

# **United or Divided We Stand? Perspectives on the EU's Challenges**

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## The possibility that the EU unites with Japan in perspective of CSDP

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### Introduction

After the Second World War, Japan has been restricted exercising the military power by military-related acts under the Article 9 of the Constitution. However, Japanese government sometimes changed the interpretation of this Article to adapt to the change of international circumstances such as establishing the Self Defence Forces (hereinafter, SDF). In the last year eventually, Japanese Lower House passed the two bills in July and the Upper House in September. These two bills enables SDF to act broader than it used to; one is the Act to amend ten Acts (我が国及び国際社会の平和及び安全の確保に資するための自衛隊法等の一部を改正する法律)<sup>1</sup>, amends existing ten security related acts and the other, the International Peace Support Act (国際平和共同対処事態に際して我が国が実施する諸外国の軍隊等に対する協力支援活動等に関する法律)<sup>2</sup> is the new Act which enables Japan send SDF overseas without legislation of new act to provide logistic support to the other countries' army such as in the Afghanistan in 2001 or Iraq cases in 2003. These two Acts were brought into effect on March 2016.

My presentation aims to consider the security relation between the EU and Japan from the legal perspective especially based on the Japanese new security legislation reform by assessing the possibility that Japan can join the EU's Common Security and Defence Policy (CSDP) missions. The typical security partner for Japan is not the EU but the US. Therefore at first sight, 'the prospect of a Japan-EU security alliance may seem about meaningful as a relationship between a bald and comb'<sup>3</sup>. However, in the field SDF often cooperates with the European troops because mission of both in the field is similar. Compared to the US, the EU and Japan are often engaged in rather the non-combat mission than combat mission<sup>4</sup>. For instance in Iraq, the troop which undertook one of the non-combat mission with SDF were the UK and the Netherlands.

Participating of Japan in CSDP is benefit for both the EU and Japan. Thierry Tardy raises two merits for the EU having partners of CSDP<sup>5</sup>. First one is capacity that the participants provide their own asset and personnel that the EU lacks. The second one is political merit because the EU can impose some conditions to admit participation of non-EU countries. For Japan, participating in the other operations than UN-led one is significant. This can embody "Japan's Foreign Policy that Takes a Panoramic Perspective of the World Map" and "Proactive Contribution to Peace" which are the policies of Japanese Prime Minister Shinzo Abe<sup>6</sup>. Furthermore, for Japan, cooperation with the EU would realize these policies without provoking China, South Korea, contrary to one with the US. Additionally, giving the current trend that contingents for the UN

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<sup>1</sup> The Act to amend ten Acts (我が国及び国際社会の平和及び安全の確保に資するための自衛隊法等の一部を改正する法律) <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anbun-heiwaanzenhouseiseibihou.pdf>

<sup>2</sup> The International Peace Support Act (国際平和共同対処事態に際して我が国が実施する諸外国の軍隊等に対する協力支援活動等に関する法律) <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anbun-kokusaiheiwasienshou.pdf>

<sup>3</sup> Paul Midford, By Land and by Sea: The Potential of EU-Japan Security Cooperation, *Japan Forum*, 24 (3), 2012: 289.

<sup>4</sup> Ibid.: 290; Michito Tsuruoka, Japan-EU Security and Defence Cooperation making progress silently, EU MAG, 2015 (in Japanese): <http://eumag.jp/behind/d0715/>. Midford raises other four reasons to prospect EU-Japan security relation as well.

<sup>5</sup> Thierry Tardy, CSDP: getting third states on board, European Union Institute for Security Studies, *Brief Issue*, no. 6, 2014: 3-4.

<sup>6</sup> Ministry of Foreign Affairs, Japan, *Diplomatic Bluebook*, 2015: 11-12.

"Proactive Contribution to Peace" is a base of new security related legislation. Government of Japan, Japan's Legislation for Peace and Security: Seamless Responses for Peace and Security of Japan and the International Community, 2016: 2: <http://www.mofa.go.jp/files/000143304.pdf>

peace keeping operations are provided by African and South Asian countries<sup>7</sup>, and the nature of the EU peacekeeping operation have diverged from the UN peacekeeping operations by the EU works on its own missions<sup>8</sup>, it will be doubted whether cooperating only in the framework of the UN operations is enough to appeal the presence to embody “Japan’s Foreign Policy that Takes a Panoramic Perspective of the World Map” and “Proactive Contribution to Peace”<sup>9</sup>.

