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Expanding the Proliferation Security Initiative: **A Legal and Policy Analysis**

Philip Johnson
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February 2010

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The mission of the Defense Threat Reduction Agency (DTRA) is to safeguard America and its allies from weapons of mass destruction (chemical, biological, radiological, nuclear, and high explosives) by providing capabilities to reduce, eliminate, and counter the threat, and mitigate its effects.

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THE THREAT OF THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

The proliferation of weapons of mass destruction (WMD), their components, and the technical expertise needed to construct them, whether nuclear, chemical, or biological, is one of the most significant threats to international peace and security in the 21st Century. Rogue states, including North Korea, which has already developed a nuclear weapons capability, and Iran, which is on the cusp of mastering the nuclear fuel cycle, have vowed to use WMD to protect their national interests.¹ These states have not brought their behavior into compliance with international legal norms despite pressure from the international community through economic sanctions and censure by the Security Council. Not only have North Korea and Iran built up their WMD capabilities despite nonproliferation safeguards, but they are also committed to helping other states circumvent them to develop their own WMD programs. North Korea, for example, is widely suspected of having provided material and technical assistance to an alleged Syrian nuclear weapons program, uncovered in the wake of Israel's airstrike on a reactor in al-Kibar.²

In addition, the threat of Islamist terrorism against the West has risen to new levels in light of al-Qaeda's repeated attempts to obtain a nuclear device. Osama bin Laden "has sought and received from a radical Saudi cleric a fatwa sanctioning a nuclear strike against the United States."³ A single nuclear explosion in the heart of a major U.S. city could have unthinkable consequences, in terms of human life, economic loss, and the very way of life in America. However, the threat of nuclear proliferation by terrorist groups extends beyond al-Qaeda. The CIA has indicated "over a dozen terrorist organizations [have] attempted to buy enriched

¹ Aftergood, Steven and Hans M. Kristensen. "Weapons of Mass Destruction: WMD Around the World." *Federation of American Scientists* [on-line]. (November 16, 2008.) Available at <http://www.fas.org/nuke/guide/dprk/nuke/index.html>. Accessed 26 November 2008.

² Sanger, David E. "Bush Administration Releases Images to Bolster its Claim about Syrian Reactor." *The New York Times*. A6. (April 26, 2008)

³ "Averting nuclear terrorism." Hearing before the Subcommittee on International Terrorism and Nonproliferation of the Committee on International Relations, House of Representatives, One Hundred Ninth Congress, First Session. (April 14, 2005), 1.

uranium and plutonium in order to make a nuclear bomb.”⁴ Disconcertingly, terrorist organizations around the world seeking to acquire and employ weapons of mass destruction to further their political and ideological objectives cannot be deterred through traditional diplomatic, economic, or military means as they have no defined territory or population. Furthermore, unlike state actors, which are largely limited in their ability to employ WMD by the missile technology they possess to deliver such weapons to their targets, terrorist organizations using suicide attacks can release chemical weapons and bio-toxins or detonate nuclear or radiological devices almost anywhere around the world.

The near impossibility of traditional deterrence mechanisms in containing the threat of WMD use by rogue states and terrorist organizations makes preventing their initial acquisition of WMD technologies imperative. Organized international efforts to prevent the proliferation of WMD technology date from the beginning of the Cold War and have taken the form of formal treaty arrangements, voluntary regulatory regimes, and cooperative activities. These efforts have traditionally focused on nonproliferation, a strategy designed to prevent the diversion of WMD materials and technology from legitimate uses through a complex system of safeguard procedures, export controls, and physical security measures verified by international inspections.

The cornerstone of the international nuclear nonproliferation regime, the Nuclear Nonproliferation Treaty (NPT), entered into force in March, 1970, and permits the five states that possessed nuclear weapons at the time, the United States, the United Kingdom, China, France, and Russia to maintain their nuclear capabilities, contingent upon a promise to work toward eventual nuclear disarmament. All other signatories promised to refrain from nuclear weapons development in exchange for assistance in developing peaceful nuclear energy technology.⁵ After the conclusion of the NPT, however, India was able to develop a successful native nuclear weapons program by the mid 1970s⁶, and Pakistan, under the leadership of

⁴ “The role of the International Atomic Energy Agency in Safeguarding against Acts of Terrorism.” Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, One Hundred Seventh Congress, First Session (October 3, 2001), 2. Available from the US Government Printing Office, Congressional Sales Office.

⁵ *Nuclear Nonproliferation Treaty* 729 U.N.T.S. 161 (July 1, 1968).

⁶ Cirincione, Joseph, John B. Wolfsthal, and Miriam Rajkumar. *Deadly Arsenals*. Washington, DC: Carnegie Endowment for International Peace (2002), 192.

European-trained engineer and future nuclear smuggling ringleader, Abdul Qadeer Khan, tested its first nuclear device in 1998.⁷ Nevertheless, apart from the Indian and Pakistani nuclear development programs and the widespread yet officially unconfirmed belief that Israel has possessed nuclear weapons since before the drafting of the NPT⁸, in nearly four decades since the treaty's entry into force, its nonproliferation framework has largely restricted nuclear weapons capabilities to the original nuclear powers.

A NEW COUNTERPROLIFERATION STRATEGY

Recently, however, the spread of WMD materials and technology to North Korea and Iran, the supply of uranium enrichment technology by the A.Q. Khan nuclear smuggling network for Libya's defunct nuclear weapons program⁹, and the very real threat of international terrorist organizations acquiring a nuclear device has made it abundantly clear that the nonproliferation framework can no longer control the spread of WMD capability. The globalization process and the concomitant rise of non-state actors have made it impossible to prevent the diversion of WMD materials and technology. Globalization, fueled by technological advances in transportation and communications technology, has dramatically increased global trade and the sheer volume of goods passing through the world's sea- and airports on a daily basis has made detection of contraband shipped under falsified export documents nearly impossible. States and private entities seeking to acquire WMD components are often able to obtain them from suppliers under the guise of legitimate end-uses, such as scientific research. Nuclear smuggling networks, which exploit business connections around the world to coordinate the delivery of WMD development components to states and terrorist organizations, exploit loopholes in export control laws and the overwhelming of customs authorities to supply their clients with restricted and dual-use items.

Concerned by the threat of nuclear terrorism and the apparent collapse of the nonproliferation regime, the Bush administration focused its efforts on counterproliferation, a strategy which seeks to staunch the flow of proliferation-sensitive goods which after they have

⁷ Corera, Gordon. *Shopping for Bombs*. Oxford: Oxford University Press (2006), 44.

⁸ Karpin, Michael. *The Bomb in the Basement: How Israel Went Nuclear and what that Means for the World*. New York: Simon and Schuster (2006), 342.

⁹ Corera, 194.

already been diverted or exported, by inspecting and seizing suspicious cargoes in transit. At the center of the administration's counterproliferation strategy was the Proliferation Security Initiative (PSI), an informal cooperation of now more than eighty countries that are committed to interdicting WMD materials and technology in transit, on land, in the air, or by sea.¹⁰ Despite several claimed operational successes, the details of which have largely been kept secret¹¹, the PSI suffers from limited international legal authority and lackluster participation from some member states. These shortfalls can largely be attributed to the PSI's emphatic rejection of institutionalism and its cart-before-the-horse approach of emphasizing counterproliferation activities before an adequate nonproliferation framework to support them has been implemented.

This paper will explore the history, mission, and goals of the PSI, its principles and activities, and the international and domestic legal authorities under which it operates. It will then highlight the shortcomings of the initiative, including a lack of understanding among participant states of what items headed to which end-users are subject to interdiction as well as weak international legal authority for conducting interdiction operations on the high seas and in international airspace and seizing proliferation-sensitive shipments. It will then recommend measures to overcome these weaknesses, to generating increased participation in PSI activities from member states, and to encourage non-member states to join the initiative. It will conclude by explaining how the PSI is better suited to counteracting proliferation threats from smuggling operations and non-state actors, rather than *inter se* proliferation among states.

THE PROLIFERATION SECURITY INITIATIVE

President Bush announced the establishment of the Proliferation Security Initiative in a speech at Wawel Castle in Poland in May 2003. Citing the failure of nonproliferation, Bush explained that "we must have the means and authority to seize weapons of mass destructions and their components in transit,"¹² heralding a new counterproliferation strategy that would take the

¹⁰ Crail, Peter. "The Proliferation Security Initiative (PSI) at a Glance." *The Arms Control Association*. Available online at: <http://www.armscontrol.org/factsheets/PSI> (Accessed 14 November 2009).

¹¹ Hodgkinson, et al. "Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap." 22 *American U. Intl. L. Rev.* 583 at 661 (2007).

¹² Joyner, Daniel H. *International Law and the Proliferation of Weapons of Mass Destruction*. Oxford, UK: Oxford University Press (2009), 299.

form of a partnership of like-minded states dedicated to curtailing the spread of WMD technology. From its inception, the Bush administration emphasized the informal nature of the PSI, characterizing it as an activity based on voluntary participation, rather than as an organization or institution. In addition, membership in the PSI does not entail any binding legal commitments. To join, states simply “declare their commitment to the PSI Statement of Interdiction Principles either orally or in writing.”¹³

The Statement of Interdiction Principles is a two-page document outlining the purposes of the PSI and the general commitments of participant states, consisting of the interdiction of suspicious cargoes, the exchange of intelligence information related to proliferation, and the expansion of national legal authorities to support counterproliferation. Conscious of the inherent difficulties in negotiating a multilateral treaty based on obtaining mutual compromise in specific issue areas, the framers of the PSI believed the activity could be established more efficiently and would receive the support of more states if it was based on voluntary participation rather than a binding legal agreement.

The administration’s wager seems to have paid off, as the ten states originally involved in the framing of the PSI have been joined by 73 others in the past six years, bringing roughly half the world’s countries into the PSI framework. Among participating states are important maritime powers, such as the United States and Great Britain, and popular flag of convenience states, including Panama, Belize, and Liberia.¹⁴ This wide support has had an important impact on the efficacy of PSI operations and has brought the vast majority of the world’s seafaring cargo, historically the primary mode of shipment of proliferation-sensitive goods, within the reach of the PSI. As a result, PSI has the potential to drastically reduce the avenues available to nuclear smuggling networks and other private proliferators dependent on commercial shipping to peddle nuclear goods on the black market.

Nevertheless, important world powers, notably China, and notorious proliferators including North Korea and Iran, have not joined the initiative. The ability of these states to

¹³ Sharp, Walter G. “Proliferation Security Initiative: The Legacy of Operation Socotora.” 16 *Transnational Law and Contemporary Problems* 991 at 1003 (2007).

¹⁴ Wilson, David G. “Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships.” 55 *Naval L. Rev.* 157 at 172 (2008).

continue to proliferate among themselves or to support the efforts of terrorist organizations to acquire nuclear weapons is thus unimpeded by the PSI. Expounding on the recent suspected Syrian nuclear reactor project to provide an example, if Iran had agreed to supply gas centrifuge components and other materials necessary to enrich uranium, it would have been able to send them on its own flag ships without stopping in any intermediate ports of call, effectively eliminating the ability of PSI partners to interdict such a shipment.

Furthermore, due to the PSI's explicit rejection of legal institutionalization in favor of an informal partnership, the activities of PSI partners have no independent legal authority and must rely on preexisting nonproliferation treaties and conventions governing maritime navigation and civil aviation. These international legal regimes were not intended to support a broad counterproliferation strategy and, as will be explored later, provide inadequate legal authority for the conduct of PSI operations, in particular interdictions on the high seas. As a result, PSI has grown increasingly dependent on national legal authorities, since port states have considerably more ability to inspect and seize shipments in their ports and territorial waters than in transit on the high seas. However, major port states that are popular transshipment locations for proliferation-sensitive goods, are concerned that active participation in PSI, which may potentially interfere with and delay shipments transiting through their ports, will cause shipping companies to choose other ports of call for refueling, reducing an important source of revenue. Suggestions for improving cooperation in the PSI on the part of such port states will be set forth below.

