

ISSUE FOCUS

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

Hiroyuki Banzai*

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

* Associate Professor of International Law at Waseda University. LL.M.(Waseda). The author may be contacted at: h-banzai@waseda.jp/Address: Waseda University School of Law, Nishi-Waseda 1-6-1, Shinjuku, Tokyo 169-8050 JAPAN.

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).

1874.⁵

At first, the PSI was unveiled by President Bush in Krakow, Poland, on May 31, 2003. Deemed “foremost among President Bush’s efforts to stop WMD proliferation,” the PSI appears to be a new channel for interdiction cooperation between states, apart from treaties and multilateral export control regimes. The main purpose of the PSI is to detect ships that transport large amounts of WMD on the high seas and sky, and in turn prevent the proliferation of WMD.⁶

However, many doubts have arisen as to the legality of the exercise of executive jurisdiction by maritime authorities, one example of which is, boarding on ships which are engaged in WMD transportation without the consent of their flag states. Although many states think of the PSI as a useful tool in stopping the proliferation of WMD, many are hesitant to accept all of the PSI execution because much of it remains in conflict with the traditional concepts of freedom of navigation and the principle of flag states.⁷ While the jurisdiction of states has traditionally been reserved to flag states in order to ensure the freedom of navigation, there is an increasing risk that the freedom will be abused to make the sea become a hotbed of terrorism.⁸ This article will analyze the problems of the PSI from the perspective of the law of the sea with reference to the opinions of several Japanese scholars.

II. PSI and Traditional International Legal Order

A. PSI as Counter-Proliferation

The PSI is a global effort that aims to stop trafficking of WMD to and from states and non-state actors. The PSI member States recognize the need for more robust tools to stop the proliferation of WMD around the world. They specifically identify interdiction as an area where greater focus will be placed. Today, more than 90 countries around the

⁵ THE MAINICHI DAILY NEWS, June 19, 2009, at 1 (available only in Japanese); “ミサイル積載か 米軍、北朝鮮船舶「カンナム」を追跡 過去に兵器拡散活動,” THE SANKEI NEWS, June 19, 2009, available at <http://sankei.jp.msn.com/world/korea/090619/kor0906190802001-n1.htm> (last visited on Feb. 18, 2010).

⁶ S. Squassoi, *Proliferation Security Initiative 1 & 4*, CRS REPORT FOR CONGRESS, Order Code RS21881, Updated Sept. 14, 2006.

⁷ R. T. CUPITT and C. JONES, *NON-PROLIFERATION EXPORT CONTROL: ORIGINS, CHALLENGES, AND PROPOSALS FOR STRENGTHENING* 203 (2006).

⁸ Y. Tanaka, *Framework of State Jurisdiction over Maritime Terrorism under SUA Convention: Conceptual Change from “Safety of Navigation” to “the Security of Navigation” and its Legitimacy*, 2 KAIYO SEISAKU KENKYU 海洋政策研究 (OCEAN POLICY STUD.) 125 (2005).

world support the PSI.⁹

The strategy of the PSI is expressed in the “Statement of Interdiction Principles for the Proliferation Security Initiative.” Its preambles states that the PSI is based on the UN Security Council Presidential Statement of January 1992 and statements of the G8 in Evian and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD.¹⁰ However, the Statement of Interdiction Principles itself and the other statements mentioned above are not legally binding. Therefore, the PSI relies on voluntary actions by states that shall be consistent with relevant international law, though the PSI is an innovative and proactive approach to preventing proliferation. Thus, PSI participants are trying to use existing national or international authorities to put an end to WMD-related trafficking and take steps to strengthen those authorities as necessary.¹¹

International security policy concerning the military and weapon systems has been discussed with the concepts of disarmament, arms control and non-proliferation. For example, the regimes of international law such as the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”), and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (“CWC”), were established to realize the concepts of disarmament, arms control and non-proliferation.

However, the PSI belongs to one of branches of counter-proliferation which in certain respects is beyond the scope of these international legal regimes. Counter-proliferation is a new concept because it includes forcible measures to reduce the effect of proliferation of WMD even in cases where preventive measures of non-proliferation fail. The term “counter-proliferation” was first used by U.S. Secretary of State in December 1993, symbolized by 8 Ds as in Table 1 below.¹²

⁹ U. S. Department of State, *Proliferation Security Initiative*, available at <http://www.state.gov/t/isn/c10390.htm> (last visited on Feb. 18, 2010).

¹⁰ *Interdiction Principles for the Proliferation Security Initiative*, available at http://www.sussex.ac.uk/Units/spru/hsp/Draft%20Convention%20supporting%20docs/international%20documents_UN_EU_treaties/PSI_Statement%20of%20interdiction%20principles%202003pdf.pdf (last visited on Feb. 18, 2010).

¹¹ Squassoni, *supra* note 6, at 3.

¹² Ashton B. Carter, *Overhauling Counterproliferation* 1-2 (2004), available at <http://foreign.senate.gov/testimony/2004/CarterTestimony040310.pdf> (last visited on Feb. 20, 2010).

