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Legal Issues to Implement the SUA 2005 Protocol from Japanese Perspective（1）

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1 Introduction

The September 11th terrorist offensive has raised a number of security concerns, *inter alia*, vulnerability in international transportation, which evoked the necessity to prevent and deter acts of terrorism at sea in their early stages. The International Maritime Organisation（IMO）found as an urgent matter to cope with the necessity and review the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation（SUA Convention）, and subsequently the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation（SUA 2005 Protocol）was adopted at the Diplomatic Conference hosted by the IMO in October 2005. The SUA 2005 Protocol obliges to the Party States, *inter alia*, to criminalise transportation of weapons of mass destruction（WMDs）on board a ship and establishes the procedures for boarding inspection of a ship navigating on the high seas.

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However, there are a number of difficuluties for States to implement the SUA 2005 Protocol. Establishing the procedures for boarding inspection of a ship navigating on the high seas makes another exception to the exclusive enforcement jurisdiction of the flag State over it. In order to legislate the domestic laws to permit such inspection, a State may need to consider from a legally and policy point of view under what circumstances it is able and intends to exercise such inspection. And criminalisation of international transportation of the WMDs on board a ship may be a new category of a crime under Japanese domestic laws, which may raise consistency problem of the existing domestic legal framework.

This note first addresses how such effective measures to cope with terrorism at sea, as adopting the boarding inspection procedures of the SUA 2005 Protocol, was reconciled with respecting for the traditional "flag state principle". Second, it considers issues related to the implementation of the SUA 2005 Protocol in Japan, and points out legal and policy issues which most States intending to be a party to the SUA 2005 Protocol may face. Lastly, it analyses whether the SUA 2005 Protocol provides the legal basis for effectively and quickly preventing maritime terrorism and interdicting the proliferation of the WMDs at sea.

2 Historical Evolution of Maritime Security: the SUA Convention, the Protocol and the Proliferation Security Initiative (PSI)

After the *M/V Achille Lauro* incident[(1)] that occurred on October 1985, member States of the IMO adopted the SUA Convention in March 1988. The SUA Convention has some features commonly observed in the so-called "counter-terrorism" conventions. Article 3 of the SUA Convention sets out acts of offences,

such as the capture of ships, violence against people on ships, and the destruction of ships. Art. 5 obliges party States to criminalise these acts as offenses in their domestic laws and impose appropriate punishments on perpetrators for such offences taking their gravity into account. Second, in order to prevent suspects from escaping from punishment, Article 10 , paragraph 1 , of the Convention obliges Party States to choose either prosecution in their state or extradition to another State (*aut dedere aut judicare*)[(2)]. A Party State, which a perpetrator of offences prescribed in the Convention enters into and is present within, is obliged to establish jurisdiction pursuant to Article 6, paragraph 4, of the Convention to prosecute them in their criminal court or extradite them to another State which has jurisdiction over the case based on principles on exercising jurisdiction in international law, such as territoriality principle, flag state principle, nationality principle and passive nationality principle. The SUA Convention entered into force in 1992, and Japan ratified the Convention in April 1998.

The review of the Convention was initiated in the wake of incidents occurred in 2000s, and member States of the IMO recognized the necessity to amend the SUA Convention. Firstly, the September 11th terrorist attacks in 2001 clearly demonstrated the vulnerability of transportation system. Ships can be used as a weapon in future attacks[(3)]. Secondly, the attack against the USN *Cole* occured on October 2000 made it clear that a ship could be a target of terrorism[(4)]. In addition, in order to prevent a terrorist attack effectively, stopping and boarding a suspicious boat for inspection would be the most effective strategy against a suicide attack using a boat to ram into a target ship with full laden with explosives[(5)]. Thirdly, a series of the United Nations Security Council Resolutions (UNSCR) were adopted in the wake of the terrorist attack in order to condemn acts of terrorism and encourage states to take further actions against terrorism.

For example, the UNSCR 1368 and 1373 in 2001 condemned the terrorist attack in the US, and the international community showed its intention to combat against acts of terrorism[6]. In addition, the UNSCR 1540 in 2004 revealed an urgent need to take additional measures to prevent the proliferation of nuclear, chemical and biological weapons (WMDs) and their means of transportation.

There was another political movement to encourage member States of the IMO to review the Convention. In May 2003, the US President George W. Bush proposed the Proliferation Security Initiative (PSI) in order to deter illicit transportation of WMDs and means of its transportation by interdiction. The President invited ten countries, Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom, to join the PSI[7].