PSI MISSION AND GOALS

The overarching goal of the PSI is to limit the spread of WMD technology through the inspection and interdiction of suspicious cargoes in transit. To this end, the Statement of Interdiction Principles, which all PSI participant states commit to, requires states to support interdiction operations, within their territorial waters or airspace, on board their flag vessels or aircraft, and on the high seas or in international airspace, to share information about suspected proliferation-sensitive shipments, and to expand national legal authorities to facilitate the interception of dangerous goods. PSI operations fall generally into three categories: proactive refusal of transportation and customs inspection, reactive interdiction operations, and joint

training exercises to build operational capabilities and improve working relationships among national military agencies and customs and border control authorities.

While popular perceptions of the PSI focus on in-transit interdiction operations and considerable ink has been spilled over the shortcomings in international legal frameworks to authorize PSI interdictions, one of the most important functions of the PSI is improving national capabilities and commitment to non-shipment of proliferation-sensitive goods. PSI partners pledge to do their best to ensure that restricted items and dual-use goods destined for states or private individuals or firms of concern are not exported from their territories, are not forwarded through their ports, and are not transported on their flag vessels or aircraft.¹⁵ Through adoption and more diligent enforcement of effective national export control laws, PSI participants are able to deny maritime, aerial, and ground transportation to would-be proliferators. The PSI does more than obtain a political commitment from member states to achieve these objectives, it brings national authorities together to share best practices and participate in joint exercises to improve individual capabilities to deter and detect the illicit export or transshipment of WMD components and technologies.

In a certain sense, interdiction operations are secondary to non-transportation efforts. If PSI participants were able to effectively halt the spread of WMD from within their territories, there would be little need for interdiction operations against shipments originating in PSI participant states or transported on their flag vessels and aircraft. However, interdiction operations remain the central activity of the PSI for two reasons. First, the PSI is founded on the recognition that even the most earnest efforts to ensure the nonproliferation of WMD technology can always be circumvented by experienced WMD traffickers and that individual shipments may be able to slip through the cracks. Second, the territories, flagships, and aircraft of non-participant states remain open to proliferation activities by trafficking networks and national governments.

PSI interdiction operations to seize proliferation-sensitive goods in transit can be used to target shipments aboard vessels and aircraft subject to the sole jurisdiction of non-PSI participant states or when intelligence indicates port screening and other export control measures by PSI participants have failed to detect suspicious shipments. Ultimately, however, in-transit

¹⁵ Sharp at 1006.

interdictions are a secondary means of controlling the proliferation of sensitive goods as diminished legal authority in international waters and airspace and the challenges of searching cargo containers while transport vessels are in motion limit the utility of such operations. Far from popular images of military parachutists boarding container ships from helicopters on the high seas, which are perhaps the result of intense media attention surrounding the exceptional in-transit boarding and seizure of missiles from a North Korean vessel, the *So San*, in 2002¹⁶, most PSI interdiction operations occur while ships are docked or airplanes are grounded.¹⁷ Even when intelligence information identifying a proliferation-sensitive shipment is not available until it is *en route* to its final destination, PSI partners usually work with flag states and ship owners to obtain permission to search the vessel in port in an intermediate PSI-participating state. In the case of the celebrated interdiction of the German-owned, *BBC China*, U.S. forces directed the ship to dock in Italy after obtaining permission to inspect the vessel from its owner and uncovered a variety of mechanical parts destined for Libya, which could be used to assemble up to 10,000 centrifuges for enriching uranium to weapons-grade levels.¹⁸ However, most PSI interdiction operations are conducted within the ports of participant states as sensitive shipments move from their countries of origin to the final destinations. As a result, while initial boarding and searches of vessels on the high seas to confirm intelligence leads are dependent on international law, most PSI interdictions are conducted under the national legal authority of the port state, within the general framework allowed under international law.

Interdictions may be conducted against shipments of restricted goods, items that international treaties, export control regimes, or Security Council resolutions prohibit to be shipped internationally, or against dual-use items, materials which have both legitimate industrial or scientific applications as well as potential uses in WMD development programs, when such

¹⁶ Goodman, Al. "U.S. lets SCUD ship sail to Yemen." *CNN World News* (December 12, 2002). Available online at: <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/11/us.missile.ship/index.html>

¹⁷ Wolf, Jr., Charles, Brian G. Chow, and Gregory S. Jones. *U.S. Combat Commands' Participation in the Proliferation Security Initiative: A Training Manual*. Washington, DC: RAND National Defense Research Institute (2009), 38.

¹⁸ "Nuclear Black Markets: Pakistan, A.Q. Khan and the Rise of Proliferation Networks: A Net Assessment," 68.

goods are shipped to states or non-state actors of proliferation concern.¹⁹ With the exception of recent Security Council resolutions prohibiting the transfer of certain dual-use items to states such as North Korea and Iran, however, there is no internationally accepted list of states or non-state actors of proliferation concern. For the purposes of PSI interdictions, “states and non-state actors of proliferation concern are those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation.”²⁰

Allowing PSI participants to determine which states should be subject to interdiction operations on the basis of subjective perceptions of proliferation activities is problematic precisely because the PSI has no independent legal authority and therefore the interdiction of shipments of dual-use goods on the basis of a determination by PSI participants that the end user is an actor of proliferation concern amounts to an illicit interference in the free exchange of goods by non-origin or recipient states. Critics of the PSI have likened interdiction operations to vigilante law enforcement in the early American West and portray PSI participants as a group of self-proclaimed world policemen violating international law and state sovereignty to enforce nonproliferation as they see fit. This is one of the greatest challenges not only to the operational capacity of the PSI, but also its perceived legitimacy and potential support by countries not currently participating in its activities.

Finally, perhaps the most important and most frequently overlooked component of PSI activities is fostering increased cooperation among national militaries and export control authorities through information sharing and joint training operations. By participating in simulations and practice exercises, states learn how to “share information, communicate more effectively, and improve their national legal authorities and operational capacities”²¹ to combat proliferation. While export control laws are the first line of defense against proliferation, they cannot be effective if they are not well enforced. Trials of suspected members of the A.Q. Khan nuclear smuggling network around the world have revealed that customs inspectors often fail to verify whether proper export licenses have been obtain before they allow restricted goods to be

¹⁹ Principle #1, “Interdiction Principles for the Proliferation Security Initiative.” *United States Department of State* (September 4, 2003). Available online at <http://www.state.gov/t/isn/c27726.htm>

²⁰ Sharp at 1004.

²¹ *Id.* at 1003.

shipped, are unable to detect falsified cargo manifests, and do not keep records of dual-use shipments to countries and private entities suspected of engagement in WMD development to gain insight into how such goods may be diverted from their stated legitimate end-uses. The PSI enables export control officials communicate more frequently with their counterparts abroad and conduct joint simulation exercises to share techniques and learn about new cargo scanning technologies to better detect proliferation-sensitive shipments and improve national capabilities to restrict the export or transshipment of WMD materials.

Furthermore, PSI partners pledge to “adopt streamlined procedures for the rapid exchange of relevant information concerning suspected proliferation activity”²² in order to coordinate multilateral interdiction efforts. While this pledge can be interpreted narrowly as requiring states to share on such information as is instantly relevant to the interdiction of a suspected shipment in transit, the broader effect of the PSI partnership is to establish permanent lines of communications among national intelligence services to share information not solely to effect interdictions, but to track export control violations. Many states maintain lists of export offenders and closely monitor their activities and in some cases suspend their export privileges.

To avoid scrutiny, export control violators, particularly members of nuclear trafficking networks, conduct operations in multiple national jurisdictions. If states routinely share information about export offenses under the auspices of the PSI, they can orchestrate international efforts to monitor “the movement of these designated persons and the activities of these entities...and have a better chance of uncovering their procurement of WMD items.”²³ In an age where people and goods are able to easily flow across borders, national authorities must be able to keep tabs on suspicious activities wherever they are occurring to trace patterns of violations and relate seemingly isolated offenses to uncover organized proliferation operations. Therefore, one of the most critical advantages of membership in PSI is establishing a constant communication network linking law enforcement and customs authorities in member states.

Finally, PSI simulations and training exercises improve national response capabilities in case preventive efforts fail and an in-transit interdiction becomes necessary. PSI training programs work with national militaries to demonstrate and practice interdictions, building

²² Principle #2, *supra* note 19.

²³ Wolf, Jr. (2009), 16.

essential skills that can enable whichever PSI partner is best positioned under given circumstances to respond quickly and effectively to prevent the delivery of proliferation-sensitive goods to end users of concern. However, in addition to contributing to the operational effectiveness of the PSI, such training exercises also develop national military capabilities that can be applied to other security threats that may affect the interests of participant states, including the reemergence of piracy in international waters, terrorist acts against maritime assets, and drug trafficking. The spillover effects of PSI training should be marketed as incentives to promote participation in the initiative.

INTERNATIONAL LEGAL AUTHORITIES SUPPORTING PSI OPERATIONS

PSI activities occur both within the territory of participating states and in the global commons, such as on the high seas and in international airspace and must therefore be conducted in accordance with relevant domestic law and international legal frameworks. Some scholars see PSI as a radical departure from traditional measure to preserve international peace and security, which transcends the limits of international law as it exists today and “may fundamentally alter the transnational legal framework for the use of force by states...making force a more ordinary tool for ensuring compliance with the dictates of international security.”²⁴ While the PSI’s potential transformative influence on international law will be discussed later, legally, pragmatically, and by the very terms of its Statement of Interdiction Principles, PSI activities must comply with “national legal authorities and relevant international law and frameworks.”²⁵

Unlike the United Nations Security Council and certain international functionalist organizations, the PSI cannot create new principles or expand the limits of international law by fiat and the common perception among non-member states that it seeks to do so is a major limitation on the acceptance of the initiative by the broader international community. This public opinion problem combined with the operational limitations imposed on PSI activities by the inadequate international legal authorities, which will now be explored, indicate that the institutionalization of the PSI on the basis of a binding treaty framework may be beneficial to the

²⁴ Shulman, Mark R. *The Proliferation Security Initiative as a New Paradigm for Peace and Security*. Carlisle, PA: Strategic Studies Institute of the U.S. Army War College (2006), 3.

²⁵ Preamble. Statement of Interdiction Principle for the Proliferation Security Initiative. *supra*. Note 19.

fulfillment of its mission by increasing international legitimacy and allowing the PSI to more directly guide the creation of international law to support interdiction operations.

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

PSI interdiction operations conducted on the high seas and in the territorial waters of participant states are subject to the provisions of international maritime law, most comprehensively stated in the United Nations Convention on the Law of the Sea, which entered into force in 1994 and has been ratified by a vast majority of states, including all non-landlocked PSI partners with the notable exception of the United States.²⁶ While the United States is not a party to the convention, it accepts most of its provisions regarding maritime navigations, including all provisions relevant to the conduct of PSI operations as customary international law and agrees to respect them in practice.²⁷ Therefore, the United Nations Convention on the Law of the Sea (UNCLOS) effectively sets forth the authorities and limits under international law for the conduct of maritime search and interdiction operations under the auspices of the PSI.

While states enjoy certain authorities over vessels passing through the waters off their coasts, on the high seas, vessels are subject to the exclusive sovereignty of the state in which they are registered, known as the flag state, a principle established by the Permanent Court of International Justice of the League of Nations in the 1927 S.S. Lotus Case, and confirmed in UNCLOS.²⁸ Since vessels on the high seas are viewed as equivalent to the sovereign territory of their flag states, warships and state vessels of other states may not detain or board them, subject to a limited class of exceptions laid out in UNCLOS. If a warship encounters a ship flying the flag of another state on the high seas, it may only stop and board it if it suspects that ship of engagement in piracy, slave trade, unauthorized broadcasting, or flying the flag of a country in which it is not duly registered. A warship may also stop and board a ship if it is not flying a flag

²⁶ “Chronological List of Ratifications/Accessions/Successions.” *United Nations Department of Oceans and the Law of the Sea*. Available online at: http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm. Accessed 17 November 2009.

²⁷ “Statement on United States Oceans Policy.” President Ronald W. Reagan, National Security Decisions Directive 58 (September 30, 1983).

²⁸ United Nations Convention on the Law of the Sea, art. 92. (December 10, 1982) 1833 U.N.T.S 396.

and is therefore presumed stateless.²⁹ If a warship improperly stops or boards a foreign vessel on suspicions that it is committing one of these offenses, and its suspicions prove unfounded, it must compensate the vessels owners for delays or damages incurred.

