Sea(hereinafter "UNCLOS" or "the Convention")<sup>1</sup>, following 9 years of negotiations in the 3rd

<sup>1</sup> The Convention entered into force on November 16, 1994 and has 168 states as members as of November 2017. The Convention is composed of preamble, the main text of 320 articles, and 9 annexes.

[http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)#The United Nations Convention on the Law of the Sea

UN conference on the law of the sea which started in 1973, was adopted in 1982 and entered into force in 1994, when the requirement of 60 ratifications was met. The Convention is without doubt the most important source of the international law of the sea, though by no means the only source.<sup>2</sup> As a Magna Carta on the regulation of international maritime order enshrining customs and new maritime system, the UNCLOS became a big achievement for the codification of maritime issues.

Making adjustment and compromise on diverse interests and customs among coastal and maritime states, land-locked and coastal states, developing and advanced states, and archipelagic states, the UNCLOS reached an agreement reflecting the desires of coastal states to extend their jurisdiction over the sea. Due to developed states' non-cooperation and inattention, negative mood was once formed during the conference, which was ultimately overcome by the desire and effort of states concerned and conference leaders. The implementing agreement on the development of deep sea in part XI of the UNCLOS was concluded in 1994, showing compromise between advanced and developing states, which became a bright sign for the inauguration of the UNCLOS.

The UNCLOS introduced new maritime systems and left some clauses ambiguous as a result of compromise. The Convention will become clearer in its contents through subsequent customs and court jurisprudence.

This article outlines the main contents and features of the Convention and examines the current situation and the way forward for the formation of a new maritime regime in North East Asia. Talks have been held over the past 20 years or so among the concerned states in North East Asia for the delimitation of sea area, which is

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<sup>2</sup> Robin Churchill, "The 1982 United Nations Convention on the Law of the Sea", in Donald Rothwell, Alex Elferink, Karen Scott and Tim Stephens, *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p.24.

semi-closed. It is not likely to reach a solution to the delimitation in the near future over the issue of baseline and possession of islands. Tentative fisheries agreements were reached, sidestepping these intractable problems. On the part of Korea, due to overfishing and infiltration into Korean economic zone by Chinese fishing vessels, it is urgently necessary to effect the delimitation in the Yellow Sea. In the end maritime governance will be touched upon for the environmental protection of the sea and sustainable management of its resources.

## THE MAIN FEATURE AND TASK OF THE UNCLOS

### *The Main Feature of the UNCLOS*

The main feature of the UNCLOS is to establish a new system to meet the demand for expansion of jurisdiction for control of states over the sea and create a system of dispute settlement to the maritime issues. In conventional theory, the jurisdiction over the sea has been quite narrow under the influence of the argument made by H. Grotius who advocated that the resources in the sea are inexhaustible, and the sea is not subject to appropriation, and should be open to the freedom of navigation. However, with the development of science and technology and entailed stronger control over the sea, the validity of his argument has been mitigated except for the use of the sea for navigation. A new regime has been established for the expansion of jurisdiction of states.

The width of the territorial sea has been outstanding for a long period of time and finally the UNCLOS has decided upon 12 nautical miles for its width. Based upon the cannon-shot rule the 3 mile width has been dominant at the beginning of the law of the sea, in the belief that the territorial sea is as far as the control of a state.

As maritime transport developed, the width of the territorial sea has widened to satisfy the demand of a state to expand its control. In modern times more states claimed 6 mile or 12 mile width. In the third UN conference on the law of the sea, the agreement was reached on the 12 mile width of territorial sea following the failed attempts in the two previous UN conferences.<sup>3</sup> Article 3 of the UNCLOS enshrines: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." This agreement is linked to assurances of navigational rights and of coastal state control over resources and marine scientific research in the EEZ.<sup>4</sup>

Previously the sea was divided into the territorial sea and the high seas. Accommodating the claim of coastal states' jurisdiction over the maritime resources, the 200 mile exclusive economic zone (EEZ) was created enabling states to exploit, develop and conserve the living resources of the sea. The discussion of the economic zone in other previous international meetings led to its establishment in the 3rd UN conference as a result, to satisfy the demand for the development of natural resources at sea. Article 55 of the UNCLOS defines the EEZ as 'an area beyond and adjacent to the territorial sea, subject to the specific legal regime applicable to the coastal state and to other states, and provided for by the relevant provisions of the Convention'. Under article 56 of the UNCLOS, the coastal state has sovereign rights over living and non-living resources of the EEZ, as well as over other activities connected with the exploration and economic exploitation of the zone, and jurisdictional rights over the establishment and use of artificial islands, installations and

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<sup>3</sup> Neither the 1930 Hague Codification Conference nor the 1958 1st UN Conference on the Law of the Sea could reach an agreement on the breadth of the territorial sea. The 2nd UN Conference on the Law of the Sea failed by one vote to settle the issue.