Based on these context, both sides seem to make the security relation stronger. For instance, in practice, the EU and Japan discussed ‘the possibility of future participation of Japan in CSDP missions<sup>10</sup>’ along with the negotiation of Free Trade Agreement and Framework Agreement. It is not weird that the countries which are geographically far from Europe to participate CSDP. For instance, Thailand, Malaysia, Brunei, Philippines<sup>11</sup> and Singapore, Norway and Switzerland joined Aceh Monitoring Mission in 2005-06<sup>12</sup>. Furthermore, some countries conclude the Framework Participation Agreement (hereinafter FPA) which regulates the framework when the non-EU countries participate CSDP. Although it does not oblige the Party to join all CSDP missions, the EU and the Party does not need to conclude the agreement to participate in each missions when it participates. It is not weird that the geographically far country concludes FPA. For instance, Colombia<sup>13</sup>, Chile<sup>14</sup> and South Korea<sup>15</sup> signed Framework Partnership Agreements in 2014. Compared to the South Korea’s successful sign of FPA, ‘Japan’s reluctance to do so is the echo of its own internal difficulties related to the constitutional debate<sup>16</sup>.’ Because although the Japanese constitution does not change itself, now its interpretation was changed by the new legislation reform, is the possibility that Japan conclude FPS with the EU now stronger than before?

The rest of my presentation will examine the possibility the security cooperation between the EU and Japan by taking the Aceh Monitoring Mission (hereinafter AMM) and the European Union Naval Force Operation Atalanta (hereinafter EUNAVFOR Atalanta). AMM was exemplified by Japanese Minister of Defence, Gen Nakatani, as one of the missions SDF may join in after the enforcement of the new military-related acts<sup>17</sup>. And this mission is estimated as ‘a near miss of what could have become the first joint military-to-military on-the-ground peace-building mission

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<sup>7</sup> UN Peacekeeping, ‘Troop and Police Contributors’: <http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml>

<sup>8</sup> Tobias Pietz, The European Union and UN Peacekeeping: Half-time for the EU’s Action Plan, *Policy Briefing*, 2013: 1-4.

<sup>9</sup> As the other merit for Japan to CSDP, Luis Simón raises the possibility that ‘the EU framework could be instrumental in helping to bring Japan and South Korea closer’ as the same FPA parties. Luis Simón, ‘Japan reaches out to the world: an opportunity for Europe?’, *European Geostrategy*, vol. 5, no. 40, 2013: <http://www.europeangeostrategy.org/2013/12/japan-reaches-world-opportunity-europe/>

<sup>10</sup> Para. 6 of the Joint Press Statement of 23rd Japan-EU Summit, Tokyo, 29 May 2015.

<sup>11</sup> ASEAN countries’ participation in the Aceh Monitoring Mission was to calm down the Indonesian parliament opposition to the pure European mission (Kirsten E. Schulze, The AMM and the transition from Conflict to Peace in Aceh, Mary Martin and Mary Kaldor (eds.), *The European Union and Human Security: External Interventions and Missions* (Routledge: London, 2009): 16). Japan also can contribute to play such a role in the future.

<sup>12</sup> EU Council Secretariat, ~Background~ EU Monitoring Mission in Aceh (Indonesia): I :[http://www.eeas.europa.eu/csdp/missions-and-operations/aceh-amm/pdf/15122006\\_factsheet\\_aceh-amm\\_en.pdf](http://www.eeas.europa.eu/csdp/missions-and-operations/aceh-amm/pdf/15122006_factsheet_aceh-amm_en.pdf)

<sup>13</sup> EEAS, ‘Colombia and the EU sign Framework Agreement on participation in EU crisis management operations’, 2014: [http://eeas.europa.eu/delegations/colombia/press\\_corner/all\\_news/news/2014/20140806\\_ue\\_operaciones\\_de\\_gestion\\_de\\_crisis\\_e\\_n.pdf](http://eeas.europa.eu/delegations/colombia/press_corner/all_news/news/2014/20140806_ue_operaciones_de_gestion_de_crisis_e_n.pdf)

<sup>14</sup> EEAS, ‘EU and Chile sign Framework Agreement on Participation in EU Crisis Management Operations’, 2014: [http://eeas.europa.eu/statements/docs/2014/140130\\_01\\_en.pdf](http://eeas.europa.eu/statements/docs/2014/140130_01_en.pdf)

<sup>15</sup> EEAS, ‘EU High Representative signs new agreement to deepen Strategic Partnership with Republic of Korea’, 2014: [http://eeas.europa.eu/top\\_stories/2014/020614\\_ca\\_republic\\_of\\_korea\\_en.htm](http://eeas.europa.eu/top_stories/2014/020614_ca_republic_of_korea_en.htm)

<sup>16</sup> Pierre Minard, The EU, Japan and South Korea: Mutual Recognition between Different Partners, Group for Research and Information on Peace and Security, *Analysis Note*, 2014: 7: [http://www.grip.org/sites/grip.org/files/NOTES\\_ANALYSE/2014/NA\\_2014-09-18\\_EN\\_P-MINARD.pdf](http://www.grip.org/sites/grip.org/files/NOTES_ANALYSE/2014/NA_2014-09-18_EN_P-MINARD.pdf)