Suspicion of engagement in the transportation of nuclear materials to states or non-state actors of proliferation concern, however, does not authorize a warship to stop, board, and inspect a foreign flagged vessel on the high seas. While the exceptions to boarding in UNCLOS are not exhaustive, no other international treaty regime confers upon warships the right to board foreign vessels suspected of trafficking restricted WMD materials and technology. Some legal scholars have pointed to an amendment made to the Convention for the Suppression of Unlawful Acts (SUA) against the Safety of Maritime Navigation in 2005 criminalizing the transportation of chemical, biological, or nuclear weapons aboard any vessel as providing authority for PSI interdiction operations.³⁰ However, the protocol merely criminalizes the transportation of WMD and does not grant states authority to search vessels suspected of carrying WMD components and technology and seize suspicious shipments.³¹

Therefore, in order to stop and search a foreign vessel on the high seas, PSI participant states are required to obtain permission of either the flag state or the ship's owner. PSI facilities obtaining such permission by creating better channels of communication among participant states, allowing any PSI state to obtain permission quickly from another PSI participant, upon showing of suspicion, to search a vessel flying its flag for proliferation-sensitive goods. In addition, boarding agreements with both PSI and non-PSI participant states can expedite the approval process, but are of limited use in expanding the operation authorities of PSI member states because they are largely bilateral, rather than negotiated among all PSI participants, and do not provide an *a priori* grant of permission.

The legal authorities of states to interdict proliferation-sensitive goods is at its weakest on the high seas, but increases when the vessels to be boarded are located closer to a states' shoreline in one of its zones of influence. UNCLOS establishes three primary areas of state

²⁹ *Id.* Art. 110.

³⁰ Hodgkinson, et al. "Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap." 22 *American U. Intl. L. Rev.* 583 at 635 (2007).

³¹ Shulman at 28.

influence over the oceans: the exclusive economic zone, the contiguous zone, and the territorial sea. In the exclusive economic zone (EEZ), which may extend a distance of up to 200 nautical miles of the coastal baseline of a state, coastal states enjoy special privileges relating to the exploitation of natural resources located in the waters within this zone or in or under the seabed below it. However, their authority over vessels passing through the zone is essentially the same as on the high seas.³²

A state's contiguous zone may extend up to 24 nautical miles from its accepted base shoreline and includes all waters outside of a state's claimed territorial sea, in most cases the area between 12 and 24 nautical miles away from the shoreline. While states enjoy increased authority over vessels passing through their contiguous zones than those on the high seas, they may only exercise limited jurisdiction for a narrowly defined set of violations, which cannot be invoked to support inspection and interdiction operations against vessels passing through the contiguous zone. Specifically, a state may exercise jurisdiction over a foreign vessel in its contiguous zone, other than a warship, only to prevent infringement of its customs, fiscal, immigration, or sanitary laws that are likely to occur within its territorial sea or to punish such violations that have already occurred.³³

From the plain language of the provision, unless a vessel in a state's contiguous zone has recently exited or is about to or clearly intends to enter that state's territorial sea, ports, or internal waterways, a state cannot exercise jurisdiction over it. If, however, a vessel in the contiguous zone is clearly on course to enter or has just exited the territorial waters of a state, it may then be subject to the customs, fiscal, immigration, and sanitary laws of the coastal state. Most national customs laws include export control provisions restricting the transportation of proliferation-sensitive goods. States can enforce these provisions on ships exiting or entering their territorial waters and would have the legal authority to board and search vessels in their contiguous zones that have either departed their territorial waters with restricted goods aboard or are attempting to bring such goods into their territory. This authority, however, only allows states to conduct the same interdiction operations they could conduct in their ports against vessels off their coasts bound for or departing from their ports. Considering the logistical

³² UNCLOS, Art. 56.

³³ *Id.* Art. 33.

challenges of interdictions at sea, such operations in the contiguous zone would largely only be conducted if somehow intelligence surfaces after a ship leaves national ports that a sensitive shipment is on board.

Some scholars argue that PSI participants enjoy broad legal authority to conduct interdiction operations within their contiguous zones. If PSI participants enact domestic legislation criminalizing the trafficking of WMD materials and technology, as they are encouraged to do by the PSI Statement of Interdiction Principles and legally obligated to do pursuant to United Nations Security Council Resolution 1540,³⁴ a vessel engaged in the illicit transfer of goods to states and non-state actors designated in national WMD trafficking statutes could be considered in violation of national customs laws and boarded and searched. However, within the contiguous zone states only have the authority to prevent infringement of their national customs laws that are about to occur or have already occurred within their territory or territorial waters. Under UNCLOS, coastal states only have the authority to conduct interdiction operations in their contiguous zones against vessels bound for or departing from their territorial waters. Vessels engaged in WMD proliferation activities that are merely passing through the contiguous zone cannot be subjected to interdiction operations.

While the limited jurisdiction of coastal states over vessels in their contiguous zones may not support PSI interdiction operations, states enjoy greater legal authority in their territorial seas. Any vessel heading toward or departing from a state's ports may be stopped and for violations of the national laws of that state while in its territorial sea. For example, PSI participants may choose to escort vessels in their territorial seas heading toward their ports with proliferation-sensitive goods aboard into a port of their choosing for inspection. However, vessels that are merely passing through a state's territorial waters enjoy a right of unimpeded innocent passage and may not be subjected to the national laws of the coastal state.³⁵ However, "passage is innocent only so long as it is not prejudicial to the peace, good order, or security of the coastal state...once innocence is lost, so too is the right of innocent passage."³⁶ A ship in the

³⁴ Resolution 1540, Operative Para. 2. *United Nations Security Council*. (April 28, 2004). Available at <http://www.un.org/News/Press/docs/2004/sc8076.doc.htm>.

³⁵ UNCLOS, Art. 17.

³⁶ Joyner, 310.

territorial sea may lose its right to innocent passage for a variety of reasons; however, only those most relevant to WMD proliferation will be explored here.

First, if a ship in the territorial sea is engaged in the threat or use of force against the coastal state, it may be engaged militarily or be boarded and have its cargo seized.³⁷ If a ship is believed to be carrying a fully capable nuclear, chemical, or biological weapons and not just precursor materials that are properly stored, a coastal state could likely justify an interdiction operation and seizure of the weapon on the grounds that it posed a direct threat of force against the coastal state, given the possibility of accidental release or detonation. Second, if a ship is contributing to pollution in violation of international law or the sanitary laws of a state, it may be subject to removal from the territorial waters, or detention and prosecution according to the laws of the coastal state.³⁸ Coastal states may have the authority to board and inspect a ship passing through the territorial sea if it is believed to be carrying improperly stored chemical, biological, or radiological materials that might cause pollution, environmental damage, or in some other way endanger the safety of the coastal state. Finally, a ship unloading or loading any commodity in violation of the customs laws of the coastal state may be stopped and boarded in the territorial sea.³⁹ Therefore, PSI participants may conduct interdiction operations on any vessel taking on or offloading proliferation-sensitive cargo in their territorial seas.

However, the mere transportation of properly stored proliferation-sensitive goods and precursor materials not yet in weapons-usable form through the territorial sea would not constitute a violation of innocent passage, subjecting the transporting vessel to the jurisdiction of the coastal state and justifying the conduct of an interdiction operation. The legal authorities of states over vessels merely transiting their territorial waters or contiguous zones, then, consistent with the emphasis on freedom of navigation that characterizes the current international maritime legal regime, provide little support for PSI operations. Most ships engaged in proliferation are merely transporting dual use goods and would not likely be subject to the jurisdiction of the coastal state even in their sovereign territorial waters so long as they have no intention of docking in that state. In addition, state proliferators may opt to transfer restricted goods aboard

³⁷ UNCLOS, Art. 19(2)(a)&(b).

³⁸ UNCLOS, Art. 19(2)(h)&(g).

³⁹ UNCLOS, Art. 19(2)(g).

warships, which are not subject to interdiction at any time. As a result of the limited authority that international maritime law provides for PSI operations, innovative legal bases for conducting PSI operations must be sought and will be explored later in this paper.

INTERNATIONAL CIVIL AVIATION FRAMEWORKS

While analyses of the Proliferation Security Initiative have traditionally focused on maritime operations, PSI partners may also conduct interdictions on land and in the air. The international legal framework governing aviation provides overflown states significantly more authority over the conduct of aircraft transiting its territory than over seafaring vessels passing through their sovereign waters. This reflects the judgment of the international community that the speed of air travel and the potential dangers posed by aircraft to civilian populations on the ground below them exceed the potential harm of slow-moving vessels miles offshore and therefore necessitated greater authority for overflown states to protect their interests.

To this end, states retain an almost unlimited right to require non-scheduled flights traversing their territories to land for inspection.⁴⁰ If a PSI member state believes an unscheduled cargo flight over its territory or territorial waters is carrying proliferation sensitive goods, it has the authority to request the pilot to land his plane for inspection or to forcibly interdict the plane, with due caution for the safety of those on board.⁴¹ Unscheduled flights, however, differ from scheduled commercial air service. Unscheduled flights may transit the territory of other states at any time without requesting permission in advance and are likely to be used by state proliferators to ferry component parts and technology to other states and non-state actors when needed because they have the resources to charter international flights as needed. While state actors could opt to transport proliferation-sensitive goods aboard military aircraft, which are not subject to forced landings, military flights may attract more attention to proliferation activities and overflown states may deny permission for overflight to military aircraft.

Unlike state proliferators, non-state actors, such as WMD trafficking networks, are significantly more dependent on commercial air transportation services, which are considered

⁴⁰ Chicago Convention on International Civil Aviation, Art. 5. (December 7, 1944) 15 U.N.T.S. 295.

⁴¹ *Id.* Art. 3(bis)

scheduled flights, permitted in advance by the overflown states and not subject to the same forced landings as unscheduled flights. However, PSI participants may expand their legal authorities to interdict scheduled flights suspected of transporting proliferation-sensitive goods by stipulating in their flight scheduling agreements that they reserve the right to request or force landings to inspect cargo and interdict restricted goods as a condition of granting permission for overflight for scheduled air service. Such a measure would not only enable states to interdict suspicious shipments aboard commercial flights over their territory, but would also provide an incentive for commercial air cargo service providers to diligently inspect cargoes and double-check shipment manifests to reduce the chance of delays associated with WMD interdiction operations against their aircraft.

Finally, the Convention on Offenses and Certain Other Acts Committed Onboard Aircraft (Tokyo Convention) grants every state the authority to intercept aircraft flying over its territory if an offense is committed on board which affects its national security.⁴² However, unlike UNCLOS which limits the ability of states to interfere with the innocent passage of vessels through territorial waters to certain defined breaches of national welfare and security, the Tokyo convention leaves open for interpretation what offenses aboard aircraft are to be considered as directed against the security of the overflown state. Therefore, PSI participants may justify interdiction operations against any aircraft above their territories on the grounds that WMD trafficking, an offense under their national laws, is occurring on board and jeopardizes their security by assisting hostile nations and non-state actors in acquiring WMD technology, which might be used against them.

NONPROLIFERATION TREATIES AND ARRANGEMENTS

The legal authorities supporting the conduct of PSI interdiction operations under maritime and aviation law are very general and are without prejudice for other relevant legal authorities found elsewhere in international law. Both UNCLOS and the Tokyo Convention provide that obligations contained within multilateral treaties to which coastal and overflown states are party may provide additional authorities for stopping vessels on the high seas or

⁴² Convention on Offenses and Certain Other Acts Committed Onboard Aircraft, Art. 4. (December 4, 1963). 704 U.N.T.S. 219.

interfering in innocent passage and peaceful overflight.⁴³ However, by expressly rejecting legal institutionalization, the framers of the Proliferation Security Initiative missed an important opportunity for expanding the initiative's operational capabilities through a legally binding treaty framework among participating states. As a result, PSI supporters and international legal scholars have looked to extant nonproliferation treaties and arrangements to derive additional authority for PSI operations.

