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The Proliferation Security Initiative: Navigating the Legal Challenges

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Cover Page Footnote

Associate, Latham & Watkins LLP; J.D., Georgetown University Law Center, 2005; B.A., Cedarville University, 2001. This paper was prepared and presented while the author was a legal intern at the International Tribunal for the Law of the Sea. Special thanks to Elisabeth Bowes for her invaluable insight on the topic.

THE PROLIFERATION SECURITY INITIATIVE: NAVIGATING THE LEGAL CHALLENGES

SAMUEL E. LOGAN*

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I. INTRODUCTION

A. Background

On December 10, 2002, Spanish authorities stopped and boarded the *So San*, a Cambodian-registered cargo ship, 600 miles off the coast of Yemen.¹ The ship, purporting to deliver cement from North Korea to Yemen, flew no flag and took evasive measures to avoid inspection.² When Spanish and U.S. authorities searched the vessel, they discovered fifteen Scud missiles underneath 40,000 sacks of cement.³ Though the vessel was seized, it was later released because, according to the United States, “There is no provision under international law prohibiting Yemen from accepting delivery of the missiles from North Korea.”⁴ In this case, the vessel’s failure to fly a flag formed a reasonable basis for

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1. James Harding et al., *US Releases Missiles Ship for Yemen*, FINANCIAL TIMES (London), Dec. 12, 2002, at 10; Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, ASIL INSIGHTS (Dec. 12, 2002), at <http://www.asil.org/insights/insigh94.htm>; Andrew C. Winner, *The PSI As Strategy*, 10 THE MONITOR 9, 11 (2004), available at http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

2. Kirgis, *supra* note 1.

3. *Id.*

4. Harding et al., *supra* note 1.

stopping and searching the vessel;⁵ however, because Yemen was not party to a treaty requiring it to refuse the shipment, and was not at war with Spain or the United States, the vessel could not be detained or the cargo seized.⁶

This embarrassing incident highlighted the need for a further international non-proliferation regime. With the end of the Cold War and the subsequent breakdown of the Soviet Union, WMD⁷ have become more accessible to terrorists. Moreover, the terror attacks of September 11, 2001, have caused many countries to become increasingly concerned that WMD may fall into the hands of states or non-state actors who have the will to use them to destabilize entire regions and undermine global security.⁸ In the case of the *So San*, for example, the United States and its allies were particularly concerned that Yemen intended to sell the Scuds to Libya, Syria, or Iran.⁹

Until recently, diplomatic efforts to stem the flow of these WMD had taken the form of formal international agreements such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),¹⁰ the Chemical Weapons Convention (CWC),¹¹ and the Biological Weapons Convention.¹² However, recent years and months have

5. Kirgis, *supra* note 1.

6. *Id.*

7. The term "WMD," shorthand for "weapons of mass destruction," is admittedly imprecise, but will be used throughout this paper to refer to nuclear, chemical, and biological weapons and, where appropriate, their delivery systems and related material.

8. U.S. DEP'T OF STATE, OFFICE OF THE PRESS SECRETARY, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES [hereinafter INTERDICTION PRINCIPLES], available at <http://www.state.gov> (Sept. 4, 2003).

9. This suspicion was due in part to the fact that the missiles did not appear on the ship's cargo manifest, even though the shipment was not illegal per se. See Harding et al., *supra* note 1.

10. Treaty for the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. On January 11, 2003, North Korea announced its intention to withdraw from the Treaty, thereby relieving itself of its formal obligation not to traffic in WMD. INTERNATIONAL ATOMIC ENERGY AGENCY, IN FOCUS: IAEA AND DPRK: FACT SHEET ON DPRK NUCLEAR SAFEGUARDS, available at <http://www.iaea.org> (May 2003); see also Andrew Ward, *N. Korea Quits Nuclear Non-proliferation Treaty*, FINANCIAL TIMES (London), Apr. 11, 2003, at 11. The PSI, introduced about six weeks after the withdrawal became effective, is likely intended to help fill the resultant gap in the anti-proliferation framework. E.g., Mark T. Esper & Charles A. Allen, *The PSI: Taking Action Against WMD Proliferation*, 10 THE MONITOR 4 (2004), available at http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

11. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317, available at http://www.opcw.org/docs/cwc_eng.pdf.

12. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163. North Korea is a party to the Biological Weapons Convention, but it is not a party to the Chemical Weapons Convention. ANDREW PROSSER, CENTER FOR DEFENSE INFORMATION, THE PROLIFERATION SECURITY INITIATIVE IN PERSPECTIVE n.30 (June 16, 2004),

seen significant changes in the approach to non-proliferation. The International Maritime Organization's (IMO) International Ship and Port Facility Security Code (ISPS Code), for example, is an intricate and exhaustive attempt to prevent acts of terrorism at sea.¹³ The Proliferation Security Initiative (PSI) aims to complement existing international arms control arrangements by creating a loose partnership of countries whose aim is to stop the illicit transport of WMD on the oceans.¹⁴

B. What is the PSI?

The PSI is a loose alliance of countries committed to non-proliferation of WMD via shipping routes on land, air, and sea — though, to this point, the PSI has focused primarily on ocean transport.¹⁵ The PSI was proposed by U.S. President George W. Bush on May 31, 2003, in Krakow, Poland, and was initially joined by eleven countries — Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.¹⁶ In December 2003, Canada, Denmark, Norway, and Singapore joined the PSI; the Czech Republic joined in April 2004, and Russia joined in May 2004.¹⁷ Currently, “[m]ore than [sixty] countries have expressed their support for the initiative.”¹⁸ In July 2003, the PSI partner countries, meeting in Brisbane, Australia, agreed upon a Statement of Interdiction Principles that provides a framework for action against proliferation.¹⁹

Who are the real targets of the PSI? According to the Statement of Interdiction Principles, the PSI aims to prevent proliferation among “states and non-state actors of proliferation concern,” defined as:

[T]hose countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in

at <http://www.edi.org/pdfs/psi.pdf>.

13. *E.g.*, S. REP. NO. 108-10, at 110 (2004) (statement of Rear Admiral John E. Crowley, Jr., Chief Counsel and Judge Advocate General, U.S. Coast Guard, Dep't of Homeland Security).

14. PROSSER, *supra* note 12.

15. *See* Esper & Allen, *supra* note 10, at 5.

