Chapter 8
Protection of Maritime Interests[1]

Seiya Eifuku

Introduction

Specific contents of maritime interests, or rights and interests related to the oceans, can vary depending on how we assume or set subjects as the beneficiaries of such interests. Maritime interests of a state can be broadly divided into two types—those related to the exercise of exclusive control, jurisdiction or sovereign right over certain maritime areas, and those related to free access to the oceans as global commons. Of these two types of maritime interests, for a long time the former covered only territorial waters (territorial seas and internal waters) as target waters.[2] Following policy changes by various countries in response to the Truman Doctrine at the end of World War II, the establishment of the four Geneva Conventions on the Law of the Sea of 1958,[3] and three rounds of the United Nations Conference on the Law of the Sea, the United Nations Convention on the Law of the Sea (hereinafter referred to as the "UNCLOS") was created in 1982. UNCLOS established a general regime under international law that describes the maritime areas over which a state can exercise exclusive jurisdiction outside its territorial sea, such as the exclusive economic zone (EEZ). Also, with a large number of countries that constitute the international community becoming State Parties to UNCLOS,[4] a

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1 The term "protection" is typically used in the context of protection of other countries or other people, as seen in such examples as "protecting powers" and "protection of the wounded and sick people." The expression that "defend maritime interests from the infringement by military measures" could give the impression that an armed attack is assumed as infringement by military measures and may lead mistakes. To avoid this, the term "protection" is used in this paper in place of "defense." In this paper, therefore, "protection" is used to mean protecting own rights and interests.

2 Examples envisioning the oceans under the dualistic systematic structure of territorial waters and the high seas include the Convention on the Territorial Sea and the Contiguous Zone (Article 24) set on April 29, 1958 (which took effect on September 30, 1962, and to which Japan acceded on July 10, 1968), and the Convention on the High Seas (Article 1) set on April 29, 1958 (which took effect on September 30, 1962, and to which Japan acceded on July 10, 1968).

3 The four conventions are the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas (which took effect on March 20, 1966, and to which Japan has yet to accede), and the Convention on the Continental Shelf (which took effect June 10, 1964, and to which Japan has yet to accede).

4 As of March 2017, a total of 168 countries are the parties to the UNCLOS. Japan acceded to the convention in 1996. For the breakdown of the contracting states, see United Nations, *Chronological lists*

general regime was established to allow a state to have maritime interests of its own in a vast expanse of maritime areas that defy comparison with the past.[5] Under a maritime classification regime like this, if a state is to secure its own maritime interests, it would be necessary for that state, in the event of a dispute or problem over those maritime interests through competition or confrontation with another country, to promptly have consultations and coordinate to determine to which country the maritime interests belong. The typical example of disputes deriving from competition for such maritime interests is the case where no agreement is reached due to differing views regarding the maritime delimitation for the EEZ and/or the continental shelf. One specific example of such cases is the delimitation of the EEZ and the continental shelf in the East China Sea between Japan and China.[6] Furthermore, the typical example of problems driving confrontation is the case where a coastal state makes excessive claims concerning its rights and jurisdiction over its territorial sea and the EEZ, running counter to the principles of the right of innocent passage and the freedom of navigation in international waters by ships of non-coastal states. One specific example of such cases is the Freedom of Navigation Program that the United States has undertaken in counteracting China's claims for maritime interests.[7] In the international community, systems for international trials and arbitration are in place as institutional frameworks for settling such disputes or confrontations peacefully,[8] and it is also deemed that parties to a dispute have a legal

of ratifications of, accessions and successions to the Convention and the related Agreements, Last updated: 23 May 2017, www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea.

5 Under the Convention on Fishing and Conservation of the Living Resources of the High Seas, the State Parties were allowed to exercise the right to regulate fishing in the high seas contiguous to their territorial waters under certain requirements. Japan did not accede to the convention, and its State Parties stood at no more than some 40 countries. Under the Convention on the Continental Shelf, the State Parties were allowed to exercise their sovereign rights over the continental shelf outside their territorial waters. Japan did not accede to the convention, either, and its State Parties stood at no more than some 60 countries.

6 For judicial judgments of the International Court of Justice concerning disputes over maritime delimitation, see, for instance, *Judgment on Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway) of 1993, and *Judgment on Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain) of 2001.

7 For example, on May 9, 2017, USS William P. Lawrence (DDG-110) navigated within 12 miles of Mischief Reef in the Spratly Islands, and on July 2, 2017, USS Stethem (DDG-63) navigated within 12 miles of Triton Island, the Paracel Islands, as part of the Freedom of Navigation Program. www.news.usni.org/2017/07/02/u-s-destroyer-conducts- freedom- navigation-operation- south-china-sea-past-chinese-island; https://news.usni.org/2016/05/10//u-s-destroyer-passes-near-chinese-artificial-island-in-south-china-sea-freedom-of-navigation-operation.

8 See Part XV, the UNCLOS.

obligation to settle their problem by peaceful means.[9]

However, even if a state could use such regimes to secure its maritime interests by settling disputes or problems peacefully, that state cannot necessarily maintain its maritime interests completely and stably, since the maritime interests fixed institutionally may be infringed upon by other countries. For example, in 2017, North Korea test-launched ballistic missiles 12 times by the end of August without prior notification, and on four occasions, North Korea is estimated to have landed them in Japan's EEZ without prior consent of or prior notice to Japan.[10] Since there exists no dispute over the definite maritime delimitation between Japan and North Korea and there is no recognized intention or necessity on the part of North Korea to demonstrate that it has its own maritime interests in the zone, the landing of its ballistic missiles in Japan's EEZ can be taken as pure and simple infringement upon Japan's maritime interests.

While the development and test-launching of ballistic missiles by North Korea is recognized as a threat to Japan's security,[11] the perception that North Korea is infringing on Japan's maritime interests by landing ballistic missiles in Japan's EEZ appears to be only tenuous at present. The idea of protecting Japan's maritime interests from infringement by another country with the use of military measures, including military power, seems to be unclear in the first place.[12] For example, while the concept and idea of Maritime Security do exist, what the While Paper on Defense takes up first as activities for Maritime Security are "counter-piracy operations."[13] As seen in this, the concept of Maritime Security appears to think primarily of policies and activities related to the maintenance of the order of the sea that center on unlawful behaviors by private individuals. Lacking here is the idea of protecting Japan's maritime interests from infringement by other countries, particularly infringement with use of military measures. The same can be said about the

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9 Article 279, the UNCLOS.

10 The dates on which North Korea test-fired its ballistic missiles from January 2017 to the end of August are confirmed as follows: February 12, March 6 (the missiles landed in Japan's EEZ), March 22, April 5, April 16, April 29, May 14, May 21, May 29 (the missile landed in Japan's EEZ), July 4 (the missile landed in Japan's EEZ), July 28 (the missile landed in Japan's EEZ) and August 29.

11 The Ministry of Defense., *Defense of Japan*, 2016 edition, pp. 289-293.

12 The Basic Plan on Ocean Policy, in "1 Vision of Japan as an Oceanic State" of General Remarks, says that the government "should defend our territorial seas and the Exclusive Economic Zone (EEZ) and other maritime zones," but does not necessarily make clear from what they should be defended. Measures cited to "prevent activities that violate Japan's sovereign rights in the EEZ and continental shelves" in "(3) Establishment of the infrastructure and environment to promote development and other activities in EEZ and continental shelves" of "3 Promotion of Development of EEZ and Continental Shelves" in chapter 2 are only the responses to "foreign research vessels and other ships."