The cornerstone of the nuclear nonproliferation regime, the Nuclear Nonproliferation Treaty, described in more detail above, was designed to prevent the spread of nuclear weapons technology beyond the five original nuclear powers it recognizes. To this end, the treaty prohibits nuclear weapons states from exporting nuclear weapons technology or components and non-nuclear weapons states from receiving them.⁴⁴ However, the treaty provides no additional support for PSI operations. First, it does not regulate activities by individuals and non-state actors, which pose a significant proliferation threat. Furthermore, the treaty seeks to control the spread of nuclear technology by preventing transfer from occurring in the first place, rather than intercepting shipments that have successfully evaded export controls. The Chemical Weapons and Biological Weapons Conventions adopt the same approach as the NPT for preventing the transfer of chemical and biological weapons precursor agents and similarly provide no additional authority for PSI operations.

Additional nonproliferation arrangements, including the Nuclear Suppliers and Australia Groups, the Wassenaar Arrangement, and the Missile Technology Control Regime, seek to prevent the proliferation of chemical, biological, nuclear, and missile technology and materials through voluntary export control coordination among participating states. However, these regimes are not legally binding and are again concentrating on preventing rather than responding to proliferation activities. In short, there are no independent sources of authority in international treaty law to support PSI operations beyond general principles of international maritime navigation and civil aviation legal frameworks. Some attribute these shortcomings to the Proliferation Security Initiative's emphasis on counterproliferation activities before the

⁴³ Tokyo Convention, Art. 4(e) and UNCLSO, Art. 110.

⁴⁴ *Nuclear Nonproliferation Treaty*, art. II & III. (July 1, 1968). 729 U.N.T.S. 161.

international nonproliferation regime has been perfected.⁴⁵ However, nonproliferation is not a prerequisite for counterproliferation, rather they are independent and complementary strategies. What the PSI needs to be more effective is not a better nonproliferation framework but rather a legal framework for counterproliferation operations, which it can expand and perfect over time.

THE USE OF FORCE IN SELF-DEFENSE

Interdiction operations are essentially a use of force and authorities for interdiction operations in treaty frameworks, such as UNCLOS and the Civil Aviation Regime are essentially authorizations to use force under specific circumstances for limited objectives that would otherwise be prohibited by the non-use of force paradigm established by the United Nations Charter.⁴⁶ However, the United Nations charter recognizes all states' "inherent right to individual or collective self defense if an armed attack occurs."⁴⁷ Given the preventive nature of the Proliferation Security Initiative and its goal of preventing rogue states and terrorist organizations from acquiring the means to develop WMD, most PSI operations will be undertaken in the absence of a prior attack. The legal status of preemptive and preventive self-defense will be explored in detail below; however, there may be certain circumstances in which an armed attack triggers a right to self-defense that would enable states to use force to conduct interdiction operations. If any state is attacked by a hostile nation or non-state actor it would be justified in using force in self-defense to prevent that hostile actor from acquiring the means of delivering a catastrophic blow through a WMD attack. For example, the United States has the right to use force in self-defense against al-Qaeda and other organizations responsible for the terrorist attacks of September 11, 2001. The Security Council recognized this right when it adopted Resolution 1368 on September 12, 2001, condemning the attacks and recognizing the United States' inherent right to use force in individual or collective self-defense under Article 51

⁴⁵ Sharp at 1014 and Joyner, 328.

⁴⁶ "All states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations." *Charter of the United Nations*, Art. 2(4). (October 24, 1945). 1 U.N.T.S XVI.

⁴⁷ *Charter of the United Nations*, Art. 51. (October 24, 1945). 1 U.N.T.S. XVI.

of the United Nations Charter.⁴⁸ The United States may therefore legally use force to defend itself against a future terrorist attack, including threatened acts of nuclear terrorism, by interdicting shipments of proliferation-sensitive goods to al-Qaeda, and may call upon its allies and PSI partners to assist in this effort.

However, non-state actors such as al-Qaeda present a unique challenge to the use of force paradigm, since they must necessarily rely on commercial shipping channels and their shipments will therefore be carried aboard the flag vessels or aircraft of other states. Thus, interdiction operations conducted against shipments of proliferation-sensitive goods bound for hostile non-state actors implicate the sovereignty of third party states, against which states may have no legal right to use force in self-defense. However, such interdiction operations are legally justified under a self-defense framework for two reasons. First, PSI interdiction operations target the actual shipments of proliferation-sensitive goods and not their modes of transportation or the actors transporting them.⁴⁹ Second, even though a forcible interdiction of such goods without the permission of the flag state of the vessel or aircraft carrying them may still be interpreted as an intrusion on the sovereignty of the flag state, if that state knowingly transports materials that will assist al-Qaeda in conducting armed hostilities against the United States, it may itself become liable to attack for aiding and abetting terrorism.⁵⁰ If the flag state is unintentionally transporting such goods, the United States and its allies nevertheless enjoy the wartime right of visit, which “allows a belligerent warship to stop and search a merchant ship on the high seas to determine whether it is engaged in war efforts for the other side.”⁵¹

UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

The United Nations Security Council, under its Chapter VII enforcement authority, has the ability to authorize uses of force to respond to threats to international peace and security. Several recent United Nations Security Council Resolutions have invoked this authority by

⁴⁸ Resolution 1368, Operative para. 1. *United Nations Security Council*. (September 12, 2001) Available online at <http://daccess-ods.un.org/TMP/58587.74.html>.

⁴⁹ Shulman, 13.

⁵⁰ Fitzgerald, Matthew Allen. “Note: Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter,” 49 *Va. J. Int’l L.* 473 at 499 (2008).

⁵¹ Wilson at 188.

calling on states to use all necessary means to interdict the flow of proliferation sensitive-goods to end-users of proliferation concern. Security Council resolutions are legally binding on all UN member states, and since they derive from the authority of the Charter, which supersedes all other international treaty obligations, Security Council Resolutions are intended to prevail over provisions of international agreements with which they cannot be reconciled.⁵² Therefore, Security Council Resolutions have the legal authority to authorize PSI interdiction operations, which are essentially a use of force against the sovereignty of another state or its flag vessels or aircraft, where such operations would otherwise be prohibited by international law.

When the Security Council was deliberating over The adoption of Resolution 1540, which is intended to prevent proliferation to non-state actors and states of proliferation concern, the United States urged the council to include a provision authorizing states to use force to conduct interdiction operations to stop the spread of proliferation-sensitive goods. However, at the threat of a Chinese veto, the provision was dropped from the text of the final resolution. While the Council refused to provide general authority for PSI interdiction operations in Resolution 1540, it has passed a handful of peace enforcement measures directed at especially notorious proliferators, which can be invoked as legal authority for certain PSI activities. In Resolutions 1737 and 1803, adopted in 2006 and 2008 respectively, the Security Council called on all UN member states to take action to pressure Iran to give up its nuclear weapons development program and deny that country the materials and technology necessary to obtain nuclear weapons. Resolution 1737 supports PSI operations against shipments bound for Iran in two ways:

*(1) It asks all states to take necessary measures, possibly including interdiction, to prevent Iran from obtaining proscribed nuclear items. (2) Its annex lists names of entities and individuals designated by the Security Council as being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities.*⁵³

The critical importance of Resolution 1737 is not only its authorization of forcible interdiction against aircraft and ships bearing goods to Iran, wherever they are located, but also its specification of which individuals and non-state actors are considered to present a

⁵² *Charter of the United Nations*, Art. 103. (October 24, 1945). 1 U.N.T.S XVI.

⁵³ Wolf, Jr. (2009), 22.

proliferation threat, eliminating the need for PSI members to make individual judgments that might be criticized as illegitimate. Furthermore, Resolution 1803 renewed the mandate for all states to use any means necessary to interdict shipments of nuclear materials and technology to Iran and specifically referenced lists of goods that are to be considered proliferation-sensitive and prevented from being delivered to Iran.⁵⁴

North Korea has also been singled out by the Security Council for its long history of noncompliance with IAEA inspections and illicit nuclear weapons development. In 2006, the Council adopted Resolution 1718, which calls on states to prevent the direct or indirect transfer of a list of proliferation-sensitive goods to North Korea, to deny passage and travel to individuals suspected of assisting North Korean nuclear development efforts, and to prevent the provision of technical expertise or advice for WMD development to North Korea.⁵⁵ Thus, by authorizing the use of force that would otherwise be prohibited under international law, designating states and non-state actors of proliferation concern, and providing a standardized list of proliferation-sensitive goods, Security Council Resolutions can provide both international legal authority for PSI interdiction operations and eliminate the need for politicized determinations by individual PSI participants of what end-users and WMD components should be subject to interdictions.

NATIONAL LEGAL AUTHORITIES SUPPORTING PSI OPERATIONS

In addition to general international legal authorities, such as Security Council Resolutions, which facilitate PSI activities, and authorities deriving from international law that permit coastal states and overflown states to exercise certain amounts of jurisdiction over ships passing through their territorial waters and aircraft transiting their territory, PSI participants also possess important national legal authorities that provide critical support to PSI operations. Viewing the international system through the lens of social contract theory, states in the absence of international law, much like individuals in the state of nature, may act without restrictions of any kind. As states find it in their interests to cooperate to achieve common goals and to impose prohibitions on certain behavior to preserve international peace, they create international legal

⁵⁴ Resolution 1803, Operative para. 8. *United Nations Security Council*. (March 3, 2008) Available online at <http://daccess-ods.un.org/TMP/3632276.html>.

⁵⁵ Resolution 1718, Operative para. 8. *United Nations Security Council*. (October 14, 2006) Available online at <http://daccess-ods.un.org/TMP/1167397.html>.

norms. The authority of international law derives from the consent of states when they agree to be bound by it. Therefore, the authority of states is only restricted to the extent that they agree to constrain their behavior and any behavior that is not prohibited by international law, can rightly be engaged in by states.

In a sense, domestic legal authorities begin where international law ends. This paper has already explored how international law limits the ability of states to use force to conduct interdiction operations and exercise jurisdiction over the flag vessels of other states on the high seas or in international airspace. However, a state's sovereign power is exclusive within its own territory and PSI participants possess broad authorities to conduct interdiction operations within their borders. While often considered secondary to international legal frameworks, domestic authorities are critical to the operational capabilities of the PSI, at least until international law can adapt to support the initiative's activities. Furthermore, even if PSI partners are unable to influence the development of international law to facilitate PSI activities, "national laws could legitimize many PSI-related interdictions of both domestic and foreign vessels and aircraft in transit through areas of state."⁵⁶

The great political theorist, Max Weber, recognized that the state holds "a monopoly on the legitimate use of physical force within its territory,"⁵⁷ and the ability of states to exercise enforcement jurisdiction over all individuals and juridical persons within its territory to enforce national laws is a firmly established principle of international law.⁵⁸ Limited exceptions to the territorial enforcement jurisdiction exist under the doctrine of foreign sovereign immunity, by which traveling heads of state and certain official state assets are exempt from the legal authority of the state in which they are located. While this exception precludes PSI participants from exercising jurisdiction over foreign warships and state aircraft in their territory, any merchant vessels or commercial aircraft in a nation's ports, internal waterways, or anywhere else within its territory are subject to national laws. By adopting domestic legislation allowing for the search of

⁵⁶ Joyner, 316.

⁵⁷ Weber, Max. *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*. [Economy and Society: Foundations of an Understandable Sociology.] Cologne: Kiepenheuer & Witsch. (1964), §1.17.

⁵⁸ "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

foreign vessels and aircraft upon suspicion that they are involved in the transportation of proliferation-sensitive goods, PSI participants may conduct interdiction operations within their territory, including the boarding and search of foreign ships and aircraft and the seizure of suspicious cargoes. By entering the territory of foreign states and using their port facilities and refueling services, foreign vessels and aircraft subject themselves to the unlimited jurisdiction of the territorial state.

However extensive the legal authority of PSI participants within their territories may be with respect to the search of foreign vessels and interdict sensitive goods, the rights of territorial states to indefinitely detain or seize suspicious cargoes is limited by international law. Within the framework of armed conflict, belligerent states have the right to seize cargoes aboard merchant ships belonging to hostile nations or cargoes aboard third party vessels bound for hostile states as prizes of war.⁵⁹ This customary international law right of belligerents may allow the United States and its PSI partners to seize shipments bound for al-Qaeda, given the current state of armed conflict between the United States and the terrorist groups responsible for the September 11 attacks. Furthermore, all states have the authority to detain shipments of particular proliferation-sensitive goods bound for Iran and North Korea as authorized in the Security Council resolutions explored above.

