

# Briefing Memo

## Flag State Principle and National Security

EIFUKU Seiya

Senior Fellow

Government and Law Division

Security Studies Department

### 1. Introduction

As a person has a nationality, so does a ship.<sup>1</sup> Each country freely defines how a person obtains a nationality unless restrictions are applied by international law.<sup>2</sup> Likewise, each country is allowed to determine on what conditions a ship belongs to it.<sup>3</sup> Therefore it is possible to register the ship's nationality in the state which is different from the state concerning the nationality of the ship's owner. The state concerning the nationality of a ship is called a flag state in international law. A flag state can claim exclusive jurisdiction over the ship on the high seas unless restricted by special conditions of a treaty and a convention or special resolutions of the United Nations Security Council (UNSC). This is the international principle called the flag state principle. And as to a cargo ship which was stranded over the coast of Mauritius on July 25, 2020, the owner of the ship is a Japanese company but its flag state is Panama. Thus, it is Panama and not Japan, as a general rule, that has exclusive jurisdiction over the ship as long as it is on the high seas.

As for the flag state principle, there is an issue whether the principle shall apply the foreign ship on the high seas which shall be inspected or taken other measure for the national security reason when a warship responds to the foreign ship. Because the flag state principle is not absolute but there are some exceptions in international law such as counter-piracy on the high seas. And as for prevention of proliferation of mass destruction weapons and activities of terrorists for (national) security, it seems that the need not to apply the flag state principle to the foreign ship on the high seas is much higher than the case of piracy etc. This article thus goes over the significance of this principle and how it is applied to ships with foreign nationality on the high seas as to response i for national security purposes.

Warships and government ships operated for non-commercial purposes on the high seas are not included in ships with foreign nationality mentioned in this article as they are completely exempt from jurisdiction of any country other than flag states.<sup>4</sup>

### 2. Significance and origin of the flag state principle

In principle, a flag state may claim exclusive jurisdiction over its ship on the high seas and a ship on

<sup>1</sup> Article 91 (1) of the United Nations Convention on the Law of the Sea (UNCLOS).

<sup>2</sup> IWASAWA Yuji, *International law* (Tokyo: University of Tokyo Press, 2020), p. 340.

<sup>3</sup> Richard A. Barnes, "Flag State," in *The Oxford Handbook of the Law of the Sea*, ed. Donald R. Rothwell et al. (Oxford: Oxford University Press, 2015), p. 306. Article 91 (1) of UNCLOS provides that each state shall fix conditions for granting its nationality to a ship. This article also provides that "There must exist a genuine link between the state and the ship." However, no criteria for "a genuine link" are given.

<sup>4</sup> Article 91 and Article 96 of UNCLOS.

the high seas is exclusively subject to the jurisdiction of its flag state.<sup>5</sup> This is flag state principle. In international law, a concept that ships are part or extension of flag state's territory, namely doctrine that a ship is regarded as "a floating territory", was invoked traditionally as theoretical basis of the flag state principle. This theory was advocated in the mid-18<sup>th</sup> century<sup>6</sup> and has been used academically in explaining the flag state principle since then. As explained in the judgment of the Lotus case (1927) by the Permanent Court of International Justice, the freedom of the high seas prevents each country from being controlled (interfered with) by other countries in its use of international waters. This allows a flag state to claim the same right on its ship on the high seas as on its territories and prevents other countries from doing it. Hence, a ship on the high seas may be regarded as identical to a territory.<sup>7</sup> However, regarding a ship as a territory is sometimes inappropriate in theory as an aircraft passing over a foreign ship on the high seas is not considered as the violation of a territory by international law and no such claim has been made by any countries. Thus, the theory regarding a ship as a territory is not currently adopted.<sup>8</sup> Instead, the flag state principle is now considered to enable flag states to claim jurisdiction of its ship on the high seas as an optimal way to maintain order based on the principle of the freedom of the high seas.<sup>9</sup> If this logic may be called the theory enabling the optimal maintenance of order, it may be said that the theory regarding a ship as a territory positions a flag state as the party which has the right to claim exclusive jurisdiction of its ship on the high seas, whereas the theory enabling the optimal maintenance of order positions a flag state as the party which has responsibility for maintaining order on the high seas. Hence, as for the case that the flag state principle is not applied, it may be said that it is exceptional situation that a flag state is not allowed to claim jurisdiction under the former theory, while it is an exceptional situation that a flag state is not required to maintain order under the latter theory. Taking this into consideration, exceptions to the flag state principle seem to be more acceptable now in comparison with those days when the theory regarding a ship as a territory was supported.