Table 1: Eight Stages (“8Ds”) of Counter-Proliferation

Preventive measures		Measures to reduce the effect of proliferation	
①	Dissuasion	⑤	Defusing
②	Disarmament	⑥	Deterrence
③	Diplomacy	⑦	Defense
④	Denial	⑧	Destruction

Source: ASHTON B. CARTER, OVERHAULING COUNTERPROLIFERATION 1-2 (2004)

Therefore, counter-proliferation ranges from diplomatic efforts for disarmament to the use of force as a final means. For example, the both of agreement between the United States and North Korea in 1994 and military attacks against Iraq can be viewed in context of counter-proliferation.

Among the 8 Ds in the table, the first four Ds from 1 to 4 are principally within the limits of non-proliferation. Under counter-proliferation, however, extra-territorial jurisdiction of enforcement and the use of force without express authorization of the U.N. Security Council Resolution may be permitted, and these measures have much a wider scope than non-proliferation measures, which are in no doubt illegal. There is also a possibility that the PSI should not be as one of branches of counter-proliferation. According to Professor Yoshida, the PSI may be located in the fourth stage of D (Denial).¹³ Therefore, in order for counter-proliferation and the PSI to be accepted in the international community, it is necessary for them to be incorporated into international law, with legal justification for the exercise of extra-territorial enforcement and the use of force without express authorization of the Security Council.¹⁴

B. PSI and the Law of the Sea

1. *The M/V So San Incident and its Impact on the PSI*

The M/V *So San* Incident in 2002 was the direct impetus behind the PSI. In response to U.S. and British intelligence of a suspicious cargo vessel in the Indian Ocean en route from North Korea, Spanish naval forces patrolling the Arabian Sea intercepted the M/V *So San* on the high seas. It was approximately 600 miles from the Horn of Africa and the

¹³ F. YOSHIDA, TAIROY HAKAIHEIKI NO GUNSHUKURO 大量破壊兵器の軍縮 [THEORIES ON DISARMAMENT OF WEAPONS OF MASS DESTRUCTION] 68 (2004).

¹⁴ S. AOKI, *Disarmament and Nonproliferation against Non-State Actors: Resilience of International Law*, 26 SEKAIHO NENPO 世界法年報 (Y.B. WORLD L.) 139 (2007).

coast of Yemen. The suspicious cargo ship was flying no flag at the time of its approach and displayed no indication of its state of registry or home port. However, it did have a painted North Korean flag on its funnel and had Korean characters for *So San*. Suspicions on the vessel's nationality remained at that point in the Spanish naval's approach. Concluding that the failure to fly a flag or display a name constituted reasonable ground for suspecting that the ship was without nationality (Article 110 (1) d of UNCLOS), Spanish authorities chose to exercise the right of a warship to "visit" the vessel on the high seas. Spanish naval acted in the pursuant to the United Nations Convention on the Law of the Sea ("UNCLOS") in boarding the suspicious vessel. Once aboard the *So San*, the Spanish boarding team discovered a cache of 15 Scud surface-to-surface missiles under sacks of cement, while the *So San's* cargo list shoed cement shipment only.

Nevertheless, it was ultimately concluded that no international agreements prohibited the sale or shipment of Scud missiles from North Korea to Yemen. Furthermore, there is no provision in UNCLOS or other sources of general international law that explicitly prohibits the transport of Scud missiles or WMD-related materials by sea. Accordingly, there was no authority for seizing the missiles in the present case, and the *So San* was released with its cargo and allowed to continue to sail to Yemen. The incident provided an opportunity for states concerned to know the restraints that the applicable rules of international law of the sea place on the maintenance of international peace and security.¹⁵

As the U.S. and the other countries recognized the gaps in international law with respect to prohibition against the transport of WMD, the *So San* episode appears to have sparked several governments to consider alternative approaches to more conventional non-proliferation policies, such as export controls and the treaty verification regimes of the IAEA and OPCW. Finally in 2003, these attempts manifested with the establishment of the PSI, as announced by President Bush in May of 2003.¹⁶

The PSI has been very popular in the 17 founding members of the PSI. Among the 17 states, ten nations including the United Kingdom and Japan initially joined with the United States to improve cooperation to interdict shipments of WMD on land, sea, or in the air.¹⁷ According to State Department officials, the "core group" defined the basic principles of interdiction and worked to expand support, but it was disbanded in

¹⁵ C. H. ALLEN, MARITIME COUNTERPROLIFERATION OPERATIONS AND THE RULE OF LAW 150-152 (2007); M. A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT' L L.J. 1, 152-153 (2005).

¹⁶ Cupitt & Jones, *supra* note 7, at 198-199.

¹⁷ The founding members of the PSI are as follows: Canada, United States, Denmark, France, Germany, Italy, Netherlands, Norway, Poland, Portugal, Russia, Spain, Turkey, United Kingdom, Australia, Japan, and Singapore.