Absent a recognized state of armed conflict or an authorizing Security Council enforcement resolution, PSI participants cannot interfere in the conduct of international commerce by permanently seizing shipments aboard vessels and aircraft under their territorial jurisdiction. Such seizures would be akin to theft in the domestic sense, or a form of stationary piracy. In order to prevent the acquisition of proliferation-sensitive goods by states and non-state actors of concern, PSI members can at most inspect ships and aircraft within their territories and interdict suspicious cargoes and return the confiscated goods to the sending party. The problem with this “return to sender” strategy is apparent: the senders are most likely proliferators who have consciously attempted to evade export controls in making their shipments and will only attempt to repeat their offenses once they regain possession of the goods they have shipped. If

⁵⁹ Within U.S. jurisprudence, this longstanding principle of international law is reflected in the famous *Paquete Habana* case and in the *Civil War Prize Cases*. See: *Paquete Habana*, 175 U.S. 677, 685-700 (1900) and *The Prize Cases*, 67 U.S. 635, 640 (1863).

the sender and recipient are both designated by the Security Council or an international organization, such as the International Atomic Energy Agency (IAEA), as an individual or entity of proliferation concern, states may have the authority to refuse to allow delivery of the shipment and retain it indefinitely because of inability to return it to the sender. If neither or only one party is a designated actor of proliferation concern, interdicting states must either let the shipment continue to its final destination, or return it to the sending party. This situation indicates the need for expanded international legal authorities for PSI activities, which will be explored later.

THE UNITED STATES' LEGAL IMPLEMENTATION OF PSI

Despite these limitations, domestic legal authorities remain the most significant basis of support for PSI activities. However, national authorities to inspect vessels in ports and aircraft on the ground explored above derive generally from the principle of state sovereignty and may exist solely *in potentia* until implemented into domestic law. If PSI participants do not take proactive measures to expand domestic legal authorities in support of PSI operations, the initiative's capabilities will be significantly attenuated. While states pledge in the Statement of Interdiction Principles to undertake to expand national legal authorities in relevant areas, not all states have done so, including, somewhat counterintuitively, the initiative's coordinator, the United States. This section will explore extant domestic legal authorities in the United States for PSI activities and will consider the roles of both the President and Congress in conducting and authorizing interdiction operations within U.S. territory.

PSI is an operations-focused partnership and as such its domestic oversight and implementation falls almost exclusively under the purview of the executive branch, which has the requisite capabilities to support PSI activities and can act with the speed required to respond to emerging proliferation threats. Two executive branch agencies bear the primary responsibility for PSI operations: the Department of Homeland Security (DHS) and the Department of Defense (DoD). The Department of Homeland Security, which includes the United States Coast Guard, Customs and Border Patrol, and Immigration and Customs Enforcement, is responsible for ensuring the security of American's ports, inspected suspicious cargo, enforcing export control regulations, and conducting interdiction operations within the United States and its territorial waters. The Department of Defense, primarily through the United States Navy and pursuant to

the Chairman of the Joint Chiefs of Staff Instruction 3520.02A⁶⁰, is responsible for conducting interdiction operations in international waters and for organizing training exercises among PSI partners. While training exercises consist not only of mock interdiction operations, but also customs inspection drills, which are the operational specialty of the Department of Homeland Security, DHS has no legal authority to conduct training activities abroad and currently sends customs officials under DoD auspices to participate in PSI training missions.⁶¹

While the executive branch is responsible for the conduct of PSI activities, Congress possesses important powers relating to the use of force, entry into hostilities, the conduct of war, and the seizure of individuals and contraband in war, which have a direct bearing on the executive branch's operational capacity to implement PSI. Furthermore, PSI activities are costly military operations that require Congressional funding. However, the rejection of legal institutionalization that characterizes the PSI framework seems also to extend to its implementation domestically, as the United States has been supporting PSI operations for the past six years despite the fact that "Congress has not authorized the PSI or allocated any funds for its activities."⁶²

LEGAL AUTHORITIES FOR PSI OPERATIONS WITHIN THE UNITED STATES

Some legal authority for the United States' participation in PSI activities derives directly from the President's Constitutional powers as Commander-in-Chief and Chief Executive. The President has significantly more authority to authorize PSI operations within the territory of the United States than to conduct interdiction operations abroad or on the high seas, since the latter involve more aggressive uses of force that may involve war powers reserved to the Congress. The President is charged with protecting and defending the Constitution of the United States and can conduct certain operations without congressional authorization to protect the homeland. PSI operations including the inspection of suspicious cargo aboard foreign vessels in U.S. ports or foreign aircraft and U.S. airfields would generally fall within the President's powers to protect national security without an authorizing act of Congress.

⁶⁰ *Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3520.02A* (March 20, 2008). Available online at www.dtic.mil/cjcs_directives/cdata/unlimit/3520_02.pdf

⁶¹ Wolf, Jr. (2009), 14.

⁶² Shulman, 16.

Furthermore, while Congress has not adopted any legislation specifically authorizing U.S. participation in the PSI, extant legislation providing for the protection of national borders and authorizing the President to conduct customs inspections supports PSI interdiction operations in U.S. territory.⁶³ Therefore, since Congress has not prohibited PSI activities within U.S. territory and since export control and border protection legislation support the President's ability to inspect and interdict proliferation-sensitive shipments at the border, when the President conducts PSI inspections in U.S. ports, he "acts pursuant to an...implied authorization of Congress [and] his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."⁶⁴

PSI SEARCHES AND THE FOURTH AMENDMENT

While the President may have the constitutional authority to conduct PSI searches of cargo exported from or imported to U.S. territory, such inspection operations inevitably target shipments made by or to U.S. nationals, resident aliens, and juridical persons, raising Fourth Amendment Concerns. The Fourth Amendment to the United States Constitution guarantees that "the right of the people to be secure in their persons, houses, and papers against unreasonable searches and seizures shall not be violated..."⁶⁵ Citizens of the United States, U.S. juridical persons, such as corporations established according to the laws of the United States, and resident aliens or other foreign nationals with significant ties to the United States, are entitled to the protections of the Fourth Amendment while located in the territory of the United States.⁶⁶ Such natural and legal persons therefore enjoy a right to privacy on shipments they make from the territory of the United States and shipments sent to the United States addressed to them.

⁶³ Congress passed the first border protection and customs inspection statute in 1789 (1 Stat. 29, 43), and has continued to authorize customs inspection and border control activities that provide ample support for the inspection of suspected proliferation-sensitive cargoes entering U.S. territory.

⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J. concurring).

⁶⁵ *Constitution of the United States of America*. Fourth Amendment: "The right of the people to be secure in their persons, houses, and papers, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

⁶⁶ See: *United States v. Verdugo Urquidez*, 494 U.S. 259, 273 (1990).

However, U.S. courts have recently upheld the longstanding practice of warrantless border searches and screenings as reasonable within the meaning of the Fourth Amendment under an emerging “special needs” doctrine, whereby the government may conduct general, non-targeted searches without a warrant if the purpose of the searches is primarily administrative and not law-enforcement, such as protecting public safety or national security. PSI inspections on personal shipments made by U.S. persons are therefore “justified by considerations specifically related to the [administrative] need to police the border,”⁶⁷ to prevent the unauthorized export or import of proliferation-sensitive goods. While U.S. authorities may choose to prosecute individuals for violations of export control laws using evidence collected through PSI inspections to deter proliferation activities, law enforcement actions are still permissible so long as the original purpose of the PSI inspection was not to apprehend individual proliferators but to reduce the national security threat posed by proliferation activities in general and to foil organized proliferation activities.⁶⁸

However, Fourth Amendment protections apply not only within the United States, but also to the activities of U.S. citizens abroad. The Constitution of the United States is a permanent contract between the U.S. government and its citizens and regulates the actions of the government against citizens at all times, regardless of location. The Supreme Court has declared that the “shield which the Bill of Rights and other parts of the Constitution provide to protect [a citizen’s] life and liberty should not be stripped away just because he happens to be in another land.”⁶⁹ Therefore, shipments made by U.S. persons abroad and shipments sent by or addressed to U.S. persons while in transit outside the territory of the United States are still protected against unreasonable search and seizure by the United States government. However, the President has even greater authority to inspect the property of U.S. persons abroad incidental to the exercise of his foreign affairs and Commander-in-Chief powers. If the President can reasonably search shipments from and to U.S. persons within the territory of the United States under the special

⁶⁷ See: *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000).

⁶⁸ Cf: *United States v. Davis*, 482 F.2d 893, 897-904 (9th Cir. 1973)(holding that regulatory screening of airline passengers was permissible as part of a general regulatory scheme to prevent hijackers from boarding planes, even if prosecution for concealed weapons possession, etc. resulted from information obtained in the search.)

⁶⁹ *Reid v. Covert*, 354 U.S. 1, 6 (1957).

needs doctrine, his power to do so abroad can only be subject to less restriction by the Bill of Rights.

PSI inspection and interdiction operations abroad are conducted by U.S. military forces for reasons of national security to reduce the threat of WMD proliferation. The decision to interdict proliferation-sensitive shipments abroad or on the high seas is essentially a matter of foreign policy designed to promote the national interests of the United States and in the conduct of this policy, courts have held that the President is responsible only to the nation as a whole in terms of political accountability, and not to individuals for breaches of their rights.⁷⁰ While the inspection of shipments from and to U.S. nationals abroad could most likely be justified on a special needs basis, the argument is moot since courts have ruled that suits against the government for violations of constitutional rights incidental to the conduct of foreign policy abroad, including the most sacrosanct Fifth Amendment right to life, liberty, and property, are non-justiciable as an undue interference in conduct constitutionally reserved to the political branches. Furthermore, any evidence collected pursuant to a warrantless PSI search and seizure against the property of U.S. citizens abroad can be used in a federal court for prosecutions related to export-control and other criminal violations.⁷¹

LEGAL AUTHORITIES FOR PSI TRAINING EXERCISES

PSI training operations involve simulated interdictions and customs inspection drills and are conducted by the Department of Defense with PSI partners. While no PSI exercises have yet taken place within U.S. territory, the legal authorities necessary for authorizing U.S. participation in such training missions is the same whether they occur at home or abroad and can be exercised

⁷⁰ See: *Durand v. Hollins* 8 F. Cas. 111 (S.D.N.Y. 1860) quoting *Marbury v. Madison*, 1 Cranch. 5 U.S. at 165, holding that in the conduct of foreign policy, the decision of the Executive is not subject to judicial review even upon the basis of violations of rights: “whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive.”

⁷¹ See: *United States v. United States District Court (Keith Case)* 407 U.S. 297, 308 (1972)(holding that while evidence obtained pursuant to a warrantless wiretap in matters of domestic security was inadmissible in court, the ruling might well have been different if the President’s foreign affairs powers were implicated in the surveillance of a foreign threat.)

solely at presidential discretion without congressional authorization. PSI exercises are conducted in a controlled environment with the consent of all participating states and thus carry virtually no risk of embroiling the United States in an international armed conflict, which might trigger a need for congressional approval and a joint exercise of the war-making powers the Constitution divides between the executive and legislative branches.

The President can exercise sole authority over the participation of the U.S. military in PSI training missions under his authority as Commander-in-Chief responsible for the daily operations of the military, including training activities intended to maintain and improve the mission readiness of the armed forces. While Congress shares some authority with the President in this area by virtue of its Constitutional right “to make Rules for the Government and Regulation of the land and naval Forces,”⁷² far from using this power to restrict the President’s freedom to determine how the military should be trained, Congress has specifically delegated that prerogative to the executive branch. The Goldwater-Nichols Department of Defense Reorganization Act tasks the Chairman of the Joint Chiefs of Staff with “formulating policies for the joint training of the armed forces” and provides that each individual Service Secretary shall make policy regarding the training activities engaged in by that branch of the military.⁷³ More significantly, Congress appears to have limited its right to oversee training operations by specifying that the deployment of U.S. forces abroad to participate in routine training missions does not require the President to make a report to Congress concerning the size, location, or purpose of the deployment under the War Powers Resolution.⁷⁴

LEGAL AUTHORITIES FOR PSI OPERATIONS ABROAD

However, unlike PSI operations within U.S. territory and training activities at home or abroad, where the President enjoys considerable constitutional authority supported by congressional acquiescence or grants of authority, the President is on considerably weaker constitutional footing in authorizing U.S. military involvement in PSI interdiction operations abroad without the participation of Congress. Whereas inspections conducted in U.S. ports and PSI training missions draw support from extant statutory authorities and are funded through

⁷² Constitution of the United States, Art. 1 §8.