16. Winner, *supra* note 1, at 10.

17. *Russia Joins Proliferation Security Initiative*, BBC WORLDWIDE MONITORING, May 31, 2004, at 1.

18. AUSTRALIAN DEPT OF FOREIGN AFFAIRS AND TRADE, PROLIFERATION SECURITY INITIATIVE [hereinafter PSI], at <http://www.dfat.gov.au> (last visited July 6, 2004).

19. The Statement of Interdiction Principles was “formally adopted at the third plenary meeting in Paris in September 2003.” *Id.*

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.²⁰

In practice, the “states” at issue boil down to North Korea, Iran, Syria, and, until recently, Libya.²¹ “Non-state actors” is clearly meant to refer to various terrorist organizations around the world that cannot be unequivocally identified with a particular state.²² PSI countries are concerned that these states and non-state actors will use WMD and WMD material for the purposes of intimidation, coercion, and blackmail, and, even worse, may resort to actually using the weapons in a catastrophic attack.²³ Under the PSI, participating countries hope to prevent, or at least delay, such contingencies as these by increasing the cost of proliferation and lengthening the time required for state or non-state actors to develop WMD capacity.²⁴ The PSI is, in large part, designed as a deterrence measure to proliferating countries.²⁵

II. LEGAL PROBLEMS WITH THE PSI

This article addresses the relationship of the PSI to the United Nations Convention on the Law of the Sea (Convention). Critics of the PSI point to the Convention as a potential legal obstacle to its implementation.²⁶ Indeed, Russia and China, among others, have expressed serious doubts about whether the PSI conforms with international law,²⁷ though Russia joined the initiative at the end of May 2004²⁸ and China seems to be softening its criticism amid growing international support for the initiative.²⁹

20. INTERDICTION PRINCIPLES, *supra* note 8.

21. PROSSER, *supra* note 12.

22. *Id.*

23. See, e.g., John S. Wolf, U.S. State Dept., Remarks at Sandia National Laboratories 12th Annual International Arms Control Conference, Albuquerque, New Mexico (Apr. 19, 2002), available at <http://usinfo.org> (“It is no longer simply the threat that states pose, but also the threat that terrorists will acquire, and use, weapons of mass destruction.”).

24. See ANDREAS PERSBO & IAN DAVIS, SAILING INTO UNCHARTED WATERS? THE PROLIFERATION SECURITY INITIATIVE AND THE LAW OF THE SEA 55 (2004), available at <http://www.basicint.org>.

25. Winner, *supra* note 1, at 10.

26. See, e.g., BENJAMIN FRIEDMAN, BIPARTISAN SECURITY GROUP, THE PROLIFERATION SECURITY INITIATIVE: THE LEGAL CHALLENGE 1 (2003), at http://www.gsainstitute.org/gsi/pubs/09_03_psi_brief.pdf; PROSSER, *supra* note 12.

27. PROSSER, *supra* note 12.

28. *Russia Joins Proliferation Security Initiative*, *supra* note 17.

29. See Li Jing, *Nations to Team Up on Arms Control*, CHINA DAILY, July 21, 2004, available at <http://www.chinadaily.com.cn>.

The Statement of Interdiction Principles, the working document for the PSI, claims that PSI activities will not violate international law.³⁰ According to the Statement, PSI countries are to pursue the goals of the initiative “to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks.”³¹ But when challenged on the legality of the initiative, PSI advocates consistently fail to provide a satisfactory explanation. For instance, a representative answer is that: “There already exists a large body of authority for undertaking interdictions, such as those involving actions by coastal states in their territorial waters, or by flag states of vessels operating on the high seas under their flags.”³² The usually sparse legal explanations offered by PSI countries in defense of the initiative suggest that its legal rationale deserves further consideration.

The Statement of Interdiction Principles lays out “specific actions” to be undertaken by PSI participants. Subparagraphs 4(b) and (c) call on flag states to board and search their own vessels regardless of their location in the world and to consider providing consent to other states for such boardings.³³ Article 92 of the Convention subjects ships flying the flag of one state to the exclusive jurisdiction of that state on the high seas,³⁴ but the flag state can waive its exclusive jurisdiction by consent.³⁵ Thus, these subparagraphs pose no problem under the Convention.

30. PROSSER, *supra* note 12.

31. INTERDICTION PRINCIPLES, *supra* note 8.

32. U.S. DEPT OF STATE, BUREAU OF NONPROLIFERATION, PROLIFERATION SECURITY INITIATIVE FACT SHEET, at <http://www.state.gov> (May 24, 2004). In a July 2003 press conference, Australian Deputy Secretary for the Department of Foreign Affairs and Trade Paul O'Sullivan stated, “[PSI participants will] abide by international law. The question that's in debate if you like is precisely what is permitted under some interpretations of some aspects of international law. But . . . on the whole the participants in this process don't feel that the existing structure of laws prevents them from doing the things that we're talking about.” Paul O'Sullivan, Press Conference, Brisbane, Australia (July 10, 2003), at <http://www.dfat.gov.au>.

33. INTERDICTION PRINCIPLES, *supra* note 8, at 4(b)-(c).

34. U. N. Convention on the Law of the Sea, Dec. 10, 1982, art. 92, para. 1, 1833 U.N.T.S. 3, 433 [hereinafter UNCLOS]. Article 94 grants flag state jurisdiction and control over “administrative, technical and social matters”; even though the Article does not specifically reference the flag state's ability to regulate the cargo of its vessels, a state could indirectly regulate the cargo by imposing certain regulations on the transport of such cargo, e.g., by requiring extensive documentation for the transport of nuclear warheads. *See id.* art. 94, para. 1, at 434.

35. For example, the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, imposes enforcement duties on the flag state, but allows the flag state to authorize another state to enforce the Agreement. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 307-08 (3d ed. 1999).

More problematic is subparagraph 4(d) of the Statement of Interdiction Principles, which calls on PSI participants:

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.³⁶

This subparagraph raises serious concerns under the Convention because of the apparent conflict with the right of innocent passage and the freedom of navigation.

