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**JAPAN’S RESPONSE TO MARINE RESEARCH ACTIVITY
BY FOREIGN VESSELS
IN ITS EXCLUSIVE ECONOMIC ZONE (EEZ)***

—Current Status and Agenda of National Legislation—

Koichi MORIKAWA**

ABSTRACT

The purpose of this report is to examine the issue of what kind of enforcement measures the Japan Coast Guard, as the state police organ at sea, can take against foreign research vessels that carry out *anomalous activities*. For that purpose, I first provide an overview of current Japanese municipal law and legislation, and then I examine the issues attendant in measures against vessels owned or operated by foreign governments (“government ships”). This is because far more maritime research activities are done by official vessels than by private sector vessels. Thirdly, in the East China Sea, there are areas in which maritime boundaries are not delimited in relation to the EEZ between China and Japan, and between South Korea and Japan (the so-called, “disputed waters”). In this paper, I examine the points that warrant particular attention when taking measures in disputed waters. A major claim of this study is that these issues will likely be significant points of contention when legislating on marine scientific research going forward.

* This paper is based on Prof. Morikawa’s lecture on 16th Sept. 2010.

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1. INTRODUCTION

1.1 Recent Situation of Marine Research Activity by Foreign Vessels

In recent years there has been an increase in unauthorized marine research activity by foreign vessels in Japan's Exclusive Economic Zone (EEZ) in the East China Sea and other areas. In January 2010, for example, the marine research vessel "Dong Fang Hong 2" of the Ocean University of China placed what appeared to be a cylindrical observational instrument underwater in the Japanese EEZ 83km north-northwest of the island of Uotsurijima in Okinawa Prefecture without Japanese consent and carried out marine research. In March the same ship performed a similar marine research activity, again without the consent of Japan, in the Japanese EEZ 140km north-northwest of the island of Kubashima. Then in May 2010, a Japan Coast Guard aircraft discovered the Taiwanese Council of Agriculture, Fisheries Research Institute's fishery research vessel "Suishi 1" (R/V Fishery Researcher I) sailing with what appeared to be a wire lowered into the sea from its stern in the Japanese EEZ 324km west-northwest of the island of Amami-Oshima.

According to unofficial reports from the Japan Coast Guard, 110 foreign marine research vessels were directly sighted by the Japan Coast Guard in Japan's territorial waters or EEZ during the four and a half year period from 2006 until July of 2010—of which the number of incidents confirmed as *anomalous activity* (research believed to be without prior consent or research activities that seem to deviate from prior consent conditions) is as high as 30. Among these incidents, ten involved Chinese marine research vessels (55 sightings), sixteen involved Taiwanese vessels (22 sightings), and three involved South Korean vessels (13 sightings). Judging from these figures, Chinese vessels are the most numerous in terms of research vessel sightings, but it should be noted that the number of incidents of anomalous activity by Taiwanese vessels, which was unconfirmed until 2007, has risen to 16 during the past 2 to 3 years, more than the number by Chinese vessels.

1.2 Purpose and Scope of this Report

According to the United Nations Convention on the Law of the Sea (UNCLOS), coastal States have sovereign rights for the purpose of exploring the natural resources within their own EEZ (Article 56, paragraph 1 (a)) and clear jurisdiction in regard to marine scientific research (Article 56, paragraph 1 (b) (ii)). Therefore, foreign vessels cannot carry out resource exploration activities within the EEZ of other countries without explicit consent from those coastal States. With regard to scientific research, provided that they are carried out "exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind," it is assumed that consent can be obtained from coastal States in "normal circumstances" (Article 246, paragraph 3), although it is still necessary to obtain such consent from those coastal States (Article 246, paragraph 2). The question is what measures Japan can take against foreign vessels that carry out marine scientific research activities or resource exploration activities under the guise of scientific research within Japan's EEZ without relevant permission or consent, or vessels that carry out research activities which differ in ocean area or form from the conditions of the given permission or consent?