⁷³ See: 10 U.S.C. §152(3)(E) and 10 U.S.C. §661(e)(3).

⁷⁴ See: 50 U.S.C. §1543(a)(2).

Congressional appropriations for the operational expenses of DHS and DoD, PSI interdictions abroad have not been authorized in any act of congress, whether explicitly or implicitly, and require significant funding not presently accounted for in the DoD operational budget.

While the President is the Commander-in-Chief of the armed forces, his warmaking powers are not plenary but rather shared with the legislature, which has the authority to declare war, prescribe rules for regulating and calling forth the armed forces in times of emergency, to grant letters of marque and reprisal, and to make rules concerning captures on land and water.⁷⁵ PSI interdiction operations abroad are controversial precisely because, as explored above, there is insufficient authority under international law to conduct such operations and the legal justification for interdiction operations has been tenuous at best. In deploying military assets to participate in PSI interdiction operations on the high seas against foreign flag vessels and targeting goods which are the property of other states, the United States risks creating tensions with other nations that may spark the outbreak of an international armed conflict.⁷⁶ As soon as the risk of embroiling the United States in war becomes a reality, the warmaking powers of Congress are implicated and Congressional approval for such military operations should be sought. While the War Powers Resolution, adopted by Congress to more actively assert its role in the warmaking process, allows the president to use force abroad for 60-90 days without Congressional approval, and would technically afford the President the ability to conduct limited interdiction operations, other considerations militate in favor of Congressional participation in the authorization of PSI interdictions outside the United States.⁷⁷

During a state of international armed conflict, which may arise even absent an official congressional declaration of war⁷⁸, the President may use force to the full extent permissible under the international laws of war without any interference in tactical decision-making by the Congress.⁷⁹ However, the President's military powers to conduct acts of hostility during peacetime are much more limited. In *Little v. Barreme*, a Civil War-era case that is surprisingly

⁷⁵ Constitution of the United States, Art. 1 §8.

⁷⁶ Shulman, 21.

⁷⁷ See: 50 U.S.C. §1544(b).

⁷⁸ See: *The Prize Cases*. 67 U.S. 635, 669 (1862).

⁷⁹ See: *Swaim v. United States*. 165 U.S. 553, 557-8 (1897).

on point for analysis of the President's authority to authorize PSI interdiction operations, the Supreme Court held that in the absence of a *de facto* or declared state of armed conflict, the President's authority to seize vessels engaged in commerce with France on the high seas was limited to that conferred to him in statute by Congress and his Commander-in-Chief powers were insufficient to allow him to expand the scope of the right of seizure granted by the legislature.⁸⁰ In reaching this conclusion, the Supreme Court was no doubt mindful of the Constitution's express investment of Congress with the authority to "make rules concerning Captures on Land and Water," which would seem to require an act of Congress to authorize the seizure of goods aboard foreign vessels on the high seas in times of peace or in situations where the security of the United States homeland is not imminently implicated, triggering the ability of the President to act alone.

There is one important exception to the President's lack of authority to authorize PSI interdiction operations abroad. Congress responded in the aftermath of the terrorist attacks of September 11, 2001, by adopting a joint resolution authorizing the President to respond in self-defense and to use force to protect the United States from future acts of terrorism. Specifically, the Authorization for the Use of Military Force Against Terrorists (AUMF) provides that the President may:

*Use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*⁸¹

The broad wording of the statute permits the President to exercise considerable discretion in determining against whom and how to use force to protect the United States from future attacks by al-Qaeda. Given the overwhelming evidence, including declarations from Osama bin Laden and other terrorist leaders that al-Qaeda is seeking to acquire a nuclear weapon and is willing to use it against the civilian population of the United States, the President would be acting well within the authority granted to him by the Congress in the AUMF in authorizing U.S. military

⁸⁰ See: *Little v. Barreme*. 6 U.S. 170, 177-8. (1804).

⁸¹ *Authorization for the Use of Military Force Against Terrorists*, §2(a). 115 Stat. 224 (September 18, 2001).

participation in PSI interdiction operations targeting proliferation-sensitive shipments reasonably believed to be destined for use by al-Qaeda.

STATUTORY IMPLEMENTATION OF PSI

Aside from the President's ability to use force to target proliferation-sensitive shipments bound for al-Qaeda agents, the ability of the United States to actively participate in PSI operations will remain limited until Congress acts to bolster the President's authority to use force abroad in support of interdiction activities. An independent act of Congress specifically authorizing the President to conduct PSI interdictions abroad is not the only way the legislative branch could express its consent for the executive's commitment of U.S. military assets to such operations. A grant of authority might instead be imputed from an appropriation of funds to support PSI interdiction operations.⁸² However, no such appropriations have yet been made and therefore the President's authority to authorize PSI interdictions at present is squarely within the uncertain "zone of twilight" Justice Jackson alluded to in the *Steel Seizure Case*, when the President acts without any express or implied authorization from Congress. Therefore, to increase U.S. capabilities to participate in and improve the functioning of the initiative, Congress should adopt a PSI-Implementation Act. Beyond merely appropriating funds to support PSI operations, such an act could also facilitate PSI operations both within the United States and abroad and bolster the President's inherent authority to conclude international agreements to strengthen the initiative.

Specifically, Congress could statutorily expand the mission of Customs and Border Patrol within the Department of Homeland Security to screen for proliferation sensitive goods in U.S. ports, at border crossings, and at airports. Congress could also appropriate increased funds to the Department to support these new mission requirements as well as confer authority for the Department of Homeland Security to organize and participate in training missions with customs inspection and other national security agencies abroad without having to work through the Department of Defense. Second, Congress could provide the President with the authority to authorize the boarding of ships on the high seas to seize proliferation sensitive cargoes and specify under what circumstances and how PSI interdiction operations should be conducted.

⁸² See: *Orlando v. Laird*. 443 F.2d 1039, 1043 (2d Cir. 1971).

Third, Congress should make appropriate amendments to the Department of Defense budget to support the conduct of interdiction operations. Fourth, a PSI implementation statute could permit the President to conclude a limited class of agreements with PSI partners, such as shipboarding authorizations and intelligence sharing arrangements. The President has some inherent authority as the “sole organ of foreign affairs” to conclude executive agreements with foreign governments without the consent of Congress, where such agreements concern power specifically designated to the executive branch in Article II of the Constitution.⁸³ However, statutory pre-approval would give PSI boarding and intelligence sharing agreements the status of joint legislative-executive agreements with the force of statutory law and remove any uncertainty about the President’s constitutional authority to conclude a sole-executive agreement in a particular issue area.

Finally, it is important to note that Congress should be kept apprised of U.S. actions in support of the PSI, including domestic inspection programs and interdiction operations on the high seas. While most PSI operations have been kept secret from the public to protect sensitive national security and intelligence information, the Congress has a constitutional right to be informed about such operations so that it can more effectively legislate in support of them.⁸⁴ If the President feels that particular operations are extremely sensitive and revelation of details prior to execution could endanger the success of the mission, he should be allowed to provide notice to the Congress within 48 hours of execution, or limit reporting to senior members of the intelligence committees of both houses, or both, as he may do in regard to covert intelligence operations. Specific reporting procedures would be specified in the PSI Implementation Act.

IMPROVING PSI THROUGH INTERNATIONAL LEGAL MECHANISMS

However, even when PSI participants implement the initiative to the fullest extent of their respective national legal authorities, many PSI activities, most notably interdictions on the high seas, fall into a gap between what can be authorized purely by domestic law and what international law currently allows. Therefore, international legal authorities need to be expanded or interpreted in innovative ways to increase the operational capabilities of the PSI

⁸³ See: *United States v. Pink*. 315 U.S. 203, 241. (1942).

⁸⁴ See: *McGrain v. Dougherty*. 273 U.S. 135, 165. (1927).

The fundamental weakness of the PSI is that it is based on a radically new and potentially very effective strategy for combating the proliferation of WMD, it was initially intended to operate under existing international legal frameworks that do not envision counterproliferation operations and focus instead on nonproliferation efforts. Therefore, PSI participants encounter significant international legal obstacles in conducting initiative activities.

First and foremost, there are limited authorities under international law for stopping and searching a vessel on the high seas and when PSI participants have accurate intelligence information placing proliferation-sensitive cargoes on board specific vessels in international waters, they often lack the ability to legally board those vessels. Second, while PSI activities center around the interdiction of “proliferation-sensitive goods,” initiative partners have not developed a common understanding of what goods should be considered sensitive and therefore subject to interdiction. Achieving agreement among PSI partners as to a list of restricted goods “presents myriad complications because most such materials are either dual-use or because participants have vested interests in trading them.”⁸⁵ Third, even when PSI partners can agree that a particular shipment contains proliferation-sensitive items and are able to successfully interdict the shipment, there may be no legal authority to seize and permanently detain the shipment. In the famous interdiction of a shipment of missiles destined for Yemen aboard the North Korean flag vessel, *So San*, by Spanish marines, PSI partners were unable to hold the missiles under international law and were eventually forced to allow the missiles to continue to Yemen.⁸⁶ Finally, by rejecting the creation of a legal framework to underpin the initiative, PSI partners not only missed a critical opportunity to expand existing international law to support PSI activities, but they also prevent customary international law to develop from PSI operations. State actions in furtherance of PSI goals cannot serve as examples of emerging state practice in favor of counterproliferation operations since they lack the *opinio juris* necessary to establish new international legal norms, as witnessed by the vocal rejection of the legally binding nature of PSI principles by the states carrying out interdictions. The challenges confronting PSI operations can be addressed through innovative application of extant international legal authorities and the expansion of international law through treaties and Security Council resolutions.

⁸⁵ Shulman, 17.

⁸⁶ Joyner, 301.

THE SHIP MASTER'S AUTHORITY

As outlined above, PSI participants only have limited legal authority to board and search foreign flag vessels when those vessels are moored in their ports or in transit to their ports through territorial waters of the contiguous zone and not merely passing through these areas. In all other circumstances, and especially on the high seas, PSI participants are generally required to obtain the permission of the flag state to board and search their vessels. The logistical challenges associated with obtaining official permission from the government of a vessel's state of nationality, which may be far removed from the theater of interdiction operations, often makes it impossible for PSI partners to act in a timely manner to interdict proliferation-sensitive shipments in response to incoming intelligence information. However, in addition to the flag state, ship owners, and their on-site proxies, the ship's master, can authorize boarding, though their legal authority is often overlooked. Especially when ships are registered in flag of convenience states, whose "loose regulations and lax oversight" provide an avenue for proliferators to spread WMD technology, the ship's owner or master may play a particularly critical role in authorizing interdiction operations in the place of a detached and unconcerned flag state.⁸⁷ For example, prior to the widely-acclaimed *BBC China* interdiction that heralded the end of Moammar Khaddafi's nuclear weapons program, the United States resorted to obtaining permission from the ship's German owners to board the vessel in the absence of a timely response from its state of registration, Antigua and Barbuda, a flag of convenience state. Attempts by some states to conduct interdiction operations after failing to obtain permission from a flag of convenience state on the basis that there was no genuine link between the vessel and its state of registration and that it was therefore stateless and subject to the jurisdiction of any state on the high seas pursuant to UNCLOS Article 110 have been definitively rejected by international tribunals and therefore the ship owner or master's authority remains the best way to exercise jurisdiction over ships registered in detached flag of convenience states.⁸⁸

⁸⁷ Wilson at 211.

