

The Japanese Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters

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The regime of innocent passage is well-established in customary international law and conventional law, especially the United Nations Convention on the Law of the Sea (UNCLOS). Foreign ships have the right of innocent passage in the territorial sea (Article 17 of the UNCLOS). The coastal State is obliged not to hamper the innocent passage of foreign ships through the territorial sea (Article 21, Paragraph 1 of the UNCLOS).

On the other hand, foreign ships in non-innocent passage are subject to the full enforcement jurisdiction of the coastal State. That State has the right to determine whether passage is innocent or not and may take the necessary steps in its territorial sea to prevent passage it deems not innocent (Article 25, Paragraph 1 of the UNCLOS).

Some breaches of the coastal State's laws and regulations may constitute a loss of innocence, depriving the ships of its right of innocent passage and entitling the coastal State to take any steps to prevent what has become non-innocent passage. Article 25, paragraph 1 of the UNCLOS does not stipulate what "the necessary steps" should be and what procedures should be followed. Yang pointed out that "it is completely within the discretion of coastal State to decide on what specific

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steps will be taken to prevent non-innocent passage⁽¹⁾.” The necessary steps taken shall conform to the basic rules of general international law, such as necessity, proportionality and non-discrimination⁽²⁾. They could include requesting a delinquent foreign ship to stop non-innocent activities, requesting a delinquent foreign ship to leave the territorial sea, boarding and searching a delinquent foreign ship, investigating and arresting crew member(s) committed an illegal activity, etc. Furthermore, where a delinquent foreign ship defies orders to cooperate during enforcement measures, the competent authorities of the coastal States may resort to coercive measures, including the use of weapons as the last resort⁽³⁾.

Article 25, paragraph 1 of the UNCLOS seems to deal solely with non-innocent passage, stipulating that “The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.” However, the right of protection may be exercised against both ships engaged in non-innocent activities and ships which are not in “passage.” The “non-passage” activities may include hovering or cruising around and sailing in zigzags, as well as unnecessary stopping and anchoring⁽⁴⁾. Churchill and Lowe pointed out that there is no express provision under the UNCLOS setting out the right to exclude ships not engaged in passage but this right undoubtedly exists under customary international law⁽⁵⁾. The coastal State may take measures to regulate and prevent the non-passage activities of foreign ships in the territorial sea. O’Connell pointed out that the purpose of defining “Passage” separately from foreign ship’s innocence is to confirm the authority of coastal States to expel ships that are not engaged in “Passage,” – for example, are hovering or anchored⁽⁶⁾.

The Japan Coast Guard (JCG) is a law enforcement authority of the Japanese Government that is responsible for ensuring the “enforcement of laws and

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regulations at sea,” as well the “prevention and suppression of crimes at sea.” The JCG may take the necessary measures against a foreign ship’s passage that is not innocent in Japanese territorial sea, in accordance with international law and the Japan Coast Guard Act (JCG Act) (Act. No. 28 of 1948), the Code of Criminal Procedure (Act No. 131 of 1948), and other related Japanese laws and regulations. If the JCG decides that a foreign ship’s passage is not innocent with reference to Article 19 of the UNCLOS, the JCG may demand that the ship should stop such passage, and if the ship does not accord to the demand and continue to take “non-innocent passage” in Japanese territorial sea, the JCG may demand that the ship should leave. Moreover, if the JCG decides that a foreign ships’ passage is “not innocent” with reference to Article 19 of the UNCLOS and “illegal” with reference to Japanese laws and regulations, the JCG’s officers may stop, board, inspect and seize the ship, and investigate and arrest the perpetrator of such illegal activity. However, Japan has not enacted the law for generally and comprehensively regulating a foreign ship’s non-innocent passage through Japanese territorial sea.

In 2008, the Japanese government decided to establish the new law regulating the navigation of foreign ships through the territorial sea and internal waters. The law focuses on the manner of its navigation, that is to say, whether a foreign ship’s navigation is “passage” or not under international law. It submitted a draft of “the Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters” to the 169th Ordinary Session of the Diet. The Act was passed by the Plenary Session of the Lower House on June 5, 2008⁽⁷⁾. It was promulgated as Act No. 64 of 2008 on June 11, 2008 and was enforced on July 1 of the same year. The revised Foreign Ships Navigation Act was passed on August 29, 2012 and was promulgated as Act No. 71 of 2012 September 5, 2012 in response to an increase in foreign ships conducting territorial claim activities in Japanese

territorial sea in recent years.

Article 3 of the Act generally stipulates that “navigation of foreign ships in the territorial sea, etc. shall be continuous and expeditious with the purpose of passage···,” which was legislated with reference to Article 18, Paragraph 2 of the UNCLOS stipulating that “Passage shall be continuous and expeditious.” And, Article 4 of the Act more specifically stipulates that the Captain of a foreign ship shall not let the ship engage in the manner of navigation that includes stopping, anchoring, mooring, loitering, etc. in Japanese territorial sea, unless there is an unavoidable reason such as avoiding stormy weather, distress and other dangers⁽⁸⁾. Article 5 of the Act prescribes that, if the Captain of a foreign ship needs to navigate the ship in the manner that includes stopping, etc. in Japanese territorial sea, the Captain shall notify the JCG of the reason for such stopping, etc. in advance⁽⁹⁾. Furthermore, if a seemingly foreign ship navigating in the manner that includes stopping, etc. in Japanese territorial sea has not notified the JCG of the reason for such stopping, etc. in advance and the Commandant of the JCG deems it necessary to confirm the reason, the Commandant may allow officers of the JCG to make a boarding inspection of the ship on the basis of Article 6, Paragraph 1. If it is revealed as the result of making the inspection that the Captain of the ship has navigated the ship with such as stopping, etc. without an unavoidable reason as described above, in other words, the Captain has violated the obligations stipulated by the Act, the Commandant of the JCG may recommend the Captain to expel it from Japanese territorial sea on the basis of Article 7. If the Captain does not accord to the expulsion recommendation, and if it is found necessary for maintenance of order for navigation of foreign ships through the territorial sea, the Commandant of the JCG may order the Captain to have the foreign ship deport from the territorial sea on the basis of Article 8,

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Paragraph 2 of the Act. Any Captain who has violated the deportation order shall be punished by imprisonment with work of one year or less, or fined JPY 500,000 or less (Article 12). And, if the Captain evades a boarding inspection, the crime of its evading shall be established, and the Captain shall be punished by imprisonment with work of six months or less, or fined JPY 300,000 or less (Article 13).

Appendix

The Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters (Act No. 64 of 2008)

Chapter I General Provisions (Article 1 and Article 2)

Chapter II Methods for Navigation of Foreign Ships (Article 3 to Article 8)

Chapter III Miscellaneous Provisions (Article 9 to Article 11)

Chapter IV Penal Provisions (Article 12 to Article 13)

Chapter I General Provisions

Article 1 Purpose

Given that Japan is surrounded by the oceans and it is therefore important to ensure the safety and security of the oceans in the context of ensuring national security, the purpose of this Act is to maintain order for navigation of foreign ships through Japan's territorial sea, etc. and deter their suspicious activities and thereby ensure the safety and security in Japan's territorial sea, etc., by providing for methods for navigation of foreign ships in Japan's territorial sea and internal waters, measures for regulation of the navigation of foreign ships, and other necessary matters.

Article 2 Definitions

In this Act, the meanings of the terms set forth in the following items shall be as prescribed respectively in those items.

(i) The term “territorial sea, etc.” means Japan’s territorial sea and internal waters.

(ii) The term “newly specified internal waters” means such water areas that are newly specified as Japan’s internal waters based on the straight baselines set forth in Article 2, paragraph (1) of the Act on Territorial Sea and Contiguous Zone (Act No. 30 of 1977).

(iii) The term “foreign ship” means a ship other than Japanese-registered ships as defined in Article 1 of the Ship Act (Act No. 46 of 1899) which excludes warships and any ships owned or operated by any national government solely for non-commercial purposes.

(iv) The term “Captain, etc.” means the captain of a ship or other individual commanding a ship on behalf of the captain.

(v) The term “waterways and basins” means such waterways and basins located in the ports in Japan as specified by an Ordinance of the Ministry of Land, Infrastructure, Transport and Tourism (hereinafter abbreviated as the “MLIT”) as basins for anchorage or other facilities or places used for ships to stay or to be anchored.

(vi) The term “mooring facilities” means such mooring facilities located in the ports in Japan that are specified by an Ordinance of the MLIT as quay walls or other facilities or places used to moor ships.

(vii) The term “waterways and basins, etc.” means waterways and basins or mooring facilities.

Chapter II Methods for Navigation of Foreign Ships

Article 3 Methods for Navigation of Foreign Ships through Territorial Seas, etc.

Navigation of foreign ships through the territorial seas, etc. shall be continuous and expeditious with the purpose of passage (limited to the one pertaining to the newly specified internal waters, if navigating through Japan's inland waters) or traffic to or from the waterways and basins, etc.

Article 4

(1) The Captains of foreign ships shall not have the foreign ships navigate in the territorial sea, etc. in a way involving any of the following acts (hereinafter referred to as "anchorage, etc."); provided, however, that this shall not apply in the case where such anchorage is intended to avert bad weather, marine accidents or any other dangers, rescue human lives or other ships or aircrafts, or ensure compliance with the provisions of the Act on Preventing Collision at Sea (Act No. 62 of 1977) or any other applicable act or ordinance, or where such anchorage, etc. involves any other unavoidable reason specified by an Ordinance of the MLIT.

- (i) staying anywhere other than the waterways and basins
- (ii) anchoring anywhere other than the waterways and basins
- (iii) mooring anywhere other than the mooring facilities
- (iv) hovering (meaning navigation on such a route or at a such speed that is not found necessary for navigation of ships in general in light of meteorological characteristics, sea circumstances, marine traffic conditions, existence or nonexistence of obstacles ahead of the route of the foreign ship in question, or other surrounding circumstances)

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(2) In addition to what is provided for in the preceding paragraph, the Captains of foreign ships shall not have the foreign ships conduct navigation for any purpose other than arrival at or departure from any waterways and basins, etc. (hereinafter referred to as “transit passage”) in Japan’s internal waters (excluding newly specified internal waters; the same shall apply hereinafter); provided, however, that this shall not apply in the case set forth in the proviso of the preceding paragraph.

Article 5 Duty of Notification of Foreign Ships

(1) When a foreign ship needs anchorage, etc. in the territorial sea, etc. or transit passage through the internal waters, the Captain, etc. of the foreign ship shall notify the nearest office of the JCG, in advance, of the name of the foreign ship, its port of registry, the reason for the intended anchorage, etc. or transit passage, and other matters specified by an Ordinance of the MLIT (collectively referred to as “reportable matters” in the following paragraph) pursuant to the provisions of the Ordinance of the MLIT; provided, however, that this shall not apply in the cases specified by the Ordinance of the MLIT where the reasons for the intended anchorage, etc. or transit passage is determined obvious.

(2) In the case referred to in the preceding paragraph, if the Captain, etc. of a foreign ship is unable to give advance notification due to the necessity of averting any imminent danger, the Captain, etc. shall notify the nearest office of the JCG of the reportable matters immediately after averting such danger.

(3) The notification that is supposed to be given by the Captain, etc. of a foreign ship pursuant to the provisions of the preceding two paragraphs may be given by the owner of the foreign ship or an agent for the Captain, etc. or the owner.

(4) When it is found necessary to do so, the head of the office of the JCG

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receiving the notification pursuant to the provision of paragraph (1) or (2) above (including what has been given pursuant to the provision of the preceding paragraph; the same shall apply in paragraph (1) of the following Article) shall provide advice or guidance to the Captain, etc. of the foreign ship pertaining to the notification.

Article 6 Boarding Inspection of Foreign Ships

(1) In the case where a certain ship is actually navigating in a way involving anchorage, etc. in the territorial sea or transit passage through the internal waters and it appears to be a foreign ship, for which anchorage, etc. or transit passage no advance notification has been given pursuant to the provision of paragraph (1) or (2) of the preceding Article or the advance notification given is suspected to contain false information, if the Captain, etc. of the ship is suspected to be in violation of the provisions of Article 4 based on the reasonable judgment from surrounding circumstances and it is found necessary to ascertain the reason for the navigation involving such anchorage, etc. or transit passage in order to achieve the purpose of this Act, the Commandant of the Japan Coast Guard may direct coast guard officers to enter the ship in question, inspect documents and other items, or ask questions to crew members and other relevant persons on board.

(2) When conducting on-board inspection pursuant to the provision of the preceding paragraph, coast guard officers shall wear their respective uniforms or carry with them a proper identification card indicating their official status and present it when requested by the person(s) concerned.

(3) The authority of on-board inspection pursuant to the provision of paragraph (1) shall not be interpreted as having been permitted for criminal investigation.

Article 7 Recommendation to Foreign Ships

In the case where a certain ship is actually navigating in a way involving anchorage, etc. in the territorial seas, etc. and appears to be a foreign ship, if it is found obvious, based on the coast guard officer's reasonable judgment from the external appearance of the ship, its mode of navigation, abnormal behavior of the crew members or others on board, or other surrounding circumstances, that the Captain, etc. of the foreign ship is in violation of the provision of Article 4, paragraph (1), the coast guard officer may recommend the Captain, etc. to have the foreign ship navigate in a way not involving anchorage, etc.

Article 8 Deportation Order to Foreign Ships

(1) If it is found, as a result of the on-board inspection pursuant to the provision of Article 6, paragraph (1), that the Captain, etc. of the foreign ship is in violation of the provisions of Article 4, the Commandant of the JCG may order the Captain, etc. to have the foreign ship deport from the territorial seas, etc.

(2) In the case where the Captain, etc. in question does not accord to the expulsion recommendation received under the preceding Article, if it is found necessary for maintenance of order for navigation of foreign ships through the territorial sea, etc., the Commandant of the JCG may order the Captain, etc. to have the foreign ship deport from the territorial sea, etc.

Chapter III Miscellaneous Provisions

Article 9 Delegation of Authority

Matters falling under the authority of the Commandant of the JCG pursuant to the provisions of this Act may be delegated to the Commanders of the Regional

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Coast Guard Headquarters pursuant to the provisions of an Ordinance of the MLIT.

Article 10 Exclusion from Application of the Administrative Procedure Act

The provisions of Chapter III of the Administrative Procedure Act (Act No. 88 of 1993) shall not apply to orders pursuant to the provisions of Article 8 hereof.

Article 11 Sincere Implementation of International Commitments

This Act shall be enforced with due consideration not to preclude sincere implementation of the treaties or other international commitments concluded by Japan.

Chapter IV Penal Provisions

Article 12

A Captain, etc. who has violated an order issued pursuant to the provisions of Article 8 shall be punished by imprisonment with work of one year or less or fined JPY 500,000 or less.

Article 13

A person who has refused, obstructed, or avoided an entry or inspection pursuant to the provision of Article 6, paragraph (1) or who has failed to answer or given a false answer to any question pursuant to the same Article shall be punished by imprisonment with work of six months or less or fined JPY 300,000 yen or less.

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- (1) Haijiang Yang, 2006, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, Springer, p. 217.
- (2) Yang 2006, p. 217.
- (3) Yang 2006, pp. 217–218. Shearer also pointed out that the coastal State may use any necessary force, proportionate to the circumstances, to require a delinquent vessel to leave its territorial sea. I.A. Shearer, 1986, “Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels,” *International & Comparative Law Quarterly*, Vol. 35, p. 325.
- (4) Yang 2006, p. 218.
- (5) R.R. Churchill and A.V. Lowe, 1999, *The law of the sea, third edition*, Manchester University Press, p. 87.
- (6) Daniel P. O’Connell, 1982, *The International Law of the Sea, Vol. 1*, the Clarendon Press, pp. 269–270.
- (7) The Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters is available at https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=420AC0000000064 (only in Japanese) (last accessed on February 13, 2021).
- (8) Cases “where such anchorage, etc. involves any other unavoidable reason” are stipulated in Article 4, Paragraph 1 of the Act and Article 4 of the Ordinance for Enforcement of the Act on Navigation of Foreign Ships in Territorial Seas and Internal Waters (Ordinance of the Ministry of Land, Infrastructure, Transport and Tourism, No. 38 of 2016 on March 31).
- (9) Items that shall be notified to the JCG are stipulated in Article 5, Paragraph 1 of the Act and Article 6 of the Ordinance, such as (1) name of ship, (2) the IMO number of ship, (3) types of ship, (4) nationality/flag State of ship, (5) port of registry of ship, (6) gross tonnage of ship, (7) registered owner’s name and address, (8) operator’s name and address, (9) name of Captain, etc., (10) name and address of the notifier, (11) current location of ship, (12) reason(s) for stopping, etc. or transit passage, (13) location/area/entry point, date and time of stopping, etc. or transit passage, (14) last ports of call, (15) type and amount of cargo, (16) call sign and “maritime mobile service identity” (MMSI) and (17) means of corresponding with the JCG.