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## Searching for the Objectives of China's Revised Maritime Traffic Safety Law of the People's Republic of China

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### Introduction

On April 29, 2021, the Standing Committee of the People's Congress of China adopted the Revised Maritime Traffic Safety Law (MTSL), which was enacted on September 1 of 2021. In comparison to the Maritime Traffic Safety Law of 1983, the revisions greatly strengthened the authority of the China Maritime Safety Administration (CMSA), which is responsible for maritime traffic safety management.

As is the case with the Coast Guard Law (CGL) of the People's Republic of China, which went into effect on February 1 2021, the purpose of this revision was not limited to merely “strengthening maritime traffic control and maintaining maritime traffic order.” One of the purpose of the revised MTSL was to “protect national interests” (Article 1) and stipulated that its scope of application included the following: “This law shall be applicable to the navigation, berthing, operations, and other activities relevant to maritime traffic safety”<sup>1</sup> (Article 2). The use of the vague phrase “sea areas under the jurisdiction of the People's Republic of China,” indicates that the scope of application includes sea areas that China describes as its own waters, including the waters surrounding the Senkaku Islands and the waters within the Nine-Dash Line in the South China Sea, a feature it shares with the CGL.

In a response to these revisions of China's MTSL issued on April 30, 2021, the then-Chief Cabinet Secretary Katsunobu Kato expressed alarm, stating: “the [Japanese] government will continue to exercise caution to ensure that the enactment of this law—and related trends—does not harm the legitimate national interests of related countries, including Japan. Yesterday, we notified the Chinese via diplomatic routes of our position on this matter.”

On September 8, 2021—after the enactment of the revised MTSL—the missile destroyer USS Benfold (US Navy 7<sup>th</sup> Fleet) conducted a Freedom of Navigation Operation in waters within 12 nautical miles of Mischief Reef (Chinese name: *Meiji*), one of the Spratly Islands (Chinese name: *Nansha*), a region originally held by the Philippines but currently under the effective control of China. China conducted a large-scale landfill project on Mischief Reef, which is an atoll, and constructed an artificial island on which it installed 2,700 km of military runways, anti-aircraft weapons, a close-

in weapons (CIWS) missile system, and electronic countermeasure systems (“jammers”).<sup>2</sup>

The Arbitration Tribunal in the South China Seas Arbitration case filed by the Philippines against China (2016) said in its ruling that “the Subi Reef, the Gaven Reefs (southern side), Hughes Reef, Mischief Reef, and the Second Thomas Shoal are low-tide elevations as defined in Article 13 of the United Nations Convention on the Law of the Sea (UNCLOS)”<sup>3</sup> (Page 1203 B (3) c). Article 13 of the UNCLOS stipulates that “Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.” Thus, even if landfill projects are conducted or structures are constructed, such elements of artificial islands do not allow a low-tide elevation to be used to establish territorial waters. The revised MTSL establishes a new standard of maritime identification of “territorial waters” in the South China Sea and demands that ships passing through Chinese territorial waters report their ship’s name, call sign, location data, next port of call, and other information. However, the USS Benfold passed through these waters without abiding by these stipulations in the revised MTSL. This Freedom of Navigation Operation was an action that demonstrated that the sea surrounding Mischief Reef is not considered territorial waters under international law and that China was unable to force foreign warships to obtain its permission before passing through areas it claimed as territorial waters.

In response to this, Press Secretary of the Southern Theater Command of the People’s Liberation Army stated that “US actions are a serious interference in the sovereignty of China and its security,” adding that “The US is a risk-taker and the greatest destroyer of peace and security in the South China Sea.”<sup>4</sup>

### **Stipulations in the revised MTSL on non-innocent passage**

The revised MTSL stipulates the following regarding non-innocent passage: “For the purpose of maintaining maritime traffic safety and protecting the marine environment, the competent transport department under the State Council may, in conjunction with relevant competent departments, take necessary measures to prevent and stop the non-innocent passage of foreign vessels through the territorial sea” (Article 53). Undoubtedly, coastal states may take the measures necessary to stop non-innocent passage (based on their territorial sovereignty) in cases in which the conditions for “innocent passage” are not met. This is to allow coastal states to recover their comprehensive sovereignty regarding safety in cases where the conditions for innocent passage are not met.

The following provision in UNCLOS confirms this: “The coastal state may take the

necessary steps in its territorial sea to prevent passage which is not innocent” (Article 25, Item 1). However, what is specifically meant by the term “necessary measures” is not indicated. Although it seems clear that what is meant is the ability to stop a ship’s passage and demand that the ship leave from the territorial sea, the question of whether measures that exceed these are allowed would depend upon the specific circumstances.

The revised MTSL states: “The following vessels of foreign nationality entering and leaving the territorial sea of the People’s Republic of China shall report to the maritime safety authority: (1) submersibles; (2) nuclear-powered vessels; (3) vessels carrying radioactive substances or other poisonous and harmful substances; and (4) other vessels that may endanger the maritime traffic safety of the People’s Republic of China as provided for by laws, administrative regulations, or the provisions of the State Council” (Article 54). In cases in which these four types of vessels do not file a report prior to their passage through Chinese territorial sea, it is highly likely that their passage would not be considered “innocent.” Regarding ships of foreign governments, the law also states: “Where official vessels of foreign nationality navigating, berthing, or operating in the territorial sea of the People’s Republic of China violate the laws or administrative regulations of the People’s Republic of China, they shall be punished in accordance with the relevant laws and administrative regulations. The relevant laws shall be applicable to the administration of foreign military vessels within the sea areas under the jurisdiction of the People’s Republic of China” (Article 120). This stipulation is believed to be intended to apply to Chinese national law, as well as foreign warship and foreign government vessels that do not receive prior permission to passing through Chinese territorial waters.

The revised MTSL also stipulates the following: “No vessel may enter or pass through a prohibited navigation area in violation of the provisions” (Article 44). UNCLOS provides: “The coastal state may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises” (Article 25, Paragraph 3). This indicates that, while temporary suspension is recognized, the specific definition (regarding time limit) of “temporary” is not stipulated in the revised MTSL. Furthermore, the revised MTSL states that the scope of application includes territorial waters, as well as waters under the jurisdiction of the People’s Republic of China, thus further increasing the chances of a violation.<sup>5</sup>

### **Innocent passage of foreign warships: The problem of prior permission**

What is problematic is that, regardless of the fact that UNCLOS recognizes the right

of innocent passage for all ships—including warships—in foreign territorial waters, the Law on the Territorial Sea and the Contiguous Zone (LTSCZ; 1992) states that “To enter the territorial sea of the People’s Republic of China, foreign military ships must obtain permission from the Government of the People’s Republic of China” (Article 6, Paragraph 2). This suggests that a prior-permission system is in use when foreign warships pass through Chinese territorial waters.

As indicated above, the revised MTSL states: “Where official vessels of foreign nationality navigating, berthing, or operating in the territorial sea of the People’s Republic of China violate the laws or administrative regulations of the People’s Republic of China, they shall be punished in accordance with the relevant laws and administrative regulations. The relevant laws shall be applicable to the administration of foreign military vessels within the sea areas under the jurisdiction of the People’s Republic of China” (Article 120). The first half of this Article indicates that Japanese Coast Guard patrol boats must bear this in mind when engaged in maritime security in the vicinity of the Senkaku Islands, which are in the East China Sea. This is because it is impossible to predict when government ships would be “navigating, berthing, or operating in the territorial sea of the People’s Republic of China.” In addition, although the law states that “[Where official vessels of foreign nationality navigating, berthing, or operating in the territorial sea of the People’s Republic of China] violate the laws or administrative regulations of the People’s Republic of China, they shall be punished in accordance with the relevant laws and administrative regulations,” UNCLOS provides: “With such exceptions as are contained in subsection A and in Articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operating for non-commercial purposes” (Article 32). This recognizes exceptions from the enforcement jurisdiction of the coastal state regarding government ships, which indicates the possibility of infringements. In addition, under UNCLOS, recognition of coastal states is limited to requiring the ship to leave its territorial waters (Article 30). Thus, if the stipulation that “[t]he relevant laws shall be applicable” includes measures beyond the above, then it would be in violation of UNCLOS.<sup>6</sup> Furthermore, Article 92 of the revised MTSL, which states: “Where any vessel of foreign nationality may threaten the safety of the internal waters or territorial seas of the People’s Republic of China, the maritime safety authority shall have the right to order it to leave,” is utilized on Japanese fishing vessels operating in the waters surrounding the Senkaku Islands to order them to cease their operations; in cases in which they do not obey, the same Article states that “Where any vessel of foreign nationality violates the laws or administrative regulations of the People’s Republic of China on maritime traffic safety or on the prevention and control of

vessel pollution, the maritime safety authority may exercise the right of hot pursuit according to law,” and thus the danger of seizure of any such vessel is increased.

On June 7, 1996, when China ratified UNCLOS, it issued the following interpretative declaration: “The People’s Republic of China reaffirms that the provisions of the UNCLOS concerning innocent passage through territorial sea shall not prejudice the right of coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warship through the territorial sea of the coastal state.” Article 6, Paragraph 2 of China’s LTSCZ is the embodiment in Chinese domestic law of this interpretation.

Article 121 of the revised MTSL states that “Where there is any conflict between the international treaty concluded or acceded to by the People’s Republic of China and this Law, the provisions of the international treaty shall apply, except the clauses on which the People’s Republic of China has announced reservations.” This indicates that China’s demand that a foreign warship obtain prior permission to pass through its territorial waters would be in violation of UNCLOS if it expressed reservations when it ratified UNCLOS. This is because although their interpretation of Article 310 of UNCLOS would allow such an action, Article 309 prohibits such reservations. Reservations that exclude the legal effect of UNCLOS are differentiated from interpretive declarations suggesting specific interpretations of Articles about which multiple interpretations are possible. “Qualified interpretive declaration” by China have the legal effect of allowing China to participate in the Convention under the condition that their own specific interpretation allows them to demand permission before foreign warships pass through territorial waters. This would be a reservation that differs from the Article or from the understanding of other signatory countries and is therefore, prohibited by UNCLOS.

In fact, regarding Rumania’s interpretative declaration indicating that “Romania reaffirms the right of coastal States to adopt measures to safeguard their security interests, including the right to adopt such measures in full conformity with articles 19 and 25 of the Convention,” Germany released a statement on March 9, 1983, objecting that “None of the provisions of the Convention, which in so far reflect existing international law, can be regarded as entitling the coastal State to make the innocent passage of any specific category of foreign ships dependent on prior consent or notification.”<sup>7</sup>

In Part II Section 3, “Innocent Passage in the Territorial Sea,” UNCLOS indicates the “Rules were Applicable to All Ships” in A, the “Rules were Applicable to Merchant Ships and Government Ships Operated for Commercial Purposes” in B, and the “Rules were

Applicable to Warships and Other Government Ships Operated for Non-Commercial Purposes” in C. All stipulations related to the right to innocent passage (Articles 17–25) are in A, indicating that the Convention recognizes the right to innocent passage for all ships, including warships.

The “Memorandum on Questions Regarding the System for Demanding Prior Notification of Entrance into Territorial Waters by Foreign Ships,” submitted by SHINOHARA Go (Member of the House of Representatives, Japan) on June 9, 2021, contained the following question: “China’s LTSCZ indicates the need for foreign military vessels to obtain permission from China prior to their entry into Chinese territorial waters... Is this stipulation in a domestic [Chinese] law in violation of international law or not, and, whether it is in violation or not, what is the reason for the Japanese government’s determination to that effect?”<sup>8</sup> In response, the then-Prime Minister SUGA Yoshihide stated the following in a written response on June 18, 2021: “As a general rule, there is no stipulation in the United Nations Convention on the Law of the Sea (UNCLOS) that allows a coastal state to demand prior permission in cases in which a foreign warship enters its territorial waters.”<sup>9</sup> This was a clear statement of the Japanese government’s position that there is no basis in UNCLOS for the need for a coastal state to demand prior permission from such ships.

### **Nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances**

UNCLOS provides that “Foreign nuclear-powered ships and ships carrying nuclear, or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements” (Article 23). This allows the innocent passage of nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to pass through territorial waters under two conditions: 1) That it carry documents established by for such ships by international agreements, and 2) That it observe special precautionary measures established for such ships by international agreements.<sup>10</sup> As pointed out by ODA Shigeru, former judge of the International Court of Justice, in regard to the passage of these ships through territorial waters, in general this Article is interpreted as meaning that there is no need for any prior notification or permission in addition to the conditions set out in the Article itself.<sup>11</sup>

The “documents established by international agreements” referred to in this Article specifically include insurance referred to in Article 3 of the 1962 Convention on the



Liability of Operators of Nuclear Ships, the International Oil Spill Certificate of the 1973 International Convention for the Prevention of Pollution from Ships, and safety assessment documents that are in accordance with Article 8, Rule 7 of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention).<sup>1 2</sup> The “special precautionary measures established for such ships by international agreements” refers to the particular precautionary measures in Article 4 Paragraph 3 and Appendix 1 Article 2 of the 1980 Convention on the Physical Protection of Nuclear Material, among others. According to the office of the International Maritime Organization (IMO), encouraging ships to carry “documents established by international agreements” and abide by “special precautionary measures established by international agreements,” as the purpose of exercising the right of innocent passage is the responsibility of the flag state: that responsibility of the flag state arises from Article 94 of UNCLOS.<sup>1 3</sup>

Although the right of innocent passage is immediately denied to ships that do not carry “documents established by international agreements,” ships that do not follow “special precautionary measures established by international agreements” may be denied the right of innocent passage owing to the dangers of a major contamination. In fact, regarding ships carrying nuclear material in a form that does not meet the protection standards required by the Convention on the Physical Protection of Nuclear Material, the Convention provides that “A State Party shall not allow the transit of its territory by land or internal waterways or through its airports or seaports of nuclear material between States that are not parties to this Convention unless the State Party has received assurances as far as practicable that this nuclear material will be protected during international nuclear transport at the levels described in Annex I.” (Article 4, Paragraph 3). In such cases, the determination of non-innocent passage indicates that the coastal state may take the “necessary steps” indicated in Article 25, Paragraph 1 of UNCLOS.<sup>1 4</sup>

However, on the issue of nuclear-powered ships and ships carrying nuclear material, the revised MTSLS, in its Article 54, states that “Vessels mentioned in the preceding paragraph, when passing through the territorial sea of the People’s Republic of China, shall hold relevant certificates, take special precautionary measures that conform to the laws, administrative regulations and rules of the People’s Republic of China, and accept instructions and supervision of the maritime safety authority.” Even if a ship meets the standards of international agreements, this same ship may be denied the right of innocent passage due to the details regarding “special precautionary measures” outlined in Chinese domestic law. Further, Article 30 of the revised MTSLS states that such ships are obligated to comply with compulsory pilotage upon navigation. Specifically, it states

the following: “The following vessels that intend to navigate, anchor, or change berths in the pilotage areas designated by the competent transport department under the State Council shall apply to the pilotage organization for pilotage.” Considering that this law is applied to the sea area within the Nine-Dash Line of the South China Sea, it is highly likely that China would intervene in navigation by nuclear-powered ships within these areas of the sea.

Countries with domestic laws on nuclear-powered ships and ships carrying nuclear materials include Spain, which denies the right to passage (1964 law, Article 70), Pakistan (1976 law, Article 3, Item 3) and the Republic of Yemen (1978 law, Article 8), which require prior notification of passage, and Cote d'Ivoire (1988 law, Article 1), which prohibits passage through its territorial waters of nuclear waste and hazardous waste. Countries that are on presumed routes used for the maritime transportation of high-level radioactive waste from French nuclear fuel reprocessing plants en-route to Japan and that have either prohibited the passage of ships carrying such cargo from passing through their territorial waters or demand that they find alternate routes include the Philippines, Chile, Indonesia, Brazil, Argentina, Uruguay, Antigua and Barbuda, while those that have prohibited passage through their Exclusive Economic Zone or demand that they find alternate routes include Fiji, South Africa, and the Solomon Islands, indicating that China does not have a prominent place in this issue.<sup>15</sup>

One of the questions included in MP SHINOHARA's aforementioned Memorandum was whether “Egypt, Iran, and Oman require permission prior to the navigation of foreign ships other than warships that are either nuclear-powered ships or are carrying nuclear material, dangerous, or hazardous material. What is the Japanese government's stance on the stipulations in the domestic laws of these countries if the Japanese government are in violation of international law, and if the Japanese government determines that they are in violation of international law, or it does not, then what are the reasons for its making that determination.”<sup>16</sup> In response, the Japanese government issued the following: “As a general rule, the Japanese government's stance is that UNCLOS has no stipulations that permit coastal states from requiring prior permission when their territorial seas are entered by foreign nuclear-powered ships other than warships and ships carrying nuclear materials, other hazardous materials, or materials that are essentially hazardous.”<sup>17</sup> Thus, the Japanese government made its stance clear that there is no basis in the Convention for the need for coastal states to require prior permission from such ships. Specifically, Japan's stance is one in which it recognizes the right to innocent passage of nuclear-powered ships and ships carrying nuclear or other dangerous and hazardous materials.



### **Making it mandatory to report ship location data in order to establish the right to manage ship navigation**

The revised MTSL stipulates the following: In cases of “(4) failing to turn on the vessel’s devices for automatic identification, navigation data recording, remote identification and tracking, and communication, and other devices related to navigation safety, security, and pollution prevention, and to continuously display and record in accordance with relevant provisions,” “the maritime safety authority shall order it to make corrections, impose a fine of not less than 20,000 yuan but not more than 200,000 yuan on its owner, operator or manager, and impose a fine of not less than 2,000 yuan but not more than 20,000 yuan on the captain and crew member liable, and temporarily seize the certificate of competency for 3 to 12 months; if the circumstances are serious, the certificate of competency of the captain or crew member liable shall be revoked” (Article 103). SOLAS Chapter 5, Regulation 19 stipulates the penalty incurred by all ships of 300 gross tonnage and upwards that are not equipped with the required automatic identification system (AIS).

Chapter 5 Regulation 11 of the Appendix to SOLAS, which takes up the issue of ship reporting systems, states “A ship reporting system, when adopted and implemented in accordance with the guidelines and criteria developed by the Organization [i.e. IMO] pursuant to this regulation, shall be used by all ships, or certain categories of ships or ships carrying certain cargoes in accordance with the provisions of each system so adopted” (Paragraph 1) and “The Organization is recognized as the only international body for developing guidelines, criteria, and regulations on an international level for ship reporting systems. Contracting Government shall refer proposals for the adoption of ship reporting systems to the Organization” (Paragraph 2). On the other hand, this same Regulation also states that “Ship reporting systems not submitted to the Organization for adoption do not necessarily need to comply with this regulation. However, governments implementing such systems are encouraged to follow, wherever possible, the guidelines and criteria developed by the Organization” (Paragraph 4).<sup>18</sup> Thus, it is presumed that the revised MTSL is operated based on this Regulation. However, as it is recommended that governments consider the guidelines and criteria developed by the IMO, ships are requested to comply with the guidelines and criteria for ship reporting systems in the appendix to a resolution adopted on June 16, 2017 (MSC433(98)).<sup>19</sup>

As Professor FURUYA Kentaro has pointed out, if coastal states require ships passing through their territorial waters to report their ship’s location, it would be necessary for them to ensure that such requirements were in accordance with the guidelines and

criteria of the ship location reporting system of the IMO.<sup>20</sup> It is presumed that what lies behind China requiring ship location data is that it intends to exercise something akin to a “right to manage ship navigation” against foreign ships that navigate in its territorial waters.<sup>21</sup> However, unlike foreign aircraft, the right of a coastal state to regulate foreign ships would be limited to the recognized scope and such requirements for ship location data would need to abide by guidelines and international criteria.

## Conclusion

The greatest problem with China’s revised MTSL is the fact that China—in spite of being a party to UNCLOS—is ignoring the duty of coastal states vis-à-vis the right of innocent passage of foreign ships. UNCLOS indicates that a coastal state “shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention.” In particular, it indicates that coastal states shall not “(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from, or on behalf of any state” (Article 24, Paragraph 1).

Thus, UNCLOS stipulates that to facilitate maritime traffic in territorial waters, the right of foreign ships’ innocent passage shall be recognized (Article 17) and coastal states may not interfere with that right of innocent passage (Article 24). As a result, coastal states are constrained in that they “cannot place the entrance into or passage through their territorial waters by foreign ships under their own complete control.”<sup>22</sup> In spite of this, China has demonstrated that it has a notion that can only be called the “right to manage navigation,” which is problematic precisely because it places the navigation of foreign ships under their complete control.

UNCLOS “attempts to establish an objective framework for the purpose of collaborative handling of the execution of the authority to legislate, adjudicate, and enforce the use of the seas by the countries of the world” and “it is assumed that these treaty provisions will be incorporated into the domestic measures and laws of each country.”<sup>23</sup> However, this fundamental premise assumes the establishment of domestic laws that are in accordance with the provisions of UNCLOS, it does not assume the establishment of laws that ignore UNCLOS. The major problem, then, is the fact that China has established domestic laws based on its completely original interpretations that are designed to ensure its own maritime interests, and the fact that it is attempting to enforce these domestic laws using the power of an enormous maritime law enforcement agency and the navy. No amount of caution regarding these actions is too

much.

Under international law, unless coastal states do not “impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage” (Article 24, Paragraph 1 (a)), they only have the authority of placing conditions on the use of their territorial waters based on their sovereignty and only have the authority to regulate passage of ships. The right of coastal states to enact laws related to innocent passage is limited to the acknowledgment of that right in sub-paragraphs (a) through (h) of Article 21.

However, we find that the issue is not so simple when we are forced to deal with whether a country, as is the case with China, can reject the right of innocent passage of a foreign ship on the direct basis of such passage being in violation of domestic laws that do not comport with UNCLOS. According to YAMAMOTO Soji, former judge of the International Tribunal for the Law of the Sea, Article 19 of UNCLOS, provides “Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. Such passage shall take place in conformity with this Convention and with other rules of international law” (Paragraph 1), “allows for the application of both separation theories and conjoining theories regarding the recognition of the innocence of passage depending upon the circumstances.” Here, the term “separation theory” refers to the idea that under international law the issue of the basis for recognizing innocence and the issue of whether there has been a violation of the coastal state’s domestic law are unrelated. The term “conjoining theory” then is the idea that the two are interconnected.<sup>2 4</sup> Consequently, coastal states require the establishment of laws that can be specifically implemented for each circumstance. For example, in the case of a violation of the fishing laws of a coastal state by a fishing vessel, the right to reject innocence due to that very act was taken up in the Convention on the Territorial Sea and the Contiguous Zone (1958), which existed prior to UNCLOS: “Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea” (Article 14, Paragraph 5). In fact, in the Act on Regulation of Fishing Operation by Foreign Nationals, Japan protects its fishing interests in its territorial waters by prohibiting operations within Japanese territorial waters by foreigners (except in cases of persons with legal residency status in Japan and under the direction of the Minister of Agriculture, Forestry, and Fisheries) (Article 3).

China insists that the waters around artificial islands are its territorial waters, and it has passed domestic laws that introduce a prior permission system that rejects the right of innocent passage of warships. For China to enforce the laws regarding its territorial

waters and contiguous zones, which are in violation of UNCLOS, it is attempting to exert its enforcement jurisdiction using its Coast Guard Law and its revised MTSL, which are themselves in violation of UNCLOS. However, under international law, even if a country claims that a foreign ship is in violation of a domestic law that is itself in violation of international law, this does not mean that the country can reject that ship's right of innocent passage, and both warships and government ships operating for non-commercial purposes are exempt from the enforcement jurisdiction rights of coastal nations.

At the risk of being misunderstood, Japan could learn from China. Specifically, considering China's protection of its own legal interests, it has shown a proactive stance, in the sense that it has attempted to regulate all cases that do not involve innocent passage in its domestic laws. Unfortunately, although the Japanese "Convention on the Territorial Sea and the Contiguous Zone" does establish the breadth of the territorial sea and the contiguous zone, it does not directly address the issue of innocent passage. This is a major difference between Chinese and Japanese domestic law. As a result, Japan has no choice but to directly apply UNCLOS.

On October 24, 2021, the China Maritime Safety Administration deployed its maritime patrol vessel *Haixun 09*, the Administration's first 10,000-ton class patrol vessel able to carry helicopters to Guangzhou, Guangdong. To protect its maritime rights and interests, it cooperated with the China Coast Guard in its patrols of the South China Sea. Although it may be currently restricted to the South China Sea, it is assumed that maritime patrol vessel *Haixun 09* may be deployed to the East China Sea in the future.

In particular, the *Haixun 09* has been sent in the waters surrounding the Senkaku Islands along with Coast Guard ships, and it has ordered Japanese fishing vessels and patrol vessels of the Japan Coast Guard that were guarding the area out of the region. This was performed on the basis that these Japanese vessels were operating in Chinese "territorial waters," based on Article 54 of the revised MTSL, which states "The following vessels of foreign nationality entering and leaving the territorial sea of the People's Republic of China shall report to the maritime safety authority"; the fourth subparagraph of this states that: "(4) other vessels that may endanger the maritime traffic safety of the People's Republic of China as provided for by laws, administrative regulations, or the provisions of the State Council."<sup>2 5</sup> In cases where the Japan Coast Guard patrol vessels resist, it is likely that the following situation would arise: "Coastal police personnel who use weapons in accordance with the law but are too late to warn or may cause more serious harm after warning, may use weapons directly." (China Coast Guard Law, Article 49). These actions would be based on Article 120 of the revised MTAL,

which states “Where official vessels of foreign nationality navigating, berthing, or operating in the territorial sea of the People’s Republic of China violate the laws or administrative regulations of the People’s Republic of China, they shall be punished in accordance with the relevant laws and administrative regulations. The relevant laws shall be applicable to the administration of foreign military vessels within the sea areas under the jurisdiction of the People’s Republic of China,” and Article 21 of the China Coast Guard Law, which states, “Coast guard organizations have the right to take necessary warning and control measures to stop foreign military ships and foreign government ships used for non-commercial purposes that violate China’s laws and regulations in the waters under China’s jurisdiction, and order them to immediately leave relevant sea areas; for those who refuse to leave and cause serious harm or threats, the maritime police agency has the right to take measures such as forced eviction and forced towing.” This assumes collaborative activities between patrol vessels and Coast Guard vessels in the waters around the Senkaku Islands.

Thus, China has gradually established domestic laws and regulations for the purpose of seizing the Senkaku Islands. The China Maritime Safety Administration and the China Coast Guard have increased and improved the equipment they carry, and is therefore, likely to increase pressure on Japan. Japan must not misunderstand China’s seriousness in attempting to use force to change the reality of the Senkaku Islands, which are currently under the effective control of Japan. Thus, there is little time left for Japan to defend the Senkaku Islands.

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<sup>1</sup> Japan P&I Club: JAPAN P&I News, No.1132 (August 23, 2021). For an English translation of the revised MTSL, see: Sloma & Co., Introduction To Maritime Traffic Safety Law of PRC (As Amended 2021) <https://www.piclub.or.jp/wp-content/uploads/2021/08/Maritime-Traffic-Safety-Law-of-the-Peoples-Republic-of-China-Revised-in-2021.pdf> (last accessed on Feb. 15, 2022)

<sup>2</sup> “U.S. warship sails near man-made South China Sea islet, flouting new Chinese law,” The Japan Times, <https://www.japantimes.co.jp/news/2021/09/08/asia-pacific/china-fonop-mischief-reef/> (last accessed on Feb. 15, 2022)

<sup>3</sup> Award of the South China Sea Arbitration Cass of July 12, 2016, pp.473-474, para.1203. <http://www.pca-cpa.org>, (last accessed on Feb. 15, 2022)

<sup>4</sup> “Biden administration engages in 5<sup>th</sup> ‘Freedom of Navigation Operation’ in the South China Sea – China protests” Bloomberg, <https://www.bloomberg.co.jp/news/articles/2021-09-08/QZ3WTIT0G1L201> (last accessed on Feb. 15, 2022)

<sup>5</sup> Raul (Pete) Pedrozo, “China’s Revised Maritime Traffic Safety Law,” *International Law Studies*, Vol.97 (2021), pp.962-963.

<sup>6</sup> *Ibid.*, p.967.

<sup>7</sup> United Nations Treaty Collection, [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en) (last accessed on Feb. 15, 2022)



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- <sup>8</sup> SHINOHARA Go, “Memorandum on Questions Regarding the System for Demanding Prior Notification of Entrance into Territorial Waters by Foreign Ships” (Question No. 179), page 2. In the Question Statement, the countries mentioned in addition to China that require prior permission when foreign warships pass through their territorial waters are: Albania, Algeria, Antigua and Barbuda, Bangladesh, Barbados, Cambodia, Cape Verde, Oman, Pakistan, the Philippines, Poland, Romania, Somalia, Sri Lanka, Sudan, Syria, and Vietnam (17 countries).  
[https://www.shugiin.go.jp/internet/itdb\\_shitsumon\\_pdf\\_s.nsf/html/shitsumon/pdfS/a204179.pdf/\\$File/a204179.pdf](https://www.shugiin.go.jp/internet/itdb_shitsumon_pdf_s.nsf/html/shitsumon/pdfS/a204179.pdf/$File/a204179.pdf) (last accessed on Feb. 20, 2020)
- <sup>9</sup> Naikaku-Shushitsu 204(179) (June 18, 2021), page 1.  
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- <sup>10</sup> See ODA Shigeru, *Notes on UNCLOS* (Yuhikaku Pub. 1985). In addition, see pp. 37-61 of OKUWAKI Naoya “Foreign ship passage through territorial waters that is inherently ‘dangerous or hazardous’” in *Research on Maritime Legal Matters*, No. 1 (1993), pp.120-121.
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- <sup>12</sup> Laura Pineschi, “The Transit of Ships Carrying Hazardous Waters through Foreign Coastal Zone,” in F.R. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm*, Graham Trotman, 1991, pp.308-309.
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- <sup>15</sup> *Ibid.* p. 3 and pp. 7-11.
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- <sup>24</sup> TANAKA Toshiyuki “Creation of domestic laws in cases that do not qualify as innocent passage” in *The Development of UNCLOS and Domestic Measure*, No. 2 (The Oceanographic Society of Japan, 1998), p. 45.
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