⁸⁸ The "genuine link" test derives from proceedings before the International Court of Justice between Guatemala and Liechtenstein, which established that there must be a genuine link, such as familial ties, residency, or economic interests, between a citizen and his state. See: *Nottebohm Case, International Court of Justice*. 1955 I.C.J. 4. Applying this logic to ships, which essentially become citizens of their states of registration, the 1958 Law of the High Seas Convention required a genuine link between a ship and its flag state. The International Law of the Sea

Ship owners are an important source of boarding authority since they can be contacted directly, rather than wading through layers of government bureaucracy, and often make decisions regarding boarding authority much more quickly than the governments of flag states. It is even easier to request boarding permission from shipmasters who are aboard the vessels to be searched and can be contacted directly through radio communications by the military forces seeking to conduct an interdiction operation. In addition, unlike national governments, which often have a predilection to safeguard their sovereignty by denying boarding rights, ship owners and shipmasters have incentives to authorize boardings. First, consenting to boarding is an indication that the owners or master were unaware that their vessels were being used to transport restricted goods. Second, an in-transit boarding and search on the high seas allows a vessel to continue toward its destination without undue delays. By denying permission, owners and masters risk that their vessels may be detained and more extensively searched at their next port of call, resulting in late delivery of cargo and economic loss.⁸⁹

While ship owners may be easier to contact and may respond more quickly and more favorably to boarding requests than flag state governments, the ship's master remains the most immediately accessible source of legal authority for maritime interdiction operations. The master is "charged with the safety of the ship and its cargo; in his hands are the lives of his passengers and crew,"⁹⁰ and therefore international law has long recognized the master's authority over all matters related to the safety of his ship. While in practice the master's once nearly absolute authority over his ship, "has diminished in modern times...due to the development of communications technology that allows ship owners and operators to make decisions in near real time,"⁹¹ customary international law and UNCLOS still acknowledge the master's authority to request assistance from and authorize boarding by foreign states to respond

Tribunal, which sits in Hamburg, Germany, and adjudicates disputes under UNCLOS, has rejected the absence of a genuine link as a grounds for considering a vessel stateless. See: Wilson *supra* at 182.

⁸⁹ *Id.* at 185.

⁹⁰ *Id.* at 196.

⁹¹ Hodgkinson, et al. "Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap." 22 *American U. Intl. L. Rev.* 583 at 588 (2007).

to an emergency situation or exercise jurisdiction over an offense aboard that threatens the safety of the ship or its crew.⁹²

In short, while the master's authority is not as extensive as it once was, the master may nevertheless continue to act as a proxy for the flag state government or ship owner's in situations where the delay associated with obtaining their permission would jeopardize the safety of the ship, its cargo, or its crew. Thus, while potentially providing a legal basis to support PSI maritime interdiction operations that has not yet been used to its fullest potential, the ship master's authority is not a fail-safe mechanism for justifying PSI operations when flag-state or ship owner permission cannot be obtained. Contrary to the opinion of some scholars, who argue that the ship's master can consent to boarding by foreign military forces to inspect and seize proliferation-sensitive cargoes, a more accurate interpretation of relevant international law indicates that when boarding requests are "not tied to the safety or proper management of the vessel itself, the long-standing principle of flag-state jurisdiction should prevail."⁹³ Arguably, if a detonation-ready nuclear device, or improperly stored chemical, and biological precursors or radiological materials were believed to be aboard a vessel, the ship's master would have the authority to permit foreign authorities to board the vessel and remove such cargo on the grounds that it posed a threat to the safety of the ship and its crew. However, in the more common case of mechanical components that can be used to build uranium-enrichment centrifuges and other dual-use goods, the master would lack the authority to authorize boarding for safety reasons. If PSI partners see value in expanding the ship master's authority to authorize interdiction operations in a wider variety of circumstances, the most effective way to reinterpret this authority as a matter of international law would be to work through the International Maritime Organization to update Regulation XI-2/8 and the International Convention for the Safety of Life at Sea (SOLAS) to reflect a broader master's authority in authorizing cargo inspections.⁹⁴ Such a provision would create a new legal basis for PSI operations under UNCLOS by the terms of Article 110 and would expand traditional interpretations of the master's authority under customary international law.

⁹² See: UNCLOS, Art. 27(3). See also: Restatement (Third) §522.

⁹³ Hodgkinson, et al. at 606.

⁹⁴ International Convention for the Safety of Life At Sea, Chapter 5. (November 1, 1974). 1184 U.N.T.S. 2

BOARDING AGREEMENTS

In addition to exploring the potential of ship owner and master authority in providing a legal foundation for maritime interdiction operations, PSI partners have also sought to enter into boarding agreements with foreign powers, especially flag of convenience states, to facilitate obtaining permission for interdiction operations from flag states. At present, the United States has concluded boarding agreements with at least nine important flag of convenience states, bringing a majority of maritime cargo under a legal boarding arrangement.⁹⁵ However, obtaining individual boarding agreements is not an effective strategy for expanding PSI's operational capabilities for three reasons. First, as concluded to date, boarding agreements are bilateral arrangements between a PSI participant state and another state, which may or may not be a PSI partner. Bilateral arrangements necessarily have a limited impact of PSI operations because the PSI is a multilateral partnership. Even if a PSI participant has concluded a boarding arrangement with the flag state of a vessel to be searched, that participant's military assets may not be in the best position logistically to conduct the search. Furthermore, searches are often conducted by a coalition of forces from several PSI participant states and a coalition unit's conduct of interdiction operations may be complicated by the different legal authorities enjoyed by participants with and without boarding arrangements. While PSI-wide boarding agreements would be much more useful than current bilateral arrangements, it is unlikely that flag states will be willing to enter into a sensitive agreement with deep implications for that state's sovereignty on the high seas with an alliance of over 80 perceived counterproliferation vigilantes with varying degrees of politico-economic ties to the flag state. This leaves PSI participants to shoulder the responsibility of attempting to coordinate multiple bilateral boarding agreements with flag states.

In addition, pursuing boarding agreements from non-PSI participant states, while a logical way to expand the reach of PSI interdiction operations, is a bit of a cart-before-the-horse approach. Surprisingly, there exists no multilateral boarding arrangement among PSI participants, which would allow all members of the initiative to board the flagships of any other participating states. This leaves PSI members in the somewhat ludicrous position of having to

⁹⁵ "Ship Boarding Agreements." *United States Department of State*. Available online at <http://www.state.gov/t/isn/c27733.htm>. Accessed 27 November 2009.

obtain approval for boarding operations on a case-by-case basis from other PSI members without any legally binding arrangement to facilitate the approval process. Participation in the PSI should have been predicated on the adoption of an inter-initiative boarding agreement that would allow all participant states to board the flag vessels of other participants to conduct counterproliferation search and interdiction operations. PSI advocates rightly point out that such an agreement would have not readily been supported by many current PSI participants and would have dramatically restricted membership in the initiative. While PSI participants express a common commitment to counterproliferation, they may nevertheless have been concerned that a multilateral boarding arrangement would be an unacceptable breach of their sovereignty and allowed other PSI participants to board their ships on the high seas without good cause. However, this is the result of the PSI's further rejection of a central approval council for authorizing interdiction operations, in which each participant would have had a voice and would have been able to deny permission for a boarding in a specific instance where credible intelligence linking the operation to a true counterproliferation purpose was lacking. As it stands, PSI members may experience difficulty in obtaining boarding approval not only from states with which they have not entered into a boarding arrangement, but also from their fellow PSI partners.

The second drawback to boarding agreements is that they are not a guaranteed “green light” for interdiction operations. The bilateral boarding agreements between the United States and flag of convenience states, which have served as models for other PSI partners, “do not allow for unilateral boardings. Instead, the United States is required to seek permission on individual cases upon a showing of good cause.”⁹⁶ Essentially, boarding agreements are no more than a legal commitment to favorably consider a request for boarding to conduct interdiction operations against proliferation-sensitive goods. While such agreements create an open diplomatic channel for making such requests and sharing intelligence information to justify boardings, they provide no means for more expeditiously obtaining boarding permission to conduct time-sensitive operations and ultimately no guarantee that permission will ever be granted.

⁹⁶ Wilson at 184.

If boarding agreements are to be an effective source of legal authority for PSI operations, they need to be multilateral agreements between flag states and the PSI initiative as a whole. After an inter-initiative boarding arrangement is established, PSI members can collectively turn to non-participant states to conclude multilateral boarding agreements. Initiative partners might encourage support for such agreements by explaining to flag states that by signing such an agreement they are supporting the enforcement of international nonproliferation agreements and fulfilling obligations under the 2005 Additional Protocol to the SUA Convention to prohibit the transportation of WMD materials and technology aboard vessels on the high seas.⁹⁷ Such agreements should further contain a provision granting automatic authority for boarding where a substantiated concern of WMD proliferation exists. To assuage concerns about the lack of international transparency surrounding PSI interdiction operations, PSI partners should agree to share information justifying the interdiction operation as soon as possible to the flag state. In addition, flag states might be more comfortable in accepting an pre-arranged grant of boarding authority for future interdictions if PSI partners agree to compensate ship owners for delays and damages and notify the flag state in cases where boarding and search reveals no proliferation sensitive cargo. Such a promise of compensation would also ensure that PSI participants only undertake interdiction operations in cases where strong intelligence confirms suspicions that proliferation-sensitive goods destined for an end-user of concern are aboard a vessel. Funds for damages suffered during the course of an unjustified interdiction operation could be shared among PSI partners to lower the costs of participation.⁹⁸

Nevertheless, boarding agreements only address one of the components of PSI interdictions: obtaining authorization to search of a vessel and its cargo. As the *So San* interdiction illustrates, even if proliferation-sensitive materials are discovered, no legal authority may exist to seize such shipments to prevent their delivery to intended end-users. One way to address this shortcoming is to negotiate, either as part of boarding agreements or independently, a customs mutual assistance agreement with a recall provision for proliferation-sensitive restricted and dual-use goods. Such agreements allow countries from which goods are illegally

⁹⁷ Hodgkinson, 637.

⁹⁸ Wolf (2008), 41.

exported to recall shipments that violate national export control laws.⁹⁹ By negotiating a PSI-wide customs recall framework, which could be expanded to include non-participant states, PSI members may obtain authority to seize a shipment discovered on the high-seas by the country of origin of the goods contained in the shipment or any country from which or through which it has been exported or transshipped in violation of customs restrictions.

In the end, however, determined proliferators will likely be able to circumvent any additional operational authority PSI partners establish through more effective multilateral boarding agreements by sending shipments only aboard vessels registered in states that are not PSI participants and have no boarding agreements with any PSI members. To combat this strategy, PSI partners would do better to try to enter into boarding arrangements secretly rather than touting such agreements as proof of the PSI's capabilities and thereby alerting proliferators that shipments sent aboard certain flagships may be subject to interdiction operations. By maintaining the secrecy of boarding arrangements, PSI partners may significantly reduce the transportation options available for proliferators to spread their wares to a limited group of states, whose vessels could then be subject to closer intelligence scrutiny and potentially to interdiction operations justified as defensive uses of force.

PREEMPTIVE SELF-DEFENSE

When American ambassador to the United Nations, John Bolton, first announced the Proliferation Security Initiative to the General Assembly, he couched its legal legitimacy in terms of self-defense, echoing the Bush administration's National Security Strategy Standpoint that the gravity of the threat posed by WMD made it impossible for states to wait until hostile nations to obtain nuclear, chemical, or biological weapons to defend themselves from a potentially catastrophic WMD attack.¹⁰⁰ Justification of PSI operations in terms of self-defense is problematic because PSI interdictions are directed against a general and ambiguous threat that has not yet materialized and may not trigger a right to anticipatory self-defense. Some scholars argue that Article 51 of the United Nations Charter, which acknowledges an "inherent right to individual or collective self-defense if an armed attack occurs," precludes the use of any

⁹⁹ Wolf (2008), 38.

¹⁰⁰ Shulman, 4.

preemptive force and limits self-defense to responses to actual attacks. Under this interpretation of the Charter, self-defense would be entirely irrelevant as a legal justification for PSI operations, which are by design a proactive rather than reactive approach to combating WMD proliferation. However, most international lawyers believe that the emphasis in Article 51 on “the inherent right” of individual or collective self-defense codifies preceding customary practice regulating the use of defensive force prior to 1945, which recognized a right to anticipatory self-defense.¹⁰¹

Preexisting customary international law regarding the use of force, if it survives the UN Charter as many argue, is a potential source of legal support for PSI operations since it acknowledges a general right to anticipatory self-defense. Outlined in the well-known *Caroline* criteria, the customary right to anticipatory self-defense is based on the principles of necessity, imminence, and proportionality, which required that preemptive force be used only as a last resort to avert a impending threat that leaves no moment for deliberation, and that such force be commensurate with the harm that it is intended to prevent.¹⁰² An interdiction operation to prevent the spread of WMD technology may be reasonably justified as necessary since many alternative measures, including diplomatic pressure and Security Council sanctions, have been ineffective in preventing rogue states and terrorist organizations for seeking to acquire WMD. Furthermore, the boarding of a ship and seizure of sensitive cargo, which is nearly always peacefully conducted and produces no casualties, is certainly a proportionate use of force in light of the threat of a WMD attack.