A. *Right of Innocent Passage*

The right of innocent passage has long formed an integral part of the law of the sea. One author describes innocent passage as “the main universally recognized manifestation of limitations imposed by international law on sovereignty in coastal waters.”³⁷ The Law of the Sea Convention preserves the right of innocent passage both in the territorial sea and in straits used for international navigation.³⁸

i. *Territorial Sea*

Article 17 of the Convention limits coastal state control over foreign vessels in the territorial sea by granting these vessels the right of innocent passage.³⁹ Innocent passage is defined in Article 19, which requires the coastal state to permit passage through its territorial waters unless the passage is “prejudicial to the peace, good order or security of the coastal State.”⁴⁰ Article 19 goes on to

36. INTERDICTION PRINCIPLES, *supra* note 8, at (4)(d).

37. FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA: THE CURRENT REGIME OF ‘FREE’ NAVIGATION IN COASTAL WATERS OF THIRD STATES 38 (1990).

38. UNCLOS, *supra* note 34, art. 45, at 414.

39. *Id.* art. 17, at 404.

40. *Id.* art. 19, para. 1, at 404.

list what might qualify as an activity that prejudices “the peace, good order, or security of the coastal State.”⁴¹

For PSI interdictions in the territorial sea to be legal, the interdicted ship must be exercising passage that is non-innocent.⁴² However, the transport of WMD does not fit neatly within any of the exceptions listed in Article 19. The only exception which might apply is “any threat or use of force . . .” against the coastal state.⁴³ It might be argued that the shipment of WMD between states or non-state actors who desire to use them against the coastal state should count as a “threat” against the state’s sovereignty, or perhaps that it even violates the prohibition in the U.N. Charter against the use of armed force “against the territorial integrity or political independence of any State . . .”⁴⁴ Thus, the passage would be non-innocent.

To make this argument cogently, the coastal state would have to demonstrate several things. First, it must prove that the transport of WMD constitutes a “threat . . . of force” against it.⁴⁵ The analysis is complicated by the possibility of “dual use” WMD material.⁴⁶ According to Dr. Michael Beck, Executive Director of the Center for International Trade and Security, PSI efforts “face a major problem because 95 percent of the ingredients for WMD are dual-use in nature, having both civilian and WMD applications.”⁴⁷ Under the PSI, the effort to interdict the rare illicit shipment may require the coastal state to stop and search numerous ships which turn out to pose no threat at all. And further, even if questionable materials are found, the coastal state must then prove that the materials will be used for threatening rather than non-threatening purposes.⁴⁸

Second, the coastal state will have to show that the transport of WMD threatens its “sovereignty, territorial integrity or political independence” or violates some other principle of international law embodied in the U.N. Charter.⁴⁹ This, too, will be difficult to prove, because it is not the mere *transport* of WMD that threatens a state’s sovereignty, but the *use* of these weapons against it. If

41. *Id.* para. 2, at 404.

42. *See id.* art. 25, para. 1, at 407.

43. *Id.* art. 19, para. 2(a), at 404.

44. U.N. CHARTER, art. 2, para. 4; *see also* U.N. CHARTER, Preamble (stating as a purpose of the United Nations “to ensure . . . that armed forces shall not be used, save in the common interest”).

45. UNCLOS, *supra* note 34, art. 19, para. 2(a), at 404.

46. Michael E. Beck, *The Promise and Limits of the PSI*, 10 *THE MONITOR* 16, Spring 2004, available at http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

47. *Id.*

48. *See* Beck, *supra* note 46, at 16-17.

49. UNCLOS, *supra* note 34, art. 19, para. 2(a), at 404.

arguing that the transport of WMD threatens its security, it may not be enough for the coastal state to show merely that the WMD will be used. Rather, on the literal wording of Article 19, the coastal state must prove that the WMD being interdicted will be used against *that particular state*.⁵⁰ This correlation will not be easily made.⁵¹

Third, if the coastal state argues that the transport violates the U.N. Charter, it cannot rely on the possibility that the WMD will be used at some time in the future. Article 19(2) requires that the threat or use of force be made "in the territorial sea."⁵² A future use of WMD will probably not occur in the territorial sea. Thus, the coastal state again must argue that the transport itself, not the future use, violates the principles of the U.N. Charter, an argument which may have difficulty winning support in the United Nations.⁵³

1. Article 25

There are a couple of possible responses to these problems. The first response might be for the coastal state to invoke Article 25 of the Convention. Paragraph 1 of Article 25 provides: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."⁵⁴ Paragraph 1 is intended to be a general introduction to the rest of the Article, which provides two specific situations in which the coastal state may take such steps.⁵⁵ First, according to paragraph 2:

[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to

50. UNCLOS, *supra* note 34, art. 19, para. 2(a), at 404.

51. The search for WMD in Iraq, which to date has been fruitless, is just one example of the difficulty of acquiring and implementing solid intelligence on this issue.

52. UNCLOS, *supra* note 34, art. 19, para. 2, at 404.

53. If the coastal state fails to show that the passage is non-innocent, UNCLOS, Article 23 would apply. Article 23 requires vessels transporting "nuclear or other inherently dangerous or noxious substances . . . through the territorial sea" to carry certain documentation when exercising the right of innocent passage. Thus, it appears that the only regulation a coastal state may impose on ships carrying WMD, so long as they are exercising innocent passage, is to require them to confine their passage to certain designated sea lanes, as provided by Article 22. But so long as the vessels stick to the designated routes, the hands of the coastal state seem to be tied by the Convention when it comes to implementing the PSI in the territorial sea. *Id.* arts. 22-23, at 406.

54. *Id.* art. 25, para. 1, at 407.

55. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 229 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter CONVENTION COMMENTARY 2].

which admission of those ships to internal waters or such a call is subject.⁵⁶

This implies that the coastal state could stop inbound ships to check for documentation or, perhaps, even to perform a cursory search. Second, paragraph 3 permits the temporary suspension of the right of innocent passage in specified areas of the territorial sea “if such suspension is essential for the protection of its security, including weapons exercises,” provided that the suspension is duly published and does not discriminate among foreign ships.⁵⁷

The suspension of the right of innocent passage is therefore contingent on several conditions: (1) the suspension must be non-discriminatory, and, therefore, ban *all* vessels if it bans any; (2) it must be temporary and not permanent; (3) it “may only cover specified areas of the territorial sea;” (4) it must “be essential for [the] protection of coastal State security, including weapons exercises,” not just one option among many; and (5) it must be published before becoming effective.⁵⁸

It could be argued that a PSI-driven interdiction is a form of suspension of the right of innocent passage. But paragraph 3 of Article 25 does little to justify typical PSI activities.⁵⁹ Under condition (1), the suspension must be non-discriminatory,⁶⁰ while PSI activities are aimed at specific actors of concern. Under condition (2), any suspension must be temporary, whereas PSI partners might suspend innocent passage for certain vessels, or for vessels flying particular flags, on a permanent basis, or at least until the countries of concern give up their proliferation activities.⁶¹ Condition (3) is also a problem, because to be effective, PSI activities will probably occur throughout the territorial sea rather than in a designated area. And under condition (4), the coastal state will have to argue that the PSI interdiction is *essential*, and that other options — such as diplomatic channels — are ineffective.⁶²

Does Article 25, paragraph 1, establish the basis for other PSI-related action besides those listed in paragraphs 2 and 3?⁶³ The answer is unclear. On the one hand, a coastal state seeking to prevent non-innocent passage through its territorial sea does not

56. UNCLOS, *supra* note 34, art. 25, para. 2, at 407.

57. *Id.* para. 3, at 407.

58. NGANTCHA, *supra* note 37, at 165-66.

59. UNCLOS, *supra* note 34, art. 25, para. 3, at 407.

60. NGANTCHA, *supra* note 37, at 166.

61. *Id.*

62. *Id.* This last point may not be as difficult to overcome as it first appears, especially with respect to non-state actors, with whom negotiation is impossible.

63. See UNCLOS, *supra* note 34, art. 25, at 407.

have many choices besides interdiction.⁶⁴ For instance, it might enact documentation requirements like those listed in Article 23,⁶⁵ but the only way to enforce such measures is by interdiction.⁶⁶ Thus, random interdictions in the territorial sea seem to be the only way to prevent non-innocent passage. On the other hand, Article 24 precludes the coastal state from “hamper[ing] the innocent passage of foreign ships” or from “impos[ing] requirements . . . which have the practical effect of denying or impairing the right of innocent passage.”⁶⁷ In order to prevent non-innocent passage by using random interdictions, the coastal state will have to hamper the truly innocent passage of a large number of foreign vessels. The question, therefore, is how much “collateral damage” should be allowed in the coastal state’s pursuit of its national security objectives?

The solution is probably found in solid intelligence. With good intelligence, the interdicting country can attempt to reconcile Articles 24 and 25 by interdicting non-innocent vessels in pursuit of its national security objectives while minimizing the hassle to innocent ships.⁶⁸ The PSI Statement of Interdiction Principles, which encourages states to “[a]dopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity,”⁶⁹ encourages such a solution.⁷⁰

2. Protective Principle & Article 27

Another response to these problems might be found in the protective principle of international law and Article 27 of the Convention.⁷¹ The protective principle holds that a state has the right to protect itself against threatening acts performed outside its territory.⁷² The case of *United States v. Gonzalez*⁷³ provides a helpful context for this principle. In *Gonzalez*, the U.S. Coast Guard stopped, boarded, and seized a Honduran vessel 125 miles off the coast of Florida after gaining the consent of Honduran authorities,

64. Winner, *supra* note 1.

65. See UNCLOS, *supra* note 34, art. 23, at 406.

66. See Winner, *supra* note 1.

67. UNCLOS, *supra* note 34, art. 24, paras. 1, 1(a), at 406. Article 24 also prohibits the coastal state from “discriminat[ing] in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any State.” *Id.* para. 1(b), at 406. Countries of concern could probably raise a persuasive argument under this provision that PSI participants discriminate against their vessels or cargo.

68. PROSSER, *supra* note 12.

69. INTERDICTION PRINCIPLES, *supra* note 8, at para. 2.

70. See *supra* note 53.

71. UNCLOS, *supra* note 34, art. 27, at 407.

72. See CHURCHILL & LOWE, *supra* note 35, at 215-16.

73. *U.S. v. Gonzalez*, 776 F.2d 931, 934 (11th Cir. 1985).

finding a large stash of marijuana on board.⁷⁴ The Coast Guard was acting pursuant to the Marijuana on the High Seas Act of 1980, which authorized searches and seizures of foreign vessels outside established “customs waters” when appropriate agreements had been reached with the flag state of the vessels.⁷⁵ In this case, Honduras’ consent allowed the U.S. Court of Appeals to uphold the interdiction.⁷⁶ But the court noted:

Even absent consent, however, the United States could prosecute foreign nationals on foreign vessels under the ‘protective principle’ of international law, . . . which permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security or could potentially interfere with the operation of its governmental functions.⁷⁷

The Law of the Sea Convention codifies a form of the protective principle for the territorial sea in Article 27.⁷⁸ Subparagraphs 1(a) and (b) of Article 27 declare that a coastal state may exercise criminal jurisdiction on board a foreign ship in the territorial sea “if the consequences of the crime extend to the coastal State” or “if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.”⁷⁹ Of course, the coastal state must first criminalize the conduct under its domestic law before it can exercise protective jurisdiction.⁸⁰

To analogize from drugs to the transfer of weapons, the protective principle and Article 27 may help to justify the PSI in territorial waters. A coastal state might persuasively argue that the transport of WMD and related material could greatly harm its security or governmental functions, or that the consequences of the transport extend to the coastal state.⁸¹

74. *Id.* at 934.

75. 46 U.S.C. §§ 1903(a)-(d) (2000).

76. *Gonzalez*, 776 F.2d at 934.

77. *Id.* at 938.

78. To be precise, the Article actually allows the coastal state to exercise a sort of “effects jurisdiction.” UNCLOS, *supra* note 34, art. 27, at 407-08.

79. *Id.* paras. 1(a), 1(b), at 407.

80. PERSBO & DAVIS, *supra* note 24, at 49. The *Gonzalez* court noted that the protective principle is limited to acts which are generally considered illegal under the laws of states with reasonably developed legal systems. *Gonzalez*, 776 F.2d at 939. This might tend to preclude the legitimate invocation of the protective principle if few States consider the transport of WMD to be a crime. But the objection loses its force in light of the broadening coalition of PSI countries who, even if not yet criminalizing such activity under their domestic laws, certainly have expressed a desire to prohibit proliferation.