August 2005 after India complained of discrimination among PSI members. The United States has strongly encouraged India to join PSI with little success so far.¹⁸

Currently 95 nations are called participants of the activities of the PSI,¹⁹ but it is unclear what participant means. According to Squassoni's paper, based on the information released by the State Department, which is now inaccessible at its homepage, requirements for participation appear to be fairly weak. The paper further states that participating states are encouraged to:

- formally commit to and publicly endorse, *if possible*, the Statement of Principles;
- review and provide information on current national legal authorities and *indicate willingness* to strengthen authorities as appropriate;
- identify specific national assets that *might* contribute to PSI efforts;
- provide points of contact for interdiction requests;
- *be willing* to actively participate in PSI interdiction training exercises and actual operations as they arise; and
- *be willing* to consider signing relevant agreements or to otherwise establish a concrete basis for cooperation with PSI efforts.²⁰ [Emphasis added]

The objectives of the PSI were initially (i) to interdict traders and smugglers of WMD materials, (ii) to interdict the passage of suspicious ships in the territorial seas and airs, and (iii) to facilitate visits to suspicious ships on the high seas. However, as for last objective which was the real target of the United States, many states strongly protested from the standpoint of the flag state principle. As such, the right to visit to suspicious vessels on the high seas is only permitted with the consent of the flag state. On this point, the measures available under the PSI are addressed in Paragraph 4 of the Statement of Interdiction Principles:

- Parties shall not transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so;
- Parties may take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified;
- Parties should seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states,

¹⁸ Squassoni, *supra* note, 6 at 2.

¹⁹ U.S. Department of State Bureau of International Security and Nonproliferation, *Proliferation Security Initiative Participants*, available at <http://www.state.gov/t/isn/c27732.htm> (last visited on Feb. 18, 2010).

²⁰ Squassoni, *supra* note 6, at 2-3.

and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states;

- Parties should take appropriate actions to stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified.

The PSI following the Paragraph 4 above can be implemented by the parties only within their internal waters, territorial seas or contiguous zones. It is difficult to fully regulate suspicious ships in narrow areas within 24 nautical miles from the coast. This narrow definition has brought up questions as to the effectiveness of the PSI.²¹

2. *The Right of Visit in the Territorial Seas*

The PSI can be implemented between participants within their territorial seas. However, a difficult problem arises as to whether the PSI can be implemented against a non-participant, especially in regards to the right of innocent passage. Under the UNCLOS, the ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. (Article 17) Furthermore, a coastal State shall not hamper the innocent passage of foreign ships through their territorial seas (Article 24). Therefore, only if the passage of those ships would not be considered innocent under international law PSI participants are allowed to inspect ships and take other enforcement measures against the transportation of WMD and related materials within their territorial seas.

Innocent passage is defined in the UNCLOS as “not prejudicial to the peace, good order or security of the coastal State.” (Article 19, para. 1) 12 actions which are not innocent passage are enumerated, e.g., threat or use of force, exercise or practice with weapons of any kind, fishing activities, etc. (Article 19, para. 2) According to Professor Takabayashi’s examination of the 3rd Conference of the Law of the Sea, the primary purpose of Article 19 was to prevent arbitrary interdictions, by limiting the legislative powers of coastal states to the explicitly enumerated list of what is not considered innocent passage.²² In addition, Professor Murakami pointed out that it is necessary to take note of non-innocent purpose of the passage, especially if a ship in the territorial sea has clear intention to prejudice the peace, good order or security of the coastal State.²³

²¹ M. ASADA, HEIKI NO KAKUSAN-BOUSHI TO YUSHUTSU KANRI - SEIDO TO JISSE 兵器の拡散防止と輸出管理—制度と実践 (PREVENTION OF PROLIFERATION OF WEAPONS AND EXPORT CONTROLS: REGIME AND PRACTICE) 96-100 (2004).

²² H. TAKABAYASHI, RYOKAI-SEIDO NO KENKYU: KAIYOHO NO REKISHI 領海制度の研究—海洋法の歴史(STUDIES ON THE REGIME OF THE TERRITORIAL SEA: THE HISTORY OF THE LAW OF THE SEA) 344 (1987).

²³ R. MURAKAMI, GENDAI NO KAIYOHO 現代の海洋法 (CONTEMPORARY LAW OF THE SEA) 150 (2003).

According to the U.S. Senate Foreign Relations Committee in 2004, it recommended that the definition of innocent passage in Article 19 of the UNCLOS should be understood as follows: “any determination of non-innocence of passage by a ship must be made on the basis of acts it commits while in the territorial sea, and not on the basis of . . . cargo, armament, means of propulsion, flag, origin, destination, or purpose.”²⁴ This U.S. position is consistent with the decision of the International Court of Justice (“ICJ”) in the Corfu Channel Case, in which the Court held that the inquiry into whether a vessel’s passage was innocent or not turns on the manner of passage, not the vessel’s motive.²⁵ According to this position, since the transportation of WMD is not included in Article 19 (2), it cannot be considered as non-innocent. In addition, specifying the state and non-state actors of proliferation concern of Paragraph 1 of the Statement of Interdiction Principles amounts to breach of an obligation, which requires a coastal state not to discriminate in form or in fact against the ships of any state or against ships carrying cargo to, from or on behalf of any state. (Article 24 (1) b of the UNCLOS).²⁶

As an objection to the general trend in interpretation of Article 19, D. H. Joyner stated that:²⁷

[i]n the modern climate of concern regarding proliferation of WMD and the fairly straightforward nature of characterizing such proliferation inclusive of activities of transit of WMD-related materials, as threats to the security of both the coastal state and, drawing upon the particular language of Article 19, to other states as well, it should be relatively unproblematic for coastal states to legitimize the overcoming of the right of innocent passage through their territorial waters of seagoing vessels regarding which there is a reasonable basis of suspicion of involvement in these activities, and particularly if such transfers are in violation of the national law of the coastal state.