However, since most PSI interdictions are aimed at preventing actors of proliferation concern from acquiring dual-use items and mechanical components, which may help construct centrifuges to support a lengthy uranium enrichment process to provide fissile material to eventually be used in a nuclear device, the threat of WMD attack to justify such operations seems compellingly less than imminent. Scholars have criticized the self-defense justification for PSI operations pointing out that “the entire thrust of the principles underlying PSI is a preventive one...this locates the PSI as being one relatively definitive step removed from addressing as its primary aim threats of WMD use which rise to the level of *Caroline*

¹⁰¹ Arend, Anthony C. and Robert J. Beck. *International Law and the Use of Force*. New York: Routledge (1993), 72.

¹⁰² *Id.* 72.

imminence.”¹⁰³ In short, PSI operations are largely preventive, not preemptive, in nature. While there may be emerging support in state practice for preventive uses of force to prevent WMD proliferation, as evidenced by international acceptance of Israel’s preventive strike against Syria’s al-Kibar reactor, which stands in sharp contrast to the near universal condemnation of a similar preventive Israeli strike against an Iraqi nuclear reactor in 1981, even the most counter-restrictionist legal scholars agree that the contours of a norm of preventive self-defense are as yet undefined in customary international law.¹⁰⁴

However, the wholesale dismissal of self-defense as a possible justification for PSI interdictions on the grounds that all such operations are preventive in nature is misguided. Certain “proliferation-sensitive” shipments may trigger a right to preemptive self-defense in and of themselves. For example, if intelligence credibly indicated that an operational nuclear, chemical, biological, or radiological device was on board a ship heading for a state’s ports and could either be remotely detonated upon arrival or is intended to be offloaded by members of a terrorist organization for use in an attack on an urban center, that state would be justified under the *Caroline* criteria in using force to interdict the shipment in transit to prevent an imminent attack. If the targeted state is a PSI member, it could call upon fellow PSI participants to assist it in conducting the interdiction operation as a form of collective self-defense. Even in less extreme scenarios involving shipments of fissile materials or warhead delivery vehicles, such as missiles, an interdiction may be justified as anticipatory self-defense. If Iran successfully develops a nuclear weapon, Israel would certainly be justified in interdicting a shipment of long-range missiles in the Strait of Hormuz to prevent Teheran from acquiring the technology needed to launch a nuclear attack on Tel Aviv.

¹⁰³ Joyner, 304.

¹⁰⁴ For an analysis of the al-Kibar strike and an emerging norm of preventive self-defense see: Spector, Leonard S. and Avner Cohen. “Israel’s Airstrike on Syria’s Reactor: Implications for the Nonproliferation Regime.” *Arms Control Today*. July/August 2008. Available online at http://www.armscontrol.org/act/2008_07-08/SpectorCohen. Accessed 27 November 2009. For an analysis of the evolution of the customary right to anticipatory self-defense, see: Arend, Anthony C. “International Law and the Preemptive Use of Military Force.” *Washington Quarterly*. Spring 2003. Available online at: <http://www.twq.com/03spring/docs/03springarend.pdf>. Accessed 27 November 2009.

Depending on how advanced an end-user's WMD capabilities are, what role a shipment of proliferation-sensitive goods would play in helping it complete WMD development, and whether the state has indicated an intent or in light of geopolitical realities is likely to use WMD, the threat of attack may start to approach the imminence requirement set forth in the *Caroline* criteria and an interdiction operation may be justified in terms of traditional preemptive self-defense. While anticipatory self-defense is far from the blank check legal underpinning for PSI interdiction operations Ambassador Bolton and some legal scholars have claimed¹⁰⁵, it is an equally unrealistic conclusion that the *Caroline* criteria could never be faithfully invoked as grounds for conducting a PSI interdiction operation.

OTHER USES OF FORCE WITHIN THE CHARTER FRAMEWORK

While the generalized preventive self-defense argument that the spread of any technology in some way related to WMD development is a threat to international peace and security is unconvincing on its face and legally tenuous at best, an explanation of the legality of interdiction operations in the absence of an imminent national security threat to the interdicting state might be adapted from arguments in favor of humanitarian intervention. Proponents of humanitarian intervention argue that the use of force within the sovereign territory of another state is permissible under the Charter framework if the exclusive purpose of that use of force is to put an end to gross human rights violations. Attributing substantive meaning to the “political independence and territorial integrity” modifiers in UN Charter Article 2(4), which are often taken to prohibit any use of force against a government or within the territory of a state, pro-interventionists argue that humanitarian operations are not directed against the territorial integrity or political independence of the target state, because they do not seek to overthrow the political regime or establish territorial control, but merely to protect human rights.¹⁰⁶ Furthermore, within the terms of Article 2(4), humanitarian intervention is intended to further the “principles of the United Nations” by promoting the respect for individual rights proclaimed in the Charter’s Preamble.

¹⁰⁵ Sharp at 1011.

¹⁰⁶ Arend and Beck, 114.

Similarly, PSI interdiction operations conducted on foreign flag vessels or aircraft, while technically involving a violation of the sovereign territory of a foreign state, are not intended to establish control over the foreign vessel and, isolated from the physical territory of any state, have even fewer potentially prejudicial affects on the political independence or territorial integrity of the flag state. In addition, PSI interdiction operations seek to curtail the proliferation of WMD technology to protect international peace and security, the primary purpose of the United Nations. It could be argued, then, that PSI interdiction operations, like humanitarian interventions, do not involve a use of force prohibited under Article 2(4). Furthermore, humanitarian interventions have been most widely accepted as legitimate when conducted under the auspices of regional organizations, such as the NATO intervention in Kosovo and the African Union humanitarian mission in Darfur, Sudan. Similarly, the PSI can be seen as an organization framework providing a measure of international legitimacy to interdiction operations.

Nevertheless, there remains a critical distinction between humanitarian intervention and interdiction operations. While humanitarian interventions were largely viewed as justified to protect universally accepted human rights norms when the UN Security Council was unable to act, there is little international consensus as to what specific materials destined for which end-users might constitute a clear proliferation threat. Therefore, PSI partners' seemingly arbitrary determination that certain shipments are sensitive and should be interdicted seems to be a direct usurpation of the Security Council's exclusive authority to make politically sensitive determinations of what constitutes a threat to or breach of the peace and dictate how the international community should respond.¹⁰⁷ Furthermore, as explore above, the Security Council has not been paralyzed by the veto power in addressing proliferation threats and has taken several proactive measures invoking Chapter VII enforcement authorities to staunch the flow of goods it deems sensitive to actors it considers of proliferation concern. Separate determinations by PSI partners to the same effect are thus illegitimate and without force of law.

OBTAINING FURTHER SECURITY COUNCIL SUPPORT

The United Nations Security Council, therefore, already possesses the legal authority and political will to make determinations as to what goods should be subject to interdiction and what

¹⁰⁷ Charter of the United Nations, Art. 39.

states and non-state actors are engaged in proliferation, and to authorize enforcement action, including the boarding of vessels and seizure of cargoes, to prevent the proliferation of weapons of mass destruction. The primary value of the PSI, therefore, lies in improving operational capabilities and technical expertise to conduct interdiction operations to allow states to more effectively implement counterproliferation resolutions adopted by the Security Council. While UN Security Council resolutions are legally binding on all UN member states and generally supersede conflicting obligations under other treaty arrangements, such as the provisions of UNCLOS that prohibit most interdiction operations on the high seas, questions have been raised recently about the scope of the Security Council's legal authority. Representatives of a variety of states as well as leading international legal scholars have argued, for example, that the requirement of Resolution 1540 that states adopt domestic legislation criminalizing proliferation activities, oversteps the Security Council's authority to respond to specific threats to international peace and security, into a function as world legislature that was not envisioned by the UN Charter framers.¹⁰⁸

Unlike Resolution 1540, however, an authorization of PSI interdiction operations by the Security Council would more closely resemble the Council's traditional function of responding to security threats and would not interfere in the domestic legal affairs of states as many states have argued the Council is forbidden to do by the express terms of the UN Charter.¹⁰⁹ Nevertheless, some scholars have already raised concerns that a broad PSI resolution might exceed the Security Council's authority. Proponents of PSI see a general Security Council "Chapter VII resolution that authorized the intermodal interdiction and seizure of any item identified by the Nuclear Suppliers Group, Australia Group, Missile Technology Control Regime, Wassenaar Arrangement, Nuclear Nonproliferation Treaty, Biological Weapons Convention, or Chemical Weapons Convention"¹¹⁰ as an important step in solidifying legal authority for PSI to combat global WMD proliferation.

However, items that appear on control lists identified by various nuclear, chemical, and biological technology control arrangements are not all single-use goods for WMD development

¹⁰⁸ Joyner, 320.

¹⁰⁹ Charter of the United Nations, Article 42.

¹¹⁰ Sharp at 1024.

and include some dual-use items that states are entitled to obtain for legitimate end-uses. Therefore, a Security Council resolution broadly authorizing interdictions of such items would still allow PSI partners, or any UN member state, to make politicized determinations, collectively or individually, as to whether a particular shipment will be use for legitimate or illicit purposes and to interdict and seize cargoes unilaterally, which could have a profound effect on global commerce and freedom of navigation. Such a resolution would effectively delegate the Security Council's intended exclusive authority to identify specific threats to international peace and security, to any UN member seeking to interdict shipments of dual-use goods. Just as Congress in U.S. domestic law cannot designate an inherently legislative function to the President, the argument goes, so also the Security Council cannot abdicate its power to determine a threat to the peace to individual UN member states.¹¹¹

Instead of an overarching resolution authorizing interdiction of any proliferation-sensitive goods, the Security Council should instead continue to fulfill its traditional mission of identifying and responding to specific international security threats as they emerge by adopting resolutions authorizing forceful interdictions against a list of specified goods destined for particular actors deemed to be engaged in proliferation activities. PSI participants have criticized this case-by-case approach as a slow and reactive way of approaching counterproliferation, which is intended to be a more proactive strategy to staunch the flow of WMD materials and technology. The politicized debate surrounding every Security Council resolution can make timely authorizations difficult and makes it impossible for PSI partners to refer particular unforeseen threats to the Council's attention for immediate consideration. However, there may be a solution to bridge the gap between a broad authorizing resolution and a succession of case-specific determinations that is well within the Council's authority and will provide for greater flexibility in the conduct of interdiction operations.

The Security Council could adopt a resolution acknowledging the threat to international peace and security posed generally by WMD proliferation to rogue states and terrorist organizations and responding under Chapter VII enforcement powers by creating an independent council to constantly monitor proliferation threats and authorize interdiction operations. Like the

¹¹¹ Kanwar, Vik. "Two Crises of Confidence: Securing Non-Proliferation and the Rule of Law Through Security Council Resolutions. 35 *Ohio N.U. L.Rev.* 171, 192 (2009).

Resolution 1540 Council, which monitors state implementation of the resolution's mandates and assists states in adopting effective criminal proliferation statutes, an "Interdiction Council" established by the Security Council could maintain a list of proliferation-sensitive goods and authorize interdiction of such goods destined for states or non-state actors it determines to be of proliferation concern. The Security Council has established independent bodies to respond to particular international security issues in the past, including the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and could similarly delegate its authority to a functional body specifically tailored to interdiction operations. Members of the Security Council could determine the composition and voting procedures of the Interdiction Council, which could then make decisions on interdiction operations more quickly and in a less politicized manner than the Security Council, assisted in part by the absence of a unanimity requirement.

In addition to providing standing authorizations for the interdiction and seizure of designated goods against actors of proliferation concern, the Interdiction Council could also hear petitions for authorization of interdiction operations from PