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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**THE PROLIFERATION SECURITY INITIATIVE
(PSI): THE COMPATIBILITY WITH UNCLOS
AND THE 2005 SUA CONVENTION
– the way forward in the East Asian region –**

By

TOKIMASA YOKOI

Japan

A dissertation submitted to the World Maritime University in partial
Fulfillment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME SAFETY AND ENVIRONMENTAL ADMINISTRATION)

2008

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the Japan Coast Guard and the University.

Signature: 横井 期正
(Tokimasa YOKOI)

Date: August 25, 2008

Supervised by: LCDR C. Agneta Dahl
United States Coast Guard
Lecturer
World Maritime University

Assessor: Dr. Maximo Q. Mejia Jr.
Assistant Professor
World Maritime University

Co-assessor: Capt. Leopoldo V. Laroya
Deputy Commandant for Intelligence and Law Enforcement
Philippine Coast Guard

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ABSTRACT

Title of Dissertation: **The Proliferation Security Initiative (PSI):**

**The Compatibility with UNCLOS and the 2005 SUA
Convention**

– the way forward in the East Asian region –

Degree: **Master of Science in Maritime Affairs**

(Maritime Safety and Environmental Administration)

This dissertation examines the Proliferation Security Initiative (PSI), a multilateral effort that aims to interdict shipments of Weapons of Mass Destruction (WMD) and related materials. Given its flexibility as an “activity” rather than an organization, the initiative has gained supports from more than 90 countries since its interception in 2003.

While the Statement of Interdiction Principles (SOP), the operational principles of the initiative, notes that the PSI activities are consistent with national legal authorities and relevant international law and frameworks, as the paper reveals, the SOP is not compatible with the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

The dissertation also provides critical reviews of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 in the PSI perspectives. The new Protocol has broadened the

range of offences to include criminalization of the transportation of WMD. Moreover, it has introduced boarding provisions which authorize states to board a foreign flagged vessel on the high seas. These newly introduced provisions will enhance the legitimacy of the PSI operations, upon entering into force.

Further, the East Asian region, where one of the “proliferation concern states” is located, is focused. The response of the states in the region to the PSI is carefully examined and the analysis leads that the states in the region are not willing to participate in the PSI, having reservation about the legitimacy of the initiative.

The author concludes with suggestions that establishing a formal organization; strengthening the legality by introducing a new UN Security Council resolution; and expanding the outreach activities are the keys for the PSI to be a full-fledged regime so that it will acquire global support and be able to contribute towards international peace and security.

KEYWORDS: Proliferation Security Initiative (PSI), Statement of Interdiction Principles (SOP), Weapons of Mass Destruction (WMD), UNCLOS, 2005 SUA Convention, the East Asian region

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LIST OF ABBREVIATIONS

ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASTOP	Asian Senior-level Talks on Non-Proliferation
BCN	Biological, chemical, and nuclear
BWC	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993
DPRK	Democratic People's Republic of Korea
EEZ	Exclusive Economic Zone
EU	European Union
G-8	Group of Eight
IAEA	International Atomic Energy Agency
IMO	International Maritime Organization
JCG	Japan Coast Guard
JMSDF	Japan Maritime Self-Defense Force
KCNA	Korean Central News Agency
LEG	Legal Committee
MTCR	Missile Technology Control Regime

MSC	Maritime Safety Committee
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OPCW	Organization for the Prohibition of Chemical Weapons
PLF	Palestine Liberation Front
PLO	Palestine Liberation Organization
PSI	Proliferation Security Initiative
SOP	Statement of Interdiction Principles
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UK	United Kingdom
US	United States
WMD	Weapons of Mass Destruction

CHAPTER 1. INTRODUCTION

On December 9, 2002, two Spanish warships, under the request of the United States, stopped and boarded a North Korean cargo vessel flying no flag while it was crossing the Gulf of Aden, about 600miles southeast of the Yemen coast.¹ They found 15 scud missiles² under bags of cement. According to U.S. administration officials, the vessel had been tracked by American intelligence “all the way out” from North Korea, however, they were not sure whether those missiles were bound for Yemen, some other nations in that region, or terrorist groups.³

¹ Before boarding the *So San*, two Spanish navy vessels, the Navarra and the Patino fired warning shots across its bow as it tried to escape from them and, in the end, Spanish special force troops boarded by helicopter. See Thom Shanker, "Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea," *The New York Times*, December 11 2002. <http://query.nytimes.com/gst/fullpage.html?res=9A0DE7DF153AF932A25751C1A9649C8B63>. For the details of the So San incident see Ibid.; Mark J. Valencia, *The Proliferation Security Initiative; Making Waves in Asia* (New York: Routledge, 2005), 35.; Thomas E. Ricks and Peter Slevin, "Spain and U.S. Seize N. Korean Missiles: Scuds Were on Ship Bound for Yemen," *Washington Post*, December 11 2002. <http://www.hartford-hwp.com/archives/27c/527.html>.; Joby Warrick, "On North Korean Freighter, a Hidden Missile Factory," *Washington Post* August 14, 2003. <http://www.washingtonpost.com/>.

² The scud missiles (400 miles range) are developed based on a Soviet-era design for a tactical surface-to-surface missile. Although it does not have high accuracy, if it is equipped with chemical or biological weapons that do not require high accuracy, the causing effect is considerable. See Shanker, note 1 above.

According to Spanish Defense Minister, Federico Trillo, after the initial search, American explosives experts secured the missiles and finally found out that there were 15 complete scud missiles, with 15 conventional, high-explosive warheads and 23 tanks of nitric acid, and 85 barrels of chemicals. See David E. Sanger and Thom Shanker, "Threats and Responses: War Matériel; Reluctant U.S. Gives Assent for Missiles to Go to Yemen," *The New York Times*, December 12 2002.

<http://query.nytimes.com/gst/fullpage.html?res=9C01EFD91738F936A25755C0A9659C8B63&ec=&spon=&pagewanted=print>.

³ Benjamin Friedman, "The Proliferation Security Initiative: The Legal Challenge," in *the*

However, when President Ali Abdullah Saleh of Yemen told the United States that he had legally bought them for the defense of his country, U.S. officials had to release the vessel as the White House spokesman, Ari Fleischer, stated that “there is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea.”⁴

The vessel was sailing without a flag and the identification marking was painted over, it appeared as a “lawless, stateless vessel.”⁵ Under Article 110 of the United Nations Convention on the Law of the Sea (UNCLOS), 1982, warships are justified to conduct “right of visit” to a vessel on the high seas if there are reasonable grounds for suspecting that “the ship is without nationality.”⁶ Yemen is a party to UNCLOS and North Korea is not, however, this provision is applicable to North Korea as well, since customary international law does apply to it in this case.⁷ Therefore, the boarding by Spanish Navy can be justified.

However, seizure of the cargo was questioned as neither North Korea nor Yemen has signed the Missile Technology Control Regime (MTCR), which was intended to prevent the spread of delivery systems for weapons of mass destruction (WMD).⁸ Moreover, President Ali Abdullah Saleh of Yemen claimed that he had legally bought them for the defense of his country. In the end, the trade of scud

Bipartisan Security Group (2003). http://www.gsainstitute.org/gsi/pubs/09_03_psi_brief.pdf.

⁴ Sanger and Shanker, note 2 above.

⁵ Shanker, note 1 above.

⁶ See United Nations Convention on the Law of the Sea, 1982 (hereinafter UNCLOS), Art. 110 for other reasons for a ship to be boarded on the high seas: engaging in piracy, slave trade, unauthorized broadcasting, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. Legal issues with respect to UNCLOS will be discussed in Chapter 3 of this dissertation.

⁷ See Michael Byers, "Policing the High Seas: The Proliferation Security Initiative," *The American Journal of International Law* 98, no. 3 (2004). <http://proquest.umi.com/>.

⁸ See Sanger and Shanker, note 2 above.

missiles between North Korea and Yemen was considered as “legal” and Fleischer had to comment that “While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of scud missiles from North Korea to Yemen. And, therefore, the merchant vessel is being released.”⁹ Even though there are doubts of the vessel’s nationality, there is no legality to search WMD on board a vessel, likewise there are no laws prohibiting the transport of conventional arms.¹⁰

The *So San* incident clearly demonstrated that existing regimes did not have sufficient capabilities to prevent the proliferation of WMD. However, a worldwide trend of counter-terrorism has been seeking some ways to prevent the spread of WMD and related materials to maintain international peace and security. It was especially true for the United States where tragic terrorist attacks were brought about as realities on September 11, 2001. Moreover, it has been a top priority on the agenda among the states in East Asia where one of the “proliferation concern states” is located. The Proliferation Security Initiative (PSI) is the answer that the United States and like-minded countries has sought and it was announced in May 2003, in Krakow, Poland. The PSI is a multilateral effort that aims to interdict the “transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern.”¹¹

However, the initiative did not receive positive reaction from countries such as China and Russia in the East Asian region. They expressed reservations about

⁹ Kevin Drew, "Law Allows Search, but Does Not Address Seizure of Cargo," (2002), <http://archives.cnn.com/2002/LAW/12/11/missiles.legal/index.html>.

¹⁰ See Valencia, note 1 above.

¹¹ The White House, "Fact Sheet: Proliferation Security Initiative; Statement of Interdiction Principles," (hereinafter SOP) September 4, 2003, <http://www.whitehouse.gov/news/releases/2003/09/print/20030904-11.html>.

legitimacy of the initiative under international law. Without a global support of the initiative, the effectiveness of PSI activities will certainly be limited. While the United States and like-minded states have been expanding the initiative, two 2005 SUA Protocols were adopted in October 2005. The Protocols, *inter alia*, have broadened the range of offences, and transportation of WMD and its related materials are criminalized. Moreover, a boarding provision that will allow states to board a suspected vessel on the high seas, has been added. These amendments, upon entering into force, are greatly expected to enhance PSI activities.

The following analysis aims to examine the controversial legal issues surrounding the PSI with respect to UNCLOS; critically review the 2005 SUA Convention and clarify what it implies for the PSI; and carefully review the reactions of the major countries of the East Asian region. Through the analysis, this dissertation clarifies what modifications are needed for the PSI, so that it will be accepted in the East Asian region and the world. For this aim, the dissertation proceeds in five chapters. In Chapter 2, an overview of the development of the PSI is provided and analysis of the principles of the initiative clarifies what and whom it is actually targeting at. Chapter 3 provides critical analysis of the PSI's compatibility with UNCLOS. The PSI's legitimacy is analyzed under each applicable maritime zone with actual interdiction examples. It further explains boarding agreements that the United States has been concluding with the major flags of registry countries. Chapter 4 examines the 2005 SUA Convention in the PSI perspective. An overview of the development of the Convention is provided and two key features of the new Convention in relation to the initiative are particularly

reviewed. Further, implication of this new SUA Convention for the PSI is analyzed. Chapter 5 provides reviews how major countries in the East Asian region responded to the PSI and it clarifies issues what the countries are concerned about. Finally, in Chapter 6, this dissertation concludes by providing suggestions hoping that the PSI, though the current structure is not ideal, will become a full-fledged regime so that it will be able to contribute toward international peace and security.

CHAPTER 2. THE EVOLUTION OF THE PSI

2.1. The emergence of the PSI

The release of the *So San* coincided with the United States' issuance of the *National Strategy to Combat Weapons of Mass Destruction* on December 11 which called for a comprehensive strategy to counter the threat of WMD. It set three principal pillars: *Counterproliferation to Combat WMD Use*; *Strengthened Nonproliferation to Combat WMD Proliferation*; and *Consequence Management to Respond to WMD Use*.¹² Having set such a National Strategy, it was noteworthy that the White House had to admit that there was no legal authority to interdict the found scud missiles. The *So San* incident demonstrated the limits of counter-proliferation policy under conventional international law and, thus, it hastened the United States to formulate the new initiative with like-minded nations.

On May 31, 2003, five months after the *So San* incident, President of the United States, George W. Bush, made a speech to the people of Poland at Wawel Royal Castle in Krakow, Poland. In this speech, he showed a basic idea of stopping proliferation of WMD and announced a new approach to fight the proliferation of WMD called the Proliferation Security Initiative (PSI).

¹² The United States, *National Strategy to Combat Weapons of Mass Destruction, December 2002* (Washington, DC). <http://www.fas.org/irp/offdocs/nspd/nspd-wmd.pdf>.

When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hands of our common enemies.¹³

PSI is a "global effort that aims to stop shipments of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide."¹⁴ John Bolton, then-U.S. Under Secretary of State for Arms Control and International Security, who was tasked to establish new responses to the *So San* incident, stated at the testimony before the House International Relations Committee, "Our goal is to work with other concerned states to develop new means to disrupt the proliferation trade at sea, in the air and on land," and he continued to say, "Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hands of our enemies."¹⁵ According

¹³ George W. Bush, "Remarks by the President to the People of Poland," <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

¹⁴ Bureau of Nonproliferation. U.S. Department of State, "The Proliferation Security Initiative," <http://www.state.gov/t/isn/rls/other/34726.htm>.

¹⁵ John R. Bolton, "U.S. Efforts to Stop the Spread of Weapons of Mass Destruction, Testimony before the House International Relations Committee," (June 4, 2003), <http://www.state.gov/t/us/rm/21247.htm>.

to Bolton, the PSI's goal is not only preventing the proliferation of WMD, but also "to eliminate or roll back such weapons from rogue states and terrorist groups that already possess them or are close to doing so."¹⁶

We believe that the existing system of national export control systems [and] multilateral export control agreements were not completely effective because there's still a thriving black market in WMD components, technologies, and production materials. And what we wanted to do was to find more active ways of dealing with the ongoing trafficking in all of these WMD-related materials-not to replace the export control regimes, but to do something that would be more effective in handling all of this trafficking. And based on what we've seen with the So San interdiction [and] based on a variety of law enforcement and other operations that had been conducted, we felt there was a potential to have a multilateral agreement that would allow us to do that-to conduct interdiction of WMD trafficking at sea, in the air, and on land.¹⁷

On June 12, 2003, two weeks after George W. Bush's announcement of the PSI to fight the proliferation of WMD, the first meeting of the PSI was held in Madrid, Spain.¹⁸ Participants in the meeting were Australia, France, Germany, Italy,

¹⁶ Ibid.

¹⁷ Arms Control Association, "The New Proliferation Security Initiative: An Interview with John Bolton," November 2003,

<http://www.armscontrol.org/aca/midmonth/2003/November/Bolton.asp>.

¹⁸ See note above 14.

Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States, which became a “core group” of the PSI. In the first meeting, they agreed to assess existing national authorities whether they have such practical measures and to encourage the various export control regimes to incorporate with the PSI to strengthen those regimes.¹⁹

The second meeting was held in Brisbane, Australia on July 9-10, 2003, where the participants focused on “defining actions necessary to collectively or individually interdict shipments of WMD or missiles and related items at sea, in the air or on land.”²⁰ The meeting also emphasized effective information sharing for interdiction, and agreed to “strengthen and improve capabilities for the exchange of information and analysis between participants as a basis for cooperative action to impede WMD and missile trade.”²¹ Moreover, the meeting agreed to have a series of interdiction training exercises, utilizing both military and civilian assets as appropriate.

Most significantly, a third PSI meeting was held on September 3-4, 2003 in Paris where the core group agreed to the Statement of Interdiction Principles (SOP) which identifies the “concrete actions to collectively or individually interdict shipments of WMD, their delivery systems and related materials”²² and is, thus,

¹⁹ Bureau of Nonproliferation. U.S. Department of State, "Proliferation Security Initiative: Chairman's Statement at the First Meeting of the PSI," June 12, 2003, Madrid, Spain, <http://www.state.gov/t/isn/rls/other/25382.htm>.

²⁰ Bureau of Nonproliferation. "Proliferation Security Initiative: Chairman's Statement at the Second Meeting of the PSI, July 9-10, 2003 " Brisbane, Australia, July 10, 2003, <http://www.state.gov/t/isn/rls/other/25377.htm>.

²¹ Ibid.

²² Bureau of Nonproliferation. "Proliferation Security Initiative: Chairman's Statement at the Third Meeting of the PSI, September 3-4, 2003," Paris, France, September 4, 2003, <http://www.state.gov/t/isn/rls/other/25425.htm>.

considered as the principle of PSI activities. Moreover, the participants affirmed that the PSI is consistent with the United Nations (UN) Security Council Presidential statement of 31 January 1992, which states that the proliferation of all WMD threatens international peace and security, and emphasizes the need to prevent proliferation. Moreover, they agreed that the PSI would be a good tool to implement it.²³

2.2. The Statement of Interdiction Principles (SOP)

The SOP (See Appendix A for the full text of SOP) identifies specific steps for the effective interdiction of WMD, and was developed and published by the core group of the PSI on September 4, 2003: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. In the preamble of the four principles, it states;

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.²⁴

This is an important paragraph as it states all the principles of the PSI and

²³ Ibid.

²⁴ SOP (See note 11 above.)

that the participants activities are based on national legal authorities, relevant international law, and frameworks, including the UN Security Council. The SOP is not establishing any new legal frameworks, rather it is a guideline which participating states are recommended to follow for the interdiction of WMD.

Paragraph 1 of the Principles states the PSI participants commit themselves to undertake effective measures for “interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern.”²⁵ Although it is not defining what “States or non-state actors of proliferation concern” are, it is generally referring to certain states or entities that are engaged in proliferation of WMD. (The issue surrounding “States or non-state actors of proliferation concern” will be further discussed in section 2.2.1 below.)

Paragraph 2 encourages PSI participants to adopt “streamlined procedures” for rapid information sharing concerning suspected proliferation activities.²⁶ Moreover, participants are encouraged to dedicate appropriate resources and efforts to interdiction operations to maximize coordination of it.²⁷ In paragraph 3, PSI participants commit themselves to review their relevant national legal authorities and international law and frameworks to strengthen them if it is necessary.²⁸

Paragraph 4 provides specific actions to support the interdiction efforts of PSI participants.²⁹ This paragraph is important to note for the following discussion

²⁵ Ibid., paragraph 1.

²⁶ Ibid., paragraph 2.

²⁷ Ibid.

²⁸ Ibid., paragraph 3.

²⁹ Ibid., paragraph 4.

in this paper that all the specific actions indicated in this paragraph should be taken “to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks.”³⁰

Paragraph 4-a asks PSI participants “Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern” and it also requests them “not to allow any persons subject to their jurisdiction to do so.”³¹ This sub-paragraph shows that PSI includes the transportation of WMD both “to” and “from” the states or non-state actors of proliferation concern.

In paragraph 4-b, PSI participants, at their own initiative or at the request and good cause shown by another state, should “take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial sea 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.”³² This sub-paragraph reflects the present status of flag state jurisdiction under UNCLOS that if a vessel which is flying its flag of nationality is “reasonably” suspected, the flag state is expected to board and search the vessel for the interdiction of WMD.

Paragraph 4-c envisions the case when flag states can not exercise their jurisdiction. Under those situations, PSI participants are encouraged to “seriously consider providing consent under the appropriate circumstances to the boarding and

³⁰ Ibid.

³¹ Ibid., paragraph 4-a.

³² Ibid., paragraph 4-b.

searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.”³³ As it is anticipated that those transportations are conducted where a flag state authority can not reach in time, this paragraph encourages flag state to allow other PSI participants who can reach the place in time to board and search the vessels on their behalf. (Boarding agreement will be further discussed in section 3.7.)

Paragraph 4-d commits PSI participants to take appropriate actions to “(1) stop and/or search in their internal waters, territorial seas, of 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; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.”³⁴ Although the actions taken under paragraphs 4-b and 4-c are based on flag state jurisdiction, the actions stated in this paragraph are under coastal state jurisdiction.

Paragraph 4-e considers the case conducted by aircraft. PSI participants, at their own initiative or upon the request and good cause shown by another state, should take actions to “(a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes

³³ Ibid., paragraph 4-c.

³⁴ Ibid., paragraph 4-d.

transit rights through their airspace in advance of such flights.”³⁵

Although it has been dealing with the transportation of WMD up to the previous paragraph, paragraph 4-f deals with the transshipment points for those cargos. “If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.”³⁶

As has been seen, the SOP is not establishing any new legal frameworks and the PSI is not a separate approach to counter proliferation, rather it is an operational mechanism which PSI participants are recommended to follow under the existing national legal authority and relevant international law and frameworks to constrain the flow of WMD.

2.2.1. “States and non-state actors of proliferation concern”

In the preamble of the SOP, it states, “PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern.”³⁷

As briefly touched upon in the previous section, when “states and non-state actors of proliferation concern” is mentioned in the SOP, it is not clear what states fall under that category. In paragraph 1 of the SOP, it states;

³⁵ Ibid., paragraph 4-e.

³⁶ Ibid., paragraph 4-f.

³⁷ Ibid., preamble.

“States or non-state actors of proliferation concern” *generally* refers to those countries or entities that *the PSI participants involved establish* should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.³⁸ (Italics added for emphasis)

In the second PSI meeting held in July 9-10, 2003 in Brisbane, Australia, the Chairman’s Statement notes that “states and non-state actors of proliferation concern” referred to North Korea and Iran.³⁹ Bolton also explains, “North Korea, Iran, and Syria, among others, are clearly states of proliferation concern.”⁴⁰ However, at the same time, he states that the PSI efforts are not directed at any one country, but, instead, at would-be proliferators to halt the worldwide trafficking in WMD, delivery systems, and related materials.⁴¹

India, Israel, and Pakistan possess nuclear weapons and have stayed outside the Nuclear Nonproliferation Treaty (NPT), which entered into force in 1970 and

³⁸ Ibid., paragraph 1.

³⁹ See Bureau of Nonproliferation, note 20 above.

⁴⁰ John R. Bolton, "The Proliferation Security Initiative: A Vision Becomes Reality: Remarks to the First Anniversary Meeting of the Proliferation Security Initiative," Krakow, Poland, May 31, 2004, <http://www.state.gov/t/us/rm/33046.htm>.; Bolton, "Stopping the Spread of Weapons of Mass Destruction in the Asian-Pacific Region: The Role of the Proliferation Security Initiative," Tokyo, Japan, October 27, 2004, <http://www.state.gov/t/us/rm/37480.htm>.

⁴¹ Bolton, "Stopping the Spread of Weapons of Mass Destruction in the Asian-Pacific Region"(See note 40 above.); Bolton, "Proliferation Security Initiative: Statement of Interdiction Principles, Remarks at Proliferation Security Initiative Meeting," Paris, France, September 4, 2003, <http://www.state.gov/t/us/rm/23801.htm>.

prevents all of its states-parties except China, France, Russia, the United Kingdom, and the United States from owning nuclear weapons.⁴² In the interview held in November 2003, Bolton responded to a question about the shipments of WMD-related goods to India, Israel, and Pakistan;

There are unquestionably states that are not within existing treaty regimes that possess weapons of mass destruction legitimately. We're not trying to have a policy that attempts to cover each and every one of those circumstances. What we're worried about are the rogue states and the terrorist groups that pose the most immediate threat."⁴³

It can be said that the emphasis of the PSI is on "bad actors" rather than "bad weapons."⁴⁴

Although it might receive criticisms, saying that the term "states and non-state actors of proliferation concern" is not clear, on the other hand, there is also a positive notion that the term provides flexibility and allows PSI participants to decide at the time of interdiction depending on the situation. For example, some

⁴² See Wade Boese, "Proliferation Security Initiative: A Piece of the Arms Control Puzzle," *Georgetown Journal of International Affairs* 2005, 63. <http://www.armscontrol.org/aca/midmonth/2003/November/Bolton.asp>.

⁴³ Arms Control Association, note 17 above.

⁴⁴ Boese, note 42 above, at 63. See also Mark J Valencia, "Unsettling Asia for Security's Sake," *Far Eastern Economic Review* 168, no. 3 (2005), 57. <http://proquest.umi.com/>. On the contrary, Dhanapala, then-Under-Secretary-General for Disarmament Affairs of the United Nations, stated that "[t]hey are not dangerous simply when located inside so-called 'rogue states.' They are dangerous everywhere and always," and he emphasized the importance of multilateral treaty regime such as BWC, CWC, and NPT. See Jayantha Dhanapala, "Multilateral Approaches to WMD Threats after September 11," Speech given at Annual Luncheon of the Arms Control Association, Washington, D.C., January 22, 2002, <http://disarmament.un.org/speech/22jan2002.htm>

years ago, Libya would probably be one of the actors of “proliferation concern”, however, it may not be considered to poses an “immediate threat” to the world today since Libya decided to abandon WMD programs following the *BBC China* incident.⁴⁵ (*BBC China* incident will be discussed in Chapter 3)

2.2.2. What are Weapons of Mass Destruction (WMD)?

In the SOP and other official statements regarding the PSI, Weapons of Mass Destruction (WMD) is a term used interchangeably with nuclear, biological, and chemical weapons, and is not defined. It does not, even, refer to any specific international conventions governing the possession of nuclear, chemical, and biological weapons and the spread of missile technology.⁴⁶ The U.S. Code provides the definition of WMD under Section 2303, Chapter 40: Defense Against Weapons of Mass Destruction, Title 50: War and National Defense;

The term “weapon of mass destruction” means any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of –

(A) toxic or poisonous chemicals or their precursors;

(B) a disease organism; or

⁴⁵ See Andrew C. Winner, "The Proliferation Security Initiative: The New Face of Interdiction," *The Washington Quarterly* 28, no. 2 (2005): 133-38. http://www.twq.com/05spring/docs/05spring_winner.pdf.

⁴⁶ See Jofi Joseph, "The Proliferation Security Initiative: Can Interdiction Stop Proliferation?," *Arms Control Today* 34, no. 5 (2004): 8. http://www.armscontrol.org/act/2004_06/Joseph.asp?print.

(C) radiation or radioactivity.⁴⁷

However, this definition does not apply to the SOP, and when the term WMD is used in the SOP or official statement of the PSI activity, it can be considered to refer to the general terms of nuclear, biological, and chemical weapons.

There are also critics that indicate a lack of definition of the term “related materials,”⁴⁸ saying that “while WMD and delivery systems can be defined in general terms, the same does not apply for ‘related materials’,”⁴⁹ because more precise control is required for dual-use (civilian/military) materials to prohibit individuals from transporting them. By not providing a definition, PSI participants may maintain flexibility of the shipment of dual-use materials that are applicable, for example, to both chemical weapons and civilian use depending on their final destination.⁵⁰ The UN Security Council Resolution 1540 (2004), adopted April 28, 2004, gives a definition for “related materials” although this applies only for this resolution, not for the SOP or other official statement of the PSI activity:

Materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design development, production or use of nuclear,

⁴⁷ The U.S. Code. Section 2303: Definition; Chapter 40: Defense against Weapons of Mass Destruction, Title 50: War and National Defense.

⁴⁸ See Joseph, note 46 above.; Christer Ahlström, "PSI International Law Aspects of the Statement of Interdiction Principles," in *SIPRI Yearbook 2005: Armaments, Disarmament and International Security*, ed. Stockholm International Peace Research Institute (Oxford: Oxford University Press, 2005), 758. <http://yearbook2005.sipri.org/ch18/ch18>.

⁴⁹ Ahlström, note 48 above, at 759.

⁵⁰ Joseph, note 46 above, at 9.

chemical and biological weapons and their means of delivery.⁵¹

2.3. UN Security Council Resolution 1540

The UN Security Council Resolution 1540 was adopted on April 28, 2004 at its 4956th meeting. The Resolution calls upon all States,

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.⁵² (Italics added for emphasis)

It requests states to develop effective measures, rules, and regulations to prevent the proliferation of WMD. The United States considers that the PSI and the SOP identify the steps that can produce the kind of cooperation which is called for in UN Security Council Resolution 1540 and, therefore, the Resolution and the PSI activity are considered as “mutually reinforcing and are legally and political compatible.”⁵³ The Chairman’s Statement at the 1st Anniversary PSI meeting held on May 31-June 1, 2004 also notes that the PSI is consistent with UN Security Council Resolution 1540.⁵⁴ This resolution was proposed by the United States, as in President Bush’s

⁵¹ United Nations Security Council Resolution S/RES/1540 (2004). <http://daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>

⁵² Ibid.

⁵³ U.S. Department of State Bureau of Nonproliferation, "Fact Sheet: Proliferation Security Initiative Frequently Asked Questions (FAQ)," Washington, DC, May 26, 2005, <http://www.state.gov/t/isn/rls/fs/46839.htm>.

⁵⁴ Bureau of Nonproliferation. U.S. Department of State, "Chairman's Statement at the 1st Anniversary PSI Meeting, May 31-June 1, 2004 " Krakow, Poland, June 1, 2004,

address to the UN General Assembly on September 23, 2003, to criminalize the proliferation of weapons.

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.⁵⁵ (Italics added for emphasis)

However, the set Resolution does not contain any phrases that criminalize the proliferation of WMD. Moreover, in a draft resolution, it contained the explicit word “interdict,” however, the phrase “take cooperative action to prevent illicit trafficking” was introduced in its place from March 24, 2004 after China’s objections, the last of the five permanent members of the Security Council to agree to the draft resolution.⁵⁶ Nevertheless, this resolution can be a supportive mechanism for states to develop effective measures, rules, and regulations to prevent the proliferation of

<http://www.state.gov/t/isn/rls/other/33208.htm>.

⁵⁵ United Nations, "Statement by His Excellency Mr. George W. Bush, President of the United States of America: Address to the United Nations General Assembly," September 23, 2003, <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>.

⁵⁶ See Merav Datan, "Security Council Resolution 1540: WMD and Non-State Trafficking," *Disarmament Diplomacy* April/May 2005, no. 79 (2005). <http://www.acronym.org.uk/dd/dd79/79md.htm/>.

WMD as well as operating the PSI activities.

2.4. Participation in the PSI

According to the U.S. Department of State, as of May 22, 2008, 91 countries are participating in the PSI.⁵⁷ (See Appendix B for the list of PSI participants) The Chairman's Statement at the Fifth Meeting held on March 4-5, 2004 in Lisbon, Portugal, provides practical steps that can establish the basis for involvement in PSI activities as following:

- Formally commit to and publicly endorse the PSI and its Statement of Interdiction Principles and indicate *willingness* to take all steps available to support PSI efforts.
- Undertake a review and provide information on current national legal authorities to undertake interdictions at sea, in the air or on land. Indicate *willingness* to strengthen authorities where appropriate.
- Identify specific national assets that might contribute to PSI efforts (e.g. information sharing, military and/or law enforcement assets).
- Provide points of contact for PSI interdiction requests and other operational activities. Establish appropriate internal government processes to coordinate PSI response efforts.
- Be *willing* to actively participate in PSI interdiction training exercises and actual operations as opportunities arise.

⁵⁷ Bureau of International Security and Nonproliferation, U.S. Department of State, "Proliferation Security Initiative Participants," <http://www.state.gov/t/isn/c19310.htm/>.

- Be *willing* to consider signing relevant agreements (e.g. boarding agreements) or to otherwise establish a concrete basis for cooperation with PSI efforts (e.g. MOU on overflight denial).⁵⁸ (Italics added for emphasis)

Although many of the steps stated in the above contain the word “willing” as indicated in italics, it is not clear how states show their “willingness.” States have not adopted any legally binding documents or drafted a charter to define its scope and mandate, but only follow the SOP.⁵⁹ Based on the SOP, the PSI participants are expected to share intelligence, enhance the cooperation of military and law enforcement agencies on a global basis to interdict trafficking in WMD, delivery systems, and related materials⁶⁰, however, there is no obligation. The nature of the PSI is, thus, often described as “an activity, not an organization.” John Bolton, then-U.S. Under Secretary for Arms Control and International Security, stated at the Press Conference at the 1st anniversary meeting of the PSI held on June 1, 2004 in Krakow, Poland:

...it’s an activity, not an organization. It has no Director General, it has no Headquarters, it has no Secretariat, it has no budget. It’s a question

⁵⁸ Bureau of Nonproliferation. U.S. Department of State, "Proliferation Security Initiative: Chairman's Statement at the Fifth Meeting of the PSI, March 4-5, 2004," Lisbon, Portugal, March 5, 2004, <http://www.state.gov/t/isn/rls/other/30960.htm>.

⁵⁹ See Joseph, note 46 above, at 8.

⁶⁰ John R. Bolton, "International Security Issues, Arms Control Matters, and Nonproliferation: Press Conference at U.S. Embassy Beijing," Beijing, China, February 16, 2004, <http://www.state.gov/t/us/rm/29723.htm>.

of the participating nations cooperating in a variety of ways when the occasion arises. If you say it's an activity, not an organization long enough all kinds of things become clear.⁶¹

This notion that the PSI is “an activity, not an organization” might give advantages for states to participate in the meetings or exercises as observers who want to keep a certain distance from the PSI coalition. However, there are disadvantages that no states can check the participants' seriousness and commitments and, moreover, the PSI's sustainability can be questioned.⁶²

2.5. Operational expert meetings and exercises

The main activity of the PSI is its operational exercises that involve military and law enforcement agencies. Just one week after the announcement of the SOP, the first interdiction exercise, called “*PACIFIC PROTECTOR*” was conducted in the Coral Sea of Australia on September 10-13, 2003. It was hosted by Australia, with France, Japan, and the United States participating.⁶³ As of August 2008, more than 30 exercises had been conducted at sea, in the air, and on land, and more than 20 operational expert meetings had been held.⁶⁴ (This means more than 6 exercises and 4 operational expert meetings per year on average since the announcement of the

⁶¹ Bolton, "Press Conference on the Proliferation Security Initiative," Krakow, Poland, May 31, 2004, <http://www.state.gov/t/us/rm/33556.htm>.

⁶² See Mary Beth Nikitin, "CRS Report for Congress: Proliferation Security Initiative (PSI) " February 4, 2008, <http://www.fas.org/sgp/crs/nuke/RL34327.pdf>.

⁶³ Bureau of Nonproliferation, note 14 above. See also Australian Government Department of Defence, "Proliferation Security Initiative," <http://www.defence.gov.au/PSI/default.htm>.

⁶⁴ Bureau of Nonproliferation, note 14 above.

SOP. See Appendix C for the Proliferation Security Initiative Meetings and Exercises.) Those exercises are discussed and planned through the operational experts meetings. It can be said that there are two purposes for the exercises: to build the participants capabilities for cooperation and to show their activities in the public for discouraging would-be proliferators from their action.⁶⁵

⁶⁵ See Arms Control Association, "The Proliferation Security Initiative at a Glance," June 2004, <http://www.armscontrol.org/factsheets/PSI.asp>; Boese, note 42 above, at 62-63. There is an opinion that providing "evidence to the public of a genuine political commitment" is also one of the purposes of the exercises. See Winner, note 45 above, at 134.

CHAPTER 3. COMPATIBILITY WITH UNCLOS

The PSI participants are encouraged to commit the SOP to prevent the shipment of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, “consistent with national legal authorities and relevant international law and frameworks.”⁶⁶ The PSI does not provide any new legal power to the PSI participants, however, every PSI activity must be conducted under the existing national and international laws and regimes. Nevertheless, the compatibility between the PSI and UNCLOS has been a controversial issue since its establishment.

In this Chapter, the compatibility of the PSI with UNCLOS will be examined with actual interdiction examples under each applicable maritime zone: internal waters, the territorial sea, the contiguous zone, straits used for international navigations, archipelagic seas, the exclusive economic zone (EEZ), and the high seas. Through this process, this paper will clarify problematic issues within the SOP when practiced alongside UNCLOS. Then, it will also discuss why the United States is rushing to make boarding agreements with the major flags of registry countries such as Panama and Liberia despite criticism from scholars as described below.

3.1. Internal Waters

⁶⁶ SOP (See note 11 above.)

In internal waters, the coastal state enjoys its full territorial sovereignty⁶⁷ and, therefore, the right of innocent passage which exists in the territorial sea does not apply.⁶⁸ Thus, as long as a suspected vessel stays in the port of the coastal state, the coastal state is free to board, search, and seize its cargoes if the cargoes are against the domestic laws. If the cargo is seized, it usually becomes a matter of a civil lawsuit.⁶⁹ The coastal states sovereignty provides legality for the PSI activities stated in Paragraph 4(f) of the SOP that require coastal states “to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified” in their ports, airfields, or other facilities.⁷⁰

3.1.1. The *Ku Wol San* incident

On June 25, 1999, the North Korean vessel *Ku Wol San* was suspected of transporting spare parts that are used for making missiles and atomic reactors to Pakistan, and was detained at Kandla port in Gujarat, India.⁷¹ The Indian port authority searched the vessel and, while doing so, the crew turned violent with the result that all 44 crew members were arrested.⁷² Indian officials found the vessel

⁶⁷ UNCLOS, Article 2.

⁶⁸ R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1999), 61.

⁶⁹ Andreas Persbo and Ian Davis, "Sailing into Uncharted Waters?: The Proliferation Security Initiative and the Law of the Sea," in *BASIC Research Report* (BRITISH AMERICAN SECURITY INFORMATION COUNCIL, 2004), 46. <http://www.basicint.org/pubs/Research/04PSI.htm>.

⁷⁰ SOP, paragraph 4(f).

⁷¹ See Yann-Huei Song, "The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment," *Ocean Development & International Law* 38 (2007): 119-20.; Persbo and Davis, note 69 above, at 47.; Warrick, note 1 above.

⁷² See Persbo and Davis, note 69 above, at 47.

was carrying components, testing equipment, and blue prints for the manufacture of Scud-type missiles, and had a falsely made cargo manifest.

Carrying military cargo to a third country, in this case to Pakistan, does not constitute any offence under Customs law of India if there is a proper declaration for the shipment, however, the faulty cargo manifest was a criminal offence.⁷³ Therefore, the Indian authority's action was compatible with the Article 2 of UNCLOS; the coastal states have full sovereignty in internal waters. The search conducted at an Indian port against a foreign flagged vessel, North Korea, without consent of the flag state was legal. The vessel was released three months later, in September, and the Indian authority explained that no charges would be imposed but provided no explanation as to why not.⁷⁴

3.1.2. The *BBC China* incident

In late September 2003, the United States and U.K. intelligence services found that the *BBC China*, a German flagged vessel owned by a German company, was carrying thousands of centrifuge parts, equipment to enrich uranium, and en route to Libya.⁷⁵ They informed the German government and accordingly, in early October, the German authorities contacted the shipowner. The shipowner was asked

⁷³ Persbo and Davis, note 69 above, at 48.

⁷⁴ Ibid.; Andreas Persbo, "The Proliferation Security Initiative: Dead in the Water or Steaming Ahead?," BASIC NOTES, 12 December 2003, <http://www.basicint.org/pubs/Notes/BN031212.htm>, (March 1, 2008).

⁷⁵ See Barry Schweid, "U.S. Nabbed Libya Nuke Parts," *CBS NEWS* (January 1, 2004), <http://www.cbsnews.com/stories/2004/01/14/world/printable593139.shtml>; James Martin Center for Nonproliferation Studies, "Proliferation Security Initiative: Libyan Case Crowns First Year's Achievements," (2003): 25. <http://www.fas.org/sgp/crs/nuke/RL34327.pdf>; Nikitin, note 62 above.; Winner, note 45 above, at 138.; Robin Wright, "Ship Incident May Have Swayed Libya: Centrifuges Intercepted in September," *Washington Post* (January 1, 2004), <http://nucnews.net/nucnews/2004nn/0401nn/040101nn.htm#041>.

to divert the vessel's route to the port of Taranto, southern Italy, where the vessel was searched. Centrifuge components were found that were not listed in the cargo manifest, and, therefore, confiscated. The shipowner of the *BBC China* voluntarily diverted her route to Italy and, thus the stop, search and seizure happened in port, in internal waters. Therefore, the seizure of parts of centrifuge was legal as of the vessel's faulty manifest and the location of seizure was in port where the coastal state could exercise full sovereignty.⁷⁶

After the incident, the United States and U.K. authorities were allowed to inspect laboratories and factories for manufacturing weapons in Libya.⁷⁷ Then, on December 19, 2003, Muammar Qadhafi, Libya's leader, announced that Libya would eliminate all chemical, biological, and nuclear weapon programmes.⁷⁸ Therefore, this incident has been repeatedly quoted by U.S. officials as a successful PSI interdiction example because it is considered that the interdiction of the *BBC China* shipment led to Libya giving up its WMD programmes. For example, John Bolton, then-U.S. Under Secretary of State for Arms Control and International Security, stated, "Exposure of the A.Q. Khan network this past year - helped along by the PSI interdiction of nuclear materials aboard the *BBC China* and the subsequent decision of Libya to forego its nuclear and other WMD programs - has brought to light the breadth of the shadowy trading network in WMD."⁷⁹

However, it seems unclear whether Libya's decision to give up the WMD

⁷⁶ See Song, note 71 above, at 121.

⁷⁷ See James Martin Center for Nonproliferation Studies, note 75 above, at 25.; Wright, note 75 above.

⁷⁸ See James Martin Center for Nonproliferation Studies, note 75 above, at 25.; Wright, note 75 above.

⁷⁹ Bolton, note 40 above.

programme was actually attributed to the *BBC China*'s interdiction.⁸⁰ John Wolf, who served as an assistant secretary of state for nonproliferation from 2001 to 2004, states that the interdiction of the *BBC China* was "separate" from PSI and Libya's decision was attributed to the previous efforts to track and uncover the Khan network.⁸¹ Moreover, a foreign official was quoted as saying "The *BBC China* operation was carried out in the spirit of PSI, but it was not a PSI operation."⁸² Winner has listed up possible reasons for Libya's decision in addition to the incident: UN-imposed sanctions in the wake of the 1988 Lockerbie bombing; the 2003 war in Iraq; and the ongoing quiet diplomacy started during the Clinton administration by the United States and the U.K.⁸³

3.2. Territorial sea

A coastal state also enjoys its sovereignty beyond its land territory and internal waters to "an adjacent belt of sea, described as the territorial sea" that does not exceed 12 nautical miles.⁸⁴ However, a coastal states' sovereignty is limited compared to the sovereignty over its land territory. Article 17 of UNCLOS gives "right of innocent passage" to ships of all states and, under Article 24, the coastal states must not infringe the innocent passage of foreign vessel through the territorial sea.⁸⁵ Passage is deemed innocent, under Article 19 (1), as long as it is "not

⁸⁰ Wade Boese, "Key U.S. Interdiction Initiative Claim Misrepresented," *Arms Control Today* 35, no. 6 (2005): 26-27. <http://proquest.umi.com/>.; Winner, note 45 above, at 138.

⁸¹ See Boese, note 80 above, at 25.

⁸² *Ibid.*

⁸³ Winner, note 45 above, at 138.

⁸⁴ UNCLOS, Articles 2 and 3.

⁸⁵ *Ibid.*, Articles 17 and 24.

prejudicial to the peace, good order or security of the coastal States.”⁸⁶ Passage becomes prejudicial to the peace, good order or security of the coastal states under Article 19 (2) if the vessel is engaged in the following activities:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or

⁸⁶ Ibid., Article 19(1)

any other facilities or installations of the coastal State;

- (l) any other activity not having a direct bearing on passage.⁸⁷

With this exhaustive list, however, transportation of WMD and the related material are not included.⁸⁸ Even, Article 23 explicitly allows “foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances” to conduct innocent passage through the territorial sea as long as they carry documents and take special precautionary measures that are internationally agreed.⁸⁹ This article is said to be a U.S.-led compromise with the nations that wanted the Convention to state explicitly carriage of nuclear weapons in foreign territorial seas to be non-innocent.⁹⁰ Therefore, transportation of WMD and the related materials in territorial seas are not deemed illegal activities under UNCLOS.

On the other hand, Song discusses that it is reasonable to assume that WMD or the related materials will not be used for peaceful purposes, therefore, the right of innocent passage is lost.⁹¹ The author notes that the carriage and transportation of

⁸⁷ Ibid., Article 19(2)

⁸⁸ See Friedman, note 3 above, at 3.; Jack I. Garvey, "The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative," *Journal of Conflict & Security Law* 10, no. 2 (2005): 130. <http://jcsf.oxfordjournals.org/>; Mark J. Valencia, "Is the PSI Really the Cornerstone of a New International Norm?," *Naval War College Review* 59, no. 4 (2006): 124. <http://proquest.umi.com/>; Valencia, note 1, at 41.

⁸⁹ UNCLOS, Article 23.; See Valencia, note 88 above, at 124-125.; Ahlström, note 48 above, at 751.

⁹⁰ Valencia, "Is the PSI Really the Cornerstone of a New International Norm?," (note 88 above), at 124.

⁹¹ Song, note 71 above, at 116. See also Mark R. Shulman, "The Proliferation Security Initiative and the Evolution of the Law on the Use of Force," *Houston Journal of International Law* 28, no. 3 (2006): 806. <http://www.markshulman.net/documents/PSI.pdf>.

WMD or the related materials fit into the provisions that is prejudicial to the “peace, good order or security” given in Article 19 (2)-(a), “the threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.”⁹² Moreover, under Article 301, when exercising the right of innocent passage, the vessel has to “refrain from any threat or use of force against the territorial integrity or political independence of any State.”⁹³ Therefore, Song concludes, it is considered to be legal for coastal states to exercise interdiction action against foreign-flagged vessels in their territorial seas if the vessel is transporting WMD or the related materials.

However, in this case, it is necessary for the coastal state to have national legislation that criminalize transportation of WMD and the related materials in its territorial sea by stating that the vessel is threatening its “peace, good order or security of the coastal States.” Under Article 21, the coastal state may adopt laws and regulations relating to innocent passage through the territorial sea with respect to, for example, “the safety of navigation and the regulation of maritime traffic”, “the protection of navigational aids and facilities”, “the preservation of the environment of the coastal State”, and “the prevention of infringement of the customs, fiscal, immigration or sanitary laws.”⁹⁴ Although it is not explicitly stated in the given list under Article 21 whether coastal states can adopt laws and regulations regarding the transportation of WMD and the related materials, it might be possible for coastal

⁹² UNCLOS, Article 19(2)(a).

⁹³ *Ibid.*, Article 301.; Song, note 71 above, at 117.

⁹⁴ UNCLOS, Article 21.

states to adopt national laws and regulations that prohibit the transportation of WMD and the related materials in its territorial sea if the coastal state makes certain relation to the list given under Article 21 for the transportation of WMD and the related materials.

However, under Article 32, warships and other government ships operated for non-commercial purposes are protected by immunities.⁹⁵ Thus, when New Zealand denied U.S. warships to enter its ports in 1985, the United States argued that it was a violation of sovereign immunity.⁹⁶ At that time, New Zealand demanded U.S. warships to assure them that there were no nuclear weapons on board, however, the United States replied that it did not confirm nor deny the presence or absence of nuclear weapons on board.⁹⁷

Moreover, under Article 24 (1)-(b), those new laws and regulations should not be discriminatory against the vessels of any states or against vessels carrying cargoes to, from or on behalf of any states.⁹⁸ These notions clearly show the difficulties of coastal states to adopt national laws and regulations that prohibit the transportation of WMD and the related materials in its territorial sea as it would contradict the immunity of warships that carry WMD. Also, it should not be possible to adopt such regulations and laws while the United States itself sends its nuclear-powered warships or warships which carry nuclear weapons through out the

⁹⁵ Ibid., Article 32.

⁹⁶ Devon Chaffee, "Freedom or Force on the High Seas?: Arms Interdiction and International Law," *Science for Democratic Action* 29, no. 3 (2004): 7. <http://www.ieer.org/sdfiles/12-3.pdf>.

⁹⁷ James R and Van de Velde, "'Neither Confirm nor Deny' at Sea Still Alive and Consistent with International Law" *Naval Law Review* 45 (1998): 271. <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA359487&Location=U2&doc=GetTRDoc.pdf>.

⁹⁸ UNCLOS, Article 24.

world as this would cause a double standard.⁹⁹

Therefore, although coastal states are encouraged to take appropriate action to stop, search, and seize a vessel if it is reasonably suspected of carrying WMD or the related materials in paragraph 4-d of the SOP, it is illegal for the coastal state to do so.¹⁰⁰ Coastal states cannot simply stop, search, and seize WMD or the related materials in territorial seas just because the vessel in question is carrying them. Therefore, the PSI activities encouraged in the SOP in the territorial sea are not compatible with UNCLOS.

3.2.1. The *Baltic Sky* incident

On June 22, 2003, the *Baltic Sky*, flying the Comoros flag, was stopped and searched by the Greek coast guard in its territorial sea while it was drifting in the Mediterranean.¹⁰¹ The Greek authorities had been tracking the vessel for five days before their investigation and they, naturally, wanted to know what the vessel was doing between Turkey and Greece. On board, the authorities discovered about 680 tonnes of explosives and 8,000 detonators. The vessel's documents showed that the cargo was destined for a company in Sudan, however, the address was proved to be a post office and the company did not exist. The captain and crew, seven in total,

⁹⁹ This means that if the state of proliferation concern uses its warships or government owned vessels, it can transport WMD in other states' territorial waters while exercising innocent passage and immunity of warships.

¹⁰⁰ SOP, paragraph 4(d).

¹⁰¹ See Al-Ahram Weekly Online, "'Black Ship' Down " (July 10-16 2003), <http://weekly.ahram.org.eg/2003/646/in3.htm>.; BBC NEWS, "Sudan Hits out at Ship's Seizure," (June 24, 2003), <http://news.bbc.co.uk/2/hi/europe/3015546.stm>.; CNN.com, "Greece Traces Route of Seized Ship," (June 24, 2003), <http://edition.cnn.com/2003/WORLD/europe/06/23/greece.ship/>.; Persbo and Davis, note 69 above, at 51.; Song, note 71 above, at 121.

were charged with the illegal possession and transportation of explosives, moreover, they were charged with failing to notify the Greek authorities 24 hours prior to their transportation of explosives into Greek waters.¹⁰²

While carrying explosives on board a cargo vessel is itself legal and not that unusual, the action taken by the Greek authorities against the *Baltic Sky* was also legal, under its domestic law, because the vessel was found to have faulty documents and it had failed to notify the Greeks of the explosives 24 hours prior to its transportation into Greek waters as required under its domestic law.

3.3. Contiguous Zone

The contiguous zone is an adjacent sea area to the territorial sea which “may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”¹⁰³ In the contiguous zone, under Article 33 (1) of UNCLOS, the coastal state may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.¹⁰⁴

Therefore, in the contiguous zone, the coastal state jurisdiction is limited

¹⁰² See Al-Ahram Weekly Online, note 101 above.; Song, note 71 above, at 122.

¹⁰³ UNCLOS, Article 33.

¹⁰⁴ Ibid.

compared to the territorial sea and it can only exercise enforcement jurisdiction with respect to “customs, fiscal, immigration or sanitary” laws and regulations that would occur in territory or territorial sea, not any offences made within the contiguous zone itself.¹⁰⁵ In order to stop, search, and seize a vessel which is suspected of carrying WMD and the related materials in contiguous zone, the coastal state must have laws and regulations that show that the carriage and transportation of WMD and the related materials are infringing the coastal state’s customs law.¹⁰⁶ In addition to these laws and regulations, the vessel needs to navigate towards the coastal state or depart from the coastal state so that the coastal state can stop, search, and seize the cargo.¹⁰⁷ As in the case of illegal drug trafficking by vessels, if there were such laws and regulations for WMD interdiction in relation to customs, it would seem possible to intercept the cargo in the contiguous zone. However, as previously explained, there are difficulties to prohibit the transportation of WMD and the related materials as this would contradict to Articles 19, 23, 24, and 32 of UNLOS. Therefore, it is illegal for the coastal state to stop, search, and seize vessels which are navigating in its contiguous zone because the carriage and transportation of WMD and the related materials do not fall under any of the “customs, fiscal, immigration or sanitary laws and regulations” which coastal states may exercise the control of.

3.4. Straits Used for International Navigation and Archipelagic seas

Under Article 38 of UNCLOS, all ships enjoy the right of transit passage in

¹⁰⁵ See Churchill and Lowe, note 68 above, at 137.

¹⁰⁶ See Persbo and Davis, note 69 above, at 51-52.; Song, note 71 above, at 117.

¹⁰⁷ See Persbo and Davis, note 69 above, at 51-52.

straits.¹⁰⁸ In the same article, “transit passage” is defined as “the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”¹⁰⁹ While ships can enjoy right of transit passage in straits, they are, at the same time, given duties when exercising it. Under Article 39 (1) and (2), when exercising the right of transit passage, ships have to satisfy the following criteria:

- (a) proceed without delay through or over the strait;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
- (d) comply with other relevant provisions of this Part;
- (e) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
- (f) comply with generally accepted international regulations, procedures and

¹⁰⁸ UNCLOS, Article 38(1).

¹⁰⁹ Ibid., Article 38(2).

practices for the prevention, reduction and control of pollution from ships.¹¹⁰

If the right of transit passage cannot be exercised in those straits used for international navigation, under Article 45, the right of innocent passage applies instead.¹¹¹ As is the case for the right of innocent passage, the transportation of WMD and the related materials does not fall under the activities that are “prejudicial to the peace, good order or security of the coastal State” regulated in Article 19 (2). There are also difficulties for states to identify whether the transportation of WMD and the related materials would fall under Article 39 (1) and (2).¹¹² Because, for example, components of WMD could have a dual-use, either military use or commercial use, it can not always be determined if there is a threat to littoral states.¹¹³ Therefore, it is legally difficult for states to stop, search, and seize WMD or the related materials in those straits used for international navigation.

In archipelagic seas, sovereignty of an archipelagic state extends, under Article 49, to the waters enclosed by the archipelagic baselines drawn in accordance with Article 47. On the other hand, under Article 52, ships of all states enjoy the same ‘right of innocent passage’ as they enjoy in the territorial sea. The archipelagic state, however, may suspend temporarily the innocent passage of foreign ships “if such suspension is essential for the protection of its security.”¹¹⁴ This

¹¹⁰ Ibid., Article 39(1) and (2)

¹¹¹ Ibid., Article 45.

¹¹² Ibid., Articles 19 and 39.; See Samuel E. Logan, "The Proliferation Security Initiative: Navigating the Legal Challenges," *Journal of Transnational Law & Policy* 14, no. 2 (2005): 264. http://www.law.fsu.edu/Journals/transnational/vol14_2/logan.pdf.

¹¹³ Ibid.

¹¹⁴ UNCLOS, Article 52.

suspension will take effect only after it is duly published.¹¹⁵ Under Article 53, an archipelagic state may designate sea lanes and air routes “suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.”¹¹⁶

The right of innocent passage in archipelagic seas must be in accordance with Part II, section 3 of UNCLOS which regulates innocent passage in the territorial sea.¹¹⁷ Therefore, just as in the territorial sea, if a state wants to stop, search, or seize a vessel which is carrying and transporting WMD and the related materials, the state has to have its reasoning under Article 19 (2) noting that the passage is “prejudicial to the peace, good order or security” of the coastal state. However, as previously explained, the transportation of WMD and the related material are not included in the list of Article 19 (2). Thus, again, states cannot legally stop, search, and seize WMD or the related materials in archipelagic seas just because the vessel in question is carrying them. Therefore, the PSI activities encouraged in the SOP are not compatible with UNCLOS in archipelagic seas.

3.5. Exclusive Economic Zone

The exclusive economic zone (EEZ) is an area beyond and adjacent to the territorial sea.¹¹⁸ The EEZ cannot extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In the EEZ the coastal state has sovereign rights over living and non-living natural resources.

¹¹⁵ Ibid.

¹¹⁶ Ibid., Article 53.

¹¹⁷ Ibid., Article 52.

¹¹⁸ Ibid., Article 55.

Moreover, the coastal state can exercise jurisdiction with respect to:

- (a) the establishment and use of artificial islands, installations and structures;
- (b) marine scientific research;
- (c) the protection and preservation of the marine environment.¹¹⁹

The EEZ is particularly designed for economic benefits such as fishing and oil mining that the coastal state's can enjoy. However, when the coastal state exercises its rights and duties in the EEZ, it must have "due regard to the rights and duties of other States" and shall act in a manner compatible with the provisions of UNCLOS.¹²⁰

When it comes to the interdiction of WMD, it seems that the coastal state lacks good reasoning. The coastal state might try to conduct interdiction of WMD as stating it is for "the protection and preservation of the marine environment," however, unless the vessel is actually polluting the ocean, it would not be likely to have sufficient justification.¹²¹ Under Article 211 (5), coastal states may "adopt laws and regulations for the prevention, reduction and control of pollution from vessels" in the EEZ, however, only when there are clear grounds for believing that a vessel may commit "substantial discharge causing or threatening significant pollution of the marine environment", may the coastal state conduct a physical inspection of the vessel.¹²² Accordingly, the coastal state can not legally stop, search, and seize a

¹¹⁹ Ibid., Article 56(1).

¹²⁰ Ibid., Article 56(2).

¹²¹ See Logan, note 112 above, at 266-67.

¹²² UNCLOS, Articles 211(5) and 220(5). See Logan, note 112 above, at 266-67.; Song, note

vessel which is carrying and transporting WMD and the related materials in the EEZ.¹²³

3.6. High Seas

The High Seas are “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic states.”¹²⁴ Under Article 87, all states enjoy “freedom of the high seas” and that includes the “freedom of navigation.”¹²⁵ While ships are enjoying their freedom of navigation on the high seas, they have to have nationality and fly the flag of their nationality.¹²⁶ On the high seas, ships are subject to the flag states’ exclusive jurisdiction.¹²⁷ Thus, only the flag state of the vessel has jurisdiction over that vessel. However, under Article 110, warships are justified to conduct “right of visit” if there is reasonable ground for suspecting the following items:

- (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

71 above, at 118.

¹²³ There are opposing opinions stating that UN Security Council Resolution 1540 confirms that WMD trafficking constitutes a threat to international peace and security, therefore, a vessel’s right of freedom of navigation in the EEZ might be lost. However, this notion would contradict the U.S. stance for navigating nuclear-powered ships when its warships are visiting ports overseas, passing through the EEZ. See Song, note 71 above, at 118.

¹²⁴ UNCLOS, Article 86.

¹²⁵ *Ibid.*, Article 87.

¹²⁶ *Ibid.*, Article 91.

¹²⁷ *Ibid.*, Article 92.

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.¹²⁸

Accordingly, as long as there are the justifications above, warships can visit a ‘foreign-flagged’ vessel. This is an exception of flag state exclusive jurisdiction regulated under Article 92.¹²⁹ However, the conditions given under Article 110 do not include the carriage and transportation of WMD or the related materials. Therefore, even if a state ‘A’ receives intelligence reports that a vessel of flag state ‘B’ is conducting the transportation of WMD and the related materials on the high seas, a warship of state ‘A’ does not have the justification to stop and visit the vessel. Only a warship of state ‘B’ can conduct a right of visit to the vessel as a flag state. In the case of the *So San* incident, it was navigating without a flag and its identification marking was painted over, it was a “lawless, stateless vessel.”¹³⁰ Hence, the boarding conducted by the Spanish Navy was justified under Article 110 (1)-(d).¹³¹ However, they could not seize the scud missiles as there was no legal ground to seize them.

The PSI has been set up through a U.S. initiative following this *So San* incident. Still, it does not provide new legal authority to the United States and other participating states, and interdiction operations must be made under international law.

¹²⁸ Ibid., Article 110.

¹²⁹ Ibid., Article 92.

¹³⁰ Shanker, note 1 above.

¹³¹ UNCLOS, Article 110(1)-(d).

It is still not allowed for the PSI participants to stop, search, and seize WMD or related material on the high seas just because vessels are transporting them. The PSI activities must follow flag state jurisdiction. Hence, paragraph 4 (d) of the SOP confines states' interdiction activities to their own flag on the high seas.

At their own initiative or at the request and good cause shown by *another state*, to take action to board and search any vessel *flying their flag* in their internal waters or territorial seas, or areas beyond the territorial sea 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.¹³² (Italic added by author for emphasis)

If the state 'A' makes an agreement with state 'B', state 'A' can take specific action on a vessel from the flag of state 'B' which is transporting WMD and the related materials on the high seas under the consent of the flag state. ('Boarding Agreement' will be discussed in section 3.7. of this paper.) The flag state can authorize the PSI participant to conduct boarding on a ship flying its flag. This notion seems to work well if those agreements are expanded broadly, however, it will probably not provide complete assurance for the state. Because considering that warships, and vessels owned or operated by a state and used only on government non-commercial service have "complete immunity" on the high seas from the jurisdiction of any state other than the flag state, under Articles 95 and 96, thus, such

¹³² SOP (note 11 above).

vessels would not be stopped even if they are transporting WMD or the related materials.¹³³ Thus, if the “states of proliferation concerns” uses its warships for transporting WMD and the related materials, there is no way to hamper it.

There is discussion, nevertheless, that the interdiction activities on the high seas could be justified under the purpose of the high seas.¹³⁴ Article 88 states that “[t]he high seas shall be reserved for peaceful purposes.”¹³⁵ Moreover, Article 301 states;

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.¹³⁶

Accordingly, the freedom of navigation on the high seas provided under Article 87 can be limited to the peaceful uses of the high seas and states should not make any threats to any states.¹³⁷ The PSI participants may possibly claim that the use of the high seas for transportation of WMD or the related materials are against “peaceful purposes. However, considering that U.S. nuclear-powered warships or warships carrying nuclear arms are navigating the world’s oceans, it is unlikely that

¹³³ UNCLOS, Article 95. ; See Valencia, note 1 above, at 43.

¹³⁴ See Chaffe, note 96 above, at 3.; Logan, note 112 above, at 268-69.;

¹³⁵ UNCLOS, Article 88. ; See Logan, note 112 above, at 268.

¹³⁶ UNCLOS, Article 301.

¹³⁷ Ibid., Article 87.; See Logan, note 112 above, at 269.

the PSI participants will seek justification of interdiction of WMD or the related materials on the high seas to these Articles.¹³⁸

3.6.1. The *Yin He* incident

In July 1993, the Chinese vessel *Yin He*, departed from a port in China bound for Iran, was suspected by the United States of carrying an illicit cargo of thiodiglycol, a mustard gas base, and thionyl chloride, used in nerve gas.¹³⁹ The *Yin He* was ordered to follow a U.S. warship while military aircraft took aerial photos of it. It was, then, lead to the port of Damman, Saudi Arabia where an inspection of the cargo was carried out between August 26 and September 4, 1993, by Saudi Arabian officials and American technical experts in the presence of Chinese officials. The result showed that the *Yin He* was carrying purely commercial chemicals and nothing related to WMD, thus, it was allowed to go on its way. Consequently, China accused the United States of its infringing China's sovereignty and its right of freedom of navigation in international waters.

The *Yin He* was ordered, on the high seas, to follow the U.S. warship without the consensus of China, the flag state, even though it was just carrying chemicals for commercial use. Therefore, this incident was most likely an illegal act under Article 110; any action or status of the *Yin He* did not fall under it. At the

¹³⁸ See Chaffe, note 96 above, at 3.

¹³⁹ See Patrick E Tyler, "No Chemical Arms Aboard China Ship," *The New York Times* (September 6, 1993), [http://query.nytimes.com/gst/fullpage.html?res=9F0CE7DD133BF935A3575AC0A965958260&n=Top%2FReference%2FTimes%20Topics%2FSubjects%2FS%2FShips%20and%20Shipping.](http://query.nytimes.com/gst/fullpage.html?res=9F0CE7DD133BF935A3575AC0A965958260&n=Top%2FReference%2FTimes%20Topics%2FSubjects%2FS%2FShips%20and%20Shipping.;); Ministry of Foreign Affairs of the People's Republic of China, "Statement by the Ministry of Foreign Affairs of the People's Republic of China on The "Yin He" Incident," (September 4, 1993), <http://www.nti.org/db/china/engdocs/ynhe0993.htm.>; Song, note 71 above, at 119.

time of the incident, neither the United States nor China were party to UNCLOS, accordingly, customary international law would be applicable.¹⁴⁰ Thus, on the high seas, the freedom of navigation and the exclusive jurisdiction of a flag state over vessels that are flying its flag should be assured, and the final result would be the same.¹⁴¹

3.7. Boarding Agreement

As has been previously seen, it appears that the PSI activities encouraged in the SOP to prevent the flow of WMD, their delivery systems, and related materials worldwide, contain several incompatibilities with UNCLOS. The PSI will not give any new legal power to the PSI participants, on the contrary, the PSI activities must still be conducted under international law and regime. Nevertheless, paragraph 4 (c) of the SOP seeks to find its way by asking the PSI participants “[t]o seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.”¹⁴² On the high seas, a flag state holds exclusive jurisdiction over vessels flying its flag, however, if the flag state comes to a consensus with state ‘A’ for boarding and searching its flagged vessels, state ‘A’ can board and search the vessels. Therefore, the United States has been signing bilateral boarding agreements with several states so that it can take the necessary actions to interdict WMD or the related materials on

¹⁴⁰ See Song, note 71 above, at 119.

¹⁴¹ Ibid.

¹⁴² SOP, paragraph 4(c).

the high seas under the consent of the flag state.¹⁴³ This boarding agreement in accordance with the PSI is modeled following similar arrangements that are set, for example, to counter drug smuggling.¹⁴⁴

On February 11, 2004, the United States and Liberia, the world's second largest shipping registry, signed an agreement on ship boarding in accordance with the PSI.¹⁴⁵ Under this agreement, authorities on a bilateral basis are given to board vessels suspected of carrying illicit shipments of WMD, their delivery systems, or related materials. Article 4, *Operations in International Waters*, of the agreement states:

Whenever the Security Force Officials of one Party ("the requesting Party") encounter a suspect vessel claiming nationality in the other Party ("the requested Party") located seaward of any State's territorial sea, the requesting Party may request through the Competent Authority of the requested Party that it:

- a. confirm the claim of nationality of the suspect vessel; and
- b. if such claim is confirmed:
 - i. authorize the boarding and search of the suspect vessel, cargo

¹⁴³ See Bureau of International Security and Nonproliferation. U.S. Department of State, "Ship Boarding Agreements," <http://www.state.gov/t/isn/c12386.htm>.; Stephen G. Rademaker, "The Proliferation Security Initiative (PSI): A Record of Success, Testimony before the House International Relations Committee, Subcommittee on International Terrorism and Nonproliferation," June 9, 2005, <http://www.state.gov/t/ac/rls/rm/47715.htm>.

¹⁴⁴ See Byers, note 7 above, at 530.; Bureau of International Security and Nonproliferation, note 143 above.

¹⁴⁵ Bureau of Public Affairs. U.S. Department of State, "Press Statement: Proliferation Security Initiative Ship Boarding Agreement Signed with Liberia " February 12, 2004, Sean McCormack, <http://www.state.gov/r/pa/prs/ps/2004/29338.htm>.

and the persons found on board by Security Force Officials of the requesting Party; and

ii. if evidence of proliferation is found, authorize the Security Force Officials of the requesting Party to detain the vessel, as well as items and persons on board, pending instructions conveyed through the Competent Authority of the requested Party as to the actions the requesting Party is permitted to take concerning such items, persons and vessels.¹⁴⁶

Under the request of “the requesting Party”, “the requested Party” has to respond to such requests within ‘two hours’.¹⁴⁷ If “the requested Party” can not respond to such requests within two hours, “the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel’s documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea.”¹⁴⁸ Therefore, under the agreement, the United States can interdict a suspected vessel, flagged in Liberia, with the consent of Liberia, and if there is no response from Liberia within two hours, the United States can deem that Liberia has given its authorization to the United States and conduct boarding and search the vessel.

Following the bilateral agreement between the United States and Liberia, the

¹⁴⁶ "Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea," (February 11, 2004), <http://www.state.gov/t/isn/trty/32403.htm>., Article 4.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

United States has signed similar agreements with Panama (May 12, 2004),¹⁴⁹ the Marshall Islands (August 13, 2004),¹⁵⁰ Croatia (June 1, 2005),¹⁵¹ Cyprus (July 25, 2005),¹⁵² Belize (August 4, 2005),¹⁵³ Malta (March 15, 2007),¹⁵⁴ and Mongolia (October 23, 2007).¹⁵⁵ As of January 1, 2007, the combination of states with which the United States has made boarding agreements and the PSI participants account for more than 60 % of the world's commercial fleet (100 gross tonnage and above) in dead-weight tonnage.¹⁵⁶ With such a large coverage of the worldwide ship registry, the bilateral ship boarding agreement may increase the probability for the PSI

¹⁴⁹ "Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice," (Panama February 5, 2002), <http://www.state.gov/t/isn/trty/32859.htm>.

¹⁵⁰ "Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea," (August 13, 2004), <http://www.state.gov/t/isn/trty/35237.htm>.

¹⁵¹ "Agreement between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials," (June 1, 2005), <http://www.state.gov/t/isn/trty/47086.htm>.

¹⁵² "Agreement between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea," (July 25, 2005), <http://www.state.gov/t/isn/trty/50274.htm>.

¹⁵³ "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 ", (August 4, 2005), <http://www.state.gov/t/isn/trty/50809.htm>.

¹⁵⁴ "Agreement between the Government of the United States of America and the Government of Malta Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea," (March 15, 2007), <http://www.state.gov/t/isn/trty/81883.htm>.

¹⁵⁵ "Agreement between the Government of the United States of America and the Government of Mongolia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea," (October 23, 2007), <http://www.state.gov/t/isn/trty/94626.htm>.

¹⁵⁶ See United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2007* (New York and Geneva: United Nations Publications, 2007), <http://www.unctad.org/Templates/Webflyer.asp?intItemID=4398>

participants to stop, search, and seize suspected vessels that are transporting WMD or the related materials.¹⁵⁷ Thus, the United States has made agreements with the major flags of registry states. If this partnership within the PSI participants goes well, Bolton's statement might hold true; "[o]ur goal is to work with other concerned states to develop new means to disrupt the proliferation trade at sea, in the air, and on land. ... Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hand of our enemies."¹⁵⁸

However, there are several critics of this ship boarding agreement. Valencia states that the flag-state consent regime is the fundamental principles of international law and "it cannot be overturned or eroded by the practice of a few countries over such a short period of time."¹⁵⁹ Chaffee notes that bilateral ship boarding agreements have "the potential for eroding the multilateral framework pursued through UNCLOS."¹⁶⁰

Moreover, if a vessel is registered in a state which has not concluded an agreement with the PSI participants, the vessel would not be stopped, searched, and seized even if there are reasonable grounds to suspect that the vessel is carrying

¹⁵⁷ See Andrew Prosser and Herbert Scoville, "The Proliferation Security Initiative in Perspective," June 16, 2004, <http://www.cdi.org/pdfs/psi.pdf>. Lehrman suggests that PSI participants sign ship boarding agreements to ensure enforcement of the UN Security Council Resolution 1540. Thomas D. Lehrman, "Rethinking Interdiction: The Future of the Proliferation Security Initiative," *The Nonproliferation Review* 11, no. 2 (2004), 24.

¹⁵⁸ Bolton, note 15 above.

¹⁵⁹ Mark J Valencia, "The Proliferation Security Initiative: A Glass Half-Full," *Arms Control Today* 37, no. 5 (2007).

¹⁶⁰ Chaffee, note 96 above. Chaffee also states that the pressure of aid and power disparities is likely to be a tool for acquiring an agreement. For example, just before the agreement between the United States and Liberia, \$200 million for humanitarian and reconstruction aid, and \$245 million for peacekeeping aid were pledged to Liberia.

WMD or the related materials.¹⁶¹ Moreover, if the vessel is a warship, or owned or operated by a government as a non-commercial service, it has complete immunity from the jurisdiction of any state other than the flag state.¹⁶² Therefore, if a suspected vessel is registered in North Korea or Iran, it is unlikely that the PSI participants will stop, search, and seize the vessel.¹⁶³ Thus, it seems that the PSI activities still contain a “big hole.”¹⁶⁴

¹⁶¹ See Valencia, note 159 above.

¹⁶² UNCLOS, Articles 95 and 96.; See Nikitin, note 62 above.

¹⁶³ Michael Richardson, "The Proliferation Security Initiative (PSI): An Assessment of Its Strengths & Weaknesses, with Some Proposals for Shaping Its Future," *Trends in Southeast Asia Series* 3 (2006): 15. <http://www.iseas.edu.sg/tr32006.pdf>.

¹⁶⁴ Timothy C Perry, "Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea," *Ocean Development & International Law* 37 (2006): 39.

CHAPTER 4. IMPLICATION OF THE 2005 SUA CONVENTION IN THE PSI PERSPECTIVE

The introduction of the PSI has made a great impact on the worldwide trend of counter-terrorism; however, it does not give any new legal authority to its participants. On the contrary, the PSI activities must still be conducted under international law and regime. Therefore, as has been demonstrated in the previous chapter, PSI activities contain several incompatibilities with UNCLOS. Therefore, the United States has been signing bilateral boarding agreements to overcome the controversial issues pertaining to UNCLOS.

In order to legally prevent the flow of WMD, their delivery systems, and related materials worldwide, it is necessary to include authorities for the interdiction activities into the international legal framework. Therefore, along with signing bilateral agreements, the United States has been attempting to seek their legal authority in the SUA Convention by amending the instrument since 2002. Consequently, two SUA Protocols were introduced in October 2005. This Chapter will examine how these new 2005 SUA Protocols will strengthen the PSI activities. Towards this aim, the chapter will first review the development of the 2005 SUA Convention, and, secondly, examine its two key provisions: the criminalization of WMD and the boarding provisions. Finally, the chapter will examine the implications of the 2005 SUA Convention for the PSI activities.

4.1. Development of the 2005 SUA Convention

4.1.1. The *Achille Lauro* incident

On October 7, 1985, four armed Palestinian terrorists, members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO), hijacked the Italian cruise liner *Achille Lauro* which was carrying more than 400 passengers and crew while en route from Alexandria, Egypt to Italy.¹⁶⁵ They originally planned to bring their arms and explosives secretly into Israel, however, when they were discovered on board the vessel, they took passengers and crew hostage and evolved into hijackers. The hijackers threatened to kill passengers unless Israel released 50 Palestinian prisoners in Israeli jails. Their demands were not met and consequently, the following afternoon, the hijackers killed a handicapped Jewish, American citizen, and threw his body, with his wheelchair, into the sea. Negotiations followed with the result that the hijackers surrendered at Port Said,

¹⁶⁵ It is not clear whether the initial seizure was on the high seas or within the territorial waters of Egypt, however, it is clear that the ship was on the high seas while being held by the hijackers. See Malvina Halberstam, "Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety," *The American Journal of International Law* 82, no. 2 (1988): 269. <http://www.jstor.org/>. For the description of *Achille Lauro* incident, see *Ibid.*; Marie Jacobsson, "Terrorism at Sea," in *Maritime Violence and Other Security Issues at Sea* ed. Proshanto K. Mukherjee, Maximo Quibranza Mejia Jr, and Gotthard M. Gauci (World Maritime University, Malmö, Sweden: WMU Publication, 2002), 157-58.; Brad J. Kieserman, "Preventing and Defeating Terrorism at Sea : Practical Considerations for Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)," in *Recent Developments in the Law of the Sea and China*, ed. Myron H. Nordquist, John Norton Moore, and Kuen-chen Fu (Leiden/Boston: Martinus Nijhoff Publishers 2006), 425-26.; Kofi Mbiah, "The Revision of the SUA Convention: An Update," in *Contemporary Issues in Maritime Security : A Selection of Papers and Presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code, 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30th August - 1st September 2004*, ed. Maximo Quibranza Mejia Jr (Malmö, Sweden: WMU Publications 2004), 163.;

Egypt on October 10 with a guarantee of safe passage out of Egypt. They were then sent to Tunisia by an official Egyptian airplane. However, under pressure from the United States, the Tunisian government could not allow the airplane to land in their country and, eventually, U.S. Navy fighters forced it to land at a NATO airbase in Sicily, Italy where the Italian authorities took custody of the hijackers.¹⁶⁶

4.1.2. Development of SUA Convention

Following the *Achille Lauro* incident, Resolution A.584(14), *Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews*, was adopted at International Maritime Organization (IMO) on November 20, 1985 with concern for “the danger to passengers and crews resulting from the increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships, including small craft, both at anchor and under way.”¹⁶⁷ The resolution sought the Maritime Safety Committee (MSC) to develop detailed and practical technical measures to ensure the security of passengers and crew on board vessels.¹⁶⁸ Moreover, on December 9, 1985, the General Assembly of the UN requested IMO “to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures” under its resolution A/RES/40/61.¹⁶⁹ In September 1986, the MSC issued its

¹⁶⁶ There was a dispute whether the Italian or U.S. authorities had jurisdiction over the case, however, they agreed that Italian forces should take custody of the hijackers. See Kieserman, note 165 above, at 426.

¹⁶⁷ IMO Assembly Resolution A.584(14).

¹⁶⁸ *Ibid.*

¹⁶⁹ UN General Assembly Resolution A/RES/40/61.
<http://www.un.org/documents/ga/res/40/a40r061.htm>.

circular, MSC/Circ.443, *Measures to prevent unlawful acts against passengers and crews on board ships*, in which governments, port authorities, administrations, shipowners, shipmasters, and crews were requested to take appropriate measures against unlawful acts threatening passengers and crews on board vessels.¹⁷⁰

In November 1986, following the process above, the government of Austria, Egypt, and Italy proposed a draft convention to the IMO on the subject of unlawful acts against the safety of maritime navigation.¹⁷¹ Then, based on this proposal, a conference held in Rome in March 1988 adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platform Located on the Continental Shelf (SUA Protocol for Fixed Platforms) was also adopted at the same time. The main purpose of the SUA Convention and SUA Protocol for Fixed Platforms is “to provide an international legal basis for action to be taken against persons committing unlawful acts against ships and fixed platforms located on the continental shelf.”¹⁷² In the SUA Convention, these unlawful acts include “the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.”¹⁷³ The SUA Protocol for Fixed Platforms contains similar provisions as in the SUA Convention, relating to the unlawful acts which are committed against

¹⁷⁰ IMO, MSC Circular MSC/Circ.443.

¹⁷¹ Z Oya Özçayır, "Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention)," *Journal of International Maritime Law* 11, no. 6 (2005): 432.

¹⁷² International Maritime Organization, *SUA Convention* (London: IMO Publication, 2006), iii.(Foreword)

¹⁷³ See IMO web-site: <http://www.imo.org/>.

fixed platforms located on the continental shelf. The SUA Convention and its protocol define offences in Article 3 and Article 2, respectively, and require each State Party to take the necessary measures for establishing jurisdiction over the offences.

Both the SUA Convention and SUA Protocol for Fixed Platforms entered into force on March 1, 1992. As of June 2008, the number of contracting¹⁷⁴ states for the SUA Convention is 149, representing 92.75 % of world tonnage and for the SUA protocol for Fixed Platforms 138 contracting states, representing 87.77 % of the world tonnage.¹⁷⁵

4.1.3. Development of the 2005 SUA Protocols

Following the tragic events of 9/11, 2001, the UN General Assembly and Security Council adopted resolutions A/RES/56/1 and S/RES/1368, on September 18 and 12, respectively, condemning the 9/11 terrorist attacks in the United States.¹⁷⁶ Further, the Security Council adopted Resolution S/RES/1373 on September 28, requesting the international community to strengthen its effort to prevent and

¹⁷⁴ These countries that have made ratifications, acceptances, approvals, or accessions to the instruments.

¹⁷⁵ See IMO Council report, C 100/17.; See also *Status of Summary of Conventions* in IMO web-site: <http://www.imo.org/>.; Until the tragic event of 9/11, many of the countries that contracted the instrument were those countries which border the Straits of Malacca and the South China Sea where unlawful acts were increasing. However, following the incident, more than 70 countries had contracted to the instrument within two years. See P.K. Mukherjee and M.Q. Mejia Jr., "The SUA Convention 2005: A Critical Evaluation of Its Effectiveness in Suppressing Maritime Criminal Acts " *Journal of International Maritime Law* 12, no. 3 (2006): 175. See also P. K. Mukherjee, "The New SUA Convention 2005 in Perspective," *Shipping & Transport International* 6, no. 1 (2006): 12.

¹⁷⁶ UN General Assembly Resolution A/RES/56/1.
<http://daccessdds.un.org/doc/UNDOC/GEN/N01/475/00/PDF/N0147500.pdf?OpenElement>.;
UN Security Council Resolution S/RES/1368 (2001).
<http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.

suppress terrorist acts, including the full implementation of anti-terrorist conventions.¹⁷⁷ Taking the UN resolutions, the IMO assembly adopted its Resolution A.924(22), *Review of Measures and Procedures to Prevent Acts of Terrorism Which Threaten the Security of Passengers and Crews and the Safety of Ships*, on November 20, which requested the Maritime Safety Committee, the Legal Committee, and the Facilitation Committee to review existing international legal and technical measures to see whether there was a need to update the relevant IMO instruments or to create new measures in order to prevent and suppress terrorism against vessels and to improve security aboard and ashore.¹⁷⁸

Accordingly, the Legal Committee started the review of the SUA Convention in 2002 and the following issues, *inter alia*, were considered as the scope of the review of the Convention:

- revision and expansion of the offences in article 3 to ensure that a wider range of unlawful acts are covered by the Convention in the light of the experience of 11 September;
- enlarging the scope of application to cover domestic cabotage navigation; and
- widening/strengthening the regulations on jurisdiction and extradition, including for instance, making it obligatory not to use the political offence exception in order to deny extradition.¹⁷⁹

¹⁷⁷ UN Security Council Resolution S/RES/1373 (2001).

<http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

¹⁷⁸ IMO Assembly Resolution A.924(22).

¹⁷⁹ IMO, LEG 84/6.

Subsequently, the United States and Turkey submitted a proposal for amending the SUA Convention at the 84th session of the Legal Committee.¹⁸⁰ The United States suggested, *inter alia*, for the amendment to: clearly address prohibiting activities which “knowingly and unlawfully” provide international maritime transportation to persons, or for supplies that are committing SUA offences; address the issue of transportation of WMD and their means of delivery which is in violation of applicable international non-proliferation agreements; criminalize using the ship or its cargo as a weapon.¹⁸¹

During its 85th session, October 21 - 25, 2002, the Committee discussed, *inter alia*, seven proposed offences which could be added to the SUA Convention; four of them concerned activities taking place on the ship or directed towards a ship involved in terrorist acts; one concerned the presence of tools or substances on a ship useful for WMD; and two of the new offences concerned the use of the ship for transporting of WMD related material.¹⁸² At this session, Japan commented that the proposal submitted by the United States considerably exceeded the scope of the SUA Convention and Protocol, and some of the offences had already been criminalized by other conventions.¹⁸³ The 86th session, April 28 - May 2, 2003, discussed, *inter alia*, to insert a reference to the protection of rights and freedoms of seafarers in the proposal.¹⁸⁴ The review of the SUA Convention was continued on a priority basis

¹⁸⁰ IMO, LEG 84/6/1.; IMO LEG84/6/2.

¹⁸¹ IMO, LEG 84/6/1.

¹⁸² IMO, LEG 85/11., paragraph 70. Discussion was made based on LEG 85/4 which contains a draft protocol to the SUA Convention in annex 1. See IMO, LEG 85/4 and its Annex.

¹⁸³ IMO, LEG 85/4/1.

¹⁸⁴ IMO, LEG 86/15., paragraph 46.

in the 87th session, October 13-17, 2003. At the subsequent 88th session, April 19-23, 2004, while most of the delegations supported the revision of the SUA Convention, several delegations cautioned that the 2005 SUA Protocols would not jeopardize the principle of freedom of navigation and the right of innocent passage which are guaranteed in UNCLOS and it would not cause unnecessary disturbance of international commercial navigation.¹⁸⁵ At the 89th session, October 25-29, 2004, and 90th session, April 18-29, 2005, the review work was finalized to prepare for the diplomatic conference scheduled in October 2005.

Following three years of discussion, the diplomatic conference was held on October 10-14, 2005 and duly adopted the amendments in the form of two protocols on October 15; the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 Protocol to the SUA Convention) and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (2005 Protocol to the SUA Protocol for Fixed Platforms).¹⁸⁶ The 2005 Protocol to

¹⁸⁵ IMO, LEG 88/13., paragraphs 34 and 35.

¹⁸⁶ Under Article 15(2) of the Protocol of 2005 to the SUA Convention, consolidated text of the SUA Convention and the Protocol of 2005 to the SUA Convention is called "2005 SUA Convention" in short, and likewise, under Article 6(2) of the Protocol of 2005 to the SUA Protocol for Fixed Platforms, consolidated text of SUA Protocol for Fixed Platforms and the Protocol of 2005 to the SUA Protocol for Fixed Platforms is called "2005 SUA Fixed Platforms Protocol" in short. The following texts in this paper use these shortened forms for convenience. Also, when the Articles are cited, they refer to the Articles in the consolidated version of the 2005 SUA Convention and 2005 SUA Fixed Platforms Protocol.

Although the United States may be a driving force for the amendment of the SUA Convention, it must not be forgot that all the process is negotiated within a large multilateral forum. Delegates from 72 states parties to the SUA Convention and 68 states parties to the SUA Protocol for Fixed Platforms attended at the conference. See Richard Shaw, "Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA): Diplomatic Conference on the Revision of the SUA Convention and Protocol," *Journal of International Maritime Law* 11, no. 5 (2005), 379.; Gouglas Guilfoyle, "Maritime Interdiction of Weapons of Mass Destruction," *Journal of Conflict & Security Law* 12, no. 1 (2007), 28. <http://jcsl.oxfordjournals.org/>.

the SUA Convention contain two key features:

- broadening the range of offences in Article *3bis*, *3ter*, and *3quater*; and
- introducing the provisions which allow states to board a vessel, which is suspected of committing an offence provided in Article *3bis*, *3ter*, and *3quater*, flying the flag of a Parties to the 2005 SUA Convention on the high seas in Article *8bis*.

Although the process for amendment for the SUA Convention began at the 84th session in 2002, that is before the PSI's principles (SOP) were announced in 2003, the two key features of the 2005 Protocols to the SUA Convention and the SUA Protocol for Fixed Platforms have very close relationships with the PSI activities. Firstly, the new Convention criminalizes transportation of WMD and the related materials under Article *3bis*(b), which the United States and like-minded countries have been craving as a legal basis for the interdiction of WMD and the related materials in the PSI activities, and secondly, the newly added provision regarding the boarding of suspected vessels on the high seas contain exactly the same notion as the boarding agreement which the United States has been proceeding since it made an agreement with Liberia in February 2004.

4.2. Key provisions of the 2005 SUA Convention for PSI activities

4.2.1. Criminalization of transportation of WMD

The 2005 SUA Convention provides a definition for biological weapons, chemical weapons, and nuclear (BCN) weapons, namely WMD, in Article 1(d) (See

Appendix D for extract of the 2005 SUA Convention).¹⁸⁷ The definition of biological weapons is extracted from Article I of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972 (BWC), which entered into force in 1975, likewise, the definition of chemical weapons is extracted from Article II(1) and (9) of the Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on their Destruction, 1993 (CWC), which entered into force in 1997.

Under Article 3*bis*(b), “transport”¹⁸⁸ of certain materials is newly criminalized as follows.

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

....

(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

¹⁸⁷ In the 88th session on March 19, 2004, Mexico proposed for the amendment to clearly define WMD. See IMO, LEG 88/13., paragraph 31.; LEG 88/3/1.

¹⁸⁸ “[T]ransport” is defined as “to initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item” in Article 1(1)(b).

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.¹⁸⁹

However, as the text shows, each act would become an offence under certain conditions. For offence (i), the subject should know that “it is intended to be used to cause, or in a threat to cause, ... 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.”¹⁹⁰ For offence (ii), the subject should know that it is BCN weapons as defined in Article 1. For offence (iii), the subject should know that said materials are “intended to be used in a nuclear explosive activity ... not under safeguards pursuant to an IAEA comprehensive

¹⁸⁹ 2005 SUA Convention, Article 3*bis*(b).

¹⁹⁰ *Ibid.*

safeguards agreement.”¹⁹¹ For offence (iv), the subject should know that said materials would “contribute(s) to the design, manufacture or delivery of a BCN weapon.”¹⁹² Therefore, for example, if a person transports WMD related materials without knowing that it is such, the person does not commit an offence. The person should “unlawfully and intentionally” commit the action stated under the Article for it to be an offence.¹⁹³

Moreover, the “saving clause” is made in Articles *2bis* and *3bis(2)* (See Appendix D). Article *2bis* states, “[n]othing in this Convention shall affect the rights, obligations and responsibilities” of state parties under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), BWC, and CWC.¹⁹⁴ Further, Article *3bis(2)* states, “it shall not be an offence within the meaning of this Convention to transport an item or material covered by Paragraph 1(b)(iii) or, ... , paragraph 1(b)(iv), if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party” to the NPT.¹⁹⁵ It must be noted, however, that India emphasized that the “saving clause” discriminates against the non-State parties to the NPT and hampers the right of those countries pursuing peaceful uses of nuclear energy.¹⁹⁶ Although there is a certain compromise for criminalizing the transportation of WMD, it was included as it is in the current 2005

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Mukherjee and Mejjia provide detailed discussion on this point. See Mukherjee and Mejjia, note 175 above at 177-80.; See also Mukherjee, note 175 above, at 13-14.

¹⁹⁴ 2005 SUA Convention, Article *2bis(3)*.

¹⁹⁵ Ibid., Article *3bis(2)*.

¹⁹⁶ IMO, LEG/CONF.15/12. Reddy, negotiator on behalf of India in the IMO Legal Committee for the amendment of SUA Convention, spoke that the “saving clause” shows the “dubious intention of the nuclear states to control the overall nuclear trade.” See A Sudhakar Reddy, “Round Table Conference SUA Protocol: Some Reflections in International Law ” *National Maritime Foundation* May 5, 2006. <http://www.maritimeindia.org/index.php/>.

SUA Convention with the support of Canada, France, the U.K., and the United States¹⁹⁷

Other provisions under Article *3bis*, *3ter*, and *3quater* (See Appendix D) regulate offences, *inter alia*, in which a person is unlawfully and intentionally, “to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”; “transport[ing] another person on board a ship knowing that the person has committed an act that constitute an offence” in Article 3, *3bis*, or *3quater*, or any other offences in other treaties listed in Annex of the Convention; “injur[ing] or kill[ing] any person in connection with the commission of any of the offences” in Article 3, *3bis*, or *3quater* or any other offences in other treaties listed in the Annex of the Convention.

Under Article 5 (See Appendix D), states are required to make the offences provided in Article 3, *3bis*, *3ter*, and *3quater* punishable by appropriate penalties taking into account the grave nature of those offences.¹⁹⁸ Moreover, under Article *5bis* (See Appendix D) states are required to take necessary measures to enable a legal entity located in its territory to be liable under its domestic law when a person responsible for management or control of that legal entity has committed an offence in this Convention.¹⁹⁹

The prohibition of the transportation of WMD in the 2005 SUA Convention greatly supports the PSI activities and gives the PSI its legal backbone. States can exercise “right of visit” to a vessel on the high seas, under Article 110 of UNCLOS,

¹⁹⁷ IMO, LEG/CONF.15/15.

¹⁹⁸ 2005 SUA Convention, Article 5.

¹⁹⁹ *Ibid.*, Article *5bis*(1).

if there are reasonable grounds for suspecting that the vessel is engaging in piracy, the slave trade, unauthorized broadcasting, or without nationality; although if flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality as a warship.²⁰⁰ However, as discussed in Chapter 3, the conditions given under Article 110 do not include the carriage and transportation of WMD or the related materials. Thus, as in the *So San* case, states might visit the vessel of a foreign flag on the high seas under the condition of Article 110 of UNCLOS, however, states could not condemn the carriage of WMD and there is no legal ground to seize the cargo, WMD and the related materials. States can, now, condemn the transportation of WMD and the related materials as an offence according to the 2005 SUA Convention if the transporting state is not a party to NPT.

4.2.2. Boarding provisions

The newly added Article *8bis* (See Appendix D) provides a comprehensive set of procedures and protections with respect to ship boarding by the third party to prevent and suppress unlawful acts under this Convention. Under Article *8bis*(1), state parties are required to co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by the Convention.²⁰¹ Article *8bis*(4) allows a state party to request the assistance of other state parties in preventing or suppressing an offence that is established under Article 3, *3bis*, *3ter*, or *3quater* if there is reasonable grounds to suspect that the offence has been, is being, or is about to be committed on

²⁰⁰ UNCLOS, Article 110.

²⁰¹ 2005 SUA Convention, Article *8bis*(1).

a vessel flying its flag.²⁰² Following the request, the requested parties are required to render assistance with the means available to them.²⁰³

Under Article 8*bis*(5), whenever a state party (the requesting Party) encounters a vessel flying the flag of another state party (the flag State) in the seaward of any State's territorial seas (EEZ or on the high seas), and if the requesting Party has reasonable grounds to suspect that the vessel has been, is, or is about to be involved in committing an offence under Article 3, 3*bis*, 3*ter*, or 3*quater*, and the requesting party desires to board the suspect vessel, the requesting Party and the flag State are placed under certain obligations as follow:

- the requesting Party requests the flag state to confirm the nationality of the suspect vessel;
- if the nationality is confirmed, the requesting Party requests the flag state to authorize to board and to take appropriate measures which may include stopping, boarding and searching the vessel and questioning the person on board;
- the flag state is required to, either, give the authorization to the requesting Party to board and to take appropriate measures; conduct the boarding and search on its own or together with the requesting Party; or decline to authorize a boarding and search.²⁰⁴

Therefore, the requesting Party cannot board and take appropriate measures without the flag state's consent even if it has reasonable grounds to suspect that the vessel has

²⁰² Ibid., paragraph (4).

²⁰³ Ibid.

²⁰⁴ Ibid., paragraph (5).

been, is, or is about to be involved in committing an offence under Article 3, *3bis*, *3ter*, or *3quater*; this is compatible with the provision set under UNCLOS. On the high seas, vessels are subject to flag states' exclusive jurisdiction under Article 92 of UNCLOS, thus, only the flag state of the vessel can exercise jurisdiction on the vessel.

However, the new 2005 SUA Convention would change the notion of this flag states' exclusive jurisdiction on the high seas, when it enters into force. Article *8bis(5)(d)* states:

Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.²⁰⁵

Therefore, the requesting party would be granted the authorization to board and search the suspected vessel if there is no response from the flag state within 'four

²⁰⁵ Ibid., paragraph(5)(d).

hours' of the request, under the condition that the flag state notifies the Secretary-General of IMO of such an arrangement upon or after becoming a party. Under, Article *8bis(5)(e)*, a state party can even give its authorization to the requesting party 'automatically' if the requesting party finds an offence set forth in Article 3, *3bis*, *3ter*, or *3quater* has been, is being, or is about to be committed, by notifying the Secretary-General of IMO of such arrangement upon or after becoming a party. With this sub-paragraph (e), the requesting party does not, even, need to wait for four hours to get the authorization from the flag state. However, the flag state can withdraw these arrangements set under sub-paragraphs (d) and (e) at any time.²⁰⁶ Nevertheless, these two sub-paragraphs bring a certain change to the notion of the flag states' exclusive jurisdiction on the high seas. At the 88th session of the Legal Committee, however, it was recognized that the principle of flag state jurisdiction must be respected to the utmost extent and a boarding by another state on the high seas may take place in "exceptional circumstances."²⁰⁷ As such, some delegations showed their concern that the notion of "tacit acceptance" for boarding was not acceptable as it was inconsistent with the exclusive flag state jurisdiction set under Article 92 of UNCLOS and if "tacit acceptance" was to be allowed, it should be in the form of an "opt-in" clause.²⁰⁸

Taking the concern of the flag state's exclusive jurisdiction into account, the following sub-paragraphs duly paying attention to it. For example, under Article *8bis(6)*, the flag state may authorize the requesting party to detain the vessel, cargo

²⁰⁶ Ibid., and sub-paragraph (e).

²⁰⁷ IMO, LEG88/13., paragraph 66.

²⁰⁸ Ibid., paragraph 73. "Opt-in" clause requires state parties to notify the Secretary-General in advance of granting its authorization to a requesting party.

and persons on board and the requesting party is required to inform the flag state of the results of a boarding.²⁰⁹ Moreover, under paragraph (7), the requesting party cannot take any additional measures without the express authorization of the flag state.²¹⁰ Further, paragraph (8) confirms that the flag state has the right to exercise jurisdiction over a vessel for seizure, forfeiture, arrest, and prosecution although it can consent to a requesting state to exercise the jurisdiction.²¹¹

Paragraphs (6) and (8) cast quite important notions on the PSI activities. As the *So San* incident indicated, states could exercise the “right of visit” to a vessel on the high seas if the conditions set under Article 110 of UNCLOS are met, however, there was no clear authority to seize the cargo. However, paragraphs (6) and (8) allow states to exercise jurisdiction for detainment, seizure, forfeiture, arrest, and prosecution if the flag state authorizes it. Therefore, states may seize WMD and the related material on board a foreign flagged vessel on the high seas. The 2005 SUA Convention will provide quite a strong legal basis to the WMD interdiction operation of the PSI, when it enters into force.

4.3. Implications of the 2005 SUA Convention for PSI

4.3.1. Strengthening PSI activities

By adopting the 2005 SUA Convention the transportation of WMD and the related material is criminalized under Article 3*bis*(b), although there is a condition that the person should “unlawfully and intentionally” commit the offence under the

²⁰⁹ 2005 SUA Convention, Article 8*bis*(6).

²¹⁰ *Ibid.*, paragraph (7).

²¹¹ *Ibid.*, paragraph (8).

Article. Moreover, under Article 8*bis* states are given a strong legal basis to stop, search, and seize WMD and the related material on board a foreign flagged vessel on the high seas if the flag state authorizes them to do so. As long as there is a flag state's authorization, a state might have taken appropriate measures on a vessel which is carrying WMD and the related materials even before the 2005 SUA Convention was adopted, however, clear legislation in an international convention which provides a comprehensive set of procedures and protections with respect to ship boarding surely strengthens the worldwide trend of counter-terrorism and the PSI activities.

The UN Security Council Resolution 1540 (2004) affirms that the proliferation of WMD constitutes a threat to international peace and security and calls for all states to take additional effective measures to prevent the proliferation of WMD.²¹² The UN Security Council resolution was proposed by the United States to criminalize the proliferation of WMD,²¹³ although the phrase to 'criminalize the proliferation of weapons' was not included when it was adopted. The draft of the resolution, moreover, contained the explicit term 'to interdict,' however, this was also changed to the phrase 'to take cooperative action to prevent illicit trafficking' after China's objections.²¹⁴ It thus seems that the United States and like-minded states finally succeeded in its attempt to 'criminalize' the transportation of WMD in the 2005 SUA Convention.

²¹² UN Security Council Resolution S/RES/1540 (2004).

<http://daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>.

²¹³ See United Nations, note 55 above. See also discussion in Chapter 2, section 2.4.

²¹⁴ See *Ibid.*; Datan, note 56 above.

4.3.2. Considerations of the 2005 SUA Convention

Although the 2005 SUA Convention is expected to strengthen the curtailing of the proliferation of WMD, it still entails issues to be considered. Firstly, the scope of the SUA Convention does not necessarily fit into the scope of non-proliferation activities.²¹⁵ The non-proliferation activities encouraged under UN Security Council 1540 and the PSI are aimed to achieve “international peace and security.”²¹⁶ On the contrary, the scope of the SUA Convention is to provide an international legal basis for action to be taken against persons committing unlawful acts against “the safety of maritime navigation”, which was sought following the *Achille Lauro* incident. While the transportation of WMD and the related material certainly falls under the threat to “international peace and security,” it does not necessarily cause any danger to the “safety of maritime navigation.”²¹⁷ This is why Japan, as previously seen, cautioned from the very early stage of the amendment process that the proposal of the United States considerably exceeds the scope of the current SUA Convention.²¹⁸ Moreover, some delegations suggested it is more desirable to develop a new convention rather than a protocol form amending the original convention.²¹⁹ Further, others showed their concerns that the International Atomic Energy Agency (IAEA) and Organization for the Prohibition of Chemical

²¹⁵ See Lee Sik Chai, "The Revision of the SUA Conventions: A Brief Look Ahead by a Maritime Lawyer," in *Coastal Zone Piracy and Other Unlawful Acts at Sea: A Selection of Papers and Presentations from the International Symposium on the New Regime for the Suppression of Unlawful Acts at Sea, 21-23 November 2005 (Malmö, Sweden) and International Symposium on Coastal Zone Piracy, 13-15 November 2006 (Malmö, Sweden)*, ed. M.Q. Mejia Jr. and Jingjing Xu (Malmö, Sweden: WMU Publications, 2005).

²¹⁶ See UN Security Council Resolution 1540 and PSI's Statement of Interdiction Principles.

²¹⁷ See Mukherjee and Mejia, note 175 above, at 177.

²¹⁸ IMO, LEG 85/4/1.

²¹⁹ IMO, LEG 86/15., paragraph 52.

Weapons (OPCW) are more appropriate places to discuss non-proliferation issues rather than IMO.²²⁰

Secondly, under Article 2, the Convention does not apply to a warship, or a vessel owned or operated by a state when used as a naval auxiliary or for customs or police. Moreover, Article 2(2) states, “Nothing in this Convention affects the immunities of warships and other Government vessels operated for non-commercial purposes.”²²¹ These provisions reserve compatibility with Articles 95 and 96 of UNCLOS which regulate the “complete immunity” of warships, and vessels owned or operated by a State and used only in government non-commercial services on the high seas.²²² Accordingly, if ‘states of proliferation concern’ use their own government vessels for transporting WMD and the related materials, no state can intervene in their ‘unlawful’²²³ acts as it would not be an unlawful act within the context of this Convention. Moreover, as already seen, the “saving clause” has been included in Articles *2bis* and *3bis(2)*. Therefore, if a state is a party to the NPT, the transportation of WMD and the related materials would not be an offence within the meaning of this Convention.

Thirdly, pessimistic views can be perceived for the entry into force of two 2005 SUA Protocols. Two 2005 SUA Protocols apply only to those state parties to the instruments. It is easily estimated that those ‘states of proliferation concern’

²²⁰ IMO, LEG 87/17., paragraph 105.

²²¹ 2005 SUA Convention, Article 2(2).

²²² UNCLOS, Articles 95 and 96.

²²³ Mukherjee and Mejia develop detailed discussion with respect to the term ‘unlawful’ and they note the absence of definition of ‘unlawful’ could be perceived as deficiency of the Convention. See Mukherjee and Mejia, note 175 above, at 176-77.; Özçayır also notes that it is not clear whether the unlawfulness will be determined according to international or national law. See Özçayır, note 171 above, at 439.

would not be likely to ratify the Convention. Moreover, it is unlikely that states which are not party to the NPT would become a party to the 2005 SUA Protocols. It was seen previously, that India strongly objected to the saving clause because it would be discriminatory to non-state parties to those treaties.²²⁴ In order to stop, search, board, and seize a vessel, not only the ‘requesting state,’ but also the ‘requested state (flag state)’ surely needs to be a party to the 2005 SUA Protocols. The 2005 Protocol to the SUA Convention will enter into force ninety days after the date on which twelve states have “either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession with the Secretary-General.”²²⁵ For the 2005 Protocol to the SUA Protocol for Fixed Platforms, it requires ratification from three States which are also parties to the SUA Protocol for Fixed Platforms, however, it will not enter into force before the 2005 Protocol to the SUA Convention has entered into force.²²⁶ As of June 6, 2008, six states have signed the 2005 Protocol to the SUA Convention and four states the 2005 Protocol to the SUA Protocol for Fixed Platforms.²²⁷ However, none of the above signatures is operative.²²⁸

4.3.3. Correlation between the 2005 SUA Convention and boarding agreement

The provisions which are newly set in the 2005 SUA Convention use quite

²²⁴ See discussion in this Chapter, 4.2.1.

²²⁵ 2005 SUA Convention, Article 18(1).

²²⁶ 2005 SUA Fixed Platforms Protocol, Article 9(1).

²²⁷ See IMO, Council report, C 100/17/Add.1.

²²⁸ Ibid.

similar language to that used in the bilateral boarding agreements which the United States has been proceeding since 2004 to enhance its PSI activities.²²⁹ For example, Article 4(3)(d) of the boarding agreement which the United States made with Liberia states;

[I]f there is no response from the Competent Authority of the requested Party [flag state] *within two hours* of its acknowledgment of receipt of the request, the requesting Party will *be deemed to have been authorized* to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea.²³⁰ (Italics added by author for emphasis)

Two-hours is set in the case of the boarding agreement between the United States and Liberia for deemed authorization if there is no response for the request of the requesting party. Moreover, under Article 5 of the agreement, the flag state may even waive its right to exercise jurisdiction over detainment, seizure, forfeiture, arrest, and prosecution and authorize the enforcement of the requesting party's law against the vessel.²³¹ This boarding agreement already entered into force on December 9, 2004. As previously indicated, the United States has signed similar boarding agreements with Panama, the Marshall Islands, Croatia, Cyprus, Belize,

²²⁹ See discussion in Chapter 3, 3.7.

²³⁰ See note 146 above.

²³¹ *Ibid.*, Article 5.

Malta, and Mongolia, and those boarding agreements, except Mongolia, have already entered into force.²³² By making a boarding agreement, the issue of flag state jurisdiction on the high seas can be overcome. Moreover, the United States does not need to wait for the slow ratification pace of the 2005 SUA Convention and its entry into force. It seems that ship boarding agreements allow more dynamic PSI operations than the 2005 SUA Convention would provide. That is why, the United States has been consecutively processing the agreements with the major flags of registry countries.

²³² See Bureau of International Security and Nonproliferation, note 143 above.

CHAPTER 5. RESPONSES TO THE PSI IN THE EAST ASIAN REGION

The notion of non-proliferation of WMD seems to have been acknowledged world wide as a precaution against terrorism, especially after the tragic incident of 9/11. It is also a great concern among the states in the East Asian region where one of the “proliferation concern states” is located.²³³ Although the PSI activities are in line with non-proliferation of WMD, the perceptions of the initiative that each country has seem to be different. In this section, the responses of the major countries in the East Asian region towards the PSI will be overviewed.

5.1. Japan

Japan, as the only country that has suffered from the tragic use of atomic bombs, has been pursuing global disarmament and non-proliferation to achieve international peace and security.²³⁴ Japan sees the PSI as consistent with Japanese efforts towards the non-proliferation of WMD, delivery system, and the related materials, and, as such, joined the initiative at its establishment.²³⁵ Moreover, Japan

²³³ Glosserman introduces the importance of the East Asian region from economic point of view. Brad Glosserman, "An Action Plan to Counter the Proliferation of Weapons of Mass Destruction in the Asia Pacific," *Pacific Forum CSIS: Issues & Insights* 6, no. 5 (March 2006).

<http://www.csis.org/pacfor/issues/>.

²³⁴ See web-site of the Ministry of Foreign Affairs of Japan.

<http://mofa.go.jp/index.html>.

²³⁵ See Ministry of Foreign Affairs Arms Control and Scientific Affairs, *Japan's Disarmament*

has been involved in the development of the principles of the PSI, the SOP, published in Paris in 2003, and actively engaged in PSI activities.

In 2003, Japan attended the first PSI exercise, called “*PACIFIC PROTECTOR*,” which was held in the Coral Sea off of Australia during September 10-13, and hosted by Australia, with France, Japan, and the United States participating.²³⁶ In October 2004, Japan hosted the PSI exercise “*TEAM SAMURAI 04*” with the same five countries that had participated in the “*PACIFIC PROTECTOR*,” participating in the exercise. Originally, this exercise was planned to be held in May, however, it was postponed until October because of concerns regarding China, North Korea, and South Korea.²³⁷ The deployment of the Japan Maritime Self-Defense Force (JMSDF) in the exercise was criticized by these countries because of Japan’s historical imperialism. As a result, the Japan Coast Guard (JCG), as a law enforcement agency, stopped and searched a suspicious vessel while guarded by the JMSDF during the scenario.²³⁸ In 2007, Japan also hosted another exercise, “*PACIFIC SHIELD 07*” where 40 countries, including observers, attended.²³⁹

and Non-Proliferation Policy, 3rd ed. (2006), 172.
<http://www.mofa.go.jp/policy/un/disarmament/policy/pamphlet.html>.

²³⁶ See web-site of Department of Defence, Australian Government.

<http://www.defence.gov.au/psi/default.htm>. As a total, representatives from 10 countries including the observers participated in the exercise.

²³⁷ See Valencia, note 1 above, at 62.; Persbo, note 74 above.

²³⁸ Alongside the said scenario, another scenario was held where the United States, France, and Australia conducted interdiction operations using their naval forces, so that Japan did not join the military operations. See Mayuka Yamazaki, “Origin, Developments and Prospects for the Proliferation Security Initiative,” (2006), http://isd.georgetown.edu/JFD_2006_PSA_Yamazaki.pdf.

²³⁹ For the exercise itself, Australia, France, Japan, New Zealand, Singapore, the United Kingdom, and the United States participated. As observers, Brunei, India, Laos, Malaysia, Marshall Islands, Mongolia, Pakistan, Papua New Guinea, Philippines, Russia, Vietnam attended in Asia and Oceania.

Japan has also conducted outreach activities so that the level of understanding of Asian countries concerning PSI would rise. Japan has been hosting “*Asian Senior-level Talks on Non-Proliferation (ASTOP)*” since 2003 to strengthen efforts for the non-proliferation of WMD and related materials and increase the awareness of non-proliferation in Asia, where the role of PSI activities is also discussed.²⁴⁰ All the members of Association of Southeast Asian Nations (ASEAN) and several other countries which share common interests in the security of Asia have been attending the ASTOP. The United States and South Korea have been attending the ASTOP since 2003 and China joined since the 2nd meeting held in 2005.²⁴¹

5.2. China

China’s geographical features have their important meaning to the PSI activities where a land border is shared with North Korea and the air routes between North Korea and its WMD trading partners in South Asia and the Middle East pass through Chinese airspace.²⁴² Thus, China’s participation in the PSI is desirable for other PSI participants to strengthen its effectiveness. However, China reserves its position and concerns about the legality and the possible consequences of the

²⁴⁰ See web-site of the Ministry of Foreign Affairs of Japan.

<http://mofa.go.jp/index.html>.

²⁴¹ On May 1, 2008, Fifth ASTOP was held in Tokyo and ASEAN member countries, Australia, Canada, China, New Zealand, Republic of Korea, the United States, and Japan, the host, participated in the meeting. See web-site of the Ministry of Foreign Affairs of Japan.

<http://mofa.go.jp/index.html>.

²⁴² See Andrew Newman and Brad Williams, "The Proliferation Security Initiative: The Asia-Pacific Context," *Nonproliferation Review* 12, no. 2 (2005): 311.

interdiction operations.²⁴³ At a Press Conference on December 4, 2003, the Chinese Foreign Ministry spokesperson commented on China's position towards the PSI;

the Chinese side understands the concerns of the PSI participating countries about the proliferation of WMD and their vehicles of delivery. However the international community also has some concerns about the legitimacy, effectiveness and possible consequences of the interception measures of PSI. The PSI participating countries should give it a serious consideration. China has always maintains that the proliferation issue should be handled through diplomatic and political methods within the framework of international laws, and all anti-proliferation measures should contribute to the international and regional peace, security and stability.²⁴⁴

Moreover, at the Press Conference on February 17, 2004, when Bolton, then-U.S. Under Secretary of State for Arms Control and International Security,

²⁴³ China's reservation about the PSI also seems to come from its fearing of disruption of China's international trade; skepticism of U.S. intention toward Taiwan; friendly relationship with North Korea; and fearing of affection to China's Navy. See James Holmes, "Rough Waters Ahead," *Bulletin of the Atomic Scientists* 61, no. 6 (2005). <http://thebulletin.metapress.com/home/main.mpx>; Jessica Van Parys, "China's Challenge to the Proliferation Security Initiative," *The Monitor* 13, no. 1 (2007). <http://www.uga.edu/cits/>; Michael Richardson, *A Time Bomb for Global Trade: Maritime-Related Terrorism in an Age of Weapons of Mass Destruction* (Singapore: Institute of Southeast Asian Studies, 2004), 104.; Ye Ru'an and Zhao Qinghai, "The PSI: Chinese Thinking and Concern," *The Monitor* 10, no. 1 (2004), 22-24. <http://www.uga.edu/cits/>.

²⁴⁴ Foreign Ministry Spokesperson's Press Conference on 4 December, 2003, Ministry of Foreign Affairs of the People's Republic of China. <http://www.fmprc.gov.cn/eng/xwfw/2510/2511/t55556.htm>.

visited Chinese officials, China reiterated the above comment.²⁴⁵ Nevertheless, Bolton appreciated China's understanding of the concern of PSI participating states with respect to WMD proliferation and emphasized that "[b]oth China and the United States obviously are firmly opposed to proliferation of weapons of mass destruction (WMD) and their means of delivery."²⁴⁶ At the meeting, China and the United States agreed to enhance cooperation regarding information exchange and to continue a dialogue on PSI issues.²⁴⁷ However, it is still doubtful whether China will *willingly* exchange information, considering the relationship with North Korea.

5.3. Russia

Initially, Russia stayed out of the PSI, considering its legality under international law, even though the United States had tried to persuade them, and was the only member of the Group of Eight (G-8) not to join.²⁴⁸ However, on May 31, 2004, while the first anniversary meeting of the PSI was being held in Krakow, Poland, the Ministry of Foreign Affairs of the Russian Federation issued a press release in Moscow, stating that "[t]he threats of WMD proliferation bear a global character and, accordingly, demand a global response. We are convinced that only by collective efforts is it possible to cope with them....The principles for the Proliferation Security Initiative ... correspond to our line in the field of

²⁴⁵ Foreign Ministry Spokesperson's Press Conference on 17 February, 2004, Ministry of Foreign Affairs of the People's Republic of China.

<http://www.fmprc.gov.cn/eng/xwfw/2510/t66681.htm>.

²⁴⁶ Bolton, note 60 above.

²⁴⁷ *Ibid.*

²⁴⁸ See Yann-Huei Song, "An Overview of Regional Responses in the Asia-Pacific to the PSI," *Pacific Forum CSIS: Issues & Insights* 4, no. 5 (2004).

<http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&v33=106592&id=34568>.

nonproliferation.”²⁴⁹ The announcement was greatly welcomed by the United States and other PSI participants. Bolton welcomed Russia’s participation by noting “[w]e expect that our intelligence-sharing and law enforcement and military assets working with the Russian Federation will make a major contribution to our effort to interdict WMD trafficking worldwide.”²⁵⁰ He also stated that “Russia is a great naval power and it has extensive land and air space that can be used for commercial activities, which we hope and expect will now be closed to proliferators.”²⁵¹

However, it seems Russia is still concerned about the PSI’s legality under international law and a press release noted that Russia will contribute to the PSI, “with consideration for the compatibility of the actions with the rules of international law, for their conformance to national legislation and for the commonality of nonproliferation interests with the partners.”²⁵² It is not clear whether Russia will actually support PSI operations when “states of proliferation of concern” commit their proliferation activities.

5.4. South Korea

Given its delicate position, South Korea has remained outside the PSI. Its stance towards the PSI reflects its foreign policy, the “*Sunshine Policy*,” that has

²⁴⁹ Ministry of Foreign Affairs of the Russian Federation, Press release: On Russia’s Participation in Proliferation in Security Initiative (PSI). <http://www.ln.mid.ru/bl.nsf/062c2f5f5fa065d4c3256def0051fa1e/2e1470910be746b6c3256ea600359aef?OpenDocument>.

²⁵⁰ Bolton, note 61 above.

²⁵¹ Ibid.

²⁵² See note 249 above.

attempted to ease tensions and achieve peaceful cooperation with North Korea, initiated by former President Kim Dae-Jung and succeeded by former President Roh Moo-hyun, until the current President Lee Myung-bak has taken a more aggressive stance towards North Korea. On December 29, 2005, the South Korea National Security Council, reportedly decided to allow its officials to attend the PSI exercises as observers.²⁵³ South Korea's Minister of Foreign Affairs and Trade, Pan Ki-mun, stated that the South Korean government's position was to "cooperate on a case-by-case basis."²⁵⁴ North Korea promptly reacted to South Korea's decision and a spokesman for the Committee for the Peaceful Reunification of the Fatherland denounced that the decision is "unforgivable anti-national crime against fellow countrymen."²⁵⁵ Moreover, the Korean Central News Agency (KCNA), the state-run agency of the Democratic People's Republic of Korea (DPRK) and speaking for the Workers' Party of Korea and the government, wrote that South Korea's attendance at the PSI is "a dangerous action of bedeviling the favorably developing inter-Korean relations and bringing nuclear holocaust to the Korean Peninsula" and it urged South Korea to withdraw its decision, otherwise it will be "accountable for all the consequences to be entailed."²⁵⁶

²⁵³ See "Official Says ROKG Consents to 'Objective' of PSI to Prevent WMD," Yonhap News Agency, January 24, 2006; "ROK FM 'Official': ROK 'Will Not Participate' in PSI, 'But Just Observe It'," Yonhap News Agency, January 25, 2006., as cited in James Martin Center for Nonproliferation Studies, "South Korea's Participation in PSI Causes Controversy," *International Export Control Observer* February 2006, no. 4 (2006). <http://cns.miis.edu/pubs/observer/>. The decision was kept secret for more than four weeks before it was revealed on January 24, 2006, for the fear of negative impact on the six-party talks to end North Korea's nuclear weapons program. See Ibid.

²⁵⁴ Ibid.

²⁵⁵ Korean Central News Agency of DPRK, "S. Korean Authorities' Decision to Join in PSI Drill Assailed" February 10, 2006, <http://www.kcna.co.jp/index-e.htm/>.

²⁵⁶ Ibid.

Although South Korea may not participate in the PSI activities, remaining as an observer, at least it is likely to cooperate on non-operational issues, such as information sharing, considering its close military relationship with the United States.

5.5. North Korea

PSI activities are not directed at any single country, however, instead, at would-be proliferators to hamper the worldwide trafficking of WMD, delivery systems, and related materials. Nevertheless, it is also commonly acknowledged that North Korea is being targeted by the fact that the PSI was evolved from the *So San* incident where a North Korean vessel was stopped by the Spanish Navy and searched by Spanish and American officials while it was transporting scud missiles from North Korea to Yemen. Moreover, at the second PSI meeting held in Brisbane, Australia, in July 2003, the Chairman's Statement noted that "states and non-state actors of proliferation concern" referred to North Korea and Iran.²⁵⁷ Further, Bolton noted that "[w]ithout doubt, North Korea remains the world's foremost proliferator of ballistic missiles and related technology to rogue states and hostile regimes."²⁵⁸

In response to the PSI, North Korea has been denouncing the initiative. At the time when the first PSI exercise, "*PACIFIC PROTECTOR*" was conducted in September 2003, North Korea condemned PSI activities stating that it is "a wanton violation of the sovereignty of the DPRK and intolerable military provocations as it

²⁵⁷ Bureau of Nonproliferation, note 20 above. See section 2.3.1 for discussion about "States and non-state actors of proliferation concern."

²⁵⁸ Bolton, note 40 above.

was a prelude to a nuclear war.”²⁵⁹ It also noted that the PSI would lead “the DPRK-U.S. relations to an explosive phase.”²⁶⁰ Moreover, when Japan was planning to host the PSI exercise in May 2004 and invited ASEAN members to observe it, North Korea judged that “its sovereignty is infringed upon even a bit owing to the vicious blockade of Japanese reactionaries its army and the people will counter it with a strong retaliation.”²⁶¹ Considering its impact on neighbouring countries, Japan postponed the exercise until October later that year.

²⁵⁹ Korean Central News Agency of DPRK, "KCNA Assails U.S.-Led Multinational Naval Blockade Exercises," September 16, 2003, <http://www.kcna.co.jp/index-e.htm/>.

²⁶⁰ Korean Central News Agency of DPRK, "U.S. Moves against DPRK under Fire," September 13, 2003, <http://www.kcna.co.jp/index-e.htm/>.

²⁶¹ Korean Central News Agency of DPRK, "Japan's U.S.-Toeing Attitude Hit," March 30, 2004, <http://www.kcna.co.jp/index-e.htm/>.

CHAPTER 6. CONCLUSION AND THE WAY FORWARD

6.1. Conclusion

Proliferation of WMD, delivery systems, and related materials to and from states and non-state actors of proliferation concern certainly poses great threats to the world. Thus, preventing the flow of WMD has been continuing efforts for the global community to maintain international peace and security. It is especially true for the United States where big scale terrorist attacks were brought about as realities on September 11, 2001. It has also been a top priority agenda among the states in East Asia where one of the “proliferation concern states” is located.

In the meanwhile, the *So San* incident clearly demonstrated that existing regimes did not have enough capabilities to hamper the proliferation of WMD and related materials. The PSI, announced in May 2003, in Krakow, Poland, with the commitments of 11 countries, was the answer that the United States and like-minded countries had sought in order to break through the situation. The PSI is a multilateral effort that aims to interdicting the shipments of WMD and related materials to and from states and non-state actors of proliferation concern. The PSI activities involve, *inter alia*, information sharing and interdiction exercises among the participants. More than 30 interdiction exercises have been conducted since 2003 to promote international cooperation and capacity building to prevent

trafficking of WMD and related materials (See Appendix C).²⁶² The exercises also contain clear and strong message to proliferators that PSI members are committed to making cooperative effort to prevent proliferation of WMD.²⁶³

The PSI is said to be an “activity” rather than an organization. It has no headquarters, secretariat, and budget. The cooperation that will be expected for the activities is on an *ad hoc* basis. This flexibility is considered to be one of the reasons that understanding of the initiative widely spread since its interception. On May 28, 2008, representatives of more than 80 countries, including non-participating states to the initiative such as China, India, and Pakistan, gathered in the PSI fifth anniversary senior-level meeting, held in Washington D.C., the United States.²⁶⁴ The number of the participants to the initiative has increased since its interception and as of May 28, 2008, 91 countries have participated in the initiative (See Appendix B).²⁶⁵

This dissertation has attempted to provide a critical review of the PSI and addressed its incompatibilities with UNCLOS. For example, under UNCLOS vessels of all states are given the “right of innocent passage” in the territorial sea and the coastal state cannot infringe the innocent passage unless the passage is prejudicial to the peace, good order or security of the coastal states. Transportation of WMD

²⁶² U.S. Department of State Bureau of Public Affairs, "United States to Host Fifth Anniversary Proliferation Security Initiative Meeting; National Security Advisor Steve Hadley to Providekeynote Address," May 22, 2008, <http://www.state.gov/r/pa/prs/ps/200/may/105147.htm>.

²⁶³ Ibid.

²⁶⁴ U.S. Department of State Bureau of Public Affairs, "Washington Declaration for PSI 5th Anniversary Senior-Level Meeting," May 28, 2008, <http://www.state.gov/r/pa/prs/ps/2008/may/105268.htm>; See also Wade Boese, "Interdiction Initiative Successes Assessed," *Arms Control Today* (July/August 2008). <http://www.armscontrol.org/>.

²⁶⁵ Bureau of International Security and Nonproliferation, note 57 above.

and related materials, however, does not constitute criteria that are prejudicial to the peace, good order or security of the coastal states under Article 19(2). Moreover, on the high seas, vessels are given the “freedom of navigation.” States may conduct a “right of visit” to a vessel if the vessel is reasonably suspected engaging in the activities provided under Article 110. However, again, the conditions given in it do not include transportation of WMD and related materials. Further, flag states are guaranteed its exclusive jurisdiction on the high seas, thus, PSI participants are not allowed to take measures against a vessel without consent of the flag state on the high sea. These PSI’s incompatibilities with UNCLOS made several countries, such as China, remain outside the initiative. In order to overcome these dilemmas, the United States has been concluding boarding agreements with the major flags of registry countries.

This dissertation has also conducted a review of two 2005 SUA Protocols in relation to the PSI. It has demonstrated the 2005 SUA Protocols will strengthen the worldwide trend of counter-terrorism and it will also greatly enhance the PSI’s legitimacy. As examined in this research, newly developed Protocols have criminalized transportation of WMD and related materials under Article 3bis(b) although there is a condition that the person should “unlawfully and intentionally” commit the offence under the Article. Moreover, under Article 8bis, states are given strong legal basis to stop, search, and seize WMD and related materials on board a foreign flagged vessel on the high seas if the flag state authorizes them to do so. Upon entering into force, the PSI participants will finally acquire their legal foundation for the interdiction operations. Nevertheless, it seems to take years for

its entry into force. As of June 6, 2008, six states have signed the 2005 Protocol to the SUA Convention, however, none of them are operative. The slow ratification pace of the 2005 SUA Protocols is another reason why the United States has been consistently proceeding the boarding agreements with the major flags of registry countries. Boarding agreements likely allow more dynamic PSI operations beyond the 2005 SUA Protocols.

Moreover, responses towards the PSI in the East Asian region are carefully reviewed in this dissertation. It has demonstrated that, given its delicate situation in the region, not all the countries are *willing* to participate in the initiative, although they share the same concern towards the proliferation of WMD and related materials. While Russia finally agreed to join the initiative, it still holds its concern about the legality of the initiative. China and South Korea remain outside of the initiative although they seem to join intelligence sharing for non-proliferation of WMD in general. China has also been expressing its concern about the legitimacy of the initiative. It seems only Japan has been actively engaging in the initiative as can be seen in their outreach activities such as ASTOP that aims to strengthen efforts and increase awareness towards non-proliferation of WMD and related materials in Asia-Pacific region. On the contrary, North Korea has been strongly against the initiative since its interception. It is noted that the PSI would lead the U.S.-North Korea relations to an “explosive phase.”

It is hoped that the examination conducted herein will be useful for understanding the initiative; controversial legal issue under UNCLOS; implication of the 2005 SUA Protocols in the PSI perspective; and the reaction of the East Asian

countries towards the initiative. It is further hoped that this dissertation would help administrators or policy-makers making a non-proliferation policy. It is recognized that the current structure of the PSI entails several shortcomings and, thus, it is difficult to acquire global support. Without global understandings, the effectiveness of the initiative would certainly be limited. However, this does not mean that the idea of the PSI is wrong. On the contrary, such kind of non-proliferation regime is under a growing demand in the worldwide trend of counter-terrorism to maintain international peace and security. The PSI still has its potential to be accepted if the participants make necessary modifications to it.

To end this dissertation, the following suggestions are presented, hoping the PSI to be a full-fledged regime so that it will be able to contribute toward international peace and security.

6.2. The way forward

6.2.1. Establishing a formal organization

As stated above, the notion of the PSI is maintained by its characteristic as an “activity” rather than an organization. As such, if interdiction operation is considered, supporters of the PSI will be able to engage in it depending on their own “*willingness*” and take preferable measures according to their political situation at that time. This flexibility can be considered as an advantage of the PSI and it will allow involving states speedy decision making and shifting to interdiction operations promptly. Moreover, this flexibility is considered to be one of the reasons that led

Russia to participate in the PSI although their commitment is still doubtful.²⁶⁶ It has finally got understandings from China and South Korea although they are not considered as participants in the initiative, and they are also expected to be involved with respect to information sharing. Considering the delicate situation in East Asia, the flexibility of the PSI seems to fit into the region.

However, as has been noted above, it is doubtful whether concerned countries will be willing to exchange information under its informal structure. This concern may undermine the basis of the PSI activities where it aims to hamper illicit trafficking of WMD based on intelligence from its supporters. Moreover, the lack of formal organization would increase the risks of conflict in interdiction operation and raise unnecessary questions.²⁶⁷ What constitutes “states of proliferation concern”? What kind of related materials would cause threats, especially if they are dual-use? How and who would command the case, bearing such uncertainties? Further, as long as it does not have a formal body and budget, its status will always remain vulnerable as governments’ policy changes, the governments’ priority for non-proliferation and their view for the PSI would change.²⁶⁸

In order to overcome such concerns, the PSI must be established under a formal mechanism where a budget is provided and regular intelligence sharing among all participants would be conducted. This will strengthen the validity of the intelligence and enhance the sustainability of the PSI. Valencia notes that it should be brought into the UN auspices as it is advocated in an Act that was approved in House

²⁶⁶ Prosser and Scoville, note 157 above.

²⁶⁷ Garvey, note 88 above, at 137.

²⁶⁸ See Richard Bond, "The Proliferation Security Initiative: Three Years On," *BASIC NOTES* (2006). <http://www.basicint.org/pubs/Notes/BN060802.pdf>.

of Representatives in the United States.²⁶⁹ However, as Joseph notes, Missile Technology Control Regime (MTCR) would be a reasonable model for the PSI, where the French Ministry of Foreign Affairs carries out point-of-contact functions, including distribution of working papers to members and hosting of monthly experts meetings.²⁷⁰ Unlike putting it under UN system, it will be able to keep its “flexibility” and provide better communication channel among participants. By formalizing the initiative and following to the MTCR as its model, the PSI would increase its credibility and sustainability as a non-proliferation regime.

6.2.2. Strengthening the legality of the PSI operation

Both Russia’s initial hesitation to join the initiative and China’s current status to remain outside of the PSI is due to the lack of its operational legality. As previously discussed, the new 2005 SUA Protocols will provide strong legal basis for interdiction operation. The Protocols criminalize transportation of WMD and the related materials; moreover, states are given legal basis to stop, search, and seize the illicit cargos on board a foreign flagged vessel on the high seas if the flag state authorizes them to do so. Accordingly, states are strongly encouraged to sign and

²⁶⁹ Valencia, note 1 above, at 74, and note 159 above. See also Valencia, "Put the PSI under the UN," *Global Asia* 3, no. 2 (2008), 46. http://globalasia.org/pdf/issue6/v3n2_valencia.pdf. The Act notes that the President should strive to expand and strengthen the PSI by “[w]orking with the United Nations Security Council to develop a resolution to authorize the PSI under international law.” It also requires the Secretary of State and the Secretary of Defense to submit a defined budget for the PSI. See “Implementing the 9/11 Commission Recommendations Act of 2007,” Section 1221, “Proliferation Security Initiative Improvements and Authorities,” 1st Session, 100th Congress.

²⁷⁰ Joseph, note 46 above.; Gahlaut also notes that the PSI shares common characteristics with other multilateral export control regimes – the Nuclear Suppliers Group (NSG), the Missile Technology Control Regime (MTCR), and the Australia Group (AG). See Seema Gahlaut, "The PSI Will Parallel the Multilateral Export Control Regimes," *The Monitor* 10, no. 1 (2004). [http://www.uga.edu/cits/..](http://www.uga.edu/cits/)

ratify the two SUA Protocols to enhance its effectiveness. However, it may not be a short-term solution, considering its pessimistic views for entering into force as previously discussed. That is why the United States has been signing bilateral agreements with major flag of registry countries, so that they can interdict WMD and the related materials legitimately under the consent of flag state. Nevertheless, it does receive criticisms. As the number of participants grows, “they may be able to bend international law, but they cannot rewrite it.”²⁷¹ However, bending international law will lead other states to justify their aggressive action.²⁷²

The issue of legality is a root obstacle that has to be overcome. To solve this problem, the PSI participants should consider introducing a UN Security Council resolution that will authorize the interdiction of suspected WMD in international waters. The UN Security Council Resolution 1540 has been introduced to request all states “to take cooperative action” to prevent illicit trafficking in WMD and the related materials. However, it does not provide any new legal authority to carry out interdiction operation. The PSI supporters need to develop a UN Security Council resolution that will go beyond the Resolution 1540 and will authorize interdiction of WMD and the related materials.²⁷³ Under Article 42 of Chapter VII of Charter of the United Nations, Security Council may “take such action by air, sea, or land forces as may be necessary to maintain or resort international peace and security.”²⁷⁴

²⁷¹ Friedman, note 3 above, at 8.

²⁷² Ibid.

²⁷³ Michael Becker, "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea," *Harvard International Law Journal* 46, no. 1 (2005), 219. <http://dialnet.unirioja.es/>. On the contrary, Lehrman suggests that PSI participants sign ship boarding agreements to ensure the resolution's enforcement. See Lehrman, note 157 above, at 24.

²⁷⁴ Charter of the United Nations: Chapter VII, *Action with Respect to Threats to the Peace*,

Clear authorization of interdiction operation under the resolution, including use of armed force, would strongly enhance the PSI activities.²⁷⁵ The European Union (EU) is also considering interdiction operation that includes use of force. Paragraph 4 of the *Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction* states, “When these measures (including political dialogue and diplomatic pressure) have failed, coercive measures under Chapter VII of the United Nations Charter and international law (sanctions, selective or global, interceptions of shipments and, as appropriate, the use of force) could be envisioned.”²⁷⁶

6.2.3. Expanding the outreach activities

The PSI needs to strengthen its outreach efforts to gain global supports so that its effectiveness would be enhanced. The participants at the PSI meeting held in Lisbon, Portugal, in 2004 also agreed that “it was essential to continue broadening the international consensus” which would be carried out by building on outreach activities.²⁷⁷ China is a key country in East Asia, considering its geographical location and relationship with North Korea, to hamper the illicit proliferation of WMD, delivery system, and the related materials. Thus, every effort to gain China’s participation should be continued.

Breaches of the Peace, and Acts of Aggression, Article 41.
<http://www.un.org/aboutun/charter/chapter7.htm>.

²⁷⁵ See Joyner for the argument surrounding the issue of getting authority for the PSI operation under Chapter VII of the UN Charter. Daniel H. Joyner, "The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law," *The Yale Journal of International Law* 30 (2005), 18.

²⁷⁶ European Union, *Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction*, paragraph 4.

http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/76328.pdf.

²⁷⁷ Bureau of Nonproliferation, note 58 above.

Moreover, it is evidenced that North Korea has been exchanging technology and resources with countries in South Asia and the Middle East,²⁷⁸ where transportation between these regions is most likely conducted through the Malacca Straits. Accordingly, cooperation among South East Asian countries is also essential to improve interdiction capability. Singapore has participated in various PSI exercises since December 2003 and officially joined the PSI since March 2004.²⁷⁹ It has also hosted PSI exercise “*DEEP SABRE*” in August 2005. On the contrary, Indonesia and Malaysia are not joining the initiative. Nevertheless, both of them are members of the ASEAN²⁸⁰ and participating ASEAN Regional Forum (ARF)²⁸¹ where WMD proliferation is always one of the top regional security agenda. For example, the Chairman’s Statement of the thirteenth ARF, which was held in Kuala Lumpur, Malaysia, in July 2006, noted that “[t]he Ministers stated that the proliferation of weapons of mass destruction (WMD) and their delivery systems, including potentially to terrorists, remained a serious security challenge” and the Ministers expressed their support for the implementation of the UN Security Council Resolution 1540. Although Indonesia and Malaysia are not joining the initiative, they share the concern for proliferation of WMD.

²⁷⁸ Sharon A. Squassoni, "Weapons of Mass Destruction: Trade between North Korea and Pakistan," *CRS Report for Congress* (2004). <http://fpc.state.gov/documents/organization/30781.pdf>

²⁷⁹ See Ministry of Foreign Affairs Singapore, "Remarks by Chan Heng Chee, Ambassador of Singapore, at the Proliferation Security Initiative (PSI) Second Anniversary Event Department of State, May 31, 2005." <http://app.mfa.gov.sg/home/index.asp>.

²⁸⁰ Members of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. See ASEAN website: <http://www.aseansec.org>.

²⁸¹ Current participants in the ARF is 10 ASEAN states plus Australia, Bangladesh, Canada, China, European Union, India, Japan, Democratic Peoples' Republic of Korea, Republic of Korea, Mongolia, New Zealand, Pakistan, Papua New Guinea, Russian Federation, Timor Leste, and the United States. See ARF website: <http://www.aseanregionalforum.org/>.

When expanding the PSI outreach, Japan has been playing an important role not only in East Asia but also whole Asian region. As previously touched upon, Japan has been hosting ASTOP since 2003 to strengthen efforts for the non-proliferation in Asia where issues of the PSI are also discussed. Moreover, it has been emphasizing cooperation in non-proliferation of WMD among states at Japan-ASEAN summit.²⁸² By enhancing the cooperation among states and expanding the outreach activity to acquire global supports, the effectiveness of the initiative will increase which will lead to achieving international peace and security.

²⁸² See, for example, “Tokyo Declaration for the Dynamic and Enduring Japan-ASEAN Partnership in the New Millennium,” <http://www.mofa.go.jp/>.

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APPENDICES

Appendix A The Proliferation Security Initiative: Statement of Interdiction Principles (SOP)

(Adopted in Paris, September 4, 2003)

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern. The PSI seeks to involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags,

ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the following set of "Interdiction Principles."

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to, international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or

facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
 - a) Not to 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.
 - b) At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial sea 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.

- c) To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d) To take appropriate actions to (1) 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; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
- e) At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
- f) If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes

that are identified.

Source: The White House. "Proliferation Security Initiative: Statement of Interdiction Principles." September 4, 2003.
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Appendix B The List of Proliferation Security Initiative Participants

Afghanistan	Djibouti	Liberia	Romania
Albania	El Salvador	Libya	Russia
Andorra	Estonia	Liechtenstein	Samoa
Angola	Fiji	Lithuania	Saudi Arabia
Argentina	Finland	Luxembourg	Serbia
Armenia	France	Macedonia	Singapore
Australia	Georgia	Malta	Slovakia
Austria	Germany	Marshall Islands	Slovenia
Azerbaijan	Greece	Moldova	Spain
Bahrain	Holy See	Mongolia	Sri Lanka
Belarus	Honduras	Montenegro	Sweden
Belgium	Hungary	Morocco	Switzerland
Belize	Iceland	The Netherlands	Tajikistan
Bosnia	Iraq	New Zealand	Tunisia
Brunei Darussalam	Ireland	Norway	Turkey
Bulgaria	Israel	Oman	Turkmenistan
Cambodia	Italy	Panama	Ukraine
Canada	Japan	Papua New Guinea	United Arab Emirates
Chile	Jordan	Paraguay	United Kingdom
Croatia	Kazakhstan	Philippines	United States
Cyprus	Kyrgyzstan	Poland	Uzbekistan
Czech Republic	Kuwait	Portugal	Yemen
Denmark	Latvia	Qatar	

Current as of May 22, 2008

Source: Bureau of International Security and Nonproliferation, U.S. Department of State. <http://www.state.gov/t/isn/c19310.htm>

Appendix C Proliferation Security Initiative Meetings and Exercises

1. PSI Meetings and Exercises in 2008 and Upcoming Events

PSI Meetings and Exercises in 2008 and Upcoming Events		
	Date	Place
2008	Feb 4-6	Operational Experts Group (OEG) Meeting, London, UK
	Mar. 10-12	Exercise Guistir 08: Djibouti and France-hosted maritime / port interdiction exercise. Key participants: Red Sea and Maghreb countries
	Apr. 8-22	Exercise Phoenix Express 08: U.S. led maritime interoperability exercise in the Mediterranean Sea. Maritime interdiction PSI scenario injects included
	May 12-14	Exercise Adriatic Shield 08: Croatia hosted maritime / port interdiction exercise. Key participants: Adriatic Sea countries, Poland, and the U.S.
	May 28-29	5th Year PSI Anniversary Conference, Washington, DC
	Aug. 11-22	Exercise PANAMAX 08: US hosted. Maritime PSI Scenario Inject
	Sept. 15-19	Exercise MARU 07: Auckland, New Zealand hosted PSI exercise
	Sept. 24-26	Operational Experts Group (OEG) Meeting, Paris, France

2009		Exercise Trade Winds: US SOUTHCOM US/Caribbean Sea LIVEX with maritime interdiction PSI scenario injects
		Exercise Phoenix Express US EUCOM led maritime interoperability exercise in the Mediterranean Sea with maritime interdiction PSI scenario injects
		Exercise Trade Winds: US SOUTHCOM US/Caribbean Sea LIVEX with PSI scenario injects
		Singapore-led PSI exercise in Asia-Pacific
		Exercise LEADING EDGE: U.S. hosted exercise (Persian Gulf)

2. PSI Operational Experts Meetings (2003-2007)

PSI Operational Experts Meetings (2003-2007)			
	Date	Place	No. of meetings per year
2003	July 9-10	Operational Experts Meeting, Brisbane, Australia	5
	July 30	Operational Experts Meeting, London, United Kingdom	
	Sept. 3-4	Operational Experts Meeting, Paris, France	
	Oct. 8-10	Operational Experts Meeting, London, United Kingdom	

	Dec. 16-17	Operational Experts Meeting, Washington, DC, United States	
2004	Apr. 16-17	Operational Experts Meeting, Ottawa, Canada	4
	Aug. 3-4	Shipping Container Security Workshop, Copenhagen, Denmark	
	Aug. 5-6	Operational Experts Meeting, Oslo, Norway	
	Nov. 30- Dec. 2	Operational Experts Meeting, Sydney, Australia	
2005	Mar. 21-22	Operational Experts Meeting, Omaha, Nebraska, United States	4
	July 6-7	Operational Experts Meeting, Copenhagen, Denmark	
	Sept. 14-15	Air Cargo Industry Workshop, Los Angeles, California, United States	
	Nov. 24-26	Regional Operational Experts Group Meeting, Hamburg, Germany	
2006	Apr. 11-12	Operational Experts Meeting, Miami, Florida, United States	4
	July 25-26	Operational Experts Meeting, Singapore	
	Sept. 25-26	Maritime Industry Workshop, London, U.K.	
	Dec. 5-7	Operational Experts Meeting, Montreal, Canada	
2007	Jan. 31-Feb .1	Proliferation Finance Workshop, Washington, DC, United States	3

	Mar. 26-28	Operational Experts Group (OEG) Meeting, Auckland, New Zealand	
	Oct. 2-4	Operational Experts Group (OEG) Meeting, Rhodes, Greece	

3. PSI Exercises (2003-2007)

PSI Exercises (2003-2007)			
	Date	Place	No. of exercises per year
2003	Sept. 10-13	Exercise PACIFIC PROTECTOR: Australia-led maritime exercise conducted in the Coral Sea	4
	Oct. 8-10	Air CPX: United Kingdom-led air interception command post (tabletop) exercise conducted in London, United Kingdom	
	Oct. 13-17	Exercise SANSON '03: Spain-led maritime exercise conducted in the Western Mediterranean	
	Nov. 25-27	Exercise BASILIC '03: France-led maritime exercise conducted in the Western Mediterranean	
2004	Jan. 11-17	Exercise SEA SABER: United States-led maritime exercise conducted in the Arabian Sea, United States	9

	Feb. 19	Exercise AIR BRAKE '03: Italian-led air interception exercise conducted over Italy (Trapani)	
	Mar. 31-Apr. 1	Exercise HAWKEYE: Germany-led customs exercise conducted in Germany (Frankfurt Airport)	
	Apr. 19-22	Exercise CLEVER SENTINEL: Italy-led maritime exercise conducted in the Mediterranean	
	Apr. 19-21	Exercise SAFE BORDERS: Poland-led ground interdiction exercise conducted in Poland (vicinity Wroclaw)	
	June 23-24	Exercise APSE '04: France-led simulated air interception exercise	
	Sept.27-Oct. 1	PSI Gaming Exercise: United States-hosted exercise at Naval War College, Newport, Rhode Island	
	Oct. 25-27	Exercise TEAM SAMURAI '04: Japan-led maritime interdiction exercise	
	Nov. 8-18	Exercise CHOKEPOINT '04: United States-led maritime interdiction exercise	
2005	Apr. 8-15	Exercise NINFA '05: Portugal-led maritime/ground interdiction exercise	6
	June 1-2	Exercise BOHEMIAN GUARD '05: Czech Republic- and Poland-led regional ground interdiction exercise	

	June 7-8	Exercise BLUE ACTION '05: Spain-led air/ground interdiction exercise	
	Aug. 15-19	Exercise DEEP SABRE: Singapore-led maritime/ground interdiction exercise	
	Oct. 3-7	PSI Air Gaming Exercise: Norwegian-hosted exercise at Norwegian Naval Academy, Bergen, Norway	
	Nov. 14-19	Exercise EXPLORING THEMIS: United Kingdom-hosted maritime/CPX interdiction exercise	
2006	Apr. 4-5	Exercise TOP PORT: Netherlands-hosted maritime / CPX interdiction exercise	6
	Apr. 4-6	Exercise PACIFIC PROTECTOR '06: Australia-hosted Air / CPX interdiction exercise	
	May 24-26	Exercise ANATOLIAN SUN: Turkey-hosted combined air, land and sea CPX and LIVEX interdiction exercise	
	June 21-22	Exercise HADES '06: French-hosted air interdiction exercise	
	Sept. 13-15	Exercise AMBER SUNRISE: Poland-hosted with Denmark, Russia and Sweden maritime/ground exercise	

	Oct. 10-31	Exercise LEADING EDGE: U.S. hosted CPX and maritime/ground interdiction exercise (Persian Gulf)	
2007	Apr. 26-27	Exercise SMART RAVEN: Lithuania hosted air interdiction exercise (Key participants: Estonia, Latvia and Poland)	6
	May 27-29	Exercise ADRIATIC GATE: Slovenia hosted ground/port interdiction exercise	
	June 18-22	PSI Gaming Exercise: United States-hosted exercise at Naval War College, Newport, Rhode Island	
	Aug.29-Sept.7	Exercise PANAMAX 07: US hosted. Maritime PSI Scenario Inject	
	Oct. 12-15	Exercise Pacific Shield 07: Japan hosted PSI maritime/port interdiction exercise	
	Oct. 29-31	Exercise Eastern Shield 07: Ukraine hosted combined air, ground, and sea interdiction exercise (Key participants: Bulgaria, Romania, Georgia, Moldova and Poland)	

Source: Bureau of International Security and Nonproliferation, U.S. Department of State. "Calendar of Events." <http://www.state.gov/t/isn/c12684.htm>.

**Appendix D Convention for the Suppression of Unlawful Acts
against the Safety of Maritime Navigation, 2005
(2005 SUA Convention) (extract)**

(Consolidated text of the Convention for the Suppression of Unlawful Acts against
the Safety of Maritime Navigation and of the Protocol of 2005 to the Convention)

Article 1

....

(d) BCN weapon means:

(i) “biological weapons”, which are:

- (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
- (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

(ii) “chemical weapons”, which are, together or separately:

- (1) toxic chemicals and their precursors, except where intended for:
 - (A) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or
 - (B) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or
 - (C) military purposes not connected with the use of chemical weapons

and not dependent on the use of the toxic properties of chemicals as a method of warfare; or

(D) law enforcement including domestic riot control purposes, as long as the types and quantities are consistent with such purposes;

(2) munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (ii)(1), which would be released as a result of the employment of such munitions and devices;

(3) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (ii)(2).

(iii) “nuclear weapons” and other “nuclear explosive devices”.

....

Article 2

1 This Convention does not apply to:

- (a) a warship; or
- (b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
- (c) a ship which has been withdrawn from navigation or laid up.

2 Nothing in this Convention affects the immunities of warships and other Government ships operated for non-commercial purposes.

Article 2bis

....

3 Nothing in this Convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993, of States Parties to such treaties.

....

Article 3bis

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 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.

2 It shall not be an offence within the meaning of this Convention to transport an item or material covered by paragraph 1(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, paragraph 1(b)(iv), if such item or

material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:

- (a) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,
- (b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party's obligations under that Treaty.

Article 3ter

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, *3bis* or *3quater* or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.

Article 3quater

Any person also commits an offence within the meaning of this Convention if that person:

- (a) unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 3, paragraph 1,

article *3bis*, or article *3ter*; or

- (b) attempts to commit an offence set forth in article 3, paragraph 1, article *3bis*, paragraph 1(a)(i), (ii) or (iii), or subparagraph (a) of this article; or
- (c) participates as an accomplice in an offence set forth in article 3, article *3bis*, article *3ter*, or subparagraph (a) or (b) of this article; or
- (d) organizes or directs others to commit an offence set forth in article 3, article *3bis*, article *3ter*, or subparagraph (a) or (b) of this article; or
- (e) contributes to the commission of one or more offences set forth in article 3, article *3bis*, article *3ter* or subparagraph (a) or (b) of this article, by a group of persons acting with a common purpose, intentionally and either:
 - (i) with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in article 3, *3bis* or *3ter*; or
 - (ii) in the knowledge of the intention of the group to commit an offence set forth in article 3, *3bis* or *3ter*.

....

Article 5

Each State Party shall make the offences set forth in articles 3, *3bis*, *3ter* and *3quater* punishable by appropriate penalties which take into account the grave nature of those offences.

Article 5bis

1 Each State Party, in accordance with its domestic legal principles, shall take the

necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in this Convention. Such liability may be criminal, civil or administrative.

2 Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3 Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

....

Article 8

1 The master of a ship of a State Party (the “flag State”) may deliver to the authorities of any other State Party (the “receiving State”) any person who the master has reasonable grounds to believe has committed an offence set forth in article 3, *3bis*, *3ter*, or *3quater*.

....

Article 8bis

1 States Parties shall 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.

....

4 A State Party that has reasonable grounds to suspect that an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed

involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall use their best endeavours to render such assistance within the means available to them.

5 Whenever law enforcement or other authorized officials of a State Party (“the requesting Party”) encounter a ship flying the flag or displaying marks of registry of another State Party (“the first Party”) located seaward of any State’s territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, *3bis*, *3ter* or *3quater*, and the requesting Party desires to board,

- (a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and
- (b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as “the flag State”) for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed, and
- (c) the flag State shall either:
 - (i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; 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, subject to any conditions it may impose in accordance with paragraph 7; or
- (iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.

- (d) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed, if there is no response from the first Party within our hours of acknowledgement of receipt of a request to confirm nationality.
- (e) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed.

The notifications made pursuant to this paragraph can be withdrawn at any time.

6 When evidence of conduct described in article 3, *3bis*, *3ter* or *3quater* is found as the result of any boarding conducted pursuant to this article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall promptly inform the flag State of the results of a boarding, search, and detention conducted pursuant to this article. The requesting Party shall also promptly inform the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

7 The flag State, consistent with the other provisions of this Convention, may subject its authorization under paragraph 5 or 6 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.

8 For all boardings pursuant to this article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the flag State may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under article 6.