81. In theory, the protective principle could be applied to acts performed anywhere in the

ii. Straits Used for International Navigation

Under Article 38 of the Convention, vessels enjoy the right of transit passage through straits used for international navigation.⁸² Transit passage can be seen as a “species” of the right of innocent passage, embodying a compromise between seafaring and coastal states.⁸³ Article 38 defines transit passage as “the exercise . . . of the freedom of navigation . . . 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.”⁸⁴ Article 39, entitled “Duties of ships and aircraft during transit passage,” requires vessels to “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.”⁸⁵ In case transit passage is not available under Article 38, the right of innocent passage applies.⁸⁶

Because of the similarities between Article 39, paragraph 1(b), and Article 19, paragraph 2(a), so-called “straits states” will encounter the same difficulties in enforcing the PSI as other coastal states, such as defining the transport as a “threat . . . of force” and linking the transport to a future threat or use in light of dual-use weapons technology.⁸⁷ Furthermore, transit passage is even more firmly entrenched than innocent passage, as straits states may not “hamper” or suspend transit passage through the strait.⁸⁸ Shipping “choke points” like the Strait of Malacca, therefore, may be inaccessible to PSI activities, even if straits states support the initiative.⁸⁹

world, and thus might be used to justify interdictions on the high seas. However, such application is unlikely because the consequences of the transport are not as immediate – it is arguably more likely that weapons will explode or that a cargo ship will sink in the territorial sea of a coastal State, thereby causing it harm, than that weapons transported on the high seas will be used in an eventual attack on the coastal state at some unspecified point in the future.

82. UNCLOS, *supra* note 34, art. 38, para. 1, at 411.

83. NGANTCHA, *supra* note 37, at 57-58.

84. UNCLOS, *supra* note 34, art. 38, para. 2, at 411.

85. *Id.* art. 39, para. 1(b), at 411.

86. *Id.* art. 45, para. 1(a), at 411.

87. *Id.* art. 39, para. 1(b), at 411; *Id.* art. 19, para. 2(a), at 404.

88. *Id.* art. 44, at 413.

89. Malaysia and Indonesia have opposed PSI activities in the Strait of Malacca. *E.g.*, PROSSER, *supra* note 12.

iii. Internal Waters and Ports

In its internal waters, a state has virtually absolute power to enforce its laws.⁹⁰ A coastal state's ports are usually considered part of its internal waters, and the right of innocent passage does not apply in this zone.⁹¹ Because the coastal state enjoys such unrestrained jurisdiction in its internal waters, it is free to inspect foreign vessels which dock at its ports and to arrest vessels and seize illicit cargo when the vessels violate its domestic laws.⁹² This recognized jurisdiction provides solid legal footing for Subparagraph 4(f) of the Statement of Interdiction Principles, which requires port states to inspect vessels suspected of proliferation and seize identified cargo.⁹³

B. Freedom of Navigation

"Beyond the territorial sea all vessels enjoy . . . [the] freedom of navigation . . . [and are subject to] the exclusive jurisdiction of their flag State."⁹⁴ This includes the contiguous zone (when declared), the exclusive economic zone, and the high seas.⁹⁵

Subparagraph 4(d) of the PSI Statement of Interdiction Principles specifically calls upon participant states to interdict vessels in their contiguous zones.⁹⁶ The Statement makes no explicit mention of interdictions of foreign vessels in a coastal state's exclusive economic zone (EEZ) or on the high seas.⁹⁷ However, interdictions outside the contiguous zone will be required for the PSI to be successful. The PSI seeks to achieve ambitious goals: John Bolton, former U.S. Under Secretary for Arms Control and International Security and the chief architect and proponent of the PSI, expressed his hope that, by May 2005, the PSI "will have shut down the ability of persons, companies, or other entities to engage in [WMD proliferation]."⁹⁸ In order to "shut down" proliferation, the scope of the PSI must be expanded beyond the territorial sea and

90. CHURCHILL & LOWE, *supra* note 35, at 65.

91. *Id.* at 60-61.

92. *Id.* at 64.

93. The principle of port state jurisdiction also underpins such maritime security measures as the IMO's ISPS Code and the U.S.-led Container Security Initiative. INTERDICTION PRINCIPLES, *supra* note 8, para. 4(f).

94. CHURCHILL & LOWE, *supra* note 35, at 264.

95. *Id.*

96. INTERDICTION PRINCIPLES, *supra* note 8, para. 4(d).

97. *Id.*

98. 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), at <http://www.state.gov> [hereinafter Remarks to the First Anniversary Meeting].

the contiguous zone. Moreover, many principal flag states do not have the military capacity to successfully monitor their own vessels on the high seas, leaving a huge enforcement gap that will likely be filled by major PSI countries like the United States and Australia.⁹⁹

1. *Contiguous Zone*

Any interdiction of foreign vessels in the contiguous zone without the consent of the flag state is probably illegal.¹⁰⁰ Because the contiguous zone is not part of the territorial sea, the freedom of navigation applies to it.¹⁰¹ The only limit on this freedom is found in Article 33, under which the coastal state may exercise the control in the contiguous zone that is necessary to “prevent [and punish] infringement[s] of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.”¹⁰² A foreign-flagged vessel sailing through the contiguous zone of a coastal state could not be stopped, as the transport of WMD does not readily fall within any of the four categories listed in Article 33.¹⁰³

2. *Exclusive Economic Zone*

In the exclusive economic zone, the coastal state enjoys sovereign rights over living and non-living natural resources and may exercise jurisdiction with regard to (1) “artificial islands, installations, and structures,” (2) “marine scientific research,” and (3) “the protection and preservation of the marine environment.”¹⁰⁴ The coastal state, however, must exercise these rights with “due regard to the rights and duties of other States,”¹⁰⁵ — one of which is the freedom of navigation protected by Article 87.¹⁰⁶

Any proposed justification for a WMD-based interdiction of a foreign-flagged vessel by the coastal state in the EEZ would be extremely shaky. The coastal state might try to excuse the

99. See Winner, *supra* note 1, at 12.

100. FRIEDMAN, *supra* note 26, at 3.

101. CONVENTION COMMENTARY 2, *supra* note 55, at 267.

102. UNCLOS, *supra* note 34, art. 33, para. 1, at 409.

103. Of course, if the vessel were inbound to a port of the coastal state, interdiction would be justified as a customs measure. Interdiction of ships carrying illegal drugs is a good example. According to a senior member of the U.S. Coast Guard testifying before the U.S. Senate Foreign Relations Committee, “[a]doption by the U.S. of an expanded contiguous zone has doubled the area where we can exercise these increased authorities. The benefits of the contiguous zone against [drug] traffickers surreptitiously shipping their illicit products to U.S. shores are clear.” S. REP. NO. 108-10, at 109 (2004) (statement of Rear Admiral John E. Crowley, Jr., Chief Counsel and Judge Advocate General, U.S. Coast Guard, Dep’t of Homeland Security).

104. UNCLOS, *supra* note 34, art. 56, paras. 1(b)(i)-(iii), at 418.

105. *Id.* para. 2, at 418.

106. *Id.* art. 58, para. 1, at 419.

interdiction as part of its duty to protect and preserve the marine environment, but this would probably fail unless the vessel is polluting the ocean while in transit. The legal regime for pollution control is found in Part XII of the Convention; among other things, Part XII authorizes measures adopted by the coastal state to minimize “pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, *preventing intentional and unintentional discharges*, and regulating the design, construction, equipment, operation and manning of vessels.”¹⁰⁷ Article 211 authorizes the coastal state to “adopt laws and regulations for the prevention, reduction and control of *pollution from vessels* conforming to and giving effect to generally accepted international rules and standards” in the EEZ.¹⁰⁸ Boarding and inspection is only justified under Part XII when a violation of these laws or regulations results “in a substantial discharge causing or threatening significant pollution of the marine environment.”¹⁰⁹ Thus, interdiction would not be justified in the absence of a “substantial discharge,” resulting in a serious threat to the marine environment — a condition that will probably not obtain in most PSI-related interdictions.

The mere fact that the cargo is potentially dangerous would not justify an interdiction, as the Convention seems to envision the unhampered transport of “nuclear or other inherently dangerous or noxious substances,” provided certain conditions are fulfilled.¹¹⁰ In short, PSI interdictions of foreign vessels in the EEZ appear legally unsupportable.

3. *High Seas*

The exclusive enforcement relationship between a flag state and its vessels on the high seas has long been recognized by international law. As early as 1927, the Permanent Court of International Justice (PCIJ) held in the *Lotus*¹¹¹ case that “vessels on the high seas are subject to no authority except that of the State whose flag they fly.”¹¹² The Convention codifies this principle in Article 92, which reserves to the flag state jurisdiction over ships

107. *Id.* art. 194, para. 3(b), at 478 (emphasis added).

108. *Id.* art. 211, para. 5, at 484 (emphasis added).

109. *Id.* art. 220, para. 5, at 489.

110. UNCLOS, *supra* note 34, art. 23, at 406.

111. S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 at 25, *quoted in* ANDREAS PERSBO & IAN DAVIS, *SAILING INTO UNCHARTED WATERS? THE PROLIFERATION SECURITY INITIATIVE AND THE LAW OF THE SEA* 43 (2004), *available at* <http://www.basicint.org>.

112. *Id.*

flying its flags on the high seas.¹¹³ Flag states could waive their exclusive jurisdiction to expedite PSI interdictions, but to this point only three states — Panama, Liberia and the Marshall Islands — have done so.¹¹⁴

In the absence of such a waiver, Article 110 of the Convention prohibits a warship from boarding a foreign ship on the high seas.¹¹⁵ There are several exceptions to this rule: a ship can be boarded if it is engaged in piracy, slave trade, or unauthorized broadcasting; if it is without nationality;¹¹⁶ or if it is “of the same nationality as the warship.”¹¹⁷ Unless a ship carrying WMD cargo otherwise falls within one of these exceptions (e.g., it flies under two or more flags of convenience), it cannot be intercepted by a foreign warship.

But might the spirit of the Convention override — or at least supplement — the letter? Perhaps PSI activities are justified in light of the purposes for which the high seas are reserved. Article 88 states, “The high seas shall be reserved for peaceful purposes.”¹¹⁸ This must be taken together with Article 301, which reads:

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.¹¹⁹

These two Articles establish that the freedom of navigation on the high seas, one of the rights under the Convention, is limited to peaceful uses.¹²⁰ PSI countries, then, might claim that the transport of WMD and their delivery systems is not a “peaceful purpose” in light of the probable consequences of proliferation. States which participate in such activities could be viewed to have waived their

113. UNCLOS, *supra* note 34, art. 92, para. 1, at 433.

114. *See, e.g.*, Remarks to the First Anniversary Meeting, *supra* note 98.

115. UNCLOS, *supra* note 34, art. 110, para. 1, at 438.

116. Article 92 extends the definition of a ship without nationality to “[a] ship which sails under the flags of two or more States, using them according to convenience.” *Id.* art. 92, para. 2, at 433.

117. *Id.* art. 110, para. 1(e), at 438.

118. *Id.* art. 88, at 433.

119. *Id.* art. 301, at 516. At the ninth session of the Conference (198), the text of Article 301 was originally proposed by ten states as an addition to Article 88, but was not adopted; instead, the text was included as Article 301. 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 90 (Satya N. Nandan & Shabtai Rosenne eds., 1995) [hereinafter CONVENTION COMMENTARY 3].

120. UNCLOS, *supra* note 34, art. 88, at 433; art. 301, at 516.

freedom of navigation under the Convention.¹²¹ Article 300, for example, declares, “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”¹²² If trafficking in WMD material is seen as an abuse of the freedom of navigation and a failure to act in good faith, a state which does so might be prevented from invoking Article 87 in its defense.¹²³

III. ROUTES AROUND THE LEGAL OBSTACLES

There are several routes around the legal problems posed by the PSI. I will try to deal with these briefly, without going too far afield of the central issue.

A. *Self-defense*

First, PSI countries might claim the right of “collective self-defence” enshrined by Article 51 of the U.N. Charter.¹²⁴ According to a 1985 report of the U.N. Secretary-General, the Law of the Sea Convention does not prohibit “military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51”¹²⁵ More to the point, “[i]n the exercise of the right of collective self-defence it is clear that parties to [collective] security arrangements may use force upon the high seas, within the limits prescribed by international law, to protect their armed forces, public vessels[,] or aircraft.”¹²⁶ Seen in this light, the PSI is a collective response to the threat of international terrorism.

However, Article 51 of the U.N. Charter sets the prerequisite that “an armed attack” against a member state occur before action can be taken in self-defense.¹²⁷ PSI countries would have to argue that the attacks such as those of September 11, 2001, and the Madrid train bombings should trigger the right to collective self-

121. See PERSBO & DAVIS, *supra* note 24, at 61-62.

122. UNCLOS, *supra* note 34, art. 300, at 516.

123. See PERSBO & DAVIS, *supra* note 24, at 61-62; FRIEDMAN, *supra* note 26, at 9.

124. Article 51 of the U.N. Charter reads in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. CHARTER art. 51.

125. *United Nations Disarmament Study Series — The Naval Arms Race, Report of the Secretary-General*, U.N. GAOR, 40th Sess., Annexes, Agenda Item 68(b), para. 188, U.N. Doc. A/40/535 (1985), quoted in CONVENTION COMMENTARY 3, *supra* note 119, at 91.

126. *Id.* para. 178.

127. U.N. CHARTER art. 51.

defense. The situation is complicated because these attacks came not at the behest of a particular state, but under the direction of a loose chameleonic association of non-state actors. The uncertain nature and location of the terrorist network create an incentive for PSI countries to cast too wide a net in the hopes of achieving a "successful" interdiction, which might raise both efficiency and equity concerns. Additionally, the PSI is forward- rather than backward-looking, envisioning pre-emptive action to prevent further attacks.¹²⁸ Because pre-emptive military action is not currently accepted as a legitimate exercise of self-defense, the right of self-defense probably fails to justify the PSI.¹²⁹ Naturally, though, the stronger the evidence that the recipient state itself plans to use WMD against the coastal state, or plans to sell the WMD to non-state actors who desire to attack the coastal state, the stronger this justification becomes.

B. U.N. Security Council Resolution

Under Chapter VII of the U.N. Charter, PSI countries could push for a U.N. Security Council resolution specifically authorizing the boarding of ships and the seizing of WMD-related cargo.¹³⁰ Indeed, in May 2004 the Security Council adopted Resolution 1540, which calls on all states "to take cooperative action" to prevent proliferation of WMD, "their means of delivery, and related materials."¹³¹ According to PSI countries, the PSI is just one example of such "cooperative action."¹³²

But Resolution 1540 is insufficient in itself. The Resolution recognizes proliferation to be "a threat to international peace and security,"¹³³ but does not explicitly authorize the types of interdictions to take place under the PSI. Therefore, a further resolution is needed. However, it is unlikely that such a resolution could be passed because, even if the majority of the members could be persuaded to override the traditional rights of innocent passage and freedom of navigation on the high seas, the resolution would almost certainly be vetoed by China, which has expressed

128. INTERDICTION PRINCIPLES, *supra* note 8.

129. It might be argued that the traditional interpretation of Article 51 of the U.N. Charter, precluding pre-emptive action, is ill-suited to deal with a world where (1) modern technology has enabled entire states to be virtually demolished with the push of a button; and (2) states are no longer the only actors in the proliferation game.

130. PERSBO & DAVIS, *supra* note 24, at 73.

131. S.C. Res. 1540, U.N. SCOR, 4956th mtg. para. 10, U.N. Doc. S/Res/1540 (2004).

132. *Id.* It is interesting that Resolution 1540 was adopted in late April 2004, nearly a year after the PSI was first proposed, rendering less forceful the claim that the PSI was initiated pursuant to the Resolution.

133. *Id.* at 1.

resistance to the PSI and frustration with the position taken by the United States on North Korea's nuclear program.¹³⁴

C. Customary International Law

It might be argued that there is an emerging norm of customary international law against proliferation, or even bolder, in favor of taking certain actions to prevent it. Indeed, the popularity of the PSI testifies that such a norm might be emerging. However, because customary international law is based on consent, countries of concern such as North Korea and Iran could ensure that this rule does not apply to them by dissenting openly and consistently as the norm develops.

D. Amending the Convention

States Parties might consider amending the Law of the Sea Convention to better deal with the threat of proliferation.¹³⁵ There are at least two reasons supporting amendment. First, although it purports to be a comprehensive constitution for the oceans, the Convention seems primarily addressed to marine conservation and resource allocation.¹³⁶ Military operations on the seas were deliberately not discussed during the United Nations conferences on the Law of the Sea.¹³⁷ On the contrary, the Convention was "intended to regulate the uses of the seas in time of peace."¹³⁸ It might be argued, therefore, that the Convention does not grant sufficient flexibility for military efforts like the PSI. Second, when the Convention was adopted in 1982, the world was a far different place than it is today. Military power was split between the United States and the Soviet Union, both of whom were too busy playing the zero-sum game to pay much attention to a potential WMD threat from non-state actors. Indeed, the fearful but relatively stable political framework of the Cold War probably helped keep WMD out of the hands of terrorist groups. But in light of the stateless, ever-changing face of terrorism, perhaps the international legal regime must be updated to ensure the efficiency and

134. See James Kynge & Andrew Ward, *Beijing Frustrated with US Policy on North Korea*, *FINANCIAL TIMES* (London) Sept. 5, 2003, at 10.

135. The Convention opened for amendment on November 16, 2004, ten years after the date of its entry into force (Nov. 16, 1994). UNCLOS, *supra* note 34, art. 312, para. 1, at 520.

136. The Convention states that its purpose is to "promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." UNCLOS, *supra* note 34, Preamble, at 397.

137. CHURCHILL & LOWE, *supra* note 35, at 421.

138. *Id.*

expediency of counter-proliferation efforts while protecting peaceful uses of the sea.

For instance, Article 19, which defines innocent passage,¹³⁹ might be amended to include a provision stating that passage is not innocent if a ship is carrying unauthorized nuclear, chemical, or biological weapons, their delivery systems, or related material. Such an amendment would provide a sound legal basis for coastal state interdiction in the territorial sea.¹⁴⁰ Likewise, an amendment to Article 110 could extend the legal grounds for boarding a foreign ship on the high seas. This could be done quite simply by adding another exception to paragraph 1 to cover illicit trade in WMD.

Realistically, the United States, though spearheading the PSI and having the most at stake in its international acceptance, is not yet a party to the Convention and is prevented from proposing an amendment.¹⁴¹ Therefore, concerns about the PSI may not be taken into serious consideration if the Convention is amended. But perhaps the United States will see the amendment process as, *inter alia*, an effective way to further its counter-proliferation efforts, remove existing doubts about the legality of the PSI, and retake its long-lost seat at the negotiating table among other leading countries in the law of the sea.¹⁴²

IV. WHAT HAPPENS NEXT?

So where does this complicated web of international law and politics leave the PSI? Despite doubts about the legality of the PSI, participants in the initiative can always bring their interdiction actions into accord with the Law of the Sea Convention by simply signing mutual shipboarding agreements with one another and, more importantly, with countries whose ships flying its flag traditionally have been used for proliferation.¹⁴³ For instance, the

139. UNCLOS, *supra* note 34, art. 19, at 404.

140. It should be noted here that a ship carrying unauthorized WMD will not declare its illicit cargo. Unlike the other non-innocent activities listed in Article 19 (e.g., exercise or practice with weapons, fishing activities, etc.), the coastal state may not be able to detect an unauthorized shipment immediately. To prevent coastal state abuse of boarding rights and to protect truly innocent passage, the coastal state should still be required to have a "reasonable ground for suspecting" that a ship is carrying unauthorized cargo. *Cf.* UNCLOS, *supra* note 34, art. 110, para. 1, at 438. Thus, the sharing of intelligence among PSI countries will continue to play a major role in interdiction efforts.

141. *See* UNCLOS, *supra* note 34, art. 312, para. 1, at 520.

142. On February 25, 2004, the U.S. Senate Foreign Relations Committee unanimously voted to send the resolution of ratification of the Convention to the full Senate for advice and consent. UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, SENATE CONTINUES EXAMINATION OF LAW OF THE SEA TREATY; ARMED SERVICES, ENVIRONMENT AND PUBLIC WORKS COMMITTEES HOLD HEARINGS (Apr. 30, 2004), at <http://www.unausa.org>.

143. *See, e.g.*, PERSBO & DAVIS, *supra* note 24, at 62-63.

United States recently signed shipboarding agreements with the governments of Panama and Liberia, which have the two largest ship registries in the world.¹⁴⁴ By virtue of these two agreements alone, the United States can freely board over 30% of the world's cargo vessels.¹⁴⁵ Assuming that all PSI countries allow ships flying their flag to be boarded as well, this figure increases to almost 50%.¹⁴⁶ These agreements are only bilateral, but Panama and Liberia will probably sign similar agreements with other PSI countries as well.¹⁴⁷

Unfortunately, the PSI is likely to be emasculated by the refusal of North Korea, Iran, and other states to sign such shipboarding agreements with PSI countries. North Korea has expressed grave concern over the initiative, stating that it has a sovereign right to develop, deploy, and export weapons, and that it would view any interdiction of its ships as a declaration of war.¹⁴⁸ North Korea has further invoked the right of innocent passage protected by the Convention to condemn Japanese blockades of North Korean ships.¹⁴⁹ Given this hostility to the PSI, it is unlikely that PSI participants will be able to sign shipboarding agreements with North Korea. The same problem will almost certainly arise with Iran and Syria.

Another problem is China's reluctance to join the PSI. China's participation is essential to the success of the initiative, not only because of its political leadership in Asia and in the world, but also because it controls important sea lanes around the Korean peninsula. China is concerned about WMD proliferation and desires international cooperation on the issue, but remains opposed to "pre-emptive strikes and maritime interception operations."¹⁵⁰ Ideally,

144. See John R. Bolton, U.S. Under Secretary for Arms Control and International Security, Remarks with H. E. Arnulfo Escalona, Minister of Government and Justice of Panama, Treaty Room, Washington, D.C. (May 12, 2004), at <http://www.state.gov/t/us/rm/32413.htm>.

145. See INSTITUTE OF SHIPPING ECONOMICS AND LOGISTICS, SHIPPING STATISTICS YEARBOOK 2001 26-27, Table 1.1.7 (2001).

146. See, e.g., Remarks to the First Anniversary Meeting, *supra* note 98.

147. There is, of course, a potential diplomatic nightmare here in that, if the PSI continues to expand its membership, PSI countries will have to create a complex web of mutual shipboarding agreements. Multilateral shipboarding agreements would avoid the problem of multiple bilateral treaties, but many countries will probably be hesitant to sign on to such agreements. For example, a trilateral shipboarding agreement among Germany, Panama, and Liberia would not only grant Germany the expedited right to board Panamanian and Liberian vessels, but would also allow Panama and Liberia to board each other's (and Germany's) vessels under the principle of reciprocity — a scenario that each country might resist.

148. *North Korean TV says Missile Exports "Sovereign Right,"* BBC MONITORING ASIA PACIFIC, Sept. 16, 2003, at 1.

149. *North Korea Warns Japan Against Ship Restrictions, Sanctions,* BBC MONITORING ASIA PACIFIC, Jan. 10, 2004, at 1.

150. Jing, *supra* note 29.

China's concerns will spark a full-scale international discussion about the PSI's legality under the Law of the Sea Convention.

Whether the PSI has been successful is highly debatable. While advocates claim the PSI has great potential,¹⁵¹ its success is difficult to measure because PSI participants have not disclosed the number of interdictions that have occurred or the methods employed.¹⁵²

But there have been highlights. The most prominent PSI success story took place in October 2003, when PSI forces interdicted the German-flagged ship *BBC China* on its way to Libya.¹⁵³ After gaining permission of the German shipping company, PSI forces diverted the ship to an Italian port, where thousands of parts of uranium-enrichment equipment were discovered on board.¹⁵⁴ Libya's subsequent decision to abandon its nuclear program might be partially attributed to this interdiction.¹⁵⁵

The case of the *BBC China* gives room for hope that the PSI can be an effective tool in the counter-proliferation effort and still remain well within the bounds of international law. But to maximize its potential, the PSI must expand its scope to include interdictions of questionable legality under existing treaties — most notably, the 1982 United Nations Convention on the Law of the Sea. Frank discussion of these issues is necessary. The PSI must be reconciled to the Convention in order to lawfully confront the chief threat of our time.

151. See, e.g., Beck, *supra* note 46, at 16.

152. PROSSER, *supra* note 12.

153. *U.S. Seized Shipload of Nuclear Equipment for Libya in October*, N.Y. TIMES, Jan. 1, 2004, at A7.

154. *Id.*

155. Esper & Allen, *supra* note 10, at 5-6.