It is often pointed out that the *M/V So San* incident has triggered the US Government to consider and propose the PSI. In December 2002 , on the high seas, approximately 100 nautical miles from southeast of Yemen, two Spanish warship were alerted by the US Government regarding a suspicious freighter whose name was covered with paint and which was not showing the flag of the State. When the Spanish Navy demanded the freighter to identify its nationality, the vessel did not follow the instruction and started to flee. After verbal warning, the warships fired three warning shots, and the freighter finally stopped. The captain of the freighter replied that the ship was registered to the Kingdom of Cambodia and that it was carrying cement to Socotra Island in Yemen. The Navy asked the Government of Cambodia to confirm the nationality of the ship. An answer from the Government of Cambodia, however, revealed that the ship was registered under a different name. Taking into account the fact, the Spanish Navy and the US Navy, which was on the scene at this time, carried out a boarding inspection on the freighter to confirm its nationality on the legal basis of Article

110 of the United Nations Convention on the Law of the Sea (UNCLOS). As a result of the inspection, it was revealed that the name of the ship was identified as "*So San*", a cargo ship registered to the DPRK (North Korea). It further revealed the ships was transporting 15 Scud missiles, 23 fuel capsules, and about 85 containers for chemical substances, all of which were shipped from the DPRK to Yemen. At this stage, the Government of Yemen and the Government of DPRK criticised the boarding inspection by the US and Spanish Navy as a violation of international law and demanded all cargoes to be returned to Yemen. The Yemeni government stated that the cargo had been ordered to the DPRK in order for strengthening the defence system. The DPRK government claimed that the Government of the US and the Government of Spain violated its sovereignty without any justification and criticised the boarding was "unforgivable piracy." After thorough consideration, the US Government decided let the ship continue sailing to Yemen. There was no international law, which prohibited a state from transporting missiles or weapons, nor which allowed a state to intervene and seize such items. This incident revealed that there was no clear legal basis to seize missiles on board a 'rouge' foreign ship under existing legal framework. In addition, it suggested future threats, in which non-state actors including terrorist groups could employ the same strategy.

The concept of the PSI is that participating States should take any measures on land, at sea, and in the air in order to interdict the proliferation of WMDs as far as existing legal framework permits. The international community has recognized the proliferation of WMDs as a threat to the peace and stability of the international community[8]. Therefore, participating States of the PSI are strongly encouraged to share information and intelligence related to the manufacture, storage, loading, and transportation of WMDs in order for any possible

interdiction. According to the US Department of State, 102 countries have endorsed the PSI by November 2012[9]. The Japanese Government has agreed and actively participated in the PSI and believes the most significant measure in the PSI operation is to stop and board suspicious ships for an inspection at sea. It hosted the maritime interdiction exercises "Team Samurai 2004" off *Sagami* Bay, "Pacific Shield 2007" in the east of *Izu Oshima* Island and "Pacific Shield 2018" off *Boso* Peninsula and *Izu* Peninsula, etc.

A challenge of the PSI is that it does not provide any legal basis to interdict a foreign ship in a suspicious transportation[10]. Instead, it is a multilateral cooperation system for the purpose of interdicting the proliferation of WMDs. It is repeatedly pointed out that measures, such as boarding, inspecting foreign ships, and seizing WMDs and related materials on high seas, should be carried out strictly under the principle of the exclusive enforcement jurisdiction of the flag State[11]. For example, the Statement of Interdiction Principles, adopted at the Third Meeting of the PSI Participants in September 2003 , emphasized that an interdiction should be made within existing international legal framework.

On the high seas, a ship sails under the flag of only one State, which grants nationality of the ship, and subject to its exclusive enforcement jurisdiction (UNCLOS Art. 92 (1)). The flag state principle used to be explained by assimilation of ships as a floating territory, whilst, nowadays, it is often explained in relation to the freedom of the high seas and the exclusive enforcement jurisdiction of the flag State[12]. The safety and security of international trade by sea have been recognised the common interest of the international community. If there was no State which effectively administrate a ship on the high seas, it would create lawlessness on the ship. Thus, the flag State is considered the most appropriate and reasonable State to take effective control over ships on high seas.

Therefore, in order to conduct maritime interdiction operations for the purpose of the PSI, it may be necessary for interdicting State to have legal basis, such as by the right of visit stipulated in Art. 110 of the UNCLOS[13], other international treaties, and the consent of the flag State. The US government paid attention to the SUA Convention so as to extend authority to board a suspicious foreign ship as effective measures to prevent terrorism at sea[14], as well as establishing the legal basis and ensuring the effectiveness of the PSI. It was argued that the SUA Convention should expand the scope of offences and include new provisions for procedures ensuring swift boarding and inspection of foreign ships on the high seas to accomplish the purpose of the PSI. The Protocol was finally adopted at the Diplomatic Conference in October 2005. Since party States are required to ensure to implement the Protocol through legislation in their respective jurisdiction, the adoption of the Protocol contributes the establishment of legal basis for the PSI operations in terms of both international law and domestic laws.