13 Ibid., pp. 339-344.

Basic Plan on Ocean Policy and the National Security Strategy, to be discussed below.[14]

One of the reasons for this is that maritime interests are the interests deriving from the maritime regime. Unless the general meaning and details of the maritime regime are accurately perceived, even in the case of the infringement by the use of military measures such as the landing of the ballistic missiles in the EEZ, it may be hard to realize what interests are being specifically infringed upon. This is seen in the fact that press reports have not given much coverage to the significance and impacts of the landing of North Korea's ballistic missiles in Japan's EEZ.

Therefore, this paper theoretically examines the regime and system related to details of maritime interests from the standpoint of clarifying the intent of the regime and system, or why such regime and system has been contrived. On the basis of this examination, it seeks to shed light on the presence or absence of the necessity to consider the prevention and rejection of infringement with use of military measures by analyzing and examining the momentum of the infringement of maritime interests by military measures, including ballistic missiles, and the impact of infringement. This paper then analyzes Japan's efforts related to the protection of its maritime interests and considers the points to note going forward in relation to relevant maritime and security policies.

1. Contents of Maritime Interests

(1) Contents of Maritime Interests and Related Regimes and Systems under International Law

Maritime interests, or rights related to the sea, may theoretically be divided into the following four types: (i) acquisition of marine (living and non-living) resources; (ii) navigation of ships for physical distribution; (iii) the effect of a natural moat on preventing the intrusion of a foreign enemy and the entry and departures of criminals; and (iv) interests obtainable from the sea aside from the three categories above, such as production of renewable energy like electricity. Thus, it can be argued that the maritime interests of a state comprise the ability of the state and its people to receive the full benefits of these four types of interests as well as the rights that can be exercised to establish and maintain the conditions to make it possible. If so, institutional (international law) points may be summarized at the following three issues concerning the maritime interests of a state: (a) how far can a state delimit an area over which it can exercise its exclusive control as the exercise of its sovereignty, or the bounds of its territorial sea that can be

[14] See Section 3 of this paper.

delimited, and how is the delimitation of the territorial sea related to the four types of interests described above?; (b) can a state exercise exclusive jurisdiction over maritime areas outside its territorial sea to receive the four types of interests?; and (c) in maritime areas that do not belong to any state or do not fall under the exclusive jurisdiction of any state, to what extent of the four types of interests can states receive?

Of these, regarding the scope of the territorial sea in (a), under UNCLOS, every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines.[15] Until UNCLOS set the breadth of territorial sea at 12 nautical miles, there were no explicit rules for the breadth of territorial sea,[16] and the historically prevailing view since the 18th or 19th century called for a breadth of three nautical miles.[17] In the first place, a general regime began to be established only in the 18th century to allow a state to exercise its sovereignty over a certain maritime area as its territorial sea.[18] When a state asserts its territorial right, the precondition in legal

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[15] The UNCLOS, Article 3.

[16] The Convention on the Territorial Sea and the Contiguous Zone, a multilateral treaty on the territorial sea established before the enactment of the UNCLOS, did not contain provisions for the breadth (numerical number) of the territorial sea.

[17] Naoya Okuwaki, "*Kaiyo Chitsujo no Kenpoka to Gendai Kokusaiho no Kino*" [Constitutionalization of the Order of the Sea and the Function of Modern International Law], Tadao Kuribayashi and Masahiro Akiyama eds., *Umi no Kokusai Chitsujo to Kaiyo Seisaku* [International Order of the Sea and Ocean Policy], Toshindo, 2006, p. 26; Chiyuki Mizukami, *Kaiyouho* [The Law of the Sea], Yushindo, 2005, pp. 58-62; Soji Yamamoto, *Kokusaiho* [International Law], Yuhikaku Publishing Co., Ltd., 1997, pp. 363-367; Shigejiro Tabata, *Kokusaiho Shinko Jou* [New Lecture on International Law Volume 1], Toshindo, 1990, pp. 159-162; Shigeru Oda, *Kaiyouho no Genryu wo Saguru* [Exploring the Origin of the Law of the Sea], Yushindo, 1989, pp. 81-85; Hideo Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], Yushindo, 1979, pp. 46-154; Malcom N. Shaw, *International Law*, Cambridge University Press, 2014, p. 412; John E Noyes, "The Territorial Sea and Contiguous Zone," Donald R. Rothwell et al., eds., *The Oxford Handbook of the Law of the Sea,* Oxford University Press, 2015, p. 93; Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2008, p. 180; R. Jennings and A. Watts, *Oppenheim's International Law,* Longman, 1996, pp. 611-612; D.P. O'Connell, *International Law of the Sea, vol. I*, Oxford University Press, 1982, p. 165.
For examples of national practices concerning the breadth of the territorial sea other than three nautical miles, see Jennings and Watts, *Oppenheim's International Law*, p. 612, n.4; H. S. K. Kent, "The Historical Origins of the Three-Mile Limit", *American Journal of International Law*, Vol.48, No.4, October 1954, pp. 537-553; Wyndham L. Walker, "Territorial Waters: Cannon Shot Rule", *British Yearbook of International Law*, Vol.22, 210-231, etc.

[18] Hideo Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], pp. 73-88; Brownlie, *Principles of Public International Law*, pp. 175; O'Connell, *International Law of the Sea,* pp. 128-129. For the national practices and theories related to control of the sea from ancient times up to the 18th century, see the following: Chiyuki Mizukami, *Haitateki Keizai Suiiki [Exclusive Econmoic Zone]*, Yushindo, 2006, pp. 3-7; Mizukami, *Kaiyouho* [The Law of the Sea], pp. 8-15; Akira Kotera, *Paradaimu Kokusaiho* [Paradigms in International Law], Yuhikaku Publishing Co., Ltd., 2004, pp. 112-113;

theory is that the state in question has exclusive control over the territory concerned. However, it is impossible for any state to continuously occupy and control the ocean, like land, and no state can exclusively control the ocean in the same manner as with land. In order to claim the territorial rights, it is theoretically construed that establishment of posture is necessary that a state authority existing on land could have the readiness to use forcible measures against those on the ocean as the enforcement of authority, or a person aboard a ship with the status as a state authority must have the readiness to use forcible measures against others on the ocean as the enforcement of authority (the exercise of public administrative authority). However, either of the above two was infeasible in those years where states lacked firearms or technology to build ships capable of staying on the sea for long periods of time. Therefore, during the years when no state could have the ability to control the maritime areas exclusively, even if a state claimed ownership over a certain area of the sea as part of its territories, such claim made no sense at all. Thus, as shown in the legal maxim that "the sea, like the air, is common to all mankind (*Maris Communem Usum Omnibus Hominibus ut Aeris*)," the principle that the right to exclusive control of the sea cannot be authorized had long been accepted as the ocean-related legal doctrine.[19] Therefore, the time when the regime of a state designating a certain area of the ocean as its territorial sea became generalized was relatively new in history,[20] and this generalization came after necessity that a neutral state in a war in Europe should show the scope of neutral waters (a state) in the sea was recognized.[21] The specific scope of the territorial sea gradually became fixed at three nautical miles from the coastline, and the first example of the implementation of the breadth of three nautical miles is said to have been a notice dated on November 8, 1793, given by the United States to Britain

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Hideo Takabayashi, *Kokuren Kaiyouho Joyaku no Seika to Kadai* [Achievements and Challenges of the UNCLOS], Toshindo, 1996, pp. 4-5; Soji Yamamoto, *Kokusaiho* [International Law], pp. 338-340; Ribou Hatano and Yoshihiko Ogawa eds., *Kokusaiho Kogi* [Lectures on International Law], Yuhikaku Publishing Co., Ltd., 1998, pp. 158-161; Soji Yamamoto, *Kaiyouho* [The Law of the Sea], Sanseido Co., Ltd., 1992, pp. 24-30; Tabata, *Kokusaiho Shinko Jou* [New Lecture on International Law Volume 1], pp. 204-205; Shaw, *International Law*, p. 441; Brownlie, *Principles of Public International Law*, pp. 224-225; R. R. Churchill and A. V. Lowe, *The law of the sea*, Manchester University Press, 1999, pp. 71-72; Jennings and Watts, *Oppenheim's International Law*, pp. 720-721; O'Connell, *International Law of the Sea,* pp. 1-19; Kent, "The Historical Origins of the Three-Mile Limit", pp. 537-553; Percy Thomas Fenn Jr., "Origins of the Theory of Territorial Waters", *American Journal of International Law*, Vol.20, No.3, July 1926, pp. 465-482.

