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The Proliferation Security Initiative and International Law of the Sea: A Japanese Lawyer's Perspective

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In the modern climate of concern regarding rogue states and terrorists attacks following September 11th, the Proliferation Security Initiative, a new cooperative interdiction separate from treaties and multilateral export control regimes, is considered a useful tool in preventing the proliferation of Weapons of Mass Destruction. However, the Proliferation Security Initiative[j2] includes certain strategies that are in conflict with contemporary international law of the sea. On a bilateral and multilateral basis, the United States seeks to promote the international law-making process to achieve the goals of the PSI through the adoption of U.N. Security Council Resolution 1540, the conclusion of a bilateral boarding agreement, and the revision of the SUA Convention. Despite such efforts, the United States has made little progress towards achieving its goals. It is difficult to overcome generally accepted and established principles of flag states and freedom of navigation, even if there are certain potential threats to international peace and security caused by the proliferation of WMD.

Keywords

Weapons of Mass destruction, Non-Proliferation, Freedom of Navigation, Principles of Flag States

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I. Introduction

On April 5, 2009, U.S. President Barack Obama made an impressive statement at Prague describing a new path towards international peace and security in the 21st century:¹

Just as we stood for freedom in the 20th century, we must stand together for the right of people everywhere to live free from fear in the 21st century. And as nuclear power - as a nuclear power, as the only nuclear power to have used a nuclear weapon, the United States has a moral responsibility to act. We cannot succeed in this endeavor alone, but we can lead it, we can start it....So today, I state clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons. I'm not naive. This goal will not be reached quickly - perhaps not in my lifetime. It will take patience and persistence. But now we, too, must ignore the voices who tell us that the world cannot change. We have to insist, "Yes, we can."

Then, he opined that it is necessary to strengthen the global regime of the non-proliferation of Weapons of Mass Destruction ("WMD")² in order to accomplish the goal of peace and security for a world without nuclear weapons. The prevention of proliferation of WMD to Rogue States and terrorists is one of the most important challenges of the contemporary international community, and such efforts as the Proliferation Security Initiative ("PSI") and the Global Initiative to Combat Nuclear Terrorism should be turned into "durable international institutions."³

In the Obama administration the PSI is considered key in the strategy to combat terrorism, although its origin began during the George W. Bush presidency. President Obama welcomed the declaration of South Korea to participate in the PSI just after South Korea found out that the North Korea performed the second nuclear test.⁴ Another reason South Korea participate in the PSI was in the pursuit of the North Korean ship, *Kangnam*, as one of the measures to fulfill Security Council Resolution

¹ President Barack Obama's Prague Speech, available at <http://www.reobama.com/SpeechesPrague09.htm> (last visited on Mar. 10, 2010).

² In this article, the term WMD refers to Weapons of Mass Destruction, their means of delivery and their related materials.

³ The White House Office of the Press Secretary, *Remarks by President Barack Obama* (Apr. 5, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered (last visited on Feb. 18, 2010).

⁴ THE MAINICHI DAILY NEWS, May 27, 2009, at 3 (available only in Japanese). For a Chinese perspective on this incident see Mu Xuequan (ed.), *U.S. welcomes S. Korea's joining proliferation security initiative*, May 27, 2009, available at http://news.xinhuanet.com/english/2009-05/27/content_11440168.htm (last visited on June 4, 2009).