(1) In 1985, the *Achille Lauro*, a ship of Italian registry, was hijacked by four armed passengers who belonged to the Palestine Liberation Front (PLF) on the high seas off Alexandria, Egypt. Halberstam, M., 1982, Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety, *American Journal of International Law*, Vol. 82, pp. 269–310.

(2) Halberstam, *supra note 1*, pp. 291–309; Joyner, C., 1988, The 1988 IMO Convention on the Safety of Maritime Navigation: Towards a Legal Remedy for Terrorism at Sea, *German Yearbook of International Law*, Vol. 31, pp. 230–262; Francioni, F., 1988, Maritime Terrorism and International Law, The Rome Convention of 1988, *German Yearbook of International Law*, Vol. 31, pp. 263–288; Plant, G., 1990, The Convention for the Suppression of Unlawful Acts agaisnt the Safety of Maritime Navigation, *The International and Comparative Law Quarterly*, Vol. 39, pp. 27–56.

(3) Balkin, R., 2006, The International Maritime Organization and Maritime Security, *Tulane Maritime Law Journal*, Vol. 30. pp. 254–287.

(4) In October 2000, an unidentified small rubber raft packed with a huge volume of explosives approached the USS *Cole*, an 8,300-ton Aegis cruiser of the US Navy's Fifth Fleet, which was anchored at Aden Port in Yemen for refueling, and exploded, killing 17 American soldiers and injuring 39. On the following day of the incident, several anti-U.S. Muslim extremist groups claimed responsibility for the bombing.

(5) H.E. Jesus, J.L., 2003, Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects, *International Journal of Marine & Coastal Law*, Vol. 18. pp. 363-400.

(6) Preamble of the Protocol.

(7) Byers, M., 2004, Policing the High Seas: Proliferation Security Initiative, *American Journal of International Law*, Vol. 98, pp. 528-529; Lehrmen, T.D., 2004, Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture, *Virginia Journal of International Law*, Vol. 45. pp. 225-228; Roach, J.A., 2004, Initiatives to Enhance Maritime Security at Sea, *Marine Policy*, Vol. 28. pp. 41-66; Von Heinegg, W.H., 2005, The United Nations Convention on the Law of the Sea and Maritime Security Operations, *German Yearbook of International Law*, Vol. 48. pp. 173-185; Kaye, S., 2006, Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction, in Freestone, D. *et. al.* (eds.), *The Law of the Sea; Progress and Prospects*, Oxford University Press. pp. 356-361; MacDonald, S.D., 2013, The SUA 2005 Protocol: A Critical Reflection, *International Journal of Marine & Coastal Law,* Vol. 28, pp. 485-516.

(8) UNSCR 1540, Preamble.

(9) See "PSI endorsing states" at the PSI website (available at http://www.psi-online.info/psi-info-en accessed on July 8, 2019)

(10) Perry, T., 2006, Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea, *Ocean Development & International Law*, Vol. 37, pp. 33-53.

(11) See "Q&A concerning PSI" published by the U.S. Department of State in May 2008 (available at http://2001-2009.state.gov/t/isn/rls/fs/105213.htm accessed on July 10, 2019); Roach, J.A., 2008, PSI and SUA updated, in Nordquist, M.R. Wolfrum, and J. Moore (eds.), *Legal Challenges in Maritime Security*, Martinus Nijhoff, pp. 281-328.

(12) Colombos, C.J., 1954, *The International Law of the Sea, 4th revised edition*, Longmans, pp. 212-215; Lapidoth, R., 1975, Freedom of Navigation - Its Legal History and Its Normative Basis, *Journal of Maritime Law and Commerce*, Vol. 6, p. 271; O'Connell, D.P., 1982, *The International Law of the Sea*, Vol. 1., Oxford University

Press, pp. 794–795; Churchill, R. and Lowe V., 1999, *Law of the Sea*, third edition, pp. 92–100, 208–209; Anderson, D., 2006, Freedom of the High Seas in the Modern Law of the Sea, in Freestone, D., *et. al.* (eds.), *The Law of the Sea; Progress and Prospects*, Oxford University Press, pp. 330–340.

(13) Reuland, R.C.F., 1989, Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction, *Vanderbilt Journal of International Law*, Vol. 22. pp. 1161–1229.

(14) Jesus, *supranote 5*, pp. 363–400.