<sup>17</sup> Reply from Gen Nakatani in the special committee on Japan’s security legislation in the House of Councilors in the 180th Diet on 30th July 2015 in the recording in the special committee on Japan’s security legislation in the House of Councilors (30th July 2015), No. 5, in the 189th Diet: 24 at <http://kokkai.ndl.go.jp/SENTAKU/sangiin/189/0192/18907300192005.pdf> (in Japanese)

for SDF and EU military personnel<sup>18</sup>. Based on the analysis of this case in the light of Japanese new security-related legislation, I will show the possibility that the relationship between the EU and Japan will make progress by the legislation reform (chapter 1). Atalanta is the military operation against piracy off the coast of Somalia which is international sea lane and the meeting point between Europe and Japan and this is why this area is important for both<sup>19</sup>. At the point on April 2016, this is the conspicuous mission that now the EU in Atalanta and Japan as a member of Combined Task Force 151 which is multinational forces to combat piracy off the coast of Somalia led by the US, are cooperating each other. Continuing the cooperation was welcomed in Japan-EU summit in 2015<sup>20</sup>. Based on the analysis on Atalanta, I will show some vague points or vacuums to conclude that Japan can cooperate with the EU more by the Japanese new legislation (chapter 2). Finally, I will sum up the prospect of security relationship between the EU and Japan (Conclusion). To show the difference between the old and new Acts, I will use the comparative chart between the past and the present of Japan's security legislation (我が国及び国際社会の平和及び安全の確保に資するための自衛隊法等の一部を改正する法律案新旧対照表)<sup>21</sup> although the differences are stipulated in the Act to amend ten Acts.

## **Chapter 1: Which change of Japanese legislation does admit to join CSDP?**

### **1. Brief History<sup>22</sup>**

In 1949, following the independence struggle, the Republic of Indonesia achieved the formal sovereignty. Aceh, a part of the Indonesia, agreed to become part of Indonesia. Aceh enjoyed significant autonomy initially, however the government in Jakarta soon pursued increased centralization towards a unitary state. While the Indonesia government harmed the Aceh people by excessive centralization, human rights violations and unfair exploitation of Aceh's resources, Gerakan Aceh Merdeka (the Free Aceh Movement, hereinafter GAM) was established with the goal of independence for Aceh. In spite of some international efforts to halt the oppression by the Indonesian government and the struggle of GAM for independence, such as sign of Joint Understandings in 2000, negotiations in Tokyo in 2003 and so on, these efforts are all failed. In 2004, the former General and Security Minister Susilo Bambang Yudhoyono, of which election manifesto included a pledge to seek peace in Aceh, became Indonesian president. Furthermore, an earthquake occurred in the Indian Ocean and this triggered a massive tsunami leading a lot of Acehnese to perish in the waves. The election and tsunami in 2004 facilitated the peace negotiation and Memorandum of Understanding (hereinafter MoU) which was signed between the parties in Helsinki in August 2005, including the provisions that GAM is to demobilize its fighters and turn in weapons, and the Indonesian government to withdraw soldiers and police. In September, the EU-led Aceh Monitoring Mission began its work, supervising implementation of the MoU.

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<sup>18</sup> Mindford (2012): 309.

<sup>19</sup> Luis Simón, 'How Japan Matters to Europe', European Geostrategy, vol. 7, no. 4, 2015: <http://www.europeangeostrategy.org/2015/01/japan-matters-europe/>

<sup>20</sup> Para. 8 of the Joint Press Statement of 23rd Japan-EU Summit, Tokyo, 29 May 2015. Supra note 10.

<sup>21</sup> The comparative chart between the past and the present of Japan's security legislation (我が国及び国際社会の平和及び安全の確保に資するための自衛隊法等の一部を改正する法律案新旧対照表) : <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/sinkyuu-heiwaanzenhouseiseibihou.pdf> (in Japanese).

<sup>22</sup> I referred to the following homepage to summarize the history of Aceh. World Watch Institute: Vision for a Sustainable World, Conflict and Peacemaking in Aceh: A Chronology: <http://www.worldwatch.org/node/3929> .

## 2. Act Related to AMM

### I. Act to Participate AMM

The most important change as regards the engagement with the EU-led mission is the addition of the kind of the operation that Japan can dispatch in the ‘Act on Cooperation for United Nations Peacekeeping Operations and Other Operations’. So far, SDF has been able to engage in the UN-led peace keeping operation on the bases of the Article 2 para. 1 and 3 para. 1 (1) of this Act as the legal ground. The Article 2 para. 1 prescribes that the Japanese government may cooperate with the UN-led Peace Keeping Operation (国際連合平和維持活動)<sup>23</sup> and the Article 3 para.1 (1) defines the UN-led cooperation<sup>24</sup>. After the revision, the Article 2 para. 1 of the Act added the ‘Non-UN-led International Peace Keeping Operation (国際連携平和安全活動)’ as one of the operations that Japan may cooperate<sup>25</sup>. Pursuant to the Article 3 para.1 (2) of the revised Act, Non-UN-led International Peace Keeping Operation is ‘conduct ..... based on the request of the international organization on Annex 1 or the country where the conduct is carried out<sup>26</sup>.’ According to Annex 1, the international organization in the Article 3 para. 1 (2) is an institution, which has experience or a special ability in the UN peace keeping operation, established by a treaty of a regional institution or multilateral institution based on the Article 52 of the UN convention, which is *the European Union*<sup>27</sup> or institutions decided by government ordinances<sup>28</sup>. Therefore, according to this new Act, Japan now may join the EU-led peace keeping operation.

### II. Contents of the Mission

Regarding the contents of the mission, the task of AMM is monitoring the observance of the MoU<sup>29</sup>. ‘Act on Cooperation for United Nations Peacekeeping Operations and Other Operations’ enumerates the tasks that Japan can be engaged in and one of them is monitoring the ceasefire, re-deployment or withdrawal agreed between the parties or disarmament (the Article 3, para. 1 (5) (a)). This provides the legal grounds for Japan to join the mission such as AMM. Compared to that Japan ‘failed to send any SDF personnel to join the AMM’<sup>30</sup> because it ‘would have needed to enact a special dispatch law to authorize deployment of SDF personnel to Aceh<sup>31</sup>’, now Japan can be engaged in the EU-led mission of which nature is similar to AMM.

New legislation not only expand the chance Japan can join but also the contents of the task. For instance, the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations admits the wider using weapons than it used to. Japan can now use weapons to rescue the people in remote locations<sup>32</sup> (what is so called, Kaketsuke Keigo (駆け付け警護)) and to

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<sup>23</sup> The Article 2 para. 1 in the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

<sup>24</sup> The Article 3 para. 1 (1) in the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

<sup>25</sup> The Article 2 para. 1 in the revised Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

<sup>26</sup> The Article 3 para. 1 (2) in the revised Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

<sup>27</sup> Emphasis added.

<sup>28</sup> Annex 1 of the revised Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

<sup>29</sup> The detail of the mandate is to (a) monitor the demobilisation of GAM and monitor and assist with the decommissioning and destruction of its weapons, ammunition and explosives; (b) monitor the re-location of non-organic military forces and non-organic police troops; (c) monitor the reintegration of active GAM members; (d) monitor the human rights situation and provide assistance in this field in the context of the tasks set out in points (a), (b) and (c) above; (e) monitor the process of legislation change; (f) rule on disputed amnesty cases; (g) investigate and rule on complaints and alleged violations of the MoU; (h) establish and maintain liaison and good cooperation with the parties. (The Article 2 (2) Council Joint Action 2005/643/CFSP)

<sup>30</sup> Midford, supra note 3: 308.

<sup>31</sup> Ibid.

<sup>32</sup> The Article 3 para. 1 (5) (w) of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

protect local inhabitants, patrol and conduct a traffic inspection<sup>33</sup> (so called, Anzen Kakuho Katsudou (安全確保活動)). Since Gulf War, Japan has been often criticized for ‘cheque book diplomacy’ because Japan do not send personnel and SDF cannot contribute to peacekeeping nor help other nationals even SDF was sent. But now Japanese troops can use weapons in wider cases than before. This perhaps helps Japan to clear bad reputation and makes us expect Japan will play an active part in CSDP. Personnel of AMM did not carry weapons<sup>34</sup> with a few exceptions<sup>35</sup>, so this point of new legislation does not matter in AMM so much. However, this would enable Japan to join the military operation of CSDP.<sup>36</sup>

## Chapter 2. Vague Point of Participation

In the first chapter, I showed that Japanese legislation opened the possibility that Japan join the EU mission. In this chapter, on the contrary, I will show that vague part of the possibility by exemplifying EUNAVFOR Atalanta. This mission is to tackle the pirates off the coast of Somalia which increased since the breakdown of Somalia. This mission seems the conspicuous mission that Japan can join because the EU in EUNAVFOR Atalanta and Japan as a member of CTF-151 since December 2013. For instance, EUNAVFOR Atalanta, CTF-151 and NATO Ocean Shield operation have the common counter-piracy coordination role among three operations and EUNAVFOR Atalanta Force Commander, Rear Admiral Alfonso Gómez Fernández de Córdoba, assumed the role from the CTF 151 commander, Japanese Rear Admiral Hiroshi Ito, during a meeting at sea on board Operation Atalanta flagship, ESPS Galicia in July 2015<sup>37</sup>. Adding to the zone defence in CTF-151, Japan also engaged in escort merchant ships individually since March 2009. Giving that Japan has already dispatched SDF into the coast of Somalia and this is the mission that both are cooperating closely each other, EUNAVFOR Atalanta is the most feasible that Japan will attend. Although before Japan join CTF-151, Paul Midford assessed the Japan can join the EUNAVFOR Atalanta.<sup>38</sup> Moreover, giving that the nature of three missions is similar each other and they divides the labour among three, we can assume easily that as the piracy attack declines, one or two of the missions withdraw. If so, the operation continues among three after

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<sup>33</sup> The Article 3 para. 1 (5) (g) of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations.

<sup>34</sup> The Article 2 (c) of Annex II of Agreement in the form of an exchange of letters between the European Union and the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM) and its personnel.

<sup>35</sup> According to the Article 5.8 of MoU, ‘Government of Indonesia (GoI) is responsible for the security of all AMM personnel in Indonesia. The mission personnel do not carry arms. The Head of Monitoring Mission may however decide on an exceptional basis that a patrol will not be escorted by GoI security forces. In that case, GoI will be informed and the GoI will not assume responsibility for the security of this patrol.’ Furthermore, ‘first phase of re-location and decommissioning completed, Press Release – 27 September 2005’, point out that ‘Its members do not carry weapons. Some monitors will have a military background as this is necessary to perform certain technical tasks implied by the mission, for example the decommissioning of weapons.’, <http://www.consilium.europa.eu/uedocs/cmsUpload/PRPhaseOnecompleted27092005.pdf>;

<sup>36</sup> Other change by the new legislation is that Japan can use weapon when even foreign countries’ cantonment was attacked (the Article 25, para. 7 of the Act). If the Headquarter is considered as a cantonment. For instance, on 21 March 2016, the head quarter of EUTM Mali mission, Gunmen have attacked the European Union military training mission’s headquarters in the Malian capital, Bamako. I am not sure that the head quarter is cantonment, but if so, this will matter for Japan.

<sup>37</sup> EUNAVFOR Atalanta, ‘Operation Atalanta Force Headquarters Assumes Counter-Piracy Coordination Role from CTF 151’ (22 July 2015): <http://eunavfor.eu/operation-atalanta-force-headquarters-assumes-counter-piracy-coordination-role-from-ctf-151>

<sup>38</sup> Midford, supra note 3: 301-303.

the other operations retreated would be the EUNAVFOR Atalanta because it is the feature of the EU's mission that the EU can approach the Somalia problems from the terms of comprehensively. CSDP is just one side of the approach of the comprehensive approach to a problem<sup>39</sup>. For instance, to tackle piracy attacks, the EU has now two missions in Somalia: EUTM Somalia since 2010 and EUCAP NESTOR since 2011 to solve the basis of piracy problems by helping Somalia with rebuilding the State. Then, for Japan the EUNAVFOR Atalanta is attractive and worth to consider to join if CTF-151 break up. In this context this chapter analyses the possibility that Japan can take part in EUNAVFOR Atalanta.

### 1. Brief History

In Somalia, since 1991 the civil war continues and this has brought about piracy. The UN Security Council calls upon States and regional organizations, to take action to protect shipping involved in the transport and delivery of humanitarian aid to Somalia and in activities authorised by the United Nations<sup>40</sup>. Addition to this, the UN authorized States cooperating with the Somalian Transitional Federal Government (hereinafter TFG), of which advance notification had been given by the TFG to the UN Secretary General, to enter the territorial waters of Somalia and to use, in a manner consistent with relevant international law, all necessary means to repress acts of piracy and armed robbery at sea under chapter VII of the charter<sup>41</sup>. Furthermore, the following Security Council resolution mentions the possibility of an EU maritime operation<sup>42</sup>. Based on these UN Security Council Resolutions, the EU adopted the Council Joint Action 2008/851/CFSP and launched the EUNAVFOR Atalanta in December 2008<sup>43</sup>. In the beginning, EUNAVFOR Atalanta was to terminate after twelve months<sup>44</sup> however after the sequent series of extensions, this continues till 12 December 2016 so far<sup>45</sup>. The other two operations are engaged in anti-piracy task: Ocean Shield operated by NATO since August 2009 after Operation Allied Provider (October-December 2008), Operation Allied Protector (March-August 2009)<sup>46</sup>, and CTF 151 by Combined Maritime Force which is a multinational force leaded by the US to promote maritime security in order to counter terrorist acts and related illegal activities<sup>47</sup> both which are based on the series of UN Resolutions mentioned above.

To respond the UN resolutions, Japanese government also started to deal with anti-piracy operation off the coast of Somalia. In March 2009, Prime Minister Taro Aso recognized the order

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<sup>39</sup> Regarding the comprehensive approach and consistency with other strands of external action such as development cooperation and between the missions, see Panos Koutrakos, *The EU Common Security and Defence Policy* (Oxford: Oxford University Press, 2013): 101-182, 210-247.

<sup>40</sup> Para. 11 of UN doc S/RES/1814 (2008)

<sup>41</sup> Para. 7 of UN doc S/RES/1816 (2008)

<sup>42</sup> The preamble of the UN doc S/RES/1838 (2008)

<sup>43</sup> EUNAVFOR Atalanta Home Page: <http://eunavfor.eu/>

<sup>44</sup> The Article 16 (3) of the the Council Joint Action 2008/851/CFSP.

<sup>45</sup> Press Release by the Council of the European Union (2014) [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/145902.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145902.pdf)

<sup>46</sup> NATO Home Page: [http://www.nato.int/cps/en/natohq/topics\\_48815.htm](http://www.nato.int/cps/en/natohq/topics_48815.htm)

<sup>47</sup> Combined Maritime Forces Home Page: <https://combinedmaritimeforces.com/ctf-150-maritime-security/>

of maritime patrol activities issued by the Defence Minister<sup>48</sup> based on the Article 82 of the Act of Self Defence Forces. And on the following day, two escort vessels, Sazanami and Samidare, left Japan and started maritime escort operations on 30 March<sup>49</sup>. In May 2009, fixed-wing patrol aircraft (P-3C) also added to the anti-piracy operation.<sup>50</sup> In June 2009, the Act of Punishment and Countermeasures against Piracy was enacted which came into effect in July. Additionally since July 2013, Japan decided to join CTF-151 to be engaged in zone defence<sup>51</sup> and the Japanese surface force started zone defence in December<sup>52</sup>.

## 2. Problem due to the Difference between CTF-151 and EUNAVFOR Atalanta

One of the problems when Japan moves or expand its operation from CTF-151 to EUNAVFOR Atalanta is that the EU mission has one Rule of Engagement compared to Common Maritime Forces which does not have a Rule of Engagement<sup>53</sup>. And in the EU missions, if the non-EU participant joins CSDP missions, a part of operational control is transferred the Head of Mission, or the Operation Commander although all forces and personnel remain under the full command of their national authorities<sup>54</sup>.

Even though Japan expanded the range of the use of weapon, we cannot rule out the possibility completely that restrictions that Japan cannot use weapons rests. The legislation reform does not lift all restriction because the Article 9 of Japanese Constitution still prohibits to use of force. Then, if Japan joins CSDP missions, is there any risk that Japan cannot control its own troops and they use weapons which is illegal under the Japanese Constitution?

Regarding this problem, when participating States want to regain *complete* command and control, they issue a reverse transfer of authority to bring their forces back under their complete command and control<sup>55</sup>. Regaining complete command and control tend to occur in the context marine operation because it is relatively easy to carry out in relation to ships as these are easily separable units<sup>56</sup>. Furthermore, as of the national restriction on using weapon, Member States may issue caveats rules of engagement which describes concerning the use of forces, applicable to their contingents but these may only impose further restrictions on the use of force<sup>57</sup>. These caveats includes one resulting from a Member State's domestic law<sup>58</sup>. Accordingly, legal framework of the EU has the groundwork to admit Japan's participation in CSDP. Taking them into

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<sup>48</sup> Recognition of Maritime Patrol Activities by the Prime Minister (in Japanese) (海上における警備行動に係る内閣総理大臣の承認について) (13 March 2009) <http://www.kantei.go.jp/jp/tyoukanpress/rireki/2009/03/13siryou2.pdf>

<sup>49</sup> *Defense of Japan 2009* (White Paper of Japanese Ministry of Defence), (2009): 127. [http://www.mod.go.jp/e/publ/w\\_paper/pdf/2009/20Part2\\_Chapter1\\_Sec4.pdf](http://www.mod.go.jp/e/publ/w_paper/pdf/2009/20Part2_Chapter1_Sec4.pdf)

<sup>50</sup> Ibid.

<sup>51</sup> *Defense of Japan 2014* (White Paper of Japanese Ministry of Defence), (2014): 296. [http://www.mod.go.jp/e/publ/w\\_paper/pdf/2014/DOJ2014\\_3-3-3\\_web\\_1031.pdf](http://www.mod.go.jp/e/publ/w_paper/pdf/2014/DOJ2014_3-3-3_web_1031.pdf)

<sup>52</sup> Ibid.

<sup>53</sup> Yasuyuki Yoshida, The Security Council's Action Under the Chapter VII of the Charter the Limited Nations towards Piracy *Jure Gentium*, *Japan Maritime Self-Defense Force Staff College Review*, 4 (2) (2014) (in Japanese): 32.

<sup>54</sup> Panos Koutrakos, The EU's Common Security and Defence Policy, Enzo Cannizzaro, Paolo Palchetti and Rames A. Wessel (eds.), *International Law as Law of the European Union* (Matrinus Nijhoff Publishers: Leiden, Boston, 2012): 171.

<sup>55</sup> Frederik Naert, The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement, Institute for International law, Working Paper, no. 151 (2011): 11.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.: 10.

<sup>58</sup> Ibid.: 11.

consideration, a rule of engagement of the EU would not matter for the Japan's joining EUNAVFOR Atalanta.

### **3. Vague Parts**

#### **I. Legal Basis Problem**

The genuine problem is the legal basis to join the EU NAVFOR Atalanta. The legal ground of the operation was the interim application of the Act of Self Defence Forces because Japan did not have act to dispatch SDF to tackle piracy, Japanese government regard anti-piracy operation as maritime police action that when the police action is needed but the maritime police cannot correspond to it such as suspicious vessels in the territorial sea.<sup>59</sup> However, according to the Act of Self Defence Forces, SDF can protect only Japanese ships not foreign ships from piracy, so Japanese government enacted the Act of Punishment and Countermeasures against Piracy which came into effect in July 2009. Ten acts that the new legislation amended does not include the Act of Punishment and Countermeasures against Piracy. Then at the first glance, the new legislation does not matter regarding the Japanese anti-piracy and it seems that Japan could join EUNAVFOR Atalanta even before the new legislation.

However, from the perspective of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations as mentioned above, it seems that Japan could not join EUNAVFOR Atalanta as a mission of the EU. This is because the nature of EUNAVFOR Atalanta is not peacekeeping operation that the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations allows Japan to join. 'Non-UN-led International Peace Keeping Operation (国際連携平和安全活動) that Japan can join shall be the following ones. The first operation is the operation that Japan keeps neutrality between the Parties when the parties agree on the ceasefire and the parties and the State where Japan dispatches SDF agree on the Japan's participation<sup>60</sup>. The second one is the operation after the parties ceased in the region where Japan dispatches SDF, when the State where Japan dispatches SDF agrees on the Japan's participation<sup>61</sup>. And the last one is the operation that Japan keeps neutrality between the Parties to prevent the armed disputes occasion when the State where Japan dispatches SDF agrees on the Japan's participation<sup>62</sup>. The anti-piracy operation does not hold true in the above operations in the Act.

Like this, from the legal perspective, the anti-piracy operation is not a peacekeeping operation that the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations assumes. Then Japan may not dispatch SDF to CSDP missions based on the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations even if it is possible based on the Act of Punishment and Countermeasures against Piracy.

#### **II. Act of Providing Goods Problem**

Furthermore, when we focus on the Act of Self Defence Forces as well, it is suspicious that Japanese law assumes joining the EU anti-piracy missions. According to the Act of Self Defence Forces, Japanese Defence Minister or people who are delegated by the Minister, when requested

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<sup>59</sup> The Article 82 of Act of Self Defence Forces.

<sup>60</sup> The Article 3 para. 1 (2) (a) of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations

<sup>61</sup> The Article 3 para. 1 (2) (b) of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations

<sup>62</sup> The Article 3 para. 1 (2) (c) of the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations

by the US army who does the following tasks, may provide goods which belong to Japanese SDF for the US army as long as it is not obstacle to achieving their own task for Japanese SDF.<sup>63</sup> Even before the legislation reform, for instance Japan may provide its own goods for the US armies being engaged in the same tasks when SDF carry Japanese people in emergency outside of Japan<sup>64</sup>. However, the kind of US army Japan can provide its own goods for was restricted very much. Then the revised Act on Self Defence Forces added the kind of US army including the US armies who engage in anti-piracy operation when SDF also engage in the same operation.<sup>65</sup> Then how does the Act prescribe about the EU army? There is no Articles about the EU army. Does this lack of the Articles mean the EU army can be treated equally with the US army or not? The clue is the Article about providing goods for the Australian army. According to the Article 100-8, Japanese Defence Minister or people who are delegated by the Minister, when requested by the Australian army who does the tasks which are prescribed in the following, may provide goods which belong to Japanese SDF for the Australian army as long as it is not obstacle to achieving their own task for Japanese SDF.<sup>66</sup> However even after the legislation reform, this Article does not add the articles which permit Japan to provide the Australian army with its own goods. Compared to the article of the US army, the both Articles of providing the SDF's goods both for the US army and the Australian army are similar each other. Nevertheless, the providing in the anti-piracy operation is added to only the US army. This shows the enactors' intention. This lack of the Article in Australian can be interpreted that Japan may not provide the Australian army. I cannot determine the interpretation that the lack of the EU means that Japan cannot provide with the EU army in anti-piracy operation immediately, however, *vice versa*. It is grey that Japan can provide its own goods with the EU army. And as mentioned above, one benefit for the EU of participation of Japan is that the participants provide their own asset and personnel that the EU lacks<sup>67</sup>. Taking this into consideration, the lack of the stipulation would give a blow to the incentive of the EU to admit the Japan's participation.

All legislation that new legislation amended and the Act of Punishment and Countermeasures against Piracy do not mention that joining the multinational forces. Nevertheless Japan now joins CTF-151. However even if by some chance Japan can join EUNAVFOR Atalanta, perhaps they cannot provide its own goods with the EU armies in the operation.

### **III. Extradition Problem**

Adding to the problems of legal basis to join EUNAVFOR Atalanta and the lack of Articles to provide the goods with the EU armies, even if Japan clear these problems, other problem remains: extradition of pirates. According to the Council Joint Action which launched EUNAVFOR Atalanta, persons having committed, or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be

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<sup>63</sup> The Article 100-6 para. 1 of the Act of Self Defence Forces.

<sup>64</sup> The Article 100-6 para. 1 (3) of the old Act of Self Defence Forces.

<sup>65</sup> The Article 100-6 para. 1 (3) of the new Act of Self Defence Forces

<sup>66</sup> The Article 100-8, para. 1 of the new Act of Self Defence Forces

<sup>67</sup> Supra note. 5

transferred to the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property<sup>68</sup>. And, no pirate may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.<sup>69</sup> Adding to Council Joint Agreement, the agreements on the participation of the third State in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) also mention that no transferred person shall be sentenced or liable to the death penalty or be the subject of an application for the death penalty<sup>70</sup>. Actually all participant countries, Norway, Croatia, Montenegro, Serbia, Ukraine (contributed a warship) and New Zealand (contributed an MPRA asset) abolish death penalty.<sup>71</sup> Although the possibility that Japan will rule on the pirates in Japan because the number of Japanese vessel is not many because of convenience flagship, we cannot rule out the possibility. For instance, MV Guanabara operated by Shosen Mitsui, Japanese shipping company, and registered in the Bahamas, was attacked and got on by four pirates off the Oman in March 2011. The US navy and Turkish guard ship captured them. All crews are not wounded and cargo are safe but a part of the ship was broken. Japan wanted the Bahamas ruled on the pirates in the beginning, however the US wants Japan to do because the Bahamas did not have laws to rule on pirates then the US navy extradited pirates to the Japan Coast Guard. And they were ruled on in Japanese courts. According to the Act of Punishment and Countermeasures against Piracy, only the person who killed the other person can be subjected to death penalty<sup>72</sup>. Then death penalty does not matter in this case. However, if the pirates who killed someone are ruled on in Japan, there is a possibility to be subjected to death penalty contradict to the Council Joint Agreement of the EU. There would be no problem if the pirates are extradited to the other countries. However, as the ex-Japanese Minister of Land, Infrastructure, Transport and Tourism, Kazuyoshi Kaneko says that in the brutal criminal case such as that Japanese was killed in the Japanese ship, Japan will transport a suspect to Japan<sup>73</sup>. In

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<sup>68</sup> The Article 12 (1) of the Council Joint Action 2008/851/CFSP.

<sup>69</sup> The Article 12 (2) of the Council Joint Action 2008/851/CFSP.

<sup>70</sup> For instance, the Article 4 of Annex of the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta); The Article 4 of the Annex of the Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta).

<sup>71</sup> Death Penalty Focus: <http://deathpenalty.org/article.php?id=81>

<sup>72</sup> The Article 4 (1) of the Act of Punishment and Countermeasures against Piracy

<sup>73</sup> Reply from Kazuyoshi Kaneko in the House of Representative in the 171st Diet on 15th April 2009 in the recording in the special committee on dealing with anti-piracy and prevention of international terrorism, our country's cooperation operation in the House of Representative (15th April 2009) no. 3 (in Japanese) at <http://kokkai.ndl.go.jp/SENTAKU/syugiin/171/0202/17104150202003a.html>

other words, killing people is the very case both that the EU prohibits to transfer the pirates to Japan according to the Council Joint Action and Japanese court may sentence the pirates to death.

### **Conclusion**

In this presentation, I showed that the legislation reform enables Japan to join CSDP missions on the surface in the Chapter 1. However, we could see that there are vague parts if we focus on the individual mission by exemplifying EU NAVFOR Atalanta even if the mission can be expected that Japan can join in the Chapter 2. There are some obstacles to join CSDP missions for Japan.