The purpose of this report is to examine the issue of what kind of enforcement measures the Japan Coast Guard, as the state police organ at sea, can take against foreign research vessels that carry out such

anomalous activities. For that purpose, I first provide an overview of current Japanese municipal law and legislation efforts, and then I examine the issues attendant in measures against vessels owned or operated by foreign governments (“government ships”). This is because far more maritime research activities are done by official vessels than by private sector vessels. Thirdly, in the East China Sea, there are areas in which maritime boundaries are not delimited in relation to the EEZ between China and Japan, and between South Korea and Japan (the so-called, “disputed waters”), and I examine the points that warrant particular attention when taking measures in such disputed waters. These issues will likely be significant points of contention when legislating on marine scientific research going forward.

While issues related to taking action against *anomalous activities* by foreign vessels arise not only in incidents occurring in the EEZ, but also in territorial waters, the extent of action that can be taken, as well as the legal grounds are not always the same in both territorial waters and the EEZ. In light of this fact, and also due to space constraints, I will limit my discussion here to action within the EEZ. There is also the issue of what “government ships” are, including the problem of the status of vessels owned or operated by the authorities of Taiwan—which Japan does not recognize as a State. This particular legitimacy issue could raise significant debate on international law, but in this paper, rather than delve into such matters, I focus on the problems that occur assuming that the vessels concerned are foreign government ships.

2. THE STATUS OF THE DEVELOPMENT OF JAPANESE MUNICIPAL LAW

2.1 Current Law

The Act on the Exclusive Economic Zone and Continental Shelf (Act No.74 of June 14, 1996), the municipal law enacted when Japan ratified UNCLOS, states that Japanese laws and regulations (including penalties) shall be applied to “the exploration, exploitation, conservation, and management of natural resources, the establishment, construction, operation, and use of artificial islands, installations and structures, and the protection and conservation of the marine environment” along with “marine scientific research” in the said areas (Article 3, paragraph 1-1) and to the thereto related “execution of duties of Japanese public officers in areas pertaining to the EEZ and continental shelf (including, in relation to the above execution of duties, the execution of duties pertaining to pursuits carried out from such areas in accordance with stipulations in Article 111 of UNCLOS) and acts to impede this”(Article 3, paragraph 1-4).

Regarding the above “exploration of natural resources,” for example, the Act on the Exercise of the Sovereign Rights for Fisheries, etc. in the Exclusive Economic Zone was simultaneously enacted (Act No. 76 of June 14, 1996), providing a system of enabling a certain regulation of exploratory activities regarding living resources. On the other hand, there are currently no municipal laws to regulate “marine scientific research” itself, so Japan is now dealing with this problem in accordance with “On Handling Scientific Research by Foreign Countries in Japan’s Territorial Waters, Exclusive Economic Zone and Continental Shelf (The Guideline for conducting Marine Scientific Research in areas under national jurisdiction of Japan)” (July 20, 1996), which was established when UNCLOS came into force in Japan.

The Guideline states that those foreign nationals or institutions planning to conduct marine scientific research are requested to submit a formal request of consent, together with an application form on the

research plans, through diplomatic channels to the Ministry of Foreign Affairs of Japan at least six months before the research is to be performed. An individual assessment shall be made on the pros and cons of that research. The criteria for this assessment are things such as “whether it is exclusively for peaceful purposes and for the benefit of all mankind” for which consent is normally given under the provisions of UNCLOS, Part XIII on marine scientific research and “whether the research is pertinent to the cases cited in UNCLOS Article 246, paragraphs 5 (a) to (d),” for which the granting of consent may be discretionarily withheld.

The Guideline further stipulates that if research activities that have received consent are not performed in accordance with the items listed in the research plans or if the conditions applied when consent was given are not observed, Japan can “take the necessary measures permitted within the scope of international law and Japanese law, such as notifying the other party of the facts, making an approach so that such a situation does not recur, and requesting the cessation of research activities, as necessary.” However, the Guideline does not clarify the precise “scope of international law and Japanese law,” or whatever “necessary measures” can be taken, apart from the above-mentioned (1) notification of the facts, (2) approach to prevent a recurrence of the situation, and (3) request that the research activities be stopped. Furthermore, it says nothing about the possible measures that may be taken against the research activities carried out without obtaining prior consent.

On this point, at the Land, Infrastructure and Transportation Committee of the House of Representatives in April 2007, the then-Commandant Hiroki Ishikawa of the Japan Coast Guard responded, “If marine research is done within the Japanese EEZ without prior permission or some such thing, we issue an alert and guide the vessel away. In addition, we issue a protest via diplomatic channels”.⁽¹⁾

Since the Guideline is not legally binding and therefore has no penal provisions in terms of domestic law, even if a violation has occurred, no enforcement measures can be taken against the offending vessel and the most that can be done is to protest via diplomatic channels while requesting at the scene that the vessel stop the research activities and leave the area. This indicates that so long as such a guideline method is followed there can be no effective measures against *anomalous activities* of scientific research performed without Japanese consent or in breach of the conditions of the consent.

2.2 Legislation Efforts

Under these circumstances, in October 2005 the Bill on the Exercise of Sovereign Rights and Other Rights Relating to Natural Resource Exploration and Marine Scientific Research in the Exclusive Economic Zone (or the EEZ Sovereignty Bill) (received by House of Representatives on October 21, 2005, withdrawn from the House of Representatives on April 4, 2007) was submitted as a bill sponsored by lawmakers including Goshi Hosono, a Member of the House of Representatives of the Democratic Party of Japan, the opposition party at the time. The Bill on Promoting the Exploitation of Seabed Resources—which set out a basic plan for the exploitation of seabed resources and promoted comprehensive implementation through the establishment of a Seabed Resource Exploitation Office—was also submitted, simultaneously.

The purpose of the former Bill was to “establish the necessary measures for exercising sovereign rights and other rights stipulated by UNCLOS related to natural resource exploration and marine scientific research in the EEZ, in order to secure Japanese national interests and appropriately control marine scientific research carried out by foreigners in the EEZ” (Article 1).

A summary of the Bill was as follows:

(1) Prohibition of natural resource exploration by foreigners

Natural resource exploration carried out in areas including the EEZ by foreigners is to be prohibited in principle (Article 3).

(2) Marine scientific research by foreigners

Marine scientific research carried out by foreigners is to be subject to a permission system by the cabinet ministers in charge (Article 5).

Procedures of permission applications, suspension orders, and permission cancellations are to be stipulated (Article 7-10).

Exceptions based on UNCLOS regarding marine scientific research carried out by foreign countries and international organizations are to be stipulated (Article 11-13).

(3) Penalties

Penalties are to be stipulated for natural resource exploration by foreigners (Article 21), marine scientific research without permission, and violations of restrictions and conditions attached when permission was given (Article 22).

(4) Establishing a system for control

“In order to ensure appropriate implementation of this Act, the State shall strive to establish the system required for properly gathering and monitoring information about research activities carried out by foreigners in the EEZ, patrolling the EEZ, and controlling acts that contravene this Act” (Article 17).

In this way, the EEZ Sovereignty Bill, on the one hand, in principle prohibits natural resource exploration carried out by foreigners within Japan's EEZ (Article 3). On the other hand, it introduces the permission system for marine scientific research (Article 5), and controls these activities by preparing penalties for natural resource exploration activities (Article 21) and marine scientific research activities that are not permitted or in violation of conditions of permission (Article 22), consequently securing Japanese national interests in its EEZ. Curiously, regarding the control of actions that violate the Act, the Bill says nothing about the concrete measures to be taken, and stops at saying that “the State shall strive to establish the system required for...” (Article 17), on which point it does not directly answer the concerns of this report.

2.3 How the Bill Was Withdrawn

Apart from this action by the Democratic Party of Japan, a Basic Act on Ocean Policy Research Group was set up in April 2006 by the then ruling Liberal Democratic Party and Komeito Party in alliance with the Democratic Party of Japan and various experts. Through its deliberations, a Basic Act on Ocean Policy Bill was submitted in April 2007 to the 166th Diet Session as a bill sponsored by a cross-party group of lawmakers and subsequently enacted in that session (Act No. 33 of April 27, 2007).

As a result of the enactment of this Basic Act on Ocean Policy, the EEZ Sovereignty Bill and the Bill on Promoting the Exploitation of Seabed Resources which had been submitted by the Democratic Party of Japan were withdrawn, although the reasons differed in each case. The reason for withdrawing the latter was that its contents were now reflected in the Basic Act on Ocean Policy, so it no longer had any meaning as an independent bill, whereas there still may have been a need to enact the former due to the gap in existing law that meant illegal marine scientific research activities could not be clamped down on. Yet the reason why it was withdrawn is not entirely clear from the Diet minutes. In his reply to questioning, Tetsuzo Fuyushiba, the then-Minister of Land, Infrastructure and Transport said, "Introducing new legislation is an issue that requires us as a State to take extremely political decisions, taking fully into consideration our national interests and the spirit of UNCLOS, and carefully examining the propriety of such legislation. I fully understand the purpose of the EEZ Sovereignty Bill which has been submitted by the Democratic Party of Japan, but the possible impact of the Bill needs to be considered from the standpoint of national policy, making this a problem that must be examined with caution".⁽²⁾ From this statement, we can surmise that the withdrawal resulted from the Democratic Party of Japan showing a certain level of understanding of such an assertion that new legislative measures would require full consideration of Japan's national interest and the spirit of UNCLOS and that its propriety needed to be studied carefully.

Since then, a study based on the Basic Act on Ocean Policy has been carried out by the newly installed General Ocean Policy Office Legislative Team in the Cabinet Secretariat, but no concrete bill has been presented, at least not yet. Below, after bringing into focus the two problems of (1) measures against foreign "government ships" that carry out illegal research activities and (2) measures against the same kind of ships in "disputed waters," which are the main problems that should be studied "taking fully into consideration our national interests and the spirit of UNCLOS," I describe the points of contention that I believe are most important.

3. MEASURES AGAINST FOREIGN GOVERNMENT SHIPS CARRYING OUT ILLEGAL RESEARCH ACTIVITIES

3.1 Prescriptive Jurisdiction

UNCLOS states that a coastal State has "jurisdiction" over marine scientific research within its EEZ (Article 56, paragraph 1(b)(ii)) and stipulates that "Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize, and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention" (Article 246, paragraph 1). This means that there is no problem in terms of international law with a State establishing municipal laws that stipulate conditions and procedures for permission and penalties for violations relating to marine scientific research carried out by foreign countries (foreign nationals) in its own EEZ.

3.2 Enforcement Jurisdiction

Regarding enforcement jurisdiction, which is the authority of a coastal State to apply forceful measures such as boarding, inspecting, and seizing vessels to ensure compliance with those established

laws, UNCLOS states that a coastal State: "may, in the exercise of its sovereign rights to explore, exploit, conserve, and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention" (Article 73, paragraph 1). Regarding marine environmental pollution, too, UNCLOS permits the enforcement jurisdiction of a coastal State to act against vessels that carry out polluting activities causing significant damage and violating domestic laws that adhere to international standards (Article 220, paragraph 6). UNCLOS, however, has not set out any explicit provisions for coastal States' enforcement measures related to marine scientific research carried out by foreign countries.

(1) Enforcement Jurisdiction over Private Vessels

Because UNCLOS has not set out specific provisions for the enforcement measures of coastal States in regard to marine scientific research, a coastal State faces the problem of whether or not it can take enforcement measures such as boarding, inspection, and seizure of private vessels that have not complied with requests to stop its marine scientific research that is violating domestic law, such as by not being permitted or by deviating from permission conditions.

On the one hand, it can be argued that although there is no explicit provision for enforcement, it is allowed as a part of the exercise of jurisdiction, as we have already seen that UNCLOS, Article 246, paragraph 1 states that "coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize, and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention."

On the other hand, while vessels in an EEZ which is established in UNCLOS as a *sui generis* sea area are taken to accept flag State exclusive jurisdiction as on the high seas, unless clearly specified in the Convention, UNCLOS stipulates enforcement jurisdiction related to living resources (Article 73, paragraph 1) and pollution of the marine environment (Article 220, paragraph 6), but there are no provisions for marine scientific research. Also, in regard to illegal fishing and marine pollution, UNCLOS stipulates a system under which a seized vessel can be promptly released upon the posting of reasonable bond (Article 73, paragraph 2 and Article 226, paragraph 1(b)), but there are no safeguards in place for marine scientific research accompanying the exercise of such enforcement jurisdiction. Because of the above, there are also negative views about the exercise of enforcement jurisdiction in relation to marine scientific research.

Be that as it may, it is alleged that "the regulation of scientific research is carried out not to restrict scientific research activities themselves but out of concern for the possible impact of the research activities on natural resources and ocean pollution. . . Assuming that to be the case, . . . the main focus of regulations is to investigate whether the activities carried out are really scientific research or are in fact resource exploration, or whether a scientific research is carried out in such a way that it violates the conditions of permission and harms the interests of the coastal State in relation to the sovereign rights of the coastal State to its marine resources," and that the coastal State may "check whether research vessels are complying with their obligations under the Convention and the conditions attached to the discretionary consent from the coastal State, and, in the case of a violation, take such measures as (boarding and inspection) because

of the need to obtain evidence to make a suspension or termination request in accordance with Article 253 of UNCLOS”.⁽³⁾

Even though the exercise of enforcement jurisdiction over marine scientific research itself is not recognized, and because it is difficult to differentiate scientific research from natural resource exploration at first glance—due to the appearance of research activities—a legislative technique could be considered, first applying procedural regulations to marine scientific research, and then establishing a system for deeming the research without permission and research activities that fail to comply with conditions of permission as being natural resource exploration activities—in the absence of evidence to the contrary—and being able to take enforcement measures such as boarding and inspection. Needless to say, further careful study is needed into whether or not such a technique is possible.

(2) Immunity of Government Ships

Even if enforcement measures could be taken against private vessels in response to actions within the EEZ that violate municipal law as described above, there is the separate problem of whether enforcement measures could be taken against warships or other “government ships” (i.e., those owned or operated by a State and used only for government non-commercial service). If, conversely, measures could not be taken against private vessels, the possibility of exercising enforcement jurisdiction over foreign government ships would not even be discussed.

On the high seas, ships in principle are subject to the exclusive jurisdiction of the flag State whose flag they raise and sail (UNCLOS Article 92), but if a vessel is engaged in an exceptional activity such as piracy, slave trade, or unauthorized broadcasting, etc., even other States’ warships have the right to board and search the vessel to inspect relevant documents and the like (Article 110, paragraph 1). However, UNCLOS stipulates that “warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State” (Article 95) and “ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State” (Article 96). This shows that warships and other government ships satisfying certain conditions have complete immunity on the high seas from any kind of enforcement measures, including inspections, by foreign ships.

Above I have talked about the situation on the high seas, but as UNCLOS stipulates that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part” (Article 58, paragraph 2), also within an EEZ, warships and other government ships that satisfy certain conditions seem to have complete immunity from the jurisdiction of any States other than the flag State. As a result, “Regarding government ships operated for scientific research with a non-commercial purpose, it would be generally understood that, beyond requesting the suspension or termination of research activities, taking the enforcement measures such as on-board inspections or seizures were deemed unacceptable”.⁽⁴⁾

But although that is the principle, it does not necessarily mean that exceptions cannot occur. There is an assertion of such exception about the connection to living resource exploration and exploitation, not exactly the context related to marine scientific research. For example, “foreign government ships that perform activities in violation of a coastal State’s laws on the exploration and exploitation of living resources may lose their ‘immunity’ ... Foreign government ships that intentionally break the laws of a

coastal State relating to the exploration and exploitation of living resources may be deemed as lacking the condition for enjoying such immunity, namely "being used for non-commercial governmental service only. For cases which can be recognized as such, the ships in question will indeed be deemed as essentially lacking the condition for enjoying such immunity".⁽⁵⁾

Could the same thing apply to enforcement measures related to marine scientific research? It may be so in cases of so-called marine scientific research activities carried out by government ships that can be seen at a glance to be in violation of laws and regulations on living resource exploration and exploitation. In reality, however, setting aside the question of violation of official procedural requirements (e.g., whether it has obtained permission, whether it is complying with conditions of permission, etc.), in most cases it is not immediately obvious whether or not a vessel is in fact carrying out living resource exploration.

If it is so, the possibility of taking enforcement measures having confirmed that the government ships have "lost" their immunity is extremely low. On the other hand, if "deemed" measures were taken based on a violation of official procedural conditions, for example, but the presumption was then rebutted, one would have to be prepared for a significantly bigger risk of international friction because, unlike cases involving private vessels, such measures would be seen as exercising governmental authority over another State.

In that sense, the probable limit to enforcement measures against government ships, even allowing for exceptions, is as follows: "If it cannot be confirmed whether a vessel is a government ship or determined from the appearance of its external distinguishing marks or activities whether it is engaging in non-commercial service, the law enforcement agency of the coastal State can tentatively take the same on-the-spot enforcement measures as with ordinary private vessels".⁽⁶⁾

4. MEASURES AGAINST FOREIGN GOVERNMENT SHIPS IN DISPUTED WATERS

From the above, there seems to be only a limited possibility of being able to take enforcement measures in regard to marine scientific research in order to clamp down on actions by foreign government ships in contravention of Japanese municipal laws, even in undisputed areas of the Japanese EEZ. Next, I examine some elements about disputed waters that warrant particular consideration.

4.1 Sea Area Covered by Sino-Japanese Verbal Notes

As for the East China Sea, "verbal notes for implementing a mutual prior notification framework on marine research activities" (February 13, 2001) have been exchanged between Japan and China, according to which if either State carries out marine scientific research in the East China Sea before the maritime boundary there is delimited, that State shall provide prior notification to the other State at least two months in advance of the starting date of the research.

China notifies Japan when carrying out scientific research in areas that are "seas adjacent to Japan (excluding Japanese territorial waters) in which Japan has an interest," which include, according to Japan's interpretation, at least the Japan side of the median line set by Japan's EEZ law. Even after the exchange of the verbal notes, there have been occasional violations by Chinese scientific research

activities of the conditions of the verbal notes. Rather than being an issue specific to disputed waters, however, the issue of the rights and wrongs of enforcement measures against such activities can be likened to the already examined issue of enforcement measures against actions violating municipal laws in the Japanese EEZ. This is because China has consented to provide prior notification of its marine scientific research in "seas adjacent to Japan (excluding Japanese territorial waters) in which Japan has an interest" due to the existence of the verbal notes, at least in the waters disputed between Japan and China in the East China Sea which are covered by the verbal notes. But because the verbal notes describe those waters extremely vaguely, the scope of the sea area covered by them becomes a cause of disputes between both countries.

In May of this year, for example, the Chinese government vessel "Haijian 51" issued a request to the Japan Coast Guard's survey ship "Shoyo" to stop the geotectonic survey which it had been carrying out in waters on the Japan side of the geographic median line. According to Japanese understanding, this is an area where there is no need to notify China of Japanese scientific research. This event illustrates the potentially different understanding between the two countries even in sea areas in the East China Sea where verbal notes can be applied. Another case involves the sea areas around the Senkaku Islands which are, according to Japan's understanding, covered by the verbal notes and yet China's understanding is that they are not. Without greater accord between the two countries on the sea areas to which the verbal notes apply going forward, the effectiveness of the mechanism of the verbal notes may be called into question.

4.2 Other Sea Areas not Covered by Verbal Notes

Next, I would like to point out some factors in particular which should be considered when taking enforcement measures against foreign government ships in sea areas which both parties regard as their own EEZ, such as those areas obviously not covered by the Sino-Japanese verbal notes. These areas include disputed waters outside the East China Sea but still related to China (e.g., the sea areas around Okinotorishima, a couple of islands which China has refused to recognize as being eligible for having an EEZ), and waters disputed by South Korea or Taiwan with which no such agreement as the Sino-Japanese verbal notes even exists.

UNCLOS provides that "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution" (Article 74, paragraph 1) and that "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation" (Article 74, paragraph 3), and there is the same kind of stipulation for the continental shelf (Article 83, paragraph 3).

As for the significance these provisions of UNCLOS can have in the case of marine scientific research being carried out in disputed waters by foreign government ships, "a frequent issue is whether actually carrying out mineral resource exploration and exploitation will fall under the jeopardizing or hampering actions, which are forbidden by UNCLOS. On this point, one view says that a unilateral

exercise of rights must be avoided because it impairs the rights of the other party, while a conflicting view says that exploration activities are possible so long as reasonable consideration is given to the point of view of the other party”.⁽⁷⁾

Analysis of international precedents such as the Aegean continental shelf case and the Guyana-Surinam maritime boundary dispute case shows that “as well as giving the opposite party prior notification of marine scientific research in the sea area around the Takeshima islands, the need also arises to provide surveillance opportunities. Performing unilateral scientific research in sea areas where the maritime boundary between overlapping EEZ has not been delimited becomes a violation of obligations such as those ordered by the Article 74, paragraph 3, of UNCLOS”.⁽⁸⁾

This analysis shows the problem of whether Japan can pursue another State's responsibility under international law if government ships of that State have carried out marine scientific research in disputed waters without giving prior notification. But, taking things further, the question of whether Japan can take enforcement measures in such a case against the foreign government ships concerned for violating Japanese municipal laws is important in connection with the problem having been discussed here.

As one example, in the Guyana-Surinam arbitral award, the tribunal is of the view that the warning by Surinam naval gunboats, “leave the area in 12 hours” or “the consequences will be yours,” which was issued to the privately-owned continental shelf drilling rigs that had been test drilling in the region of the continental shelf disputed under the oil concession agreement with Guyana (on the Guyana side of the equidistant line), “seemed more akin to a threat of military action rather than a mere law enforcement activity”.⁽⁹⁾ There is an analysis that this conclusion of the tribunal was guided “because the installation of continental shelf drilling rigs was closely connected to territorial claims to the continental shelf and also due to the vessels dispatched to the site being warships”.⁽¹⁰⁾

How, in light of the above arbitral award, to assess law enforcement activities as being performed by Japan Coast Guard vessels rather than Japan Self-Defence Forces warships—when foreign government ships (or private vessels) have carried out marine scientific research on the Japanese side of the median line in a disputed EEZ in violation of Japanese municipal laws—is an important point of contention that requires further study going forward.

More attention should be paid to the words of a profound scholar on the law of the sea who warns against the easy resort to countermeasures against internationally wrongful acts, except in extreme cases where a clear basis can be shown. Soji Yamamoto, a former judge of the International Tribunal for the Law of the Sea, wrote, “At the transitional stage when agreement on disputed waters with non-delimited boundaries has yet to be reached, further careful consideration is needed in regard to the exercise of enforcement jurisdiction which is associated with physical enforcement measures”.⁽¹¹⁾

5. CONCLUDING REMARKS

From the studies reviewed in this paper, at the present stage we can safely state the following three points in regard to (1) measures against foreign government ships carrying out illegal research activities and (2) measures against the same kind of ships in disputed waters.

First, it is not a problem for Japan to enact municipal laws and stipulate conditions and procedures for permission, including penalties for the violation thereof, for marine scientific research in Japan's own EEZ carried out by foreign States (or foreign nationals). As for whether one can take enforcement measures such as boarding, inspection, and seizure in order to clamp down on violations of such laws, there may be no consensus on the rights and wrongs, nor on the scope of those measures that can be taken.

Second, regarding foreign government ships operated for the non-commercial purposes of scientific research within an EEZ, there is a consensus that enforcement measures, beyond requesting suspension or termination of research activities, such as on-board inspections or seizures are in principle unacceptable, but further study is needed on the extent to which exceptions can be allowed and on their scope.

Third, while there are claims that unilateral scientific research in waters where the boundary between overlapping EEZ has not been delimited are in violation of obligations such as those ordered by UNCLOS, Article 74, paragraph 3, there are more cautious opinions about whether enforcement measures may be taken in response to unilateral scientific research that contravene Japanese municipal laws.

If illegal marine scientific research activities are carried out within the Japanese EEZ by foreign government ships, it is quite natural for Japan to protest to the State concerned through diplomatic channels and submit requests to the encroaching vessel to cease and desist. This applies even in disputed waters. When such circumstances arise, protests are essential in order not to give acquiescence to the violating State's actions. However, if municipal laws are to be introduced enabling on-the-spot enforcement measures to be taken against vessels that do not comply with such requests, there will be many points that need to be examined first, including the points of contention discussed in this paper. Above all, measures against foreign government ships need to be structured in a way that makes them more easily connected to disputes between nations than measures against private vessels, to say nothing of measures in waters with non-delimited maritime boundaries which, being directly concerned with a nation's sovereign rights, easily trigger overreaction by the opposite State. Introducing new legislation could bring the advantage for Japan Coast Guard officers of enabling them to carry out their duties of enforcing the laws without hesitation, but, conversely, special care must be taken that it does not constrict the leeway for hitherto flexible resolutions through diplomatic negotiations.

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