

## **Research on Innocent Passage System of Territorial Sea**

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**Abstract.** The innocent passage system plays an important role in the law of the sea as an important system in our country, which is of great significance to safeguard the coastal defense security and economic development. This paper summarizes and analyzes the restriction conditions of innocent passage in different periods and types, and expounds the regulations and concepts of innocent passage system in China, providing reference for future research in related fields.

### **1. Introduction**

Under the background of economic globalization, the trade between countries at sea has become more frequent, and the problems between countries at sea have become increasingly obvious. The protection of maritime territorial sovereignty has become an international focus. However, with the development of maritime trade, it is inevitable that ships with foreign nationality will pass through the territorial sea of a certain country. Ships want to pass quickly and safely while coastal countries want to ensure national security. Therefore, a compromise between the two results in the right of innocent passage. China is gradually growing into a big ocean country. Making full use of innocent passage will play an important role in promoting the coastal defense construction and the development of the ocean industry. On February 26, Lu Kang, the spokesman of Chinese Foreign Ministry, protested the passage of US warships through the Taiwan Strait, which will certainly provide impetus and pressure for China to further improve relevant legal construction and actively participate in international law research.

### **2. Overview of Innocent Passage System in Territorial Sea**

#### **2.1 The Legal Concept of Innocent Passage System**

The so-called "innocent passage" is a system for foreign ships to pass through the territorial waters of other countries stipulated in Article 19 of the United Nations Convention on the Law of the Sea. It means that on the premise of not posing a threat to the security of coastal countries, foreign ships can pass through the territorial waters of coastal countries quickly and continuously without the need for coastal countries to know or obtain their permission.[1] "Innocent" means that it does not pose a threat to the order and security of coastal countries. "Passage" refers to the navigation that passes through the territorial sea without entering the internal water, which must not stop and move forward quickly.

#### **2.2 Establishment of Innocent Passage Right**

The establishment and development of the right of innocent passage has gone through a long process. At first, the original intention of establishing the right of innocent passage for ships of various countries was to develop international maritime trade and facilitate maritime traffic. This right is an international customary law and a result of the principle of freedom of high seas.

### *2.2.1 The Principle of Freedom of High Seas*

Freedom of the high seas was first proposed by the Dutch jurist Grotius. In his *The Free Sea* published in 1609, Grotius argued that the sea should not be occupied by any country. Later, the British scholar named Sheldon refuted Grotius' point in his book *Mare Clausum* in 1618 by suggesting that Britain has ownership of the sea around it. With the in-depth development of capitalism, people find that the ocean cannot be completely occupied by any one country. Therefore, the debate on ocean freedom and occupation ends with the ocean being divided into territorial sea and high seas. The principle of freedom of high seas is finally established.

### *2.2.2 Establishment of Territorial Sea System*

Territorial sea is an important concept in the international law of the sea that has gradually formed since the 17th century. The territorial sea used to have many names, but it was generally called the territorial sea after the international law codification conference in 1930. According to the United Nations Convention on the Law of the Sea, the territorial sea refers to "the sovereignty of the coastal state as well as the waters adjacent to its land territory and its internal waters, and in the case of the archipelagic state, the waters adjacent to the archipelagic waters is called the territorial sea." This sovereignty extends the airspace above the territorial sea as well as its seabed and subsoil.

### *2.2.3 Generation of Innocent Passage System*

Freedom of the high seas is undoubtedly a powerful driving force for deepening maritime trade between countries and promoting the development of navigation among countries. It actively promotes ocean activities among countries and makes the economy more prosperous. However, due to their coastal safety and offshore interests, each country has begun to stipulate its own territorial sea sovereignty. If they are not restricted and allowed to exercise their national sovereignty, it will inevitably lead to chaos and greatly affect maritime transportation between countries, thus the "innocent passage system" are created.[2] As pointed out in the *Oppenheim International Law*, "every country has the right to request permission for its merchant ships to pass through the territorial waters of any other country innocently in normal times in accordance with international customary law, which is a result of the principle of freedom on the high seas." In 1982, the United Nations Convention on the Law of the Sea clearly stipulated that under the restrictions of this Convention, all countries, whether coastal or landlocked, have the right of innocent passage through the territorial sea. Since then, the innocent passage system has been formally established.[3]

## **2.3 Scope of Application of Right of Innocent Passage**

It is not difficult to see from the definition that the right of innocent passage is not enjoyed under any circumstances. The United Nations Convention on the Law of the Sea provides detailed regulations on the exercise of the right of innocent passage in many aspects.

### *2.3.1 Applicable Sea Area*

The right of innocent passage can be exercised in territorial sea, specific internal waters, archipelagic waters and specific international straits in accordance with the UN Convention on the Law of the Sea. However, the right of innocent passage enjoyed by foreign ships is different depending on the sea area in which it is located. The territorial sea is the most original and main applicable sea area for the right of innocent passage [4].

### *2.3.2 Applicable Ships Practice of Innocent Passage of Warships*

Vessels that apply the right of innocent passage can be divided into merchant ships, warships and other special vessels. Merchant ships refer to ships specially used for commercial purposes such as economic and trade exchanges. They are the most basic ships that enjoy the right of innocent passage. With the development of the law of the sea and the establishment of the legal status of the territorial sea, the right of innocent passage is for merchant ships, and a consensus has been reached on the view that "merchant ships of any country enjoy the right of innocent passage".

In addition, warships and other special ships are subject to more restrictions in enjoying the right of innocent passage, and the situation is the most special.

### **3. Limitations of the Innocent Passage System in the Territorial Sea**

In 1982, the United Nations Convention on the Law of the Sea defined warships in detail. The Convention pointed out that "warships" refer to ships that belong to the armed forces of a country, have external marks to identify the nationality of warships, being commanded by officers who is officially appointed by the government of that country and listed on the corresponding active duty roster or similar roster, and equipped with crew members who are subject to the discipline of the regular armed forces. The right to innocent passage of warships is affirmed in the UN Convention on the Law of the Sea, but not all countries in the world accept this provision. In response to this problem, different countries have different opinions and practices.

#### **3.1 Relevant Treaty and Provisions**

The innocent passage of warships has been debated since the first Conference on the law of the Sea. Its legislative process is long and tortuous. As early as 1959s, it was stipulated in the draft convention adopted by various countries through the conference that coastal countries can require warships to pass through the territorial sea subject to prior approval or notification, but usually they should pass innocently.

In 1958, the Convention on the Territorial Sea and Adjacent Areas detailed the issue of innocent passage, dividing innocent passage into four subsections. Among them, the "Rules Applicable to Warships" stipulates that "if any warship does not comply with the regulations of the coastal countries regarding passage through the territorial sea and disregards any request from the coastal countries to comply with the regulations, the coastal countries may require the warship to leave the territorial sea." It is not difficult to see from this regulation that the right of innocent passage of warships has been affirmed. Although there are regulations which reflect the interests of large maritime countries, many other countries have expressed reservations on this issue.

In 1982, the United Nations Convention on the Law of the Sea further improved the Convention on Territorial Sea and Adjacent Areas in the 1958 and adjusted some of its contents. [5] First of all, in terms of the applicable subject, the Convention on Territorial Sea and Adjacent Areas stipulates that "it is applicable to all ships". However, the United Nations Convention on the Law of the Sea has added a restrictive regulation on the mode of passage, stating that in addition to force majeure and disaster relief, ships should "continue to move forward continuously and rapidly through the passage". It has also made detailed regulations on stopping and anchoring, confirming the legality of staying in the territorial sea for humanitarian relief and fully embodying the humanitarian principle. Secondly, 12 non-harmless acts are listed, which provides an accurate and reliable legal basis for coastal countries to judge whether the passage of ships will pose a threat to their safety.[6] Finally, the United Nations Convention on the Law of the Sea has optimized the structure of the Convention on Territorial Sea and Adjacent Areas, dividing ships into two different categories: merchant ships and government ships for commercial purposes, warships and other government ships for non-commercial purposes.

#### **3.2 Practice of Innocent Passage of Warships**

In the international community, countries have different practices. Each country considers and formulates relevant policies according to its own special national conditions. China maintains that "all foreign aircraft and military vessels shall not enter the territorial sea and the airspace above the territorial sea without the permission of the Chinese government", that is, "the passage with prior permission"; Germany's Convention on the Law of the Sea declares that it is a basic right for all ships to pass through the territorial sea without harm, including warships, merchant ships and fishing boats. Myanmar, Pakistan and other countries have stipulated that the passage of warships in the territorial sea should be subject to prior permission. To sum up, whether foreign warships enjoy innocent passage in the territorial sea is an extremely complicated issue, and each country needs to consider its own specific circumstances to make corresponding legal provisions. The road to its international legislation is still long.

### **3.3 The Right of Innocent Passage of Other Special Ships**

Regarding whether submarines enjoy the right of innocent passage, Article 14 of the Convention on Territorial Sea and Adjacent Areas stipulates that submarines shall sail on the sea surface and display their flags. It can be seen that in order to enjoy the right of innocent passage in the territorial sea, submarines need to satisfy the following two conditions at the same time. First, submarines must sail on the sea surface and cannot sail on the seabed. The second is the need to display the flags of their countries. The United Nations Convention on the Law of the Sea further supplements its content by adding "other submersibles", thus further expanding the scope of application. [7] It mainly takes into account that with the progress and development of science and technology, there may be new submersibles or submarines for other purposes. If they cannot be found, they will cause huge losses to coastal countries. Therefore, such restrictions are imposed on their special subjects.

Nuclear power, as a new type of energy source after the Second World War, has been applied to a wide range of fields. As a double-edged sword, nuclear power makes people covet the high benefits it brings, but also fear its power. Nuclear-powered ships are also special ships, which are more special than fishing boats and warships. Article 23 of the United Nations Convention on the Law of the Sea clearly stipulates that foreign nuclear-powered ships and ships carrying nuclear substances or other inherently dangerous or toxic substances shall, when exercising the right of innocent passage through the territorial sea, hold the certificates and comply with the special precautions stipulated by international agreements. [8] Nuclear-powered ships also enjoy the right of innocent passage, but to exercise their rights, two conditions need to be met. First, they must hold relevant certificates and second, they must take special preventive measures. As nuclear-powered ships will bring potential dangers and threats to coastal countries when passing through, the requirements for such ships are more stringent.