19 Jennings and Watts, *Oppenheim's International Law,* p. 720.

20 Akira Kotera, *Paradaimu Kokusaiho* [Paradigms in International Law], p. 112.

21 Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], pp. 73-78; Brownlie, *Principles of Public International Law*, p. 175.

and France at the time of the Anglo-French War.[22] It is believed that the theoretical rationale for three nautical miles was that the distance proposed by Ferdinando Galiani, an Italian author, in 1782 was three nautical miles, a distance that roughly corresponded to the "cannon shot rule," a theory related to the breadth of the territorial sea advocated by Cornelius van Bynkershoek, a Dutch jurist.[23] (However, the point of view similar to that of Galiani had also been presented by Domenico Azuni, an Italian jurist, in 1795.[24]) As noted in comments that "the cannon shot rule had been broadly supported by theories and practices by nations until the second half of the 19th century as the only authoritative rule concerning the scope of the territorial sea,"[25] in pioneer days of the territorial sea regime, nations seemed to have thought primarily of how far into the sea they could extend their controlling power from the land.[26] As mentioned earlier, since the claims for territorial seas (neutral waters) by European nations in the 18th century were closely linked to the security purpose of delimiting the geographical scope in relation to the neutrality system, it is believed that the idea of enjoying maximum interests in terms of the acquisition of marine resources and the navigation of ships did not exist at the time

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[22] Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], pp. 80-81; Brownlie, *Principles of Public International Law*, p. 175; O'Connell, *International Law of the Sea,* p. 131. Japan also officially specified the neutral waters with a breadth of three nautical miles in "*Dajokan Fukoku*," or the Proclamation by the Grand Council of State, of 1871 issued in relation its neutrality in the Franco-Prussian War. Since then, Japan adopted territorial sea with the breadth of three nautical miles until it set forth the territorial sea of 12 nautical miles under the Territorial Sea Act of 1977. For changes in Japan's territorial sea regime, see, for example, Mizukami, *Kaiyouho* [The Law of the Sea], p. 62; Atsushi Yoshii, "*Ryokai Seido no Shiteki Tenkai*" [Historical Development of the Regime of Territorial Sea], Japanese Society of International Law ed., *Nihon to Kokusaiho no 100 nen Dai 3 Kan Umi* [100 Years of Japan and International Law Volume 3 Ocean], Sanseido Co., Ltd. 2001, pp. 32-53, etc.

[23] Mizukami, *Kaiyouho* [The Law of the Sea], pp. 58-59; Takabayashi, *Kokuren Kaiyouho Joyaku no Seika to Kadai* [Achievements and Challenges of the UNCLOS], p. 6; Oda, *Kaiyouho no Genryu wo Saguru* [Exploring the Origin of the Law of the Sea], p. 84; Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], pp. 78-80; Brownlie, *Principles of Public International Law*, pp. 174-175, 180; Churchill and Lowe, *The law of the sea*, pp. 77-78; O'Connell, *International Law of the Sea,* pp. 130-131.

[24] Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], pp. 79-80; Brownlie, *Principles of Public International Law*, p. 175, n.12.

[25] Hideo Takabayashi, "*Bainkerusufuuku*" [Bynkershoek], Japanese Society of International Law ed., *Kokusai Kankeiho Jiten* [Dictionary of International Legal Studies], Sanseido Co., Ltd., 1995, p. 636; Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], p. 302.

[26] This is indicated by the fact pointed out by Takabayashi, or the fact that when in 1874 the British government made inquiries to the governments of the United States, France, Germany, the Netherlands, Italy, Denmark, Sweden, Norway and Russia about "to what extent a state can legitimately claim jurisdictional authority over its coastal waters," all of them other than the United States and the Netherlands replied that the cannon shot rule is the principle under international law governing the breadth of the territorial sea. Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], p. 302.

in the first place. This was perhaps derived from the following reasons: given the levels of technologies related to the acquisition of non-living resources in the 18th century, the ideas of and motivation for the acquisition of non-living resources and production of renewable energy from the sea presumably were not workable. In terms of technologies concerning construction of fishing boats and fishing, including the manufacturing of fishing gear, single-day coastal fishing was the predominant form of fishery operations, with deep-sea fishing or offshore fishing generally considered difficult. So in those days, little competition for fishing grounds with foreign fishermen was anticipated, except for waters around national borders. Regarding the interests from the navigation of ships, the wider the scope of the waters for free navigation without any regulations by coastal states, the greater such interests. Delimiting the wider territorial sea does not lead to an expansion of maritime interests related to the navigation of ships, and it is instead believed to be conducive to the contraction and limitations of such interests.

Thus, in relation to the aforementioned four types of interests, it can be argued that the benefit of the delimitation of the territorial sea is confined to the effect of a natural moat on preventing the intrusion of a foreign enemy and the entry and departures of criminals. Since it is hard to recognize the relationship between the delimitation of the territorial sea, given how this came about, and the acquisition of marine resources or the securing of renewable energy, no significant effects can be expected concerning the securing and expansion of the acquisition of resources, particularly under the principle of the breadth of three nautical miles of territorial sea. Moreover, the delimitation of territorial sea would rather prove disadvantageous in relation to the benefit of the freedom of navigation of ships. In view of the above, if the objective is not to secure and expand the acquisition of resources, territorial sea should suffice to have the minimum breadth necessary for activities to prevent the intrusion of a foreign enemy and the entries and departures of criminals.

Obviously, that necessity may change in association with the feasibility of such activities as well as technological progress, including the abilities of an adverse party. So the scope necessary as the breadth of the territorial sea may also change with this, and essentially, there should be no absolute level for the breadth.[27] In order to ensure

[27] Shigeru Oda also points to the fact that the regime of the breadth of the territorial sea may change in tandem with technological changes by quoting Bynkershoek's statements that "I am discussing the present where such (weapons) are in use. Otherwise, I should have to say in general terms that the control from the land ends where the power of men's weapons ends." Oda, *Kaiyouho no Genryu wo Saguru* [Exploring the Origin of the Law of the Sea], pp. 84-85.

institutional stability, however, it is necessary to express the breadth of territorial sea in a numerical number and regularize it. This is why UNCLOS sets this numerical number as up to 12 nautical miles.[28] As one of the measures to balance an expansion of the interests a coastal state can expect to enjoy by the delimitation of the territorial sea and the securing of the benefits of the freedom of navigation by ships of non-coastal states, it is considered theoretically effective to set forth a regime of establishing a maritime zone outside of the territorial sea where the freedom of navigation similar to that on the high seas is guaranteed and a coastal state can implement the same measures as in its territorial sea or those similar to them (the zone related to the control exercised by a coastal state to prevent or punish the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea[29]). The contiguous zone system is consistent with this theory, and therefore, it is the maritime regime separate from that related to the acquisition of marine resources.[30]

Thus, in order to satisfy both the securing by a state of interests related to marine

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[28] The need to express the breadth of the territorial sea in a numerical number from the standpoint of the institutional stability is also believed to have motivated Galiani and Azuni to propose the distance of three nautical miles as the breadth of the territorial sea corresponding to the cannon shot rule. On this matter, Takabayashi reached the conclusion that "it is hard to imagine that the firing range of coastal artillery at the end of the 18th century had already reached three nautical miles" after examining the common firing ranges of cannons from the 18th century to the 19th century. He commented: "The distance of three nautical miles was not derived from the actual firing range of cannons at the time but stood for the distance thought to be the technical utmost of the firing range of cannons with gunpowder of the time. Similarly, under the prevailing practice at the time of limiting the neutral waters to the seawater surface within the ranges of cannons, for each case of the capture of a foreign ship, people in those days presumably had to check the presence or absence of gun batteries, sizes of cannons, the actual ranges of those cannons, or the positioning of turrets in the sea. Therefore, it is conceivable that Galiani and Azuni proposed the distance of three nautical miles, thought to be the technological limit of cannons at the time, as the scope of the territorial sea regardless of what types of cannons were placed or where cannons were installed, thereby eliminating the need to go through the troublesome process of determining the facts disputed in each case of the capture of a foreign vessel." Takabayashi, *Ryokai Seido no Kenkyu* [Study of the Regime of Territorial Sea], p. 286, p. 288, pp. 299-300.

[29] The UNCLOS, Article 33, Paragraph 1.

[30] For the legal status (nature) of the contiguous zone, see Hideo Takabayshi, "*Setsuzoku Suiiki no Houteki Seishitsu*" [The Legal Nature of the Contiguous Zone], *Kaiyouho no Rekishi to Tenbou* [History and Prospects of the Law of the Sea], Yuhikaku Publishing Co., Ltd., 1986, pp. 3-34. Regarding the continuous zone, Takabayashi explains, "Since the second half of the 19th century, when the speed of vessels increased and it became increasingly difficult to regulate ships of other states within the territorial sea, this regime had been widely adopted as an expedient to allow the exercise of authority by a coastal state outside its territorial sea for the limited specified purposes instead of expanding the scope of the territorial sea." Takabayashi, "*Setsuzoku Suiiki no Houteki Seishitsu*" [The Legal Nature of the Contiguous Zone], p. 3.

resources and the securing of a state of interests related to the freedom of navigation by its ships, it is necessary to institutionalize the establishment of a relatively large area of waters outside the territorial sea that provides a coastal state with the exclusive acquisition of marine resources by its people and the exclusive management of those resources by the state, and also allows the freedom of navigation for ships of all countries. The EEZ permitted under UNCLOS is the maritime regime suited to secure such interests, and is different from maritime zones designed to ensure activities related to a state's safety and public security like the territorial sea. In other words, the EEZ is definitively distinct from territorial sea in that it is the zone under the regime related to the acquisition of marine resources and production of renewable energy. Thus, regarding the issue of (b) above, that is, whether a state can exercise the exclusive jurisdiction related to the benefits to be obtained from the sea outside its territorial sea, the current UNCLOS provides that jurisdiction to a state (a contracting state) by allowing it to establish the EEZ within the scope of up to 200 nautical miles outside its territorial sea and exercise the exclusive jurisdiction over it to make the exclusive management of living and non-living resources etc. possible.[31]

Regarding the last issue of (c), or what sorts of interests states can possess from the sea that do not belong to any state or do not fall under the exclusive jurisdiction of any state, as is obvious from the explanations thus far, the institutionalization of the ability to establish maritime zones where the exclusive jurisdiction over marine resources etc. is allowed should be designed, in theory, to be compatible with the benefits of the freedom of navigation for ships. Therefore, even in the EEZ of either state, as long as the zone is outside the territorial sea, a state should be assured of the benefit of having its ships navigate freely there. In fact, UNCLOS secures this in Article 90 and Article 58.

Summing up the above, it can be argued that what are theoretically assumable as the contents of the maritime interests are four types of interests, more specifically: (i) the safety and security ensured through maritime activities; (ii) the acquisition of marine resources; (iii) the interests that can be obtained from the ocean other than (i), (ii), and (iv), including production of renewable energy; and (iv) free navigation of ships and various rights related to activities for securing these four types of interests mentioned above. Under UNCLOS, the territorial sea and continuous zone regimes are seen as related to the interests of (i), the EEZ regime (and the continental shelf regime) to the interests of (ii) and (iii), and the high seas regime to the interests of (iv) especially.

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[31] For the legal status (nature) of the EEZ, see, for example, Mizukami, *Haitateki Keizai Suiiki* [Exclusive Econmoic Zone], pp. 52-65.

(2) Institutions Concerning the Protection of Maritime Interests

Contents of maritime interests and relevant institutions under UNCLOS were explained in (1) above. The securing and maintaining of maritime interests may be divided into the institutional determination of those interests, and for the already determined interests, the prevention of encroachment on them, or once encroachment has occurred, the expulsion of such encroachment.

Of the steps mentioned above, a typical example that gives rise to the need to institutionally determine maritime interests would be the case where the maritime area claimed by two states overlap and the boundaries cannot be fixed, i.e. the case of a dispute over maritime boundaries. Furthermore, the reasons for the inability to fix the maritime boundaries may be classified into the case of the disputed territorial ownership of an island or a rock that serves as the basis of the baseline for the claimed maritime zone and the case of a dispute over the principles and methods to delimit the boundaries. An example of the former is the situation in the South China Sea, while an example of the latter is the confrontation between Japan and China over the maritime boundary delimitation excluding the portion related to the Senkaku Islands.

When the need arises for a state to protect its own rights and interests in international community where a supranational entity of power does not exist, a state's exercise of force has been traditionally approved as "self-help" equivalent to an act of self-remedy under domestic law.[32] Under these circumstances, at one time in the past, war was regarded as lawful under international law. However, the use of force as a means of "self-help," particularly with the use of military force, is not desirable from the standpoint of peace and stability in the international community. For this reason, the international community has pursued efforts to settle disputes between states through peaceful means, such as the good offices, mediation, and arbitration. The Convention for the Pacific Settlement of International Disputes of 1899 and the 1907 convention to amend it set forth dispute-settlement procedures other than trials as an international system. The conclusion of these conventions reflected the resolve and endeavors of the international community to settle interstate disputes peacefully. Furthermore, after World War I,

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[32] Akira Kotera, Yuji Iwasawa and Akio Morita eds., *Kogi Kokusaiho* [Lectures on International Law], Yuhikaku Publishing Co., Ltd., 2004, p. 4; Kotera, *Paradaimu Kokusaiho* [Paradigms in International Law], p. 224; Tabata, *Kokusaiho Shinko Ge* [New Lecture on International Law Volume 2], p. 66, p. 162, p. 181; Yuichi Takano, *Kokusaiho Gairon Ge* [An Introduction to International Law Volume 2]; Kobundo Publishers Inc., 1986, p. 312; Gerhard von Glahn, *Law Among Nations*, Macmillan Publishing, 1976, p. 494.; Humphery Waldock, *The Law of Nations*, Oxford University Press, pp. 398-408; Hebert W. Briggs, *The Law of Nations*, Appleton-Century-Crofts, 1952, p. 957.

war became regulated under international law, and in order to strengthen the regime under which each state can protect its rights without resorting to "self-help," a system of international trials under the Permanent Court of International Justice (PCIJ) was established. After World War II, the use of force became subject to regulations, and a system of trials by the International Court of Justice (ICJ) was established. The resolve of the international community to settle interstate disputes peacefully was also reflected in UNCLOS, which provides for the obligation to settle disputes by peaceful means in Part XV "Settlement of Disputes." This paper spares the explanation about them since they are described in detail in other chapters. At any rate, of the protection of the maritime interests, procedures for cases requiring the institutional determination of the maritime interests are secured institutionally, aside from its effectiveness. It can be argued that this framework is being made use of in disputes in the South China Sea.[33]

On the other hand, UNCLOS at least does not provide for the system designed to handle cases where so-called "rogue states" that assign great value to military power and do not assign great value to law and the principle of "rule of law" intentionally infringe on the maritime interests of other states.

2. The Need to Address the Infringement of Maritime Interests with the Use of Military Measures

Details of maritime interests and the systems to protect them were discussed in the preceding section. In order to determine whether there is a need to address the protection of maritime interests from infringement with the use of military measures, it is deemed necessary to examine the reason of necessity to consider infringement by military measures, the mode of the infringement, the interests to be lost by the infringement, and its impact. This section analyzes and examine these matters below, pondering whether there is the need to address infringement with the use of military measures in order to protect maritime interests.

(1) Catalyst to Consider the Infringement with the Use of Military Measures

In light of the origin of the maritime regime and systems, as the high seas emerged as a concept opposed to that of territorial seas, the concept and regime of the high seas were nonexistent until the concept and regime of the territorial sea were established. In

[33] *The South China Sea Arbitration*, Award of 12 July 2016 (PCA Case No 2013-19), Arbitral Tribunal, para.28.

those times in history, when the territorial sea regime had yet to be established, the sea was constituted absolutely as the integrated ocean, and it was theoretically inconceivable that any state would stand opposed to or fight against another state over the control and management of a certain maritime area. However, when a state came to be authorized under international law to own a certain maritime area as part of its territory, or the territorial sea, the conceptual necessity arose for a state to defend the territorial sea, its maritime domain, against infringement by a foreign country, just as the state found it necessary to defend its territory, its overland domain, against occupation and deprivation by a foreign country. However, due to the special characteristics of the sea, it is difficult to occupy and control only the sea continuously and exclusively and a state cannot help carrying out its continuous and exclusive control of the territorial sea through the occupation and control of land territory, like an island and a continent.[34] Therefore, it is quite understandable that in the early years of the territorial sea regime, the cannon shot rule drew broad support in international law theories and state practices as the theoretical rationale for the breadth of the territorial sea. As just described, the defense of the territorial sea essentially was integrated with the defense of land territory and considered attainable as the reflective effect of the defense of land territory, presumably eliminating the need to become particularly conscious of the defense of the territorial sea. However, regarding the maritime zones related to maritime interests completely separate from the territorial sea, like the EEZ that extends up to 200 nautical miles from the shore (base line), it is no longer possible to protect them by the reflective effect of the defense of land territory.

Furthermore, the advancement of military technology helped extend the firing ranges of cannons and other heavy firearms, and as seen in the development and evolution of missiles and rockets, the firing ranges of weapons in general became much longer as to defy comparison with the times when Bynkershoek advocated the cannon shot rule. In addition, the advancement of technologies related to shipbuilding, navigation, and ergonomics helped shorten the traveling time by ship and made it possible for ships to stay on the ocean much longer.

Under the United Nations Charter, occurrence of an armed attack is considered the prerequisite for the exercise of the inherent right of self-defense.[35] An armed attack

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[34] One of the points made in relation to this is the explanation offered by Mizukami that the territorial sea "constitutes an integral appurtenance of land territory." Mizukami, *Kaiyouho* [The Law of the Sea], p. 63.

[35] The United Nations Charter, Article 51; Ryoichi Taoka, *Kokusaihojo no jieiken* [The Right of Self-Defense under International Law], Keiso Shobo, 1981, p. 204.

is interpreted as damage to human lives and properties within a territory of a foreign country and an attack and/or capture of a foreign ship or aircraft on international waters by a military measure of a state.[36] Thus, even in the case of infringement related to the sea with the use of military measures, if the action does not fall under the categories of an attack or capture of a ship or aircraft on the sea and represent nothing more than the infringement of maritime interests, it is hard to regard the infringement as an armed attack under international law, and it may be difficult for the state to explain the use of military measures to get rid of the infringement as the exercise of the right to self-defense.

Therefore, it may be said that the changes in the maritime regime and the advancement of military technologies as described above, combined with the rules concerning the use of (military) force under international law, are taken to serve as a catalyst to choose an infringement on maritime interests with the use of military measures as a means of strategic harassment against other countries.

(2) Maritime Interests Vulnerable to the Infringement with the Use of Military Measures

Then, what types of Japan's maritime interests has North Korea infringed upon through its past efforts to land its ballistic missiles in Japan's EEZ without any prior notification? Needless to say, it can be argued that the landing of ballistic missiles in Japan's EEZ, even on the edge of it, without obtaining prior consent or giving prior notice to Japan exposed ships engaged in operations in or navigating through these maritime zones as well as the lives and bodies of Japanese citizens aboard those ships to danger. But it has to be pointed out that the lives of Japanese citizens are an interest separate from that of maritime interest.

Furthermore, Japan has not detected any direct damage to Japanese fishing boats and other ships by the landing of missiles. Thus, on the surface, it appears that no specific infringement on Japan's interests took place. In addition, Japan cannot directly invoke UNCLOS as the basis to denounce North Korea, which is not a contracting party to the convention. In the first place, North Korea, though a member of the United Nations, has no diplomatic relations with Japan. Even so, it does not seem advisable for Japan to take any action against North Korea that would be tantamount to recognizing the country's status as being a sovereign state or subject to international law.

On the other hand, despite North Korea's continuing actions to land its ballistic missiles in Japan's EEZ, if Japan cannot prevent or force back these landings, the Japanese

[36] Ibid., p. 204.

government has no choice but to urge Japanese citizens to avoid activities in its EEZ in the event that in the future. And even if the notice of the landing of ballistic missiles in Japan's EEZ is just a bluff and North Korea has no true intentions of launching a ballistic missile, as long as Japan cannot confirm that independently, Japan would need to make that call to its citizens and also have to suspend its monitoring operations to secure the sovereign rights of government vessels and aircraft. If such a situation actually occurs, it would mean that Japan, despite being a contracting party to UNCLOS, cannot enjoy the maritime interests based on the EEZ regime. In other words, the continuation of the missile landings in Japan's EEZ would virtually deprive Japan of the institutional framework to secure its maritime interests related to Japan's EEZ. It may be said that the recent individual cases of the missile landings in Japan's EEZ are taken to indicate that Japan is being deprived of this institutional framework. Therefore, it can be argued that Japan needs to prevent or force back the landing of ballistic missiles in the EEZ by North Korea.

The modes of infringing on maritime interests by the use of military measures may conceivably be classified, in relation to the interests being infringed on, into two types: actions to impede the acquisition of marine resources and the freedom of navigation and the unlawful acquisition of the interests, such as stealing of marine resources. Of these two, aside from North Korea's dangerous efforts to land ballistic missiles and other long-range weapons in Japan's EEZ without consent or notification, the former could include interference by dangerous actions to send naval vessels or aircraft coming close to the distance that would raise the danger of collisions, interference by dangerous actions on the pretext of military drills, persistent hanging around or making appeals by naval vessels and aircraft to put psychological pressures, thereby forcing the target state to alter or give up on the acquisition of natural resources or the navigation by its ships.

