

Exercising the Right of Innocent Passage in the Territorial Sea: The Korean Supreme Court Decision 2017Do9982, May 7, 2021*

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This case arose from an incident in which a foreign vessel conducted search of the floor of the Korean territorial sea to find the underwater location of a sunken vessel. The foreign vessel utilized an electronic fish-finder in the search. The search was conducted without authorization of the relevant authorities of the Korean government. As a matter of fact, the foreign vessel was hired by a Korean businessman who attempted to find and salvage the sunken ship to sell it in the market as scrap steel. The businessman was arrested by the police and charged by the prosecution for violation of criminal code and the Territorial Sea Act of Korea. The critical question was whether the action of the businessman, together with the foreign vessel, constituted violation of the Territorial Sea Act because of the non-compliance with the principles relating to the “right of innocent passage”.

According to customary international law and the 1982 *United Nations Convention on the Law of the Sea* (“UNCLOS”), the right of innocent passage is accorded to foreign vessels navigating through territorial waters of a coastal state. The right of innocent passage is recognized only for foreign vessels navigating through territorial waters of a coastal state in a

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“continuous and expeditious” manner,¹⁾ which is “not prejudicial to the peace, good order or security of the coastal State”.²⁾ Examples that do not constitute instances of innocent passage are set forth in the UNCLOS as follows:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage (emphasis added).³⁾

In sum, activities that fall under one of the above categories are not considered ‘innocent’, and thus foreign vessels conducting those activities are unable to exercise the right of innocent passage. This means that such activities are allowed only with the authorization of the coastal state at issue. Noteworthy in this regard is Item (j) which relates to “research or

1) See UNCLOS, Article 18, paragraphs 1 & 2.

2) See UNCLOS, Article 19, paragraph 1.

3) See UNCLOS, Article 19, paragraph 2.

survey activities”.

Korea also recognizes the right of innocent passage as part of customary international law, and as a contracting party to the UNCLOS. Mirroring the UNCLOS, the Korean Territorial Sea Act also sets forth relevant provisions in this regard. Article 5, paragraph 1 of the Act thus stipulates that foreign vessels are entitled to the right of innocent passage. Paragraph 2 of the article then sets forth instances that do not constitute innocent passage, one of which is conducting “research or survey” without authorization (Item 11 of Paragraph 2).

In the case at issue, the utilization of an electronic monitoring system (*i.e.*, fish-finder) in search of a sunken vessel lying on the floor of the Korean territorial sea was found to fall under “search or survey” under Item 11, and the activity was not authorized by the agency. As such, the activity was determined by the lower courts to be non-innocent within the meaning of the Territorial Sea Act. It then follows that the foreign vessel was not considered to have been exercising the right of innocent passage, thus violating the act. As a result, the Korean businessman who hired the foreign vessel for the search was also found in violation of the said act, and was sentenced to a 6-month imprisonment by the district and appeals courts. He then appealed the judgment of the appeals court. The Supreme Court of Korea affirmed it.

While this case looks relatively straightforward on its face given the explicit provisions in the UNCLOS and the counterpart Korean domestic legislation (stipulating “research or survey” as non-innocent), it also raises an important structural question. What is employed in the seabed search process by the foreign vessel was electronic devices. If a highly sophisticated machine or system is to be applied in similar instances in the future utilizing satellite connection or digital processing, a search or survey of the seabed could be conducted remotely- even without entering the territorial sea in the first place. The fast technological development has made this type of search and survey all the more possible. The question then is whether such activity without physical intrusion into the (Korean or other countries’) territorial sea should still be regarded as non-innocent or as innocent search or survey.

Arguably, the right of innocent passage is premised upon the notion of physical navigation by a ship as the term (“passage”) itself indicates. If the

“navigation” or “passage” part is missing one way or another, then all those activities of non-innocent nature listed in Article 18, paragraph 2 of the UNCLOS (and thus counterpart provisions in the Korean Territorial Sea Act) may simply lose a legal anchor. Possibly, this may open up legal debates in this area in the future. As such, this case offers another example of conflicting norm and reality as a result of fast technological development in the digital age. Korea as well as other countries will encounter similar challenges in various areas.

Judgment (in pertinent part)

3. As to ground of appeal concerning Defendant 1’s violation of the Territorial Sea Act

A. Relevant statutes and the issue in question

Article 5, paragraph 1, first sentence of the Territorial Sea Act stipulates that “Foreign ships may enjoy the right of innocent passage through the territorial sea of the Republic of Korea so long as it is not prejudicial to peace, public order, or security of the Republic of Korea”. Article 5, paragraph 2 further states that “Passage of a foreign ship shall be considered to be prejudicial to peace, public order, or security of the Republic of Korea, if the ship engages in any of the following activities in the territorial sea: Provided, that this shall not apply to cases where the activities prescribed in subparagraphs 2 through 5, 11, and 13 have been permitted, approved, or given consent by the authorities concerned,” with subparagraph 11 prescribing “Conduct of research or survey activities”.

Defendant 1⁴⁾ asserts that its passage does not construe a “passage of a foreign ship” for reasons including its completion of reports on arrival and departure. Furthermore, Defendant 1 asserts that conducting research on

4) Author’s note: A Korean businessmen who hired a foreign vessel for the seabed search.

the location of a sunken vessel abandoned on the ocean floor and salvaging it do not constitute “research” under the Article 5, paragraph 2, subparagraph 11, because such activities are not prejudicial to peace, public order or security of the Republic of Korea. Therefore, the relevant issue in question is whether the activities conducted by Defendant 1 constitute a “passage of a foreign ship” and a “conduct of research activities”.

B. Determination of this Court

(1) The phrase “passage of a foreign ship” under Article 5, paragraph 2 of the Territorial Sea Act refers to any and all navigation through the territorial sea for the purpose of (1) traversing the territorial sea, (2) proceeding to or from internal waters, (3) and calling at a roadstead or port facility (See Article 18, paragraph 1 of UNCLOS). Thus, determination of “passage of a foreign ship” is regardless of whether the foreign ship has completed required reports on arrival and departure in accordance with the Act of the Arrival, Departure, etc. of Ships.⁵⁾ The reasons are as follows.

A) The “right of innocent passage” as prescribed by Article 5 of the Territorial Sea Act is a rule aimed for the reconciliation of coastal state’s sovereignty in its territorial sea and the right of passage exercised by foreign vessels on the sea. Therefore, this article also applies to the cases of foreign vessels whose purpose is to navigate towards the internal waters of the coastal state or to call at the port facility.

B) The reports on arrival and departure prescribed in the Act on the Arrival, Departure, etc. of Ships of Korea has the purpose of supporting the arrival and departure of ships in the water zone, etc. of trade ports and maintaining the safety and order of ship operation (See Article 1 of the same act). Therefore, the Act on the Arrival, Departure, etc. of Ships differs in its purpose and objective from the Territorial Sea Act as regards the “right of innocent passage”.

C) Therefore, a foreign vessel navigating in the territorial sea must comply with the principle of the right of innocent passage, regardless of whether it has fulfilled the reports on arrival and departure prescribed in

5) Author’s note: This is a different act from the Territorial Sea Act.

The Act on the Arrival, Departure, etc. of Ships of Korea.

(2) Furthermore, “conduct of research activities” prescribed in Article 5, paragraph 2, subparagraph 11 of the Act on the Arrival, Departure, etc. of Ships of Korea means ‘any survey or research activities towards the seabed, subsoil, topwater zone and the contiguous air aimed for understanding and clarifying of maritime environment and condition.’ Thus, it is not merely limited to the cases substantially prejudicial to the peace, public order, or security of the Republic of Korea based on following reasons.

A) The “right of innocent passage” enjoyed by foreign vessels in territorial seas constitutes a restriction on the sovereignty of the coastal states, and the sovereignty of the coastal states contains the right of resource development, the right of environmental conservation, the right of scientific survey. Therefore, the “innocence” as the prerequisite of the “right of innocent passage” requires not infringing the sovereign rights of the coastal states.

B) “Fishery” under Article 5, paragraph 2, subparagraph 10 of the Territorial Sea Act is considered non-innocent even if it is by itself not prejudicial to peace, public order, or security of coastal countries, as it infringes on fishery rights which constitutes crucial part of the sovereignty.

C) Article 21, paragraph 1, subparagraph (g) of the UNCLOS stipulates that the coastal state may adopt laws and regulations on “marine scientific research and hydrographic survey” relating to the right of innocent passage, and Article 245 of the UNCLOS further stipulates that in the territorial sea marine scientific research may only be conducted with the express consent of the coastal countries. This is on the premise that research activities in territorial waters without express consent of the coastal state are not allowed regardless of whether they are substantially prejudicial to peace, public order, or security.

D) Furthermore, when foreign ships collect information on natural environment and condition of the ocean through research activities in territorial waters, such activities cannot be concluded as non-prejudicial to peace, public order, or security of the Republic of Korea just because the purpose at the time of research activities is not so, as such information may be used to endanger or threaten peace and safety of the coastal state in the future.

C. Sub-conclusion

Examining this case in light of aforementioned legal principles, Defendant 1's search of the sea floor utilizing an electronic fish-finder installed on a foreign ship to find the location of a vessel sunk in the waters of *Jindo Maengolsudo*⁶⁾ falls under "passage of a foreign ship engaging in conduct of research or survey activities" under Article 5, paragraph 2, subparagraph 11 of the Territorial Sea Act.

Therefore, the original judgment of the appeals court, which upheld the conviction of the first trial of the district court, did not err by violating the rule of logic and experience or otherwise deviating from the principle of 'free evaluation of evidence', or by misapprehending the legal principles under Article 5, paragraph 2 of the Territorial Sea Act regarding the right of innocent passage, seabed search, and navigation of foreign vessels, as asserted in the grounds of appeal.

6) Author's note: A maritime area located in the south-western part of the Korean peninsula.