## **4. Provisions on Innocent Passage System in China**

The territorial sea is the main sea area where the right of innocent passage applies. The Chinese government also stipulates that ships of foreign nationality shall enjoy the right of innocent passage internationally stipulated in the territorial sea of China. However, considering its own national conditions, some international legal provisions on the right of innocent passage has been retained. Therefore, the Chinese government has its own attitude and stand for this system.

### **4.1 Establishment of Territorial Sea System in China**

#### *4.1.1 Scope of Territorial Sea*

After the establishment of The People's Republic of China (1949), the "Statement of the Government of the People's Republic of China on the Territorial Sea" was issued On September 4, 1958, declaring that the territorial sea of China is 12 nautical miles wide and applicable to all Chinese territories. The baseline of territorial sea is drawn by straight lines. This provision is of great significance for establishing the territorial sea system and safeguarding the territorial sea sovereignty in China.

In order to further improve the territorial sea system, the 24th meeting of the Standing Committee of the National People's Congress passed the Law of the Peoples Republic of China Concerning Territorial Waters and Contiguous Zone on September 25, 1992, which comprehensively the stipulated territorial sea and contiguous zone system of China. The scope of the territorial sea stipulated by law is the sea area adjacent to China's land territory and internal waters.

#### *4.1.2 Legal Status of Territorial Sea*

The territorial sea is an integral part of the territory of China as a part of national sovereignty which extends to the airspace above the territorial sea and the seabed and subsoil of the territorial sea. Therefore, if foreign ships want to pass through these areas, they must sign an agreement with the Chinese government or obtain approval from relevant state organs. The Law of the Peoples Republic of China Concerning Territorial Waters and Contiguous Zone stipulates the principle for foreign ships to pass through the territorial sea, i.e. foreign non-military ships enjoy the right of innocent passage

stipulated by international law when passing through the territorial sea of China, while foreign warships need the prior approval of the Chinese government. [9]

#### **4.2 The Attitude and Position on Innocent Passage System of China**

On the issue of innocent passage of ships, China advocates that merchant ships and warships should be treated differently. With regard to merchant ships, China, like the international community, advocates that merchant ships enjoy the right of innocent passage in China's territorial sea, but imposes restrictions on warships, stipulating that the passage of foreign warships through China's territorial sea requires the prior approval of the Chinese government, and promulgates numerous laws to clearly stipulate them.[10] The Declaration of the Government of the People's Republic of China on the Territorial Sea in 1958, The Maritime Safety Traffic Law of the People's Republic of China in 1983, and The Law of the Peoples Republic of China Concerning Territorial Waters and Contiguous Zone in 1992 all have detailed and explicit provisions to express the attitude of the Chinese government. As early as 1958, the Chinese government stipulated in its statement on the territorial sea that " all foreign aircraft and warships are not allowed to enter the territorial sea of China and its airspace without the permission of the government of the people's Republic of China. Any foreign ship sailing in the territorial sea of China must abide by the relevant laws and regulations of the government of the people's Republic of China ". The Law of the Peoples Republic of China Concerning Territorial Waters and Contiguous Zone in 1992 also clearly stipulates that foreign non-military ships enjoy the right of innocent passage stipulated by international law when passing through the territorial sea of China, while foreign warships need the prior approval of the Chinese government. At the Third United Nations Conference on the Law of the Sea, our delegation has also unswervingly adhered to this idea winning the support of many third countries. It is not in conformity with international law that U.S. warships passed through the Taiwan Strait without the permission of the government of China .

With regard to the innocent passage system, China has been improving its relevant laws. In 2017, China passed and promulgated the Maritime Safety Traffic Law (Draft Solicitation of Comments). article 15 of which expressly provides for the innocent passage of submarines and other submersibles, reiterating once again China's position on the innocent passage of submersibles. This " draft" is a refinement of the previous " Maritime Safety Traffic Law" and takes more fully into account the needs of the national conditions and the development of the times, which is in line with the current development situation of our country.

#### **5. Conclusion**

The innocent passage system is a product of the principle of freedom of the high seas. After the establishment of the status of the territorial sea, as a part of national sovereignty, the exercise of sovereignty over the territorial sea by various countries has restricted free navigation and brought great inconvenience. In order to guarantee the freedom of navigation without harming the safety of coastal countries, a system of innocent passage was created. On the one hand, it allows ships to have the right to pass through the territorial sea of the country, which imposes certain restrictions on the exercise of sovereignty by coastal countries; On the other hand, it also restricts the types of ships passing through the territorial sea, which plays a great role in safeguarding national security and interests. However, innocent passage is indeed an extremely complicated issue. Due to the particularity and diversity of its subject, there is no provisions clear enough. Therefore, all countries should continue to improve the existing marine legal system on the basis of abiding by international law and promote the legitimate and reasonable use of the ocean.

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