<sup>4</sup> John Noyes, "The Territorial Sea and Contiguous Zone", in Donald Rothwell et al., *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p.94.

structure and scientific research, and the protection of the marine environment. Article 58 envisages the freedom of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea connected with the freedom of navigation and overflight. The controversial nature of the EEZ was well known to the drafters of the Convention.<sup>5</sup>

The seabed and subsoil beyond the outer edge of the continental shelf is under no jurisdiction of any state and is considered as a common heritage of mankind. Deep-seabed resources management regime was established for the management of the deep-seabed resources by the international community. The development of deep-seabed caused dispute between developing and developed states, becoming a big hurdle to the smooth creation of the Convention. The hurdle was removed by the conclusion of the implementing agreement on the development of deep-seabed resources in 1994. The UNCLOS provided for the use of the benefit arising from joint development of resources such as manganese nodule deposited in the deep-seabed in the interest of all mankind. It was decided in this way in consideration of the nature of the deep-seabed as common heritage of mankind, not to put its development at the mercy of developed states.<sup>6</sup>

In the international straits, transit passage was established in the Convention, making channel for maritime navigation. In the 3rd UN conference, the interest of coastal states collided with that of the maritime states concerning the transit passage. As the width of territorial sea expands up to 12 nautical miles, along with the introduction of the EEZ, the maritime states have endeavored to establish

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<sup>5</sup> The juridical character of the EEZ is controversial and divergent between the maritime states and coastal states. The United States and other maritime states claim that the EEZ is considered the high seas, while China and coastal states assert the *sui generis* character of the EEZ.

<sup>6</sup> Andrew Clapham, *Brierly's Law of Nations* (7<sup>th</sup> edition), Oxford University Press, 2012, pp.198-200.

free transit passage in the international waterway. The transit passage is provided for in articles 37 to 44 of the Convention. All ships and aircraft enjoy the right of transit passage, which shall not be impeded, for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The right of transit passage should be exercised solely for the purpose of continuous and expeditious transit of the strait. The transit passage accords the rights similar to the freedom of navigation on the high seas to vessels except for the conditions of continuous and expeditious transit.<sup>7</sup>

In consideration of archipelagic states' interest the archipelagic waters were introduced. The archipelagic waters in Part IV of the UNCLOS were a significant innovation in the law of the sea. The development of this regime was shaped by the exclusive interests of the archipelagic states which desired control over interconnecting waters surrounding their insular territory for historical, economic, and security reasons, and the inclusive interest of the maritime powers, which wanted to preserve maritime mobility through such waters.<sup>8</sup> The juridical nature of the waters within archipelagic baselines was a major issue in the 3rd UN conference. The debate centered on whether the waters enclosed within archipelagic baselines were more akin to internal waters or territorial sea. As a compromise, a new term 'archipelagic waters' emerged. Article 49 of the Convention provides that "the sovereignty of an archipelagic state extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast." This sovereignty extends to the air space above archipelagic waters as well as their seabed and subsoil, and the resources contained therein.

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<sup>7</sup> E. D. Brown, *The International Law of the Sea*, Vol. 1, Dartmouth Publishing Co. 1994, p.89.

<sup>8</sup> Tara Davenport, "The Archipelagic Regime", in Donald Rothwell et al., *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p.134.

The Convention provides for the conservation and protection of the maritime environment, imposing obligation upon the states to protect the sea from oil pollution.<sup>9</sup> Provisions relating to the protection of maritime environment remained in the realm of soft law, being recommendatory and thus having no imposition of duty and sanctions. With its character being changed from soft to hard law, the degree of state's obligation is strengthened.

Another characteristic noticeable in the birth of the UNCLOS is the establishment of compulsory dispute settlement system on the interpretation and application of the Convention. International Tribunal for the Law of the Sea (ITLOS) is to exercise compulsory jurisdiction in the dispute under article 286<sup>10</sup> of the Convention except for article 297 (limitation of application) and article 298 (optional exception).<sup>11</sup> ITLOS which decides upon the jurisdiction of the case tends to exercise its jurisdiction actively.

### *Task of the Convention*

In reaching agreements among diverse interested states the provisions of the Convention became in part ambiguous in the meaning, making it difficult to become a concrete standard to settle disputes while interpreting and applying the Convention. In a sense, it is understandable to reach a compromise, and the formation of custom and terms of reference through court ruling and state practice over time is expected to sort out the problems.

Hereby the main issues will be outlined in brief.

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<sup>9</sup> Lee Hanki, *Lecture on International Law*, Parkyoungsa, 1992, pp.378-379.

<sup>10</sup> Article 286 of the Convention states: Any dispute concerning the interpretation or application of this Convention shall be submitted at the request of any party to the dispute to the court of tribunal having jurisdiction.

<sup>11</sup> Bernard Oxman, "Court and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals", in Donald Rothwell et al., *The Oxford Handbook of the Law of the Sea*, Oxford University Press 2015, pp.403-407.

### *Expansion of Jurisdiction: Width of Territorial Sea, Island Dispute, EEZ and Continental Shelf*

The Convention provides for the maximum 12 miles for the width of territorial sea, establishing an international standard for the extent of national jurisdiction in the territorial sea. The coastal state exercises sovereign jurisdiction over the territorial sea, whose character is restricted compared with the right over the internal sea. The vessels of other states enjoy right of innocent passage in the territorial sea. The right of coastal states is called sovereign jurisdiction, not sovereignty in consideration of this restriction. From the outer limit of territorial sea, contiguous zone is to be established for a length of 12 miles to protect the interest of immigration, customs and sanitary purpose. About the baseline the Convention provides for normal baseline and straight baseline,<sup>12</sup> which fails to suggest a clear standard. In practice baselines quite far from the coast have been drawn, causing controversy. In principle, the drawing of baseline is in the realm of sovereignty of each state. But this right should be exercised within reasonable limits in accordance with the principle of international law, so as not to prejudice the interests of other states. However, the reality is that many states have tended to draw straight baselines to expand the jurisdiction of sea area, making an arbitrary interpretation of provisions of the Convention.<sup>13</sup>

As the domination over the sea increases, states tend to show more interest in islands beyond the jurisdiction, leading to growing dispute

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<sup>12</sup> The Convention, article 5, provides for normal baseline for measuring the breadth of the territorial sea which is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state. In the Anglo-Norwegian Fisheries Case in 1951, the ICJ handed down the ruling that the method of straight baseline may be employed in localities where the coastline is deeply indented and cut into, or there is a fringe of islands along the coast. The article 7 of the Convention provides for straight baseline following the ICJ ruling. Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> edition, Oxford University Press 1998, pp.180-184.

<sup>13</sup> Ashley Roach and Robert Smith, "Straight Baselines: The Need for a Universally Applied Norm", *Ocean Development and International Law*, Vol. 31, 2000, pp.47-48.

about the possession of islands. Under article 121 on islands, the Convention in paragraph 3 states that rocks which cannot sustain human habitation or economic life of their own shall not be entitled to economic zone or continental shelf. Because of difference in their position or opinion, dispute tends to increase on the nature of islands or rocks. Most states declare the status of islands even in case of rocks in order to have entitlement of economic zone and continental shelf. A landmark decision concerning this issue was taken by the arbitration court on the South China Sea case in 2016.<sup>14</sup>

With the expansion of jurisdiction over the sea, delimitation emerges as a difficult issue. Among court proceedings over the maritime case, delimitation stands out clearly. The Convention, in article 76, suggests the outer limit of continental shelf. The product of a compromise in the wake of long discussion brings about problems. The coastal state is entitled to the continental shelf as far as 350 mile beyond the conventional 200 mile limit as its outer edge. For the delimitation of economic zone and continental shelf the Convention states in articles 74 and 83 that the issue shall be settled in accordance with the treaty and custom mentioned in article 38 of ICJ Statute. In this regard the provision does not suggest a clear guideline for the delimitation.

The decision of the ICJ in the 1969 North Sea Continental Shelf case was based upon the natural prolongation of land territory and the ICJ later changed its position to equidistance principle in the subsequent decisions like 1985 Libya-Malta Continental Shelf case and 1993 Greenland-Jan Mayan Continental Shelf case.<sup>15</sup> With article 76 of the Convention being based upon the concept of natural

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<sup>14</sup> In its award on South China Sea case on July 12, 2016 the Permanent Court of Arbitration finds that maritime features occupied by China are rocks that shall not generate entitlement to exclusive economic zone or continental shelf.  
<https://pcacases.com/web/sendAttach/2086>

<sup>15</sup> Malcolm Evans, "Maritime Boundary Delimitation", in Donald Rothwell, *The Oxford Handbook of the Law of the Sea*, Oxford University Press 2015, pp.263-266.

prolongation of land territory, the gap between court ruling and convention needs to be bridged.

### *Transit Passage*

In straits important for international navigation the coastal state's jurisdiction is restricted. The freedom of navigation is permitted in international straits for vessels. Under article 39 of the Convention, ships engaged in transit passage have certain duties reflective of some elements of innocent passage. They include the requirement to proceed without delay, to refrain from any use or threat of force against the sovereignty, territorial integrity, or political independence of the strait state or in any other manner in violation of principles of international law or refrain from activities other than those which are incidental to their normal mode of transit. Article 44 makes clear that strait states are not to hamper transit passage and are to give appropriate notification of any dangers to navigation within or over the strait of which they may be aware, which would extend to cases of shipwreck blocking parts of the strait.

The ability of warship to exercise navigational rights through international straits has been controversial. Some states demand that consent be obtained prior to transit taking place. The Convention does not differentiate between the rights of warships and the rights of merchant vessels exercising transit passage, and article 39 provides that warships engaged in transit passage are bound by the same constraint as merchant vessels.<sup>16</sup> Without any explicit clause on nuclear-powered vessel it is arguable whether nuclear ships are allowed to sail underwater. Articles 38 and 39 of the Convention do not provide for underwater sailing. Being a result of compromise of diverse, conflicting interests of states, the transit passage regime of

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<sup>16</sup> Donald Rothwell, "International Straits", in Donald Rothwell, *The Oxford Handbook of the Law of the Sea*, Oxford University Press 2015, p.128.

the Convention poses difficult problems in its interpretation.

### *Development and Conservation of Marine Living Resources*

The exclusive economic zone was established to meet the demand of coastal states for the expansion of jurisdiction over the marine living resources. The economic zone provides the entitlement to the coastal states to exercise the jurisdiction over fishing without prejudicing the freedom of navigation. Since the fishery resources remain mainly inside the economic zone, straddling into the high seas, overfishing outside the economic zone will make the sustainability of fishery difficult. Article 63, paragraph 2 of the Convention provides for the endeavor to agree upon necessary measures between the coastal states and high seas fishing states for the conservation of straddling fish stocks. The examples of the agreement reached accordingly are "Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries(1978 NAFO Convention), "Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries(1980 NEAF Convention), "International Convention for the Conservation and Management of Alaska Pollack Resources in the Central Bering Sea(1994)". Article 64 of the Convention provides similarly for highly migratory fish stocks. The nature of these provisions are declaratory about the duty of coastal and high seas fishing states jointly to strive to agree on the cooperative measures necessary for the conservation and management of fishery resources.

Following these agreements, which brought about overfishing as the result of technology development and investment increase in fishery, the necessity for sustainable management and conservation of marine resources was recognized. After the 1992 Rio Environment and Development Conference urged the necessity for relevant codification, a high seas fishing meeting was held, which adopted the Implementing Agreement for the Conservation of Living Resources

on the High Seas<sup>17</sup> on August 4, 1995, which entered into force on December 11, 2001. The problem of the Agreement is that the parties are not legion and the establishment of regional fishery organizations encouraged by the agreement is not viable.

### *Operation of Maritime Dispute Settlement Organization*

Providing a venue for the judicial settlement of international dispute is a great achievement, by establishing compulsory jurisdiction on the interpretation and application of law of the sea through the International Tribunal for the Law of the Sea (ITLOS). Conventionally, two methods like ICJ and international arbitration have been used for the judicial settlement of international dispute. Multiplication of international judicial organs through the creation of ITLOS, International Criminal Court and so on will bring about the fraction of international law in one view<sup>18</sup> while opposite view<sup>19</sup> argues that the phenomena make for the favorable conditions for the development of international law and dispute settlement.

In a sense, we cannot help the creation of other dispute settlement organs in other field along with the making of laws in international society. Its positive role in the development of international law is expected through the accumulation of practices of settling disputes by law. On the other hand, unlike domestic court proceedings international court will have problems in securing uniform application of international law if other courts render different rulings with different interpretation and application. The typical case

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<sup>17</sup> The formal name of the implement agreement is; "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.

<sup>18</sup> Shigeru Oda, "The International Court of Justice viewed from the Bench, 1976-1993", 244 *Recueil des Cours* 9, 144-55, (1993).

<sup>19</sup> Jonathan Charney, "The Implication of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", 90 *AJIL* (1996), 69-75.

is the European Union. The legal order of the EU has evolved the framework of international law estranged from existing international order as the result of independent development within the system of EU Court of Justice.<sup>20</sup>

Another issue results from having no hierarchical structure in the judicial organs. As each international court has final say in its own case, it will be necessary to arrange a uniform approach system for similar cases through the establishment of hierarchical structure like domestic courts. At the moment the collision of jurisdictions among different international courts and the incompetent rulings of some courts have not evolved to a serious extent. Against the rainy day of worsening circumstances of jurisdictional collision or incompetent judicial rulings some possible solution needs to be worked out-e.g. giving the authority of final decision to the ICJ. For that it naturally requires the amendment to the UN Charter and ICJ Statute.

## MARITIME REGIME IN NORTHEAST ASIA

After the completion of domestic procedure for its ratification, the Convention came into force in 1996 in three countries in Northeast Asia: Korea, China and Japan. The three countries enacted domestic laws<sup>21</sup> which included the establishment of baseline and exclusive economic zone to enforce the Convention.

The delimitation of the sea area among opposite or adjacent states will be desirable following the implementation of UNCLOS system

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<sup>20</sup> Pierre-Marie Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice", 31 *International Law and Politics*, 1999, p.797.

<sup>21</sup> Korea ratified the UNCLOS on January 29, 1996 and has enforced the EEZ Act on September 10, 1996. Japan, having ratified the Convention on June 20, 1996, has enforced the Act on EEZ and Continental Shelf on July 20, 1996. Having ratified the Convention on June 7, 1996, China has enforced the PRC's Act on EEZ and Continental Shelf on June 26, 1998.

allowing for the extended appropriation of the sea. Considering that the delimitation would be hard to be effected in a short period of time due to conflicting opinions concerning the baseline methods and delimitation, tentative fisheries agreements were concluded to manage and regulate the fishing order. This article examines major pending issues in Northeast Asia including delimitation, island dispute, fisheries agreements, outer limit of continental shelf, and maritime governance.

### ***Fisheries Agreement***

The three countries in Northeast Asia are opposite each other across the East Sea, Yellow Sea and East China Sea of less than 400 miles in width. While negotiations have been underway among three countries on the delimitation, they above all reached fisheries agreements to manage and regulate a new fishery order.

On September 24, 1998, the fisheries agreement was reached between Korea and Japan, replacing the 1965 fisheries agreement, and entered into force on January 22, 1999. Both state parties agreed to maintain close contacts and cooperation to take appropriate measures concerning the maritime safety and smooth management of maritime accidents.<sup>22</sup> It was decided to establish a Korea-Japan Joint Fisheries Committee composed of experts of both countries, whose function is to make recommendations concerning permission of fishing and make decisions on conservation and management of maritime living resources in the sea to the south of Jeju Island.<sup>23</sup>

The fisheries agreement established middle zones/intermediate zones in the East Sea where the fishery would be managed by the principle of nationality(flag state), and joint management zone for the sea to the south of Jeju Island is established to evade the intractable delimitation.

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<sup>22</sup> Korea-Japan Fisheries Agreement, article 11.

<sup>23</sup> Korea-Japan Fisheries Agreement, article 12.

The interim fisheries agreements skirt the decision on the possession of islands or delimitation of economic zone and continental shelf. Korea-Japan fisheries agreement was concluded evading the Dokdo issue by establishing the middle zone around the Dokdo. The middle zone was established to evade the issue of delimitation and manage the fishery resources with priority. The middle zone is a sort of tentatively established, joint fishing zone referred to in article 7 of the Convention.<sup>24</sup> In the middle zone each party is not allowed to enact its own laws and regulations to the people and vessels of the other party, and in accordance with the advice of the Korea-Japan Joint Fisheries Committee each party should take relevant resource conservation measures including allotment of the number of fishing vessels, which should be notified to the other party. It is the same with the joint management zone to the south of Jeju Island, in which laws and regulations of one party is not to be enacted to the people and vessels of the other party and resource management measures should be taken in accordance with the advice of the Korea-Japan Joint Fisheries Committee. Critical opinion was expressed about the establishment of middle zone in which Dokdo was placed, stating that it would prejudice the integrity of Dokdo possession by Korea. Their argument was that placing of Dokdo in the middle zone could be construed as Dokdo under the condominium of the two countries.<sup>25</sup>

In circumstances where it would be difficult to effect delimitation with China in a short period of time due to China's drawing of unreasonable baseline, even with no dispute over the possession of islands, fisheries agreement was reached with China with the establishment of provisional measure zone and transitional zone,

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<sup>24</sup> Kim Hyunsoo, "Roles of Regional Maritime Cooperation in East Asia", *Inha Law Review* Vol. 18, No. 3, Sept. 30, 2015, pp.8-9.

<sup>25</sup> Kim Younggu, *Korea and International Law of the Sea*, Hyosung Publishing Do, 1999, pp.433-444.

ultimately managing fishing order in Yellow sea. The fisheries agreement, whose negotiation started from December 1993, was reached five years later and was signed on August 3, 2000 and entered into force on June 30, 2001. Based upon the economic zones of domestic law and the Convention, Korea-China fisheries agreement established provisional measure zone in overlapping EEZ areas. In the provisional measure zone the fishery resource is to be managed jointly under the instruction of Korea-China Joint Fisheries Management Committee. The principle of nationality is to be applied in the provisional measure zone. Outside the provisional measure zone the transitional zone is established. The fishery in the transitional zone is to be jointly managed similarly to the provisional measure zone and four years later the transitional zone is to be merged into the EEZ of each party.<sup>26</sup>

In response to China's initial proposal of opening up the sea area beyond the territorial sea to fishing, it is appraised that Korea secured its fishery for its EEZ by establishing provisional measure zone and thus was able to defend its zone against robust fishing capabilities of China. However, with the northern limit of the agreement established at 37 degree latitude, it is criticized that allowing room for Chinese vessels to fish, Korea was not able to keep its fishing ground near the five islands in the periphery of NLL.<sup>27</sup> In the midst of China's overfishing, the agreement needs to be amended to reflect upon the changed circumstances.

### ***Delimitation***

No significant progress has been made in the negotiations over the past two decades to effect delimitation. It was mainly due to the difference in their opinions over the drawing of baseline and island

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<sup>26</sup> Korea-China Fisheries Agreement, articles 7, 8 & 9.

<sup>27</sup> Kim Younggu, *op.cit.*, pp.464-465.

sovereignty issue.

To delimit economic zone and continental shelf in Yellow sea and East China sea, China promulgated the Act on EEZ and Continental Shelf in June 1998, making explicit its sovereign rights and jurisdiction over EEZ and continental shelf and protecting marine resources in the sea area. In accordance with the Act, the EEZ extends up to 200 miles from the coast and continental shelf extends to the seabed and subsoil beyond the territorial sea to the outer edge of continental margin as far as the natural prolongation of the land territory, or to a distance of 200 nautical miles from the baselines.<sup>28</sup> China's position on the delimitation of EEZ and continental shelf is based upon the natural prolongation of land territory or equity principle rather than equidistance or middle line endorsed by the ICJ jurisprudence. Due to this difference of position with that of Korea and Japan, delimitation has not been effected yet.

China made an announcement of straight baseline establishing 49 base points connecting Shandong high edge with Hainan island, and establishing 28 base points near Sisaarchipelagos.<sup>29</sup> In principle, straight baseline method applies to the coastline deeply indented or cut into, or with a fringe of islands along the coast. China's coast to the south of Shandong peninsula is not known to be complicated or dotted with fringes of islands. Some base points are to be established on rocks quite far from the continent. For example, point 9 and point 10 are known to be established on sand shoals which do not appear on maps. These shoals, presumed to be formed through the pile-up of sands flown down from Yangze river, mostly emerge above water at ebb, and submerge into water at the flow. Point 12 and point 13 are considered mere rocks.

These points(9,10,12,13) are just low-tide elevation under the law

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<sup>28</sup> The Act on EEZ and Continental Shelf, article 2.

<sup>29</sup> In the 8th People's Congress Party held on May 15, 1996, China announced base points in 'the statement on the baseline of the territorial sea'

of the sea. The UNCLOS, article 7 para 4, provides that in principle straight baseline shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them. At the time China has announced its baselines, no installations were built on low-tide elevations, and no other states have drawn baseline on sand shoals.

Some base points are located at a far distance from the coastline. Even with no geographical standard, baseline must not depart to any appreciable extent from the general direction of the coast and the sea areas lying within the coastlines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.<sup>30</sup> Taking into account the freedom of navigation the distance decided within a reasonable extent corresponds to equity principle. Point 12 is located 69 miles away from the continent. Point 13, located further eastward than point 12, departs from general direction of the coast.<sup>31</sup>

On the other hand, Korea enacted the "Territorial Sea and Contiguous Zone Act" on December 6, 1995. According to the Act, the territorial sea of Korea shall be the zone not extending beyond 12 nautical miles measured from the baseline: Provided that in cases of specified areas, the breadth of the territorial sea may be otherwise determined within the breadth of 12 nautical miles, as prescribed by Presidential Decree.<sup>32</sup> Taking as principle the ordinary baseline for measuring the breadth of the territorial sea which shall be the low-water line along the coasts as marked on large-scale charts officially recognized by Korea, straight baselines may be also employed, in case of the area of the sea where special geographical circumstances

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<sup>30</sup> The Convention, article 7 paragraph 3.

<sup>31</sup> Park Yonghyun, "The Delimitation of the Sea in Northeast Asia", Korea Northeast Journal vol.2, 1996, pp.556-557; Lee Seokyong, "A Comparative Study on Ocean Law and Policy of Northeast Asian States", Ilkam Law Review, Vol. 33, Feb. 2016, pp.418-419.

<sup>32</sup> The territorial sea and contiguous zone act, article 1.

exist.<sup>33</sup> Korea employs straight baseline in the west and southern coast with a fringe of islands and normal baseline in the east coast with simple coastline.

Japan employs straight baseline in article 2 of the "Act on Territorial Sea and Contiguous Zone" in 1996 which amended and replaced previous "Territorial Sea Act". Japan's straight baseline drawn inconsistent with the principle and provisions of the UNCLOS, tends to extend the extent of sea area<sup>34</sup> and has received protest from neighboring states. The biggest hurdle to the delimitation with Japan is Dokdo sovereignty issue. In order to secure the largest jurisdiction in the overlapping sea with Korea, Japan announced the economic zone from Dokdo as its base point.<sup>35</sup> Japan does so for maintenance of consistency as it draws base points on rocks all around Japan to maximize the extent of maritime jurisdiction.

Korea, on the other hand, draws baseline from Ulleungdo in a strict interpretation of the UNCLOS article 121 para 3, as this method includes Dokdo within its sea area. Dokdo was regarded as rocks in the meaning of article 121 para 3 of the Convention which provides that rocks which cannot sustain human habitation or economic life of their own shall not have economic zone or continental shelf.

Criticism has been made of drawing baseline from Ulleungdo, arguing that this method resulted in prejudicing the status of Dokdo,<sup>36</sup> for the reason that garrison has been stationed on Dokdo

<sup>33</sup> The territorial sea and contiguous zone act, article 2.

<sup>34</sup> United States Department of State, "Straight Baselines and Territorial Sea Claims: Japan", *Limits in the Seas*, No. 120, 1998, p.6.

<sup>35</sup> Kim Younggu, *op.cit.*, pp.56-92.

<sup>36</sup> Lee Sangmyun, "The Direction of Korean Policy in Declaring EEZ in face of Japan, Korea's Response Strategy with regard to Japan's Declaration of EEZ", *Documents of Academic Seminar published by the Korean Society of International Law*, 1996, p.4. Kim Younggu, *op.cit.*, pp.441-444. Prof. Kim argued that Korean government's self-limiting interpretation of the Convention, article 121 paragraph 3, could not block the establishment of EEZ by Japan drawn from rocks such as DanjoGunto, Torishima and also could not prevent China from drawing the baseline from Dongdao or Hainanjiao.

which has the implication of sustaining economic life of its own.

### ***Issue of Island Sovereignty***

It is clear that legally, historically and geographically Dokdo is in the realm of Korean territory, but Japan has striven to flare up dispute over the islands continuously. Through Shimane prefecture notice in 1905, Japan claimed sovereignty over Dokdo, reversing its previous position made by the cabinet directive in 1877 which stated that Dokdo is beyond the territory of Japan. In negotiations with Korea over the delimitation in East sea, Japan has drawn baseline from Dokdo. Korea has previously disregarded Japan's claim, but nowadays made on-and-off strong responses against Japanese measure to appeal to popular opinion. On the part of Korea, which has control and possession of Dokdo, it is more appropriate to consolidate its position over the long term, not flaring up the dispute. This is in general the main position of the states who possess territories. China claimed sovereignty over Ieodo to the south of Jeju Island which is underwater rocks, having no status of island. Korea has built a maritime base over Ieodo which is more proximate to Korea than China. It will not have sovereignty dispute in the real sense.

### ***Outer Limit of Continental Shelf and East China Sea***

The UNCLOS states that a coastal state who wishes to extend continental shelf beyond 200 nautical miles is required to submit detailed materials to the Commission on the Limits of Continental Shelf (CLCS) by May 2009. Korea, Japan and China respectively submitted its position paper on the outer limit of continental shelf to the CLCS. In the East China Sea the outer limit of Korea's continental shelf reaches Okiwana trough based upon the natural prolongation of land, while Japan's delimitation of continental shelf is grounded upon equidistance principle. On the other hand, in the Yellow Sea Korea draws upon equidistance principle in the delimitation of

continental shelf, but China posits the natural prolongation of land.

China protested<sup>37</sup> against the development conducted in the sea area to the south of Jeju Island in accordance with the Korea-Japan Southern Continental Shelf Joint Development Agreement in 1974. In the East China Sea the outer limit of continental shelf is overlapping among the three concerned states. The problem is that the CLCS has no authority to decide upon the boundary of continental shelf even in case of disparate positions among the states.

In consideration of possible flare-up of dispute around development of the sea area deposited with mineral resources in the East China Sea, Korea needs to elaborate upon its legal reasoning and build relevant systems in support of its position.

#### *The Maritime Governance in Northeast Asia*

The sea is in reality connected all throughout, even though it is divided between territorial sea, exclusive economic zone and high seas for the sake of convenience. Since the sea is faced with difficulties in managing through artificial division, international cooperation on global or regional level is necessary, with the government as well as informal organizations. In this regard, maritime governance is under discussion.

In the sea of Northeast Asia the discussion and cooperation among states to manage the maritime resource conservation and oil pollution has been in progress.<sup>38</sup> On occasion states in Northeast Asia have been confrontational in politics and diplomacy, and have met with obstacles to cooperation due to difference in historical

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<sup>37</sup> Arguing that continental shelf should be established based upon the natural prolongation of land territory and China has unprejudiced sovereignty over East China Sea, China announced that the Korea-Japan Continental Shelf Joint Development Agreement providing for joint development of continental shelf without consultation with China prejudices the sovereignty of China and cannot be recognized as such. Kim Younggu, *op.cit.*, pp.601-02.

<sup>38</sup> Christian Wirth, "Ocean Governance, Maritime Security and the Consequences of Modernity in Northeast Asia, *The Pacific Review*, vol.25, no.2, 2012, pp.228-235.

perspective. Nevertheless, unless no cooperative framework among the states is established in maritime matters, a host of challenges and difficulties would result, worsening oil pollution and other environmental degradation by the exhaustion of resources. In cognizance of these problems, cooperative system needs to be in place, and in due course cooperation in maritime area is expected to make for the cooperation in diplomacy and politics.

As semi-closed sea, the Yellow Sea especially in Northeast Asia is shallow and susceptible of oil pollution. Therefore, the cooperation in maritime governance has been underway mainly between Korea and China. The cooperation in the Yellow Sea has been in progress from the perspective of ecological approach in terms of sustainable development and maritime environmental protection.<sup>39</sup>

Let's look at some of the ongoing projects. The Northwest Pacific Action Plan(NOWPAP) is managed by the UNEP, to protect environment in the Northwest Pacific with the participation of Korea, Japan, China and Russia. In the beginning the NOWPAP was oriented mainly toward the prevention of oil pollution, but recently pays attention to the monitoring of maritime waste, red tide, and eutrophication phenomena. It appears that substantial cooperation in NOWPAP has not been smooth and activity centers have been dispersed among states, causing shortage of connectivity. Besides, other examples are Yellow Sea Large Marine Ecosystem(YSLME) and Yellow Sea Environment Joint Survey Project between Korea and China.

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<sup>39</sup> Lee Seokyoung, "Study on the Maritime Governance and Maritime Management System", *Journal of Research on Science and Technology*, vol.21, issue1, 2015, p.107.

## CONCLUSION

Over 20 years have elapsed since the UNCLOS has been enforced among three states of Northeast Asia. Reflecting upon the desire of expanding the jurisdiction in international community, the UNCLOS introduced and established exclusive economic zone, new continental shelf system, and archipelagic waters and agreed upon the width of the territorial sea. Transit passage and deep-sea resources management were introduced into the Convention. In addition, compulsory settlement of international maritime disputes was established, making great contributions to the codification of the law of the sea.

Northeast Asian states, ratifying the Convention in 1996, concluded fisheries agreements, establishing a tentative legal order on fishery. There remains the task of effecting delimitation at sea. The delimitation seems not feasible over a short term, with such big hurdles as method of baseline, possession of island issue etc.

Since in the Yellow Sea no delimitation is effected yet, overfishing of China poses problems to the Korean economic zone. In the East Sea the Southern Continental Shelf Joint Development Agreement is scheduled to expire in 2028 unless no extension is made. Possible conflict seems to be in the offing in East China Sea around the development of natural resources and it may flare up further if endowment of resources is apparent. While continuously ascertaining the position of other states through maritime negotiations and making adjustment to their positions to be consistent with the practice, jurisprudence and the provisions of the Convention, the agreement is necessary to be reached. On occasion political breakthrough needs to be made through decisions made at the highest level. There must be limitations to the settlement of issues among three states by means of legal approach under UNCLOS, for Northeast Asia geopolitics has been very complicated and enmeshed with political and economic relations, historical legacy, and psychological sentiment of each people.

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