The modes of unlawful acquisition of interests presumably include the unlawful acquisition of marine resources in another country's EEZ under the guise of military surveys and the unlawful collection of marine resources in another country's EEZ by military personnel disguised as civilian fishermen. While the United States and the United Kingdom take the stand that military surveys are not included in "marine scientific research,"[37] China and some other countries are understood to have the position

[37] Department of the Navy, The Commander's Handbook on the Law of Naval Operations (NWP1-14M/MCWP5-12.1/COMDTPUB P5800.77A), June 2007, para.2.6.2.2; S. Bateman, "Hydrographic surveying in the EEZ", *Marine Policy*, Vol.29, No.2, March 2005, p. 173.

that they are included.[38] Though theories are also varied,[39] it appears reasonable in legal theory to construe that "military surveys are not included in 'marine scientific research,'" since, as Kentaro Wani points out, "the purpose and objectives of the provisions of the Convention on the Law of the Sea concerning marine scientific research are to protect the economic interests of a coastal state in its EEZ and continental shelf, and the results of military surveys normally are used only for military purposes and are not published. With no room to harm the economic interests of a coastal state, no conflict with interests protected by law of a coastal state should arise in the first place."[40] However, if Japan

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[38] Zou Keyuan, "Law of the Sea Issues between the United states and East Asian States," *Ocean Development and International Law*, Vol.39, 2008, p. 79

[39] Kentaro Wani, "*Kokuren Kaiyouho jouyaku ni okeru 'Gunji Chosa' no Ichi*" [The Positioning of 'Military Survey' under the UNCLOS], *Handai Hougaku* [Osaka University Law Reivew], Vol. 66, No. 3-4, November 2016, p. 619.

[40] Ibid., p. 629. For the relationship between military surveys and "marine scientific research" see the following literature, on top of the research paper above by Wani: Akira Kotera, "*Haitateki Keizai Suiiki ni Okeru 'Gunji Chosa*" ['Military Surveys' in the Exclusive Economic Zone], *Kaiyo Keneki no Kakuho ni Kakawaru Kokusai Funso Jirei Kenkyu: Kaijo Anzen Hoan Taisei Chosa Kenkyu Iinkai Houkokusho* [Research on International Dispute Cases Concerning the Securing of Maritime Interests: Report of the Examination and Research Committee on the Maritime Safety System], No. 2, March 2010, pp. 47-58; Yumi Nishimura, "*Kaiyo Chosa ni Kansuru Engankoku Kankatuken*" [Jurisdiction of Coastal State over Ocean Surveys], *Kaiyouho no Shikko to Tekiyo wo Meguru Kokusai Funso Jirei Kenkyu* [Research on International Dispute Cases Concerning the Implementation and Application of the Law of the Sea], Japan Coast Guard Foundation, 2008, pp. 82-83; Moritaka Hayashi, *Gendai Kaiyouho no Seisei to Kadai* [Generation and Problems of the Modern Law of the Sea], Shinzansha Publisher Co.,Ltd., 2008, pp. 224-225; Shigeki Sakamoto, "*Haitateki Keizai Suiiki ni Okeru Gunji Katsudo*" [Military Activities in the Exclusive Economic Zone], Kuribayashi and Akiyama eds., *Umi no Kokusai Chitsujo to Kaiyou Seisaku* [International Order of the Ocean and Maritime Policy], pp. 100-103; Kenji Nagaoka, "*Haitateki Keizai Suiiki ni Okeru Military Survey ni Kansuru Ichi Kosatsu*" [A Study on Miliatry Survey in the Exclusive Economic Zone], *Kansai Daigaku Hougaku Ronshu* [Kansai University Law Review], Vol.55 No. 3, September 2005, pp. 138-166; Akio Morita, "*Kokuren Kaiyouho Joyaku ni Okeru 'Gunji Chosa' no Ichizuke: Haitateki Keizai Suiiki/Tairikudana ni Okeru Hoteki Kisei no Kento*" [Positioning of 'Military Surveys" in the UNCLOS: Consideration of Legal Regulations in the Exclusive Economic Zone/Continental Shelf], *Kaiyou no Kagakuteki Chosa to Kanyouhojo no Mondaiten* [Scientific Surveys on the Ocean and Problems under the Law of the Sea], Japan Institute of International Affairs, 1999; Akira Mayama, "*Haitateki Keizai Suiiki ni Okeru Gunji Chosa: Beikoku no Tachiba no Kento*" [Military Surveys in the Exclusive Economic Zone: Eamination of the U.S. Stand], *Kaiyou no Kagakuteki Chosa to Kanyouhojo no Mondaiten* [Scientific Surveys on the Ocean and Problems under the Law of the Sea], Japan Institute of International Affairs, 1999; Kotera, James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhoff Publishers, 2013, pp. 285-288; Raul Pedrozo, "Responding to Ms. Zhang's Talking Points on the EEZ", *Chinese Journal of International Law,* Vol.10, No. 4, February 2011, pp. 207-223; Haiwen Zhang,"Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul Pedrozo's Article on Military Activities in the EEZ, *Chinese Journal of International Law*, Volume 9, No.1, March 2010, Pages 31–47; Raul Pedrozo, "Preserving Navigational Rights and Freedoms: The Right to Conduct Military

makes it clear to embrace the interpretation similar to that of the United States, it should be noted with caution that the possibility cannot be ruled out of a rogue state, seizing an opportunity to reap gains by banking on the interpretation, sending naval vessels into Japan's EEZ on the pretext of military surveys and engaging in activities that would infringe on Japan's maritime interests.

3. Japan's Initiatives

(1) Current Situation

Japan ratified UNCLOS in 1996. Of a host of rights under the convention, and in order to secure the rights related to the contiguous zone, Japan revised the Territorial Waters Act into the Act on the Territorial Sea and the Contiguous Zone. Japan also enacted acts and regulations related to the EEZ, making the necessary arrangements to be in a position to benefit from relevant maritime interests. Consequently, Japan became able to exercise sovereign rights and jurisdiction related to the EEZ over the waters of some 4.05 million km^2. The total area of territorial sea (including internal waters) and EEZ under Japanese jurisdiction came to some 4.47 million km^2, the 6th largest in the world.[41] Combining exports and imports, Japan's trade volume surpasses 900 million tons a year, over 99% of which is transported by ships.[42] Under these circumstances, Japan enacted the Basic Act on Ocean Policy in 2007 with the purpose of promoting measures with regard to the oceans comprehensively and systematically,[43] and Japan also formulated the Basic Plan on Ocean Policy in 2008. The Basic Plan says that the Japanese government "should also observe relevant international law and regulations, such as the Charter of the United Nations and UNCLOS, and aim to establish the international order of the sea based on the rule of law." On this basis, the Basic Plan positions the development of marine resources as a means of bringing wealth and prosperity to Japan, and it sets forth the basic policy of Japan's measures concerning the ocean, committing Japan to defending

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Activities in China's Exclusive Economic Zone," *Chinese Journal of International Law,* Vol.9, No. 1, March 2010, pp. 9-29; J. Ashley Roach, "Marine Data Collection: Methods and the Law," M. H. Nordquist et al., eds., *Freedom of Seas, Passage rights and the 1982 Law of the Sea Convention*, Martinus Nijhoff Publishers, 2009, pp. 171-208, etc.

41 Materials provided by the Japan Coast Guard: www1.kaiho.mlit.go.jp/JODC/ryokai/ryokai_setsuzoku.html. In the rankings of the comprehensive area of the territorial sea and the EEZ combined, the United States ranks first with some 7.62 million km^2, Australia second with some 7.01 million km^2, Indonesia third with some 5.41 million km^2, New Zealand fourth with some 4.83 million km^2, and Canada fifth with some 4.70 million km^2.

42 Materials provided by the Japanese Shipowners' Association: www.jsanet.or.jp/qanda/text/q4_46.html.

43 The Basic Act on Ocean Policy, Article 1.

its territorial seas, the EEZ, and other maritime zones, securing safe, efficient and stable maritime transport routes in the sea, and maintaining the ocean as part of the global commons for which rule of law persists, in order to "protect life, body and property of the people and contribute greatly to maintaining or developing the lives of the citizenry and economic activities."[44] Given the challenges related to the maintaining and securing of Japan's maritime interests under these policies, the Basic Plan cites (a) the intensification in recent years of claims and activities by neighboring countries over maritime security and marine interests in the sea zones surrounding Japan, (b) cases of illegal operations by foreign fishing boats in Japan's territorial seas and the EEZ, (c) marine surveys by foreign vessels in Japan's territorial seas and the EEZ, conducted without Japan's consent, and (d) the continual pirate attacks off the coast of Somalia and in the Gulf of Aden.[45] For the direction of measures to deal with these challengers, and for (a) in particular regarding overlapping maritime claims of Japan and neighboring states, the Basic Plan says Japan will secure its interests in the EEZ and other waters by making every effort to resolve the issues based on international law[46]. Regarding (b), under the direction of making every possible effort to maintain maritime security and guard Japan's territorial seas[47], the Basic Plan calls on the Japanese government to take measures to strengthen its systems, improve the abilities of the Maritime Self-Defense Force (MSDF) and the Japan Coast Guard, and heighten coordination among related ministries in order to ensure safety of the country's territorial seas and the EEZ.[48] It also says the related ministries and agencies should respond appropriately to (c) under mutual cooperation.[49] As for (d), under the direction of promoting, above all, measures to protect ships related to Japan from pirates off the coast of Somalia,[50] the Basic Plan states that Japan will continue to pursue measures of counter-piracy off the coast of Somalia and in the Gulf of Aden, strengthen coordination with relevant countries, and provide support to help improve abilities of Maritime Security authorities in Somalia and neighboring countries.[51] As seen above, the Basic Plan on Ocean Policy sets forth the basic policy of defending Japan's EEZ.

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44 The Basic Plan on Ocean Policy (written in Japanese and English), pp. 1-3, adopted by Cabinet Decision on April 26, 2013.

45 Ibid., p. 11.

46 Ibid., p. 55.

47 Ibid., p. 21.

48 Ibid., p. 13.

49 Ibid., p. 57.

50 Ibid., p. 21.

51 Ibid., p. 65.

And as the Basic Plan uses the English term of "defend" instead of "protect,"[52] it gives the impression that Japan assumes the situation of defending the EEZ against a foreign state's infringement on it with the use of military measures. As discussed earlier, however, the assumption of the infringement on Japan's maritime interests by another country with the use of military measures is not recognized in the Basic Plan's descriptions of the assumed infringers on Japan's maritime interests or the direction of Japan's responses to such infringers. The same can be said about the National Security Strategy, which sets forth the goals of national security. The National Security Strategy does refer to "Ensuring Maritime Security," but specific measures cited for that are nothing more than measures to address various threats in sea lanes of communication, including anti-piracy operations to ensure safe maritime transport and promote maritime security cooperation with other countries, and the offering of assistance to those coastal states alongside the sea lanes of communication and other states in enhancing their maritime law enforcement capabilities.[53] Thus, the National Security Strategy offers no clear-cut ideas about the infringement on Japan's maritime interests by other countries with the use of military power or Japan's responses to such infringement. The similar situation surrounds the National Defense Program Guidelines, which describes how Japan's defense should be based on the National Security Strategy. The Guidelines note "an increase in the number of so-called 'gray-zone' situations, that is, neither pure peacetime nor contingencies over…maritime economic interests."[54] However, as measures related to the protection of its maritime interests, the Guidelines do not go any further than stating that Japan will surely defend its territorial seas and respond effectively and promptly to gray-zone situations or any other acts that may violate its sovereignty,[55] and will take all possible measures for the defense and security of the sea and airspace surrounding Japan.[56] As with the National Security Strategy, the Guidelines offers no clear-cut ideas about the infringement on Japan's maritime interests by other countries with the use of military power or Japan's responses to such infringement.

Regarding Japan's responses to foreign naval vessels navigating through Japan's territorial seas and internal waters in a manner not corresponding to innocent passage

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52 Ibid., p. 4.

53 National Security Council Decision and Cabinet Decision on December 17, 2013, *National Security Strategy*, p. 14.

54 National Security Council Decision and Cabinet Decision on December 17, 2013, *National Defense Program Guidelines for FY2014 and Beyond*, p. 1.

55 Ibid., p. 12.

56 Ibid.

under international law, Self-Defense Forces (SDF) units are assigned to take up the task under the Cabinet Decision of May 14, 2015. But these responses are to be made from the perspective of defending Japan's sovereignty and securing the safety of Japanese people, not from the perspective of protecting Japan's maritime interests.[57]

As seen above, Japan's responses to infringement on its maritime interests with the use of military measures are not clarified even in the government's policy guidelines concerning ocean and security, including the Basic Plan on Ocean Policy, the National Security Strategy and the National Defense Program Guidelines. There is also the impression that they are not addressed explicitly in official international statements. For example, the Group of Seven (G7) Foreign Ministers' Statement on Maritime Security issued on April 11, 2016, cited "maintaining a maritime order" as an important issue of maritime security, and expressed their strong concern about the situation in the East and South China Seas and their strong opposition to any intimidating, coercive or provocative unilateral actions that could alter the status quo and increase tensions. As specific events impeding the maritime order, however, the statement cited only piracy, armed robbery at sea, transnational organized crime and terrorism in the maritime domain, trafficking in persons, the smuggling of migrants, and illegal, unreported and unregulated (IUU) fishing.[58] The G7 Ise-Shima Leader's Declaration of May 27, 2016, cited only piracy as a concrete example of maritime security issues, and referred to the concern over the situation in the East and South China Seas only in the context of the fundamental importance of peaceful management and settlement of disputes.[59]

As seen above, neither Japan's policy guidelines nor official international statements refer clearly to the infringement of maritime interests by a state with the use of military measures and the responses to such infringement, and there are two conceivable theoretical reasons for this. The first is as follows. The confrontation between states over the maritime interests can take two forms: one is the case where the confrontation arises because the boundaries of their mutually claimed maritime interests are either undefined or undecided, and another is the case where one state took over another state's pre-determined maritime interests or infringed on them for harassment purposes. The infringement on maritime interests by a state that used force in doing so may be construed as the latter under the above categorization. But very few actual cases of the latter are

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57 Adopted by Cabinet Decision on May 14, 2015, *Response to foreign warships navigating in territorial seas and internal waters of Japan in the form of non-innocent passage*.

58 *G7 Foreign Ministers' Statement on Maritime Security*, April 11, 2016, Hiroshima, Japan.

59 *G7 Ise-Shima Leader's Declaration*, G7 Ise-Shima Summit, May 26-27, May 2016.

found other than North Korea's landing of ballistic missiles in Japan's EEZ without prior consent or notice. This situation does not necessarily allow the international community to claim that an abundance of actual examples have been ascertained to generalize their policy concerns.

The second conceivable reason is that the proactive preparation of responses, including the use of forcible measures, by anticipating a failure of peaceful settlements from the outset could ultimately risk the deviation from efforts to peacefully resolve the dispute or the idea and principle of dispute settlements based on the "rule of law." More specifically, when a dispute arises between states, the basic principle of the international community calls on the parties to the dispute to strive to resolve it peacefully. In order to give a concrete shape to the basic principle, the international community endeavored to develop a system for peaceful settlements of disputes under international law since the late 19th century, including international arbitration and trials etc. A variety of official international statements in recent years emphasize the "rule of law"[60] apparently as a reflection of such continuous efforts by the international community. There may exist an idea that making assumptions not conducive to the peaceful settlement of a dispute is undesirable in relation to an action of another country to infringe on the maritime interests that is not deemed an armed attack.

On the other hand, the peaceful settlement of a dispute between states based on the principle of the rule of law can be attained when the parties to that dispute share that principle. In the case of maritime interests, peaceful settlement may be achieved if there is room left for a settlement through dialogue when the parties to the dispute make competing claims. However, it is difficult to find room for dialogue with a state that attempts to usurp another country's already-determined maritime interests or infringe on those interests solely to harass. Against the infringement on the maritime interests with the use of military power, such as the actions by North Korea to land its ballistic missiles in another country's EEZ, it would become necessary to exercise a certain level of the defense capability from the standpoint of protecting the maritime interests.

(2) Future Challenges

In light of Japan's ocean policy and maritime policy guidelines discussed in (1), the protection of Japan's maritime interests from infringement by military means, such as

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[60] See, for example, the speech by then Defense Minister Tomomi Inada at the Shangri-la Dialogue on June 3, 2017.

North Korea's landings of its ballistic missiles in Japan's EEZ, would eventually require the expulsion of the infringement.

Japan has the equipment and operation technology to intercept ballistic missiles, and the legal framework for the SDF to deal with the falling of ballistic missiles not considered an armed attack is also in place in the form of Article 82-3 of the SDF Act. However, the behavioral requirement for responding to ballistic missiles prescribed under the article is to "prevent damage to human lives or property in the territory of Japan," thus excluding ballistic missiles landing in Japan's EEZ from the coverage of an order to shoot down, in principle.[61] Can this problem be eliminated if a legal framework is put in place to enable the SDF to shoot down a ballistic missile feared to be landing in the EEZ? That is not necessarily the case.

If it became legally possible to shoot down a ballistic missile feared to be landing in Japan's EEZ, given the special characteristics of that task, it would be a unit of the MSDF that takes up the task of shooting it down. However, the roles the MSDF is expected to play tend to be increasing and becoming more diversified under the current international situation; moreover, the security environment and regular geographical scope of its activities goes beyond the maritime area surrounding Japan and the Pacific Ocean, extending to the South China Sea, the Indian Ocean, Africa, off the coast of Somalia, and in the Gulf of Aden. On top of these conditions, it is extremely difficult to quantitatively expand the force size, even for addressing new threats and duties, due to defense budget constraints attributable to Japan's demographics of an aging population with a falling birthrate and Japan's economic conditions. Therefore, it would be necessary to carefully plan the scope of the potential actions to deal with ballistic missiles.

On the other hand, if Japan remains unable to do away with the landing of ballistic missiles in Japan's EEZ without prior consent or notification, it would mean not only that Japan cannot protect the lives, bodies, and properties of Japanese people engaged in activities in the EEZ, but also that Japan eventually would virtually lose the institutional framework to maintain and secure its maritime interests. So, it is deemed essential for Japan to have the defense capability to force out the infringement on its maritime interests by other countries using military measures, as exemplified by North Korea's landing of ballistic missiles without prior consent and notification in Japan's EEZ. If it is difficult to have that defense capability in terms of quantity, Japan has no choice but to secure it by

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[61] The Self-Defense Forces Act, Article 82-3, Paragraph 1 and Paragraph 3.

qualitative superiority, as pointed out in the National Defense Program Guidelines.[62] The success or failure of that depends entirely on Japan's research and development capabilities based on its science and technology infrastructure. But, the community of Japanese scientists is not positive about research and development of defense-related technologies, as seen in the statement issued on March 24, 2017, by the Science Council of Japan, the representative organization of that community.[63] This attitude seems to be based on the notion that (in the light of the past experiences) research related to security (which is close to military) does not necessarily lead to the sound development of science and technology.[64] Thus, as long as it is considered that a high level of science and technology is essential for Japan to have the defense capability to deal with the infringement of its maritime interests by other countries with the use of military measures, it would be necessary first to untangle concerns in the community of scientists about research on defense equipment. Toward this particular goal, it is deemed necessary to present a sound and convincing security vision to the community of Japanese scientists. The formulation of such vision requires an accumulation of the fruits of systematic and detailed studies on security, and such accumulation would in turn have to depend on academic and research institutions of social sciences. In this sense, while the starting point of a chain of efforts to protect Japan's maritime interests against the infringement by other countries using military measures is the formulation of sound and convincing security theory, the roles expected to be played by Japan's social science research institutions and universities can be described as huge.

Conclusion

At present, the Basic Plan on Ocean Policy, the National Security Strategy, and the National Defense Program Guidelines all do not explicitly offer guiding principles for the protection of Japan's maritime interests against infringement by other countries using military measures. The continuation of North Korea's landing of ballistic missiles in Japan's EEZ virtually deprives Japan of the institutional framework to secure the

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62 *National Defense Program Guidelines*, p. 25.

63 The Statement on March 24, 2017 said the Science Council of Japan reaffirms the 1950 statement "on its commitment to never become engaged in scientific research for war purposes" as well as the 1967 statement "on its commitment to never become engaged in scientific research for military purposes." Science Council of Japan, *Statement on Research for Military Security*, March 24, 2017.

64 For the notion the Science Council of Japan has at the moment, see Science Council of Japan, Committee on the Review of Security and Science, *Hokoku: Gunjiteki Anzen Hosho Kenkyu ni Tsuite* [Report: Concerning Military Security Research], April 13, 2017.

maritime interests related to Japan's EEZ. Hence, the prevention and expulsion of such situation seems absolutely imperative from the perspective of protecting Japan's maritime interests. On the other hand, as it is now difficult, due to various factors, to shoot down missiles feared to be landing in Japan's EEZ, Japan would have to seek to prevent the landings of missiles in the EEZ by the reflective effect of conventional national security measures in the short run. In the long run, however, it is deemed to be of paramount importance to protect Japan's maritime interests by eliminating the problems described above and having the capability to expel the infringement on Japan's maritime interests by other countries with the use of military measures as well as a vision for the sound and proper operation of that capability[65]. In addition, even if Japan has enough capability to protect maritime interests, Japan needs to bear in mind that the protection of its maritime interests should be based on the principle of the "rule of law" and from the standpoint of peace and stability in the international community.

(The views expressed in this paper represent the views of the author and do not necessarily represent the official views of the National Institute for Defense Studies or the Ministry of Defense.)

[65] The Basic Plan on Ocean Policy is set to be reviewed almost every five years under the act (the Basic Act on Ocean Policy, Article 16, Paragraph 5), while the National Security Strategy and the National Defense Program Guidelines are set to guide Japan's national security policy "over the next decade" (the National Security Strategy, p. 2).