### 3. Exceptions to the flag state principle

Exceptions to the flag state principle are more likely to be accepted in theory now in comparison with those days when the theory regarding a ship as a territory was supported. Are they actually applied in current situations? These exceptions are generally categorized into two types: exceptions based on treaties and exceptions based on UNSC resolutions.

The United Nations Convention on the Law of the Sea (UNCLOS), which is considered as the general law of the law of the sea, defines exceptions to the applicability of the flag state principle that authorizes the inspection of a foreign ship on the high seas as cases where such a ship is engaged in 1) piracy, 2) slave trade, or 3) unauthorized broadcasting; 4) is without nationality; 5) is suspected to have the same nationality as the warship which encounters;<sup>10</sup> or is a target of hot pursuit from territorial waters (territorial sea and internal waters), archipelagic waters or the contiguous zone.<sup>11</sup> However, as for dealing with a

<sup>5</sup> HAYASHI Moritaka, SHIMADA Yukio, and KOGA Mamoru, *International Law of the Sea (2nd edition)* (Tokyo: Yushindo, 2016), p. 100.

<sup>6</sup> MIZUKAMI Chiyuki, *Law of the sea* (Tokyo: Yushindo, 2005), p. 156.

<sup>7</sup> MIZUKAMI Chiyuki, *Nationality of a Ship and a Flag of Convenience* (Tokyo: Yushindo, 1994), p. 26.

<sup>8</sup> MIZUKAMI Chiyuki, *Law of the Sea*, p. 157.

<sup>9</sup> KANEHARA Atsuko, "Significance of the Flag State Principle in Modern Fishing Regulations on High Seas," *ST. PAUL'S REVIEW OF LAW AND POLITICS* Vol. 75 (2008), pp. 35-36.

<sup>10</sup> Article 110 of UNCLOS.

<sup>11</sup> Article 111 of UNCLOS. International regulations on fishery on high seas basically refer to the flag state principle to define specific measures. However, some individual conventions provide exceptions to the flag state principle. One such convention is the Convention on Fishing and Conservation of Living Resources of the High Seas (Article 21 and Article 22) which is implementation agreement for UNCLOS.

foreign ship in terms of national security, UNCLOS does not provide it as an exception to the flag state principle. On the other hand, some conventions on marine security activities stipulate exceptions where the flag state principle is not applied to deal with a foreign ship on the high seas. Protocol for the Amendment to the International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), which Japan has not ratified, is one example of such conventions. The protocol authorizes the inspection of a ship that is suspected of transporting explosives, radioactive substances or BCN weapons knowing that they are used to threaten residents or governments when consent from its flag state is given<sup>12</sup>. On the other hand, it provides certain conditions and procedures that do not require flag state consent.<sup>13</sup> In a sense, however, these conditions, which do not require flag state's consent, are also based on the flag state principle since they respect prior flag state consent (authorization).

Some UNSC resolutions, which is in relation to embargo measures to ensure the effectiveness of economic sanctions in line with Article 41, Chapter VII, Charter of the United Nations, include special authorization that eliminates the flag state principle. For example, UNSC Resolution 221 (1966) on an embargo against Southern Rhodesia, UNSC Resolution 665 (1990) on an embargo against Iraq, UNSC Resolution 875 (1993) on an embargo against Haiti and UNSC Resolution 787 (1992) on an embargo against former Yugoslavia. These resolutions explicitly represent that (navies of the) member states of the United Nations may take forcible measures to enforce an embargo.<sup>14</sup> Some UNSC resolutions (including UNSC Resolution 1874) on economic sanctions concerning North Korea's nuclear tests and ballistic missile launches, adopted since UNSC Resolution 1718 (2006) on economic sanctions concerning the country's nuclear tests, require member states to inspect a ship that is suspected of transporting prohibited items on the high seas. However, this inspection needs to be conducted "with the consent of the flag state." Therefore, as for inspections of a ship on the high seas based on UNSC resolutions, exceptions to the flag state principle are not always allowed.

These conventions related to the law of the sea and UNSC resolutions do not aggressively eliminate the flag state principle to deal with a foreign ship on the high seas for national security purposes. On the other hand, it is theoretically possible to interfere with a foreign ship on the high seas by way of exception of the flag state principle without reasons attributed to conventions or UNSC resolutions as long as it comes under the condition concerning right of self-defense. There are some academic opinions that it is possible to invoke the right of self-defense to deal with a ship on the high seas for national security purposes. For example, there is an opinion that right of self-defense concerning imminent and grave invasion against a state by private individual is not admitted under article 51, UN Charter because premise of article 51 is occurrence of armed attack (by another state) but it is admitted for a state to exercise the right of self-defense against a foreign ships on the high seas based on the right of self-defense under the general international law, hence under general international law, it is possible for a state to interfere with foreign ships (third party vessels) on the high seas as counter-terrorism maritime interdiction operation as long as it meets the condition of the right of self-defense (the right of self-defense for maintaining the

<sup>12</sup> Article 8 (2) (5) (b) and (c) of the Protocol for the Amendment to the SUA Convention.

<sup>13</sup> Article 8 (2) (5) (d) of the Protocol for the Amendment to the SUA Convention provides that as soon as or after they ratify this protocol, states parties may notify the International Maritime Organization (IMO) that if they receive a request from another country to inspect their ship and do not respond to that country within four (4) hours of such request, rights of inspection and other actions are granted to that country.

<sup>14</sup> The United Kingdom was the only country authorized to take forcible measures to enforce the embargo against Southern Rhodesia.

security and good order) under the general international law.<sup>15</sup> Even based on this theory, however, mere the suspicion that a ship is suspected of transporting weapons of mass destruction and other items to terrorists and other related organizations does not satisfy (instant) necessity of self-defense as fundamental requirement for executing the right of self-defense and does not authorize the aforementioned interference.<sup>16</sup> Thus, executing such right of self-defense seems to be applied to extremely limited scenarios.

#### 4. Harmony with the flag state principle

As explained in Section 3, as to response to foreign ships on the high seas for the purpose of national security, UNCLOS does not admit it as an exception to the flag state principle and the Protocol for the Amendment to the SUA Convention authorizing such exception does not aggressively eliminate the flag state principle. In addition, UNSC resolutions do not always authorize this exception and cases that right of self-defense may be invoked as to this kind of response to foreign ships seem limited. Therefore such response are currently being taken or planned in harmony with the flag state principle in the international community. Specifically, harmony with the flag state principle translates into inspecting a ship with the consent from its flag state. For example, Maritime Interdiction Operation (MIO) named “Operation Enduring Freedom”<sup>17</sup>, commenced by Combined Task Force 151 (CTF-151) from October 2001 right after the September 11 attacks up to the present, are conducted with the consent of the merchant ship’s master or flag state and MIO named “Operation Active Endeavour”<sup>18</sup>, started by NATO in October 2001 after the September 11 attacks for terrorism detection and prevention activities in the Mediterranean, was conducted with the consent of the ship’s master or flag state.<sup>19</sup> (However, it is questionable and controversial under international law whether consent of the merchant ship’s master can replace consent of a flag state.<sup>20</sup>) The international community also notices that it is important to prevent North Korea from engaging in ship-to-ship cargo transfer in the ocean in order to ensure the effectiveness of economic sanctions concerning the country’s nuclear tests and ballistic missile launches. UNSC Resolution 2397 requires United Nations member states to impose sanctions on ships violating embargo rules. As explained in Section 3, however, if a United Nations member state needs to inspect a ship suspected of carrying prohibited items on the high seas, it is required to obtain consent of its flag state as to the inspection. Moreover, ship inspection operation, which is conducted in the situation that will have an important influence on Japan’s peace and security and the situations threatening the international peace and security, will require the consent of a flag state if no UNSC resolutions authorize inspection.<sup>21</sup> Prevention activities based on the “Proliferation Security Initiative (PSI)” also assumes to submit to existing

<sup>15</sup> ISHII Yurika, “Self–Defense on the High Seas against a Third Party Vessel Which Poses Security Threat,” *Yearbook of World Law*, Vol. 36 (2017), pp. 146-147.

<sup>16</sup> Ibid, p. 146.

<sup>17</sup> “CTF 150: Maritime Security,” Combined Maritime Forces, <https://combinedmaritimeforces.com/ctf-150-maritime-security/>.<sup>18</sup> Operation Active Endeavor was completed in October 2016 and its activities are succeeded by the NATO’s “Operation Sea Guardian” as Maritime Security Operation. “Operation Sea Guardian,” Allied Maritime Command, <https://mc.nato.int/missions/operation-sea-guardian>.

<sup>18</sup> Operation Active Endeavor was completed in October 2016 and its activities are succeeded by the NATO’s “Operation Sea Guardian” as Maritime Security Operation. “Operation Sea Guardian,” Allied Maritime Command, <https://mc.nato.int/missions/operation-sea-guardian>.

<sup>19</sup> Ishii, “Validity of self-defense actions against a third country ship causing security threat in international waters,” p. 143. J. Kraska and R. Pedrozo, *International Maritime Security Law* (Leiden: Brill Nijhoff, 2013), pp. 54-55.

<sup>20</sup> Ishii, “Self–Defense on the High Seas against a Third Party Vessel Which Poses Security Threat,” p. 143.

<sup>21</sup> Article 2 of the Act concerning the Ship Inspection Operations in Situations That Will Have an Important Influence on Japan’s Peace and Security.

international law.<sup>22</sup> As existing conventions and UNSC resolutions do not include special authorization that eliminates the flag state principle for maritime interdiction based on the PSI,<sup>23</sup> consent of a flag state will be required to take forcible measures against its ship on the high seas.

When a country tries to obtain consent of a flag state, it either negotiates with a flag state on a case-by-case basis or obtains its prior consent. Bilateral inspection agreements executed between the United States and some countries exemplify the latter approach.<sup>24</sup>

## 5. Conclusion

As explained in Section 2, the flag state principle has traditionally been explained based on the doctrine regarding a ship as territory, which is the theory that a ship on the high seas is regarded as territory of the flag state, as a result of freedom of the high seas. These days, however, the principle is explained as the doctrine concerning the responsibility imposed on a flag state because it may be considered that the most adequate way to maintain good order on the high seas under the principle of freedom of high seas is execution of flag state's jurisdiction. Thus, exceptions to the flag state principle seem theoretically more acceptable now in comparison with those days when the principle regarding a ship as a territory was supported. However, both approaches share the same concept that the flag state principle is based on benefits granted by international law preventing a country from being controlled (interfered with) by other countries according to the freedom of the high seas and, more specifically, the freedom of using the high seas. In other words, the flag state principle is derived from important benefits based on international law granted to countries: the freedom of the high seas and particularly the freedom of using the high seas. Therefore this makes it difficult to deny this principle. As explained in Section 3, conventions related to the law of the sea and UNSC resolutions do not aggressively eliminate the flag state principle as to the response to a foreign ship on the high seas even if its purpose is national security. Hence, the response is, or is assumed to be, conducted with the consent of the flag state in current situations, as explained in Section 4. This may be partly because of the concern that granting exceptions to the flag state principle may hamper the freedom of the high seas in consideration of the origin of this principle. So in examining the response to a foreign ship on the high seas for the purpose of national security, it needs to take note of this perspective.

(Completed on November 30, 2020)

The views expressed in this column are solely those of the author and do not represent the official views of NIDS.

We do not permit any unauthorized reproduction or unauthorized copying of the article.

Please contact us at the following regarding any questions, comments or requests you may have.

Planning and Management Division, Planning and Administration Department, The National Institute for Defense Studies

Telephone: +81-3-3260-3011 ext.: 8-6-29171 FAX: +81-3-3260-3034 NIDS Website:

<http://www.nids.mod.go.jp/>

<sup>22</sup> United States Department of State, *Statement of Interdiction Principles for the Proliferation Security Initiatives*, September 4, 2003.

<sup>23</sup> In 2002, Spain inspected the North Korean cargo ship *Sosan* transporting Scud missiles to Yemen. This inspection was conducted based on the ground for suspecting that the ship is without nationality. The United Nations Security Council Resolution 1540 (2004) regarding the non-proliferation of weapons of mass destruction did not include conditions that authorized exceptions to the flag state principle, either. Michael Byers, "Policing the High Seas: The Proliferation Security Initiatives," *American Journal of International Law*, vol. 98, no. 1 (January 2004), p. 526.

<sup>24</sup> Kraska and Pedrozo, *International Maritime Security Law*, pp. 787-794.