According to his opinion, the arrest, boarding, and search and seizure of illegal items found on board, as well as the prosecution of crew members, should be possible for coastal states to legitimize under international law, as long as these measures are based on the coastal states’ rights to safeguard their security.²⁸

However, it is important to note the opinion of Professor Sakamoto when he states that “the criteria of ‘innocence’ of innocent passage in territorial sea and the criteria of “maintenance of international peace and security” which constitutes the grounds of

²⁴ Allen, *supra* note 15, at 115.

²⁵ I.C.J. 1949, 30-31.

²⁶ Allen, *supra* note 15, at 164.

²⁷ D. H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 317 (2009).

²⁸ *Id.*

activities of the PSI are different.”²⁹ According to Professor Sakamoto, under current law of the sea a violation of the legal right of innocent passage is not to be legitimized by force of threat to the international peace and security. This opinion is generally accepted in Japan.

Within the contiguous zone next to the territorial sea, the coastal state may legitimately exercise control over the passage of ships transporting WMD as a measure to prevent and punish infringement of laws and regulations of its customs under Article 33 (1)(a), if the coastal state prohibits the export and import of WMD-related materials through national trade control regulations.³⁰

3. *The Right of Visit on the High Seas*

The right of visit on the high seas was originally recognized in times of war. As a measure prior to arrest, the right was used in order to confirm whether a ship has the nationality of an enemy state, and to search ships of neutral states for prohibited cargo. This right was not originally established for the suppression of crimes in time of peace.³¹

Because PSI was implemented during time of peace, the right of visit on the high seas is applicable to boarding a vessel only if there are reasonable grounds under Article 110 of UNCLOS for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Although only the first three cases were recognized in the 1958 Convention on the High Seas, the right of visit on the high seas in times of peace should now be permitted in those five cases which require the strict procedure in Article 110. According to Professor Yamamoto, the right of visit to foreign ships can be exercised only where there are reasonable grounds to suspect specific crimes and only when the visit is permitted under international law.³² Because suspicions of transporting WMD and their related materials are not included in the five cases recognized in Article 110, the right of visit on

²⁹ S. Sakamoto, *PSI (Proliferation Security Initiative) and International Law*, 1279 JURISUTO (JURIST) 55 (2004).

³⁰ Allen, *supra* note 15, at 167.

³¹ J. SHINOBU, KAIJO KOKUSAIHO-RO 海上国際法論 (THEORIES ON MARINE TIME INTERNATIONAL LAW) 249 (1957).

³² S. YAMAMOTO, KAIYOHO 海洋法 (THE LAW OF THE SEA) 227 (1995).

the high seas is not permissible on this case.³³ Therefore, on Professpr Yamamoto's opinion, most of measures of the PSI are considered to be illegal under current law of the sea.

III. International Efforts to Implement the PSI

A. U.N. Security Council Resolution 1540

In September 23, 2003, President Bush made a statement at General Assembly of the U.N. regarding three challenges: (1) the rebuilding of Afghanistan and Iraq, (2) the proliferation of WMD, and (3) actions necessary to meet humanitarian crisis. Among them, a part of his statement on the second challenge is noteworthy:

We're also improving our capability to interdict lethal materials in transit. Through our Proliferation Security Initiative, 11 nations are preparing to search planes and ships, trains and trucks carrying suspect cargo, and to seize weapons or missile shipments that raise proliferation concerns. . . . And we're working to expand the Proliferation Security Initiative to other countries. We're determined to keep the world's most destructive weapons away from all our shores, and out of the hands of our common enemies....Because proliferators will use any route or channel that is open to them, we need the broadest possible cooperation to stop them. Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation of weapons -- weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders.³⁴ [Emphasis added]

Evading the time-consuming process of multilateral treaties, President Bush asked the Security Council to adopt the resolution, which entitles PSI participants to visiting, boarding and searching suspicious ships on the high seas.³⁵

Based on the US initiative, there were several consultations between permanent members until March 2004, and Resolution 1540 was adopted in April.³⁶ The Security

³³ Joyner, *supra* note 27, at 311-314, 317-318; Sakamoto, *supra* note 29, at 56-57.

³⁴ The White House Office of the Press Secretary, *President George W. Bush Addresses at United Nations General Assembly*, Sept. 23, 2003, available at <http://merln.ndu.edu/archivepdf/afghanistan/WH/20030923-4.pdf> (last visited on Feb. 18, 2010).

³⁵ Aoki, *supra* note 14, at 145-146.

³⁶ S. D. Murphy, *Contemporary Practice of the United States relating to International Law: UN Security Council Resolution on Nonproliferation of WMD*, 98 AM. J. INT'L L. 606-608 (2004).

Council Resolution 1540 affirms that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security. The resolution further stated the “urgent need” for all States to take additional effective measures to prevent weapons proliferation.³⁷

In Resolution 1540, obligations of paragraphs 1 through 3 to adopt and enforce the export control regulations are owed to all member states. Additionally, paragraph 3 provides concrete measures in subsections (c) and (d). In these paragraph 3(c) and (d), all States shall take and enforce effective measures to:

(c) develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

(d) establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.

These measures may be interpreted as obligations to control over the whole process of trade beyond the scope of export control whose responsibilities are mainly due to exporting states. Such obligations are not familiar to many states because the obligations include a wider range of control than the measures of the Nuclear Suppliers Group (“NSG”) and the Australia Group (“AG”). Even more, participants of the NSG and the AG had to newly review their national laws and regulations.³⁸

Regardless of difficulties in many states, adopting Resolution 1540, the Security Council decided *inter alia* that States should adopt and enforce appropriate effective laws which prohibit any non-State actor to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery. Similarly, the Council further decided that States should take and enforce effective measures to establish domestic controls to prevent the proliferation of such weapons and their means of delivery, including related materials.³⁹ Therefore, it can be

³⁷ S/2006/257, at 5, para.1 (Apr. 25, 2006).

³⁸ S. Jones, *Resolution 1540: Universalizing Export Control Standards?*, 36 ARMS CONTROL TODAY (May 2006), available at http://www.armscontrol.org/act/2006_05/1540.asp (last visited on Feb. 18, 2010).

³⁹ *Supra* note 37, at 5.

evaluated that Resolution 1540 constitutes the legal basis of a universal trade control system.

Resolution 1540 has no similar provision, however, on punishment of crimes to other treaties relevant to terrorism, while it owes obligations to all member states to prevent or prohibit from supporting the transportation of WMD by (or to) non-state actors and from establishing and enforcing criminal or civil penalties on trade control. It fails to achieve, however, the criminalization of proliferation of WMD to the effect that President Bush asked the Security Council in his statement of 2003.

In addition, Paragraph 10 of Resolution 1540 provides that all States are called upon, “in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.” By limiting cooperative action in this context to conduct consistent with general international law, it can be said that the resolution does not deny the principle of flag state. Therefore, the resolution does not constitute a legal basis to board and inspect foreign ships on the high seas.⁴⁰

Although Resolution 1540 affirms that proliferation of WMD constitutes a threat to international peace and security, it does not deal with some concrete situation in particular States and regions. Resolution 1540 only amounts to legislation to make the binding rules for all states in international community.⁴¹ In this definition of the resolution, the United States attempted to criminalize the proliferation of WMD and to establish the right of visit to foreign ships on the high seas can consequently be considered a failure. Rather, the implementation of the PSI is entrusted to bilateral and multilateral treaties to fill the gaps of the law of the sea. This shows how firmly the freedom of navigation and the flag state principle are settled and established in the international community under the long tradition of the law of the sea.⁴²

B. Bilateral Boarding Agreement

In 2003, at the London meeting for the PSI participating states, the U.S. presented a proposal to the other participants to negotiate bilateral agreements with key flags of convenience to put in place a framework for consensual boarding of vessels flying their flag. On the support of the PSI members, the U.S. negotiated those agreements and

⁴⁰ Aoki, *supra* note 14, at 146.

⁴¹ On legislative power of the Security Council, M. Asada, *Resolution 1540 and International Legislation: New Threat of WMD Terror*, 547 KOKUSAI MONDAI 国際問題 (INT'L AFF.) 53-57 (2005); K. Sakamoto, 'Legislation' of International Law through the U.N. Security Council, 25 SEKAIHO NENPO 世界法年報 (Y.B. World L.) 136-162 (2006).

⁴² Joyner, *supra* note 27, at 322.

currently concluded the agreements with nine states. Among the nine states, six are Liberia, Panama, the Marshall Islands, Croatia, Cyprus, and Belize, which account for more than 60 percent of the world's commercial vessel tonnage.⁴³ Following the agreements, the nine states fell within the rubric of "specific actions" under paragraph 4.c of the Statement of Interdiction Principles.

These bilateral agreements are similar in their terms with some different forms. Taking an example of the agreement with Belize in 2005,⁴⁴ operations to suppress proliferation by sea pursuant to this Agreement shall be carried out only against "suspect ships." Whenever the Security Force Officials of one Party ("the requesting Party") finds a suspect ship located in international waters, the requesting Party may request to confirm the nationality of that ship through the Competent Authority of the requested Party. If such a claim is confirmed, the requesting Party may ask the requested Party to authorize the boarding and search of the suspect ship, cargo and the persons found on board. If the items of proliferation are found, the requesting Party may ask the latter Party to authorize to exercise control over the movement of the ship, as well as items and persons on board. On the other hand, the requested Party may (1) decide to conduct the boarding and search with its own officials, (2) authorize the boarding and search by the Officials of the requesting Party, (3) decide to conduct the boarding and search together with the requesting Party, or (4) deny permission to board and search. The requested Party shall answer the requests made for the verification of nationality and authority to board within two hours of its acknowledgment of the receipt of such requests. If there is no response from the Requested Party within 2 hours, and if no contact can be established with it, the Requesting Party may proceed to board the suspect vessel for the purpose of inspecting the vessel's documents in order to verify the said vessel's nationality. This is called as "two-hour rule."⁴⁵ (Table 2)

The agreements do not authorize boarding to interdict WMD shipments under all circumstances. The flag states may choose to waive its primary right to exercise jurisdiction over the vessel and, at the same time, permit the boarding state to exercise its own jurisdiction. Therefore, the fact that a flag state consents to a boarding does not necessarily confer on the boarding state jurisdiction over the vessel.⁴⁶ It is important to know the intention of the parties of bilateral boarding agreements when it is considered

⁴³ The other three countries are Malta, Mongolia and Bahamas. See Allen, *supra* note 15, at 53-54.

⁴⁴ Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, U.S.-Belize, Aug. 4, 2005, available at http://www.state.gov/t/isn/trty/5080_9.htm (last visited on Mar. 3, 2010).

⁴⁵ A. Yoshida, *Transition of Jurisdictional Framework over Foreign Ships in International Maritime Convention*, 77 *PRI REV.* 95 (2007).

⁴⁶ Allen, *supra* note 15, at 161.

as practice of states relevant to the formation of new general international law.

On the side of the U.S., however, it clearly has had an intention to generalize the contents of bilateral boarding agreements. The U.S. has taken the next step to revise the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUA Convention”), in order to implement the PSI on the basis of general multilateral convention.

Table 2: Boarding to Suspect Ships on the High Seas

Right of Requesting States	Right of Requested States	2 hours rule	
<ul style="list-style-type: none"> • Confirmation of Nationality of Suspect Ships • Request to Authorize the boarding and search for cargo and the persons • Request to Authorize to exercise control over the movement of the ship, as well as items and persons on board, if items of proliferation concern are found 	<ul style="list-style-type: none"> • Decision to conduct the boarding and search with its own Security Force Officials • Authorization the boarding and search by the Security Force Officials of the requesting Party 	If nationality of Suspect Ship cannot be confirmed within 2 hours after request	If the response are not done within 2 hours after request of confirmation of nationality
	<ul style="list-style-type: none"> • Decision to conduct the boarding and search together with the requesting Party • Denial of permission to board and search 	<ul style="list-style-type: none"> • Authorization of boarding and search by requesting state • Protest against claims of nationality 	Deemed to have been authorized by the Requested Party to question persons on board and to search the vessel

Source: A. Yoshida, *Transition of Jurisdictional Framework over Foreign Ships in International Maritime Convention*, 77 *PRI REV.* 95 (2007).

C. PSI and the 2005 Protocol to the SUA Convention

Since the September 11 terrorist attacks, the main concerns of the U.S. and its allies are the connection of WMD to shadowy terrorist networks.⁴⁷ However, there are no specific rules on terrorism under general customary law of the sea and the UNCLOS. In order to fill the gaps of the general law of the sea concerning maritime terrorism, the SUA Convention was adopted in 1988.⁴⁸

Terrorists could hijack a vessel and demand certain satisfaction like liberating

⁴⁷ M. Nishida, *Proliferation Security Initiative (PSI)*, 1 *GAIMUSHO CHOSA GEPPU* 外務省調査月報, 32-33 (2007).

⁴⁸ Y. TANAKA, *UMI NO KOKUSAI CHITSUJO TO KAIYO SEISAKU* 海の国際秩序と海洋政策 (INTERNATIONAL ORDER OF THE SEA AND OCEAN POLICY) 133 (2006).

prisoners in exchange for the release of the vessel and its crew. The “Achille Lauro” hijacking by Palestinian terrorists in 1985 drew the attention of the international community on the threat of terrorist hijackings of a vessel on the high seas. This incident posed several legal questions concerning the status of maritime terrorists committing hijackings completed within one ship. The SUA Convention was originally adopted to fight certain acts of maritime crime not falling under the piracy provisions of the UNCLOS, due to the two-vessel requirement and the private end criterion. The SUA Convention is noteworthy not only because it introduced an obligation for States having connection with the offence to establish jurisdiction but also because it imposed an obligation for all states to criminalize the offences covered by the convention and to either punish or extradite the offenders (*aut dedere aut judicare*). However, the scope of offences does not include the conduct PSI aims to regulate, so the new protocol is thought to be needed to combat maritime terrorism after 9.11.⁴⁹

1. *Offences covered by the 1988 Convention and the 2005 Protocol*

The 1988 Convention seeks to remedy definitional ambiguities by specifically spelling out what acts are to be considered unlawful offences. All offences under the Convention are defined as acts that “endanger the safe navigation of ships.”⁵⁰ As contained in Article 3, an offence occurs if the person “unlawfully and intentionally” commits any of the following acts:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

⁴⁹ P. WENDEL, STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW 26 & 35 (2007).

⁵⁰ On the characteristics of the offences of the 1988 Convention, see F. Francioni, *Maritime Terrorism and International Law: The Rome Convention of 1988*, 31 GERMAN Y. B. INT’L L. 263-269, 271 (1988).

- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

Article 3 assists in resolving potential controversies concerning the character of unlawful acts harmful to safe maritime navigation. Article 3 makes clear the types of unlawful offence in question, reflecting the intention of drafters to sharpen the unlawful character of maritime terrorist acts that fall within the scope of the Convention.⁵¹ There is no room to interpret and enlarge the scope of the offences contained in Article 3 to the transportation of WMD. Thus, in order to implement the PSI, it is necessary to add new types of offences to Article 3 of the 1988 Convention.

The motives to revise the 1988 Convention are due to the failure to criminalize the proliferation of WMD in the Security Council Resolution 1540, and the incident of a suicide attack against U.S. Navy destroyer the USS Cole on October 12, 2000 while it was harbored in the Yemeni port of Aden. According to an analysis of Professor Hayashi, the main purposes of the U.S. initiative to revise the SUA Convention are as follows:

... first, to add the use of ships and the use of WMD from ships to offences under the SUA Convention, second, to include the transportation of WMD, its delivery means, and its related materials as one of offences under the Convention, and third, to establish in advance the system for mitigating the application of the flag state principle and making the boarding by foreign states more smooth.⁵²

As a consequence of the negotiations to revise, the first purpose was adopted as Article 3*bis* 1 (a), and second as Article 3*bis* 1 (b), and the last as Article 8*bis*. The offences under the SUA Convention are greatly enlarged through Article 3*bis*:

1 Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

- (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
 - (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
 - (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or

⁵¹ C. C. Joyner, *The 1988 IMO Convention on the Safety of Maritime Navigation: Toward a Legal Remedy for Terrorism at Sea*, 31 GERMAN Y. B INT'L L. 237-239 (1988).

⁵² M. HAYASHI, GENDAI KAIYOHU NO SEISEI TO KADAI 現代海洋法の生成と課題 (THE FORMATION OF THE CONTEMPORARY LAW OF THE SEA AND SELECTED ISSUES) 349 (2008).

- noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- (iii) uses a ship in a manner that causes death or serious injury or damage; or
 - (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or
- (b) transports on board a ship:
- (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
 - (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or
 - (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or
 - (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.⁵³

As for the prevention of proliferation to (or from) States or non-state actors of proliferation concern, the offences to transport on board a ship are provided in Article 3*bis* 1 (b), and the transportation of WMD as well as its related materials and even dual-use commodities are criminalized. In the chapeau of Article 3*bis* 1 (b), the definition of terrorism is not inserted, although it may be stipulated from the offence (b) (i) as transportation of any explosive or radioactive material “for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act.”⁵⁴ On the other hand, the offences listed in (b) (ii) ~ (iv) are limited by the requirement that the party know that the WMD are used or States or non-state actors of proliferation concern have their intention to develop WMD, etc.⁵⁵

The offence of transportation is also provided in treaties on slave trade and drug trafficking. However, there is a postulate in these treaties that individual persons are prohibited from holding slaves or drugs, and that transportation of prohibited persons or goods can be criminalized.⁵⁶ While it is not prohibited to hold the WMD-related

⁵³ IMO, LEG/CONF.15/21 (Nov. 1, 2005).

⁵⁴ Tanaka, *supra* note 8, at 140.

⁵⁵ Allen, *supra* note 15, at 176.

⁵⁶ T. Sugihara, *New Drag Convention and the Right of Visit Based on the System of Authorization*, 58 KAIYO JIHO 海洋時報 (OCEAN BULLETIN) 14-15 (1990).

materials and dual-use commodities, therefore, it may be unreasonable to criminalize only the transportation of them.⁵⁷

The 2005 protocol calls attention to the “international will” to combat terrorism in all of its forms and manifestations, as expressed in the Security Council Resolutions 1368 and 1373. It also cites Resolution 1540 as evidence of the “urgent need” for all states to take additional effective measures to prevent the proliferation of WMD, means of delivery and related materials.⁵⁸ Among these Resolution 1540 provides in its paragraph 2 that “all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to . . . transport . . . nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes.” Following the resolution, all member states of the U.N., are obliged to adopt and enforce national laws to prohibit the transportation of WMD, at least, to non-state actors. Therefore, as long as the offence of transportation is concerned with non-state actors, even with the 2005 protocol not in force, there are legal grounds under international law through Resolution 1540.⁵⁹

2. Mitigation of the Flag State Principle

In principle, the 2005 protocol takes the same position on the jurisdiction of states as the 1988 Convention. It is provided in Article 6 of the latter convention. The concept of “jurisdiction” in this context has a wide range from judicial review in the courts to enforcement of judgments and maritime police power.⁶⁰ Four types of standards of jurisdiction in Article 6 provides:

- Compulsory jurisdiction (flag state principle, territorial principle, positive personal principle);
- Optional jurisdiction (stateless person with permanent residence, negative personal principle, protective principle);
- *Aut dedere aut judicare* (territorial state where the alleged person is present); and
- Other standards of jurisdiction.⁶¹

In Article 6 of the 1988 Convention, states may have jurisdiction to punish the offenders. However, jurisdiction of states other than flag states should be exercised within the limits of rules of general international law, stipulated in Article 9 that “[n]othing in this Convention shall affect in any way the rules of international law pertaining to the

⁵⁷ Tanaka, *supra* note 48, at 144.

⁵⁸ Allen, *supra* note 15, at 132.

⁵⁹ Hayashi, *supra* note 52, at 353.

⁶⁰ Tanaka, *supra* note 48, at 134.

⁶¹ SUA CONVENTION, art. 6, paras. 1, 2, 4 & 5.

competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.”

The principle of flag state is to a certain extent mitigated in new Article 8bis of the 2005 protocol which is on the visit to the ships on the high seas. It is noteworthy that, in its paragraph 1, the states is obliged to “co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this article as expeditiously as possible.” Furthermore, the extent to what a flag state can deny a request from a requesting state is narrowed and the procedure for cooperation between the flag state and requesting state is stipulated in detail.⁶²

The PSI is considered to be one of implementing measures of the 2005 protocol, encouraging the states to develop standard operating procedures for “joint operations” in Article 8bis (12). According to PSI, a flag state which has reasonable grounds to suspect that an offence has been, is being or is about to be committed in a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. (Article 8bis (4)). In this sense, the principle of flag state is mitigated through the procedures of authorization by the flag state to the foreign requesting state. If nationality of the ship is confirmed, the requesting Party shall ask the flag state for authorization to board and to take appropriate measures with regard to that ship. Necessarily, such measures may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board. (Article 8bis (5) b). The flag State shall (i) authorize the requesting Party to board and to take appropriate measures, or (ii) conduct the boarding and search with its own law enforcement or other officials, or (iii) conduct the boarding and search together with the requesting Party, or (iv) decline to authorize a boarding and search.(Article 8bis (5) c). In addition, a flag state may notify the Secretary-General of International Maritime Organization (“IMO”) in advance that, with respect to ships flying its flag or displaying its mark of registry, the requesting state is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board, if there is no response from the flag state within four hours of acknowledgement of receipt of a request to confirm nationality. (Article 8bis (5) d).⁶³

3. Characteristics and Problems of the 2005 Protocol

In the 2005 protocol, some procedures of unique executive jurisdiction which has no

⁶² F. Spadi, *Bolstering the Proliferation Security Initiative at Sea: A Comparative Analysis of Ship-boarding as a Bilateral and Multilateral Implementing Mechanism*, 75 NORDIC J. INT’L L. 272 (2006).

⁶³ *Id.* at 273-274. See also Allen, *supra* note 15, at 174-175.

corresponding system in the general law of the sea, were introduced and it succeeded in making special laws concerning maritime terrorism, not as only supplement of the UNCLOS. It can be evaluated, therefore, that the protocol will be the first international instrument illegalizing transporting WMD on the sea and providing for the suppression of such crimes through high seas interdictions.⁶⁴ As such, the legal system of maintaining international peace and security is newly applicable to the high seas. However, there still remain certain barriers for this system to be settled down in the law of the sea.

Through the expansion of offences including hijacking offences, the use of ships for the purpose of terrorism and/or the transportation of WMD become objects of the SUA Convention. The Convention had attempted to maintain the maritime order through the management of the activities that obstruct the safety of navigation. In addition to hijacking offences, using a ship for terroristic acts to obstruct the safety of navigation may have no problems to be included as crimes in the SUA Convention. However, the offence of transportation constitutes a threat to the maintenance of international peace and security, not the activities that obstruct navigation. It is an offence introduced in the treaty for the purpose of effective implementation measures of the PSI. However, it is required to think deliberately of whether the SUA regime of “management of the maritime order plus maintenance of peace and security” can be fully functioned, because the SUA Convention originally played a sole role of managing the maritime order only by controlling the activities which obstruct the safety of navigation.⁶⁵ It can be said that irrespective of the strong initiative of the U.S., many states still hesitate to prioritize the proliferation of WMD over the freedom of navigation. The ratifications of 12 countries have not yet been obtained after the protocol was adopted in 2005.

Moreover, although the contents of bilateral boarding agreements are partly employed in the 2005 protocol, they are completely corrected, while clarifying the right of the flag state. Thus, there still remains an impediment on the implementation of the PSI because the flag state principle cannot be fully mitigated through several international legislative efforts to establish the legal interests of maintenance of international peace and security of the sea.

⁶⁴ D. GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 254 (2009).

⁶⁵ Hayashi, *supra* note 52, at 351. See also Tanaka, *supra* note 8, at 144.

IV. Conclusion

It is generally accepted in the international community that the acquisition of WMD by states or non-state actors of proliferation concern constitutes a threat to the maintenance of international peace and security. One attempt to solve the concern is Resolution 1540. Although the resolution does not permit states to exercise enforcement jurisdiction to the suspected offenders who are transporting the WMD on the basis of universal principle, it obliges states to adopt and enforce effective export control regulations for preventive measures. There are a gradually increasing number of states that adopt such national laws and regulations.

If a perspective related to the non-proliferation of WMD is brought into the high seas, however, the maritime order to ensure the freedom of navigation through the traditionally accepted principle of flag state has priority over the maintenance of international peace and security. Therefore, the PSI can be implemented limitedly under the law of the sea. Also, in the sanction Resolutions 1718/1874 against North Korea, any new elements are not introduced beyond the existing framework of international law. The principle of flag state is strictly maintained even in concrete cases where the international community faces the actual threat of nuclear proliferation through the nuclear test of North Korea.

As mentioned above, the right of visit on the high seas was permitted not for the suppression of crimes but in order to capture the belligerents at war. The reason why neutral states should accept the visit to their own ships by the foreign belligerents, according to Professor Shinobu, is that it reflects the principle that no states want the responsibility of checking the cargo that their nationals will transport to foreign states.⁶⁶ This was an attitude of leaving it to the right of visit and investigation by the belligerent states, because it was impossible for neutral states, obliged not to benefit one party of the belligerents, to check in advance all transporting cargos of their own ships. Therefore, the legal grounds of the right of visit depend not only on the generally accepted right of capture of the belligerents, but also simultaneously on the abandonment by neutral flag state of its responsibility to check the cargos in advance.

Accordingly, in order for the PSI to be fully accepted in the international community, legal interests of states to maintain international peace and security need to be strengthened to the extent that flag states think that they should abandon their rights and responsibilities to the ships flying their flags and accept the executive jurisdiction of foreign states over their ships to help prevent the transportation of WMD.

⁶⁶ Shinobu, *supra* note 31, at 247.