Japanese Measures against the Protection and Preservation of the Marine Environment under the UNCLOS and the IMO Treaties

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Abstract

The purpose of this paper is to make it clear the present state and its problems of Japanese measures against the protection and preservation of the marine environment from the perspective of international law and Japanese domestic laws and regulations. The analysis is divided into three sections. Firstly, the relationship between Part XII of the UNCLOS and the IMO marine environmental treaties will be addressed in brief. Secondly, Japanese implementation of the IMO treaties will be addressed in the context of the regulations regarding both dumping wastes into the sea from vessels and marine pollution from vessels. Finally, the problems to be solved regarding Japanese implementation of marine environmental treaties will be made clear.

Keywords: marine environment, UNCLOS, IMO, Japan Coast Guard

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Ⅰ. Relationship between the UNCLOS and the IMO Marine Environmental Treaties

Part XII of the United Nation Convention on the Law of the Sea (UNCLOS)[1] stipulates the adoption and enforcement of domestic laws and regulations for the prevention, reduction and control of pollution of the marine environment, such as pollution from land-based sources, pollution from seabed activities, pollution from dumping, pollution from vessels and pollution from or through the atmosphere etc (UNCLOS, arts. 207-211). However, these articles do not set any absolute standards to prevent marine pollution but adopt a form of international minimum harmonization based on obligation of result[2]. Absolute standards to prevent marine pollution can be found in detailed treaties related to the marine environment to be adopted by the International Maritime Organization (IMO).

One of the contented issues regarding the enforcement of laws and regulations against foreign vessels is the interpretation of the "laws and regulations adopted in accordance with this Convention" and "applicable international rules and standards established through the competent international organization or general diplomatic conference" as mentioned in Part XII of the UNCLOS. For example, Article 210 of the UNCLOS deals with the pollution by dumping, and stipulates that domestic laws and regulations "shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards." It further requires States to establish goals and regional rules, standards and recommended practices and procedures "especially through competent international organizations or diplomatic conference." It is generally interpreted that a representative example of a "competent international

organizations" is the IMO. The rules and standards adopted by the IMO are as follows: the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (London Convention of 1972);[3] the 1996 Protocol on the London Convention of 1972 with regard to dumping into the sea (London Protocol of 1996);[4] the International Convention for the Prevention of Pollution from Ships, 1973 (1973 MARPOL);[5] the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78)[6] and Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Protocol of 1997)[7].

Ⅱ. Japanese Implementation of the IMO Marine Environmental Treaties

Japan is a Contracting Party to many marine environmental treaties adopted by the IMO, some of which are the London Convention of 1972, the London Protocol of 1996, the MARPOL 73/78, the Protocol of 1997, the International Convention on Oil Pollution Preparedness, Response and Co-operation of 1990 (OPRC Convention)[8], and the subsequent Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances of 2000 (OPRC-HNS Protocol)[9].

A. Japanese Measures against Dumping into the Sea from Vessels

(1) The London Convention of 1972

Dumping at sea refers to carrying wastes generated on land by ship and dumping them in the sea. The first convention to regulate dumping at sea was the

London Convention which was adopted in 1972 and came into force in 1975. The London Convention of 1972 prevents marine pollution from the dumping of wastes and was adopted for the purpose of preserving the marine environment. The London Convention of 1972 adopts the concept of assuming that the sea has a given self-purification ability and regulating dumping which exceeds that capacity, categorizes wastes in Annex I through Annex III based on their toxicity and harmfulness, and adopts the negative list approach of setting regulations on matters such as prohibition and permission by category. Annex I , which is called as "black list", lists substances for which dumping at sea is completely prohibited. Annex I includes intermediate and high-level radioactive wastes, and wastes containing heavy metals such as mercury and cadmium, etc. Annex II, which is called as "grey list", lists substances which require prior special permission for dumping at sea. Annex II includes wastes containing a significant amount of the matters, such as arsenic, beryllium, chromium, copper, lead, nickel and vanadium, etc. Annex III is a category for substances other than those listed in Annex I and Annex II which require general permission prior to dumping at sea. Annex III does not list specific substances, but instead presents factors to be considered regarding the various conditions under which approval should be granted. In this way, the London Convention of 1972 adopts the method of specifically listing wastes believed to have strong toxicity and harmfulness and making them subject to regulation.

About 20 years after the London Convention of 1972 was adopted, the role of the convention and the need for strengthening its regulations came to be examined. The Agenda 21 that was compiled at the 1992 Rio Summit proposed revising the London Convention of 1972 from the perspective of strengthening regulations. Also a moratorium regarding all dumping of radioactive waste at sea

including the low-level radioactive wastes listed in Annex II was adopted at the 1985 Conference of the Parties to the London Convention of 1972 (COP9), and the dumping of low-level radioactive wastes at sea was then prohibited through revisions to Annex I and Annex II at the 1993 Conference of the Parties (COP10) (which entered into force in February 1994) following the dumping at sea of low-level radioactive wastes (900 m^3 of spent coolant and other liquid radioactive wastes from dismantled nuclear submarines) by the Russian Navy on the high seas in the Sea of Japan in 1993.

(2) The London Protocol of 1996

The Revised Protocol was adopted in 1996 to strengthen the regulations under the London Convention of 1972. Unlike the London Convention of 1972 itself, the London Protocol of 1996 does not assume the self-purification capacity of the sea, and based on the precautionary principle and approach initiated from the 1990s it adopts the reverse list format with a waste assessment framework (WAF) and waste assessment guideline (WAG) for specific assessment. The London Protocol of 1996 clearly prescribes that it adopts the precautionary approach and the polluter pays principle (PPP) as its basic principles (London Protocol of 1996, art. 3, paras. 1–2).

The London Protocol of 1996 prohibits dumping in principle, stipulating as follows: "Contracting Parties shall prohibit the dumping of any wastes or other matter with the exception of those listed in Annex I," (London Protocol of 1996, art. 4, para. 1) and allows the parties to consider granting a permit regarding dumping of only the wastes or other matter listed in Annex I, such as (1) dredged material, (2) sewage sludge, (3) fish waste, or material resulting from industrial fish processing operations, (4) vessels and platforms or other man-made structures at

sea, (5) inert, inorganic geological material, (6) organic material of natural origin, and (7) items primarily comprising iron, steel, container and similar materials generated at locations such as small islands with no practicable access to disposal options other than dumping at sea[10]. When proposed revisions to Annex I were adopted in 2006, carbon dioxide streams from carbon dioxide capture processes for sequestration were added as a measure against a global warming. The revised Annex I was entered into force in 2007. Japan interprets red mud (sludge generated in the aluminum manufacturing process, which is the sediment from extracting aluminum from bauxite ore) as corresponding to item (5) mentioned above, and permits the dumping of red mud at sea.

The contrast between the London Convention of 1972 and the London Protocol of 1996 is with respect of the regulations of dumping. The London Convention of 1972 (and the UNCLOS) doesn't prohibit dumping but rather subject it to a system of prior approval[11]. On the other hand, the so-called "negative listing approach" adopted by the London Protocol of 1996 is an example of application of the precautionary approach, and reverses the regulatory approach, from 'permitted unless prohibited' to 'prohibited unless permitted.'[12] Under the negative listing approach, only listed substances may be permitted to be dumped, while the dumping of all other substances is prohibited[13].

The London Protocol of 1996 also prescribes individual approval by the regulatory authorities of all State parties for wastes even if they are wastes on the reverse list for dumping at sea, and presents a Waste Assessment Framework (WAF) as an assessment framework when examining the advisability of dumping. Under this framework (WAF), when the regulatory authorities of each State party make decisions on issuing permits for dumping at sea, they must confirm the necessity of dumping the concerned wastes at sea by examining whether efforts

have been made to reduce the generation of wastes and alternatives to dumping pursed. The authorities are also obliged to confirm the properties of wastes and the quantities of hazardous substances contained and assess the potential impact on the concerned sea area. Approval can only be granted once these assessments are completed and the post-dumping monitoring conditions decided, and at that time the measures to minimize the harm to the environment must be examined. A Waste Assessment Guideline (WAG) was also adopted as a more concrete guideline regarding the WAF contents.

(3) Japanese Implementation

In 1970, Japan adopted the Act on the Prevention of Marine Pollution and Maritime Disaster (the Marine Pollution Prevention Act) (Act No. 136 of 1970). The primary purpose of the Marine Pollution Prevention Act is to "secure appropriate enforcement of international convention on the prevention of marine pollution and maritime disaster." (Marine Pollution Prevention Act, art. 1). Although the Marine Pollution Prevention Act has no explicit provision on its scope of application, the Act applies to any vessel in Japanese internal waters and territorial sea[(14)], as well as to any Japanese vessel outside these areas. Japan amended the Marine Pollution Prevention Act in 1980 to ratify the London Convention of 1972, and then revised the Act in 2004 and 2007 in order to ratify the London Protocol of 1996. The amendment of the Act in 2004 obliged any person who will dump wastes and other matters into the sea to obtain permission for dumping from the Minister of the Environment, and to obtain a confirmation of actual dumping from the Commandant of the Japan Coast Guard. As mentioned above, when ratifying the London Protocol of 1996, Japan amended the Marine Pollution Prevention Act in accordance with "the global rules and

standards" (UNCLOS, art. 210) as set forth in the Protocol. These rules and standards apply to any vessel, including foreign vessels in Japanese internal waters and territorial sea whether its flag State is a Contracting Party to the Protocol or not. From December 2006 to July 2018, the Minister of the Environment issued 106 permissions on dumping of five types of wastes and other matters, such as (1) red mud, (2) sand and gravel on the bottom, (3) construction sludge, (4) waste acid (distilled spirit [*shochu* (Japanese spirit)] lees) and (5) animal dung[(15)].

B. Japanese Measures against Marine Pollution from Vessels

The establishment of international treaties to prevent marine pollution from discharges of oil from ships advanced from an early date. The government of the U.K. hosted the International Conference on Pollution of the Sea by Oil in London from April through May 1954, and the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) was adopted on the last day of the conference. The OILPOL regulates marine pollution from the discharge of oil that emerges in usual ship operations by setting discharge standards for oil (crude oil, fuel oil and other persistent oils). The OILPOL was subsequently revised several times, expanding the range of ships, substances and acts subject to regulation, and strengthening the regulations. However, the regulation of marine pollution by the OILPOL did not fully respond to the growing demands for environmental protection in the 1970s, in part because the enforcement of regulations continued as in the past to primarily rely on the flag state principle despite the increase in tankers, increased size of tankers, increased marine transportation of noxious substances aside from oils, and increase in ships under flags of convenience.

The new agreement adopted in response to this was the MARPOL Convention

(1973 MARPOL). The 1973 MARPOL is not yet in effect today (as of the end of September 2018), but following the March 1978 Amoco Cadiz grounding and oil spill offshore the Atlantic coast of Brittany of France, the Inter-Governmental Maritime Consultative Organization (IMCO) held the International Conference on Tanker Safety and Pollution Prevention in February 1978 , revised and made additions to the 1973 MARPOL, and adopted a protocol (MARPOL 73/78) for execution of the 1973 MARPOL. The MARPOL 73/78 is positioned as a single document together with the 1973 MARPOL (Article 1, Paragraph 2 of the MARPOL 73/78) and the State parties are to execute the 1973 Convention as revised and expanded by this protocol. The MARPOL 73/78 came into effect in October 1983, and there are 157 State parties as of the end of September 2018.

Based on the weak points of the OILPOL, the MARPOL 73/78 sets comprehensive regulations for the prevention of marine pollution by expanding the range of ships subject to regulation, and also expanding the range of substances subject to regulation to all types of oils (including not only crude oil, fuel oil and other persistent oils, but also gasoline, diesel fuel, kerosene and other non-persistent oils) and including noxious liquid substances, noxious substances in packaged form, sewage and ship wastes. The contents of the regulations go beyond regulating discharges of oil and other substances by additionally requiring double-hull construction and the ability to withstand damages to prevent discharges during accidents, as well various types of equipment on ships, and otherwise regulate the physical aspects of ship construction and equipment.

The MARPOL 73/78 comprises the preamble, the main text, the annexes, and two protocols (“Protocol I: Provisions concerning Reports on Incidents involving Harmful Substances” and “Protocol II: Arbitration”). Among the six technical Annexes, Annex I and Annex II are “obligatory“ annexes that must be ratified together with the

convention when ratifying the convention. The other annexes are "optional" annexes.

The annexes prescribe ship structure and equipment standards, periodic inspections by the supervisory agency or certified body (which is a classification society), issue of certificates, and supervision by the port State. The following are six technical Annexes of the MARPOL 73/78 . Annex I: Regulations for the Prevention of Pollution by Oil[16], which prescribes discharge methods and equipment standards to control discharges of oil accompanying ship navigation, Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk[17], which prescribes cleaning methods, cleaning water discharge methods, and requirements for the concerned equipment for ship freight tanks that carry noxious liquid substances in bulk, Annex III: Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form[18], which prescribes packaging method, package labeling and stowage methods for hazardous substances carried in packaged form, Annex IV: Regulations for the Prevention of Pollution by Sewage from ships[19], which regulates discharge methods for sewage generated during ship operations, Annex V: Regulations for the Prevention of Pollution by Garbage from Ships[20], which prescribes disposal methods for garbage generated during ship operations, and Annex VI: Regulations for the Prevention of Air Pollution from Ships[21], which prescribes reduced emissions of nitrous oxides (NOx) and sulfur oxides (SOx) from ship engines.

The ratio of the combined merchant fleets of the Contracting Parties to the gross tonnage of the world's merchant shipping at 1 October 2018 is 99.15 % regarding Annexes I and II, 98.57% regarding Annex III, 96.31% regarding Annex IV, 98 . 73 % regarding Annex V, and 96 . 62 % regarding Annex VI[22]. The

international rules and standards set forth in the MARPOL 73/78 , its Annexes and the Protocol of 1997 may be considered as *de facto* "generally accepted rules and standards."(UNCLOS, art. 211 , para. 2). In the meantime, Japan amended the Marine Pollution Prevention Act in 1983 and the related ministerial ordinances in order to ratify the MARPOL 73/78.

The setting of structural and equipment standards for ships by the MARPOL 73/78 has had some effect, but because of the series of large-scale accidents involving tankers since 1989 efforts have been made to strengthen ship structural standards to minimize oil discharges when accidents occur. First, the 1992 revision following the grounding and oil spill accident of the U.S. tanker Exxon Valdez in Prince William Sound, Alaska in 1989 required the use of double hull construction not only for new tankers but also for existing tankers once they reach a certain age. Next, the 2001 revision following the breakup, sinking and oil spill accident of the Maltese flag tanker Erika in the English Channel in 1999 set a staged period for the reduction of tankers with single hull designs. Then, the 2003 revision following the breakup, oil spill, drifting and sinking accident of the Bahamas flag tanker Prestige with a single hull design offshore Spain in 2002 prescribed the accelerated implementation of the staged reduction of tankers with single hull structures. This was influenced by France and other European countries beginning to adopt domestic laws prohibiting the port entry of tankers with single hull construction following the Prestige accident.

Japan passed the 2004 amendment of the Marine Pollution Prevention Act in order to prepare for entry into force of the Protocol of 1997 which prevents air pollution via nitrogen oxide ("NOx") emitting from engines of vessels. This amendment obliges ship-owners to install and operate their engines compatible with such standards, as well as to use fuel of vessels compatible with the

standards on sulfur oxide ("SOx") (Marine Pollution Prevention Act, arts. 19-3 and 19-21). The 2004 amendment of the Act entered into effect at 19 May 2005, the same date of the entry into force of the Protocol of 1997.

Ⅲ. Japanese Enforcement of Laws and Regulations for Marine Environmental Protection and its Policy

A. Reallocation of Jurisdiction in order to Regulate Marine Pollution under the UNCLOS

There are only a limited number of grounds recognized by international law for States to exercise jurisdiction in order to regulate marine pollution. The UNCLOS has largely codified the rules on jurisdiction, and recognizes three forms of national jurisdiction; that of the flag State, that of the coastal State, and that of the State of a port into which a vessel entered voluntarily(25).

The UNCLOS does not present specific rules and standards regarding prevention of the pollution of the marine environment that State parties should adopt in their domestic laws and regulations which they apply and enforce, and the UNCLOS only requires that the concerned domestic laws and regulations conform with "international rules and standards." Yet, the UNCLOS does prescribe the conditions under which the concerned ship's flag State, the coastal State where the act of pollution was committed, and the State of the port in which the ship that committed the act of pollution enters (port State) can exercise jurisdiction over ships which commit acts of pollution. For example, regarding pollution caused by ships, while the exercise of jurisdiction by the flag State based on the flag State principle is principle, the exercise of jurisdiction by the

coastal State and the port State is also permitted (reallocation of jurisdiction to the coastal State or port State).

The flag State principle is a principle of international law which assumes the principle of "freedom of the high seas" and holds that the flag State can exclusively exercise enforcement jurisdiction over its flag ships on the high seas. To overcome the harmful aspects of the flag State principle for the protection and preservation of the marine environment, the UNCLOS permits the exercise of jurisdiction by the coastal State and the port State in addition to the flag State. The harmful aspects of the flag State principle include ships that do not conform to conventions (substandard ships) that navigate without undergoing sufficient inspection by the flag State and without conforming to the environmental standards and safety standards set by the MARPOL 73/78 , International Convention of the Safety of Life at Sea (the SOLAS Convention) and other international agreements, and the negative aspects of ships sailing under "flags of convenience" (FOC) where an ocean shipping company manages the operation and manning of the ship, but registers the ship as owned by a local subsidiary established by the ocean shipping company in Panama, Liberia, the Marshall Islands or some other country to reduce taxes on the ship owner, ship registration fees, equipment expenses, inspection expenses, crew wages and other operating costs. Considering how the seas are used today, the principle of freedom of the high seas may become a freedom to harm the interests of other countries and the general interests of the international community through marine pollution.

Regarding pollution caused by ships in the EEZ, the jurisdiction is reallocated to the coastal State of the EEZ. The UNCLOS prescribes that when a ship navigating the EEZ violates the coastal State's domestic laws or regulations

regarding pollution caused by ships and "there are clear grounds for believing" that this resulted "in a substantial discharge causing or threatening significant pollution of the marine environment, the State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information. . . if the circumstances of the case justify such inspection" (UNCLOS, art. 220 , para. 5). Additionally, the coastal State may institute proceedings, including detention of the vessel, when by violation of domestic laws or regulations of a coastal State "there is clear objective evidence. . . [of] a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone" (UNCLOS, art. 220 , para. 6). However, regarding the means of responding to the concerned violations of laws or regulations, the UNCLOS prescribes that "monetary penalties only may be imposed" with respect to violations by foreign ships in water areas "beyond the territorial sea" (UNCLOS, art. 230 , para. 1), and adopts procedures considering the navigation interests of ships (prompt release system upon posting of bond or other security).

In this way, the UNCLOS permits the coastal State of the EEZ to exercise enforcement jurisdiction against foreign ships in its EEZ, but strictly stipulates the conditions under which coastal States can exercise jurisdiction specifying that physical inspections of ships can only be made in cases that meet the requirements of a "substantial discharge" etc., and that vessels can only be detained in cases where there is "major damage" or "threat of major damage."

Also, States where the foreign ship is at port (port States) can also exercise jurisdiction over the concerned ship with the reallocation of jurisdiction by the UNCLOS. When a foreign ship voluntarily remains in a port, the port State may undertake investigations and, where the evidence so warrants, institute

proceedings in respect of any discharge from that vessel outside the EEZ of that State and any other State, that is, on the high seas, in violation of "applicable international rules and standards established through the competent international organization or general diplomatic conference" (UNCLOS, art. 218, para. 1). For that reason, under the UNCLOS, port States can apply and enforce domestic laws and regulations (which conform with international standards) against acts of pollution by foreign ships in sea areas where they normally could not exercise jurisdiction (on the high seas). On the other hand, "no proceedings shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State. . . or unless the violation has caused [harm to]. . . the State instituting the proceedings" (UNCLOS, art. 218, para. 2). So the UNCLOS first emphasizes exercising jurisdiction by the coastal State of the sea area of the discharge and then permits exercise of jurisdiction by the port State as well.

The exercise of jurisdiction by the port State which is the above-stated application and enforcement of the laws and regulations of the coastal State against discharges by foreign ships on the high seas differs from Port State Control (PSC) conducted through Memorandum of Understanding (MOU) exchanges by region to implement the various conventions concerning the marine environment, safety at sea and ship labor adopted by the IMO.

B. Significance of Establishing Domestic Laws for Implementing the UNCLOS

When State parties that are signatories of the UNCLOS arrange some kind of individual laws to regulate specific activities of private individuals for implementing the rights and obligations of State parties recognized under the

Convention, their administrative agencies can exercise enforcement jurisdiction based on the said individual laws. To implement them, State parties can exercise administrative enforcement jurisdiction of questioning and on-site inspections, and, when there are activities which violate the concerned domestic laws, they can also exercise criminal enforcement jurisdiction of investigation, arrest, confiscation, custody, referral and prosecution to recover legal interests that were violated.

For example, when foreign nationals conduct fishing activities in Japan's territorial sea, the authorities can take measures against them based on the Act on Regulation of Fishing Operation by Foreign Nationals (Act No. 60 of 1967) which basically prohibits fishing activities etc. by foreign nationals etc. in Japan's territorial sea etc. Also, in cases where foreign ships stop etc. in Japan's territorial sea without prior notification to the Government of Japan, the authorities can take measures against them based on the Act on the Foreign Ships Navigation (Act No. 40 of 2008).

Then what about domestic implementation in cases where individual laws corresponding to the individual rights and obligations granted to signatory countries by the UNCLOS have *not* been established?

For example, under Japanese domestic legal system, there are provisions of some laws and regulations which presume Japan has the right of hot pursuit under international law (Article 3 and 5 of the 1996 Revised Act of the Act on Territorial Sea and Contiguous Water Zone (Act No. 30 of 1977) (the 1996 Territorial Sea Act), Article 3 of the Act on the Exclusive Economic Zone and the Continental Shelf (Act No. 74 of 1996) (EEZ Act)), as well as detailed provisions regarding exercising this right of hot pursuit (Article 14 of the Ordinance for Enforcement of the Law on the Exercise of the Sovereign Right for Fishery Etc. in the Exclusive Economic Zone (Cabinet Order No. 212

of July 5, 1996)), but there is no domestic law which prescribes that Japan has the right of hot pursuit under international law. Regarding this, Article 111 of the UNCLOS and Article 23 of the Convention on the High Seas, which was adopted in Geneva April 29, 1958, entered into force Sept. 30, 1962 and acceded by Japan July 30, 1968, prescribe the details of the emergence of the right of hot pursuit, the policing authorities which can exercise the right, the sea areas from which the authorities can exercise the right, and the lapse of the right. Also, generally, in countries such as Japan where the Constitution incorporates international treaties into the domestic legal system (countries which adopt the doctrine of incorporation), treaties signed by Japan take legal effect as Japanese domestic law, just as they are, within the domestic legal system (as described below), so treaty provisions incorporated into Japan's legal system can be direct legal grounds for the exercise of enforcement jurisdiction and it is deemed unnecessary to copy the contents of treaty provisions into domestic laws. For example, in cases where the Government of Japan exercises the right of hot pursuit to arrest the master etc. of a foreign ship caught in violation of laws to regulate fishing activities in Japan's territorial sea or EEZ and pursues the ship onto the high seas, the legal ground for taking these measures under domestic law comes from Article 212 and Article 213 of the Code of Criminal Procedure (Act No. 131 of 1948), but when the concerned foreign ship continues to escape and enters the territorial sea of the flag state or a third country, there is no law which serves as legal grounds for suspending the further pursuit because the right of hot pursuit lapses under Article 111, Paragraph 3 of the UNCLOS.

Also, Article 20, Paragraph 2 of the Japan Coast Guard Act (JCG Act) (Act No.28 of 1948), concerning identifying ships subject to the use of weapons under the provision, stipulates "passage that is not innocent passage as defined by Article

19 of the the UNCLOS." Under Article 20, Paragraph 2 of the JCG Act, the subject ships are identified through interpretation and application of the UNCLOS incorporated into Japan's domestic legal system, and not through interpretation and application of individual laws enacted to regulate activities listed in Article 19, Paragraph 2 of the UNCLOS for passage that is not "innocent passage" in territorial sea.

Regarding the exercise of judicial jurisdiction, Article 97 , Paragraph 1 of the UNCLOS prescribes that in the event of a collision or any other incident of navigation concerning a ship on the high seas, the exercise of judicial jurisdiction is permitted only for the flag state or the state of nationality of the master, etc. For example, as interpretation of the Penal Code (Act No. 45 of April 24, 1907), in a case where a Japanese ship collided with a foreign ship on the high seas, the Japanese ship sank and Japanese crew members died, even if the offense occurred inside the Japanese ship and professional negligence resulting in death is recognized from negligence by the master in the operation of the ship, under international law (Article 97 of the UNCLOS), as long as the concerned master is not a Japanese citizen, even if the concerned master enters Japanese territory after the collision occurs, Japan has no criminal enforcement and judicial jurisdiction over the concerned master. Japan's courts are restricted by Article 98, Paragraph 2 of the Constitution of Japan (discussed below), and even if hypothetically a lawsuit were filed despite the lack of criminal enforcement and judicial jurisdiction under international law, the suit would be dismissed by judgment under Article 338 , Item 1 of the Code of Criminal Procedure.

To be certain, regarding domestic measures for implementing international treaties, in Japan the Constitution of Japan takes the position that basically treaties shall be approved by the Diet (Article 73, Item 3 of the Constitution of Japan),

and that approved treaties themselves are automatically promulgated by the Emperor (Article 7, Item 1), and furthermore states in Chapter X "Supreme Law" that "the treaties concluded by Japan and established laws of nations shall be faithfully observed" (Article 98, Paragraph 2). Because the Constitution of Japan recognizes the obligation to observe treaties and established laws of nations, they are immediately incorporated into the Japanese domestic legal system by their promulgation, and have legal effect under domestic legal system without taking any particular measures (adoption of the doctrine of incorporation). For that reason, even if laws for implementing treaty rights and obligations are not prepared, treaties which have been promulgated have legal effect as domestic law within the Japanese legal system just as they are. In other words, because Japan adopts the doctrine of incorporation, there is no need to enact domestic laws corresponding to the individual rights and obligations granted to Japan as a party by treaties and rewrite the contents of treaties into such laws as there is in countries that adopt the doctrine of transformation under which concluding treaties and other international agreements does not make them effective as domestic law under the domestic legal system and domestic laws must be enacted based on the contents of the concerned treaties for them to become effective as domestic law.

For that reason, the meaning of establishment of individual laws for implementing treaties within Japan can be understood either as a measure for cases where administrative agencies and courts cannot or find it difficult to directly apply and enforce treaty provisions to secure the domestic realization of the concerned treaty provisions, or as an expedient means of reinforcing the domestic implementation of the concerned treaty even when they can directly apply and enforce the treaty provisions.

Consequently, in the implementation of the UNCLOS in Japan, it becomes necessary to prepare some sort of laws for cases where administrative agencies exercise their authority to order or force private persons. If individual domestic laws were not prepared for the domestic implementation of the UNCLOS, the policing authorities of investigation, arrest, confiscation, custody, referral and prosecution could not be exercised, and fundamentally only administrative measures which counterparties voluntarily accept could be exercised within the range permitted by the UNCLOS and within the range permitted by the JCG Act, which is one of the laws providing legal grounds for the exercise of enforcement jurisdiction at sea (explained in the next section).

C. Enforcement of the Marine Pollution Prevention Act

The Japan Coast Guard Act (JCG Act) is one of the important laws and regulations in order to exercise jurisdiction at sea. Article 1 of the JCG Act provides the establishment and purpose of the Japan Coast Guard (JCG). Article 2 defines the missions of the JCG in general, including "prevention of marine pollution." Article 5 stipulates the twenty-nine definite missions that the JCG shall carry out, including "matters concerning prevention of marine pollution."

The JCG is authorized to exercise administrative enforcement jurisdiction on the basis of the "enforcement of laws and regulations at sea" under Article 2 , Paragraph 1 of the JCG Act. Moreover, the JCG could exercise judicial enforcement jurisdiction on the basis of the "prevention and suppression of crimes at sea" and the "detection and arrest of criminals at sea." (JCG Act, art. 5 (11)). Article 15 stipulates as follows: "When officers of the JCG are engaged in enforcing laws or regulations, they shall be deemed to be acting as agents of the particular administrative office charged with the administration of the particular

laws or regulations." This provision authorizes the JCG officers to exercise general and comprehensive enforcement jurisdiction in order to manage all sorts of activities at the sea.

Article 17 of the JCG Act provides three authorities for officers of the JCG as follows: (1) the authority to order the production of the official papers on the vessel; (2) the authority to stop, visit and inspect the vessel and (3) the authority to question the crew and passengers of the vessel.

In order to prevent marine pollution, the JCG officers may inspect the vessels in accordance with Article 17 of the JCG Act. Article 17 is an enforcement procedure to ascertain the compliance of marine environmental laws and regulations including the Marine Pollution Prevention Act. The officers may, in the event of violation of such laws and regulations, exercise criminal jurisdiction in accordance with the Code of Criminal Procedure.

The UNCLOS has no provisions on the exercising of enforcement jurisdiction by coastal States in case of dumping or discharge from foreign vessels in internal waters in violation of coastal States' laws and regulations. It can be interpreted that coastal States, on the basis of their sovereignties or sovereign rights, may exercise such jurisdiction freely by applying domestic laws and regulations to those polluting activities in internal waters and deciding the legality of them. The Marine Pollution Prevention Act, however, deals with such illegal activities in internal waters by means of "the bond system." This is the system of the prompt release of vessels or crew arrested for such illegal activities upon the posting of a reasonable bond or other financial security. This system is adopted as Japanese policy and in no way as implementation of an obligation under international treaties including the UNCLOS.

In case of dumping or discharge from foreign vessels in the territorial sea, its

coastal State has the right to inspect foreign vessels. However, its coastal State shall exercise this right in the way that it does not hamper the innocent passage of its vessels.

The UNCLOS stipulates that, in case of a foreign vessel's committing of "any act of willful and serious pollution" (UNCLOS, art. 19, para. 2 (h)) in the territorial sea, its coastal State may deny the innocence of passage, and take "the necessary steps" (UNCLOS, art. 25, para. 1) which includes the exercise of enforcement jurisdiction. The Marine Pollution Prevention Act, however, deals with such pollution by means of the bond system, which is also adopted as Japanese policy. Even if a coastal State commences its judicial proceedings, it may only impose a pecuniary penalty, and its proceeding shall be suspended if the flag State of that vessel invokes similar judicial proceedings within six months.

Additionally, in case of dumping or discharge from a foreign vessel in EEZ or on the high seas, Japan inspects the vessel and ascertains the fact of such polluting activities only after its voluntary entry into a Japanese port (UNCLOS, art. 25, para. 1). Whereas UNCLOS allows port States to undertake investigation and institute proceedings in case of discharge from a foreign vessel in violation of "applicable international rules and standards" in EEZ, Japan only seeks information regarding the vessel's discharge and notifies the flag State of the vessel of such discharge.

Ⅳ. Conclusion

The Japanese practices of exercising jurisdiction over marine polluting activities by foreign vessels, such as giving much careful consideration to the interests of navigation through the bond system, are interpreted to be in

accordance with international law and to be based on the high considerations of the interests of comity with other States and the freedom of navigation. However, in order to take more effective measures against the protection and preservation of the marine environment, the time has come to reconsider these Japanese "moderate" exercising of jurisdiction. At the least, the exercising of the port States jurisdiction to marine polluting activities is very attractive alternative, since it presents no danger to the freedom of navigation, and afford better facilities for investigation and the collection of evidence concerning polluting activities at the early stage, wherever they have taken place[24].

（1） The UNCLOS entered into force in 1994 and was ratified by Japan in 1996.

（2） Catherine Redgwell, 2006, "From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment", in David Freestone, Richard Barnes and David M Ong (eds.), *The Law of the Sea: Progress and Prospects*, Oxford University Press, pp.188–189.

（3） Entered into force in 1975; Japan acceded in 1980.

（4） Entered into force in 2006; Japan acceded in 2007.

（5） Not yet entered into force.

（6） Entered into force in 1983; Japan acceded in 1983.

（7） Entered into force in 2005; Japan acceded in 2005.

（8） Entered into force in 1995; Japan acceded in 1995.

（9） Entered into force in 2007; Japan acceded in 2007.

(10) Art. 1, para. 1 of Annex I of the London Protocol of 1996 stipulates as follows: "The following wastes or other matter are those that may be considered for dumping being mindful of the Objectives and General Obligations of this Protocol set out in article 2 and 3"

(11) *Supra note* 2, pp. 187–188.

(12) *Ibid*., p. 188.

(13) David Freestone and Salman M.A. Salman, 2007 , "Ocean and Freshwater Resources", in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds.), *Handbook of International Environmental Law*, Oxford University Press, pp. 343–344.

(14) Since the definition of "Vessel" excludes warships and ships used only on governmental non-commercial service under the IMO treaties concerning marine environment, it is generally interpreted that "Vessel" in the Marine Pollution Prevention Act also excludes them.

(15) This data of permissions issued by the Minister of the Environment is published at the homepage of the Ministry of the Environment of Japan, http://www.env.go.jp/earth/kaiyo/ocean_disp/3hakkyu/index.html (1 October 2018).

(16) Entered into force in 1983.

(17) Entered into force in 1983.

(18) Entered into force in 1992.

(19) Entered into force in 2003.

(20) Entered into force in 1988.

(21) Entered into force in 2005.

(22) These rations are published at "Status of Conventions" of the homepage of the IMO, http://www.imo.org/ (1 October 2018).

(23) *Supra Note* 13, pp. 343–344.

(24) The exercising of the port States jurisdiction covers polluting activities both on the high seas and within the coastal zones (internal waters, territorial sea and EEZ) of another State, although in the latter case the port State may only act in response to a request from the State concerned. Patricia Birnie and Alan Boyle, 2009 , *International Law & the Environment*, third Edition, Oxford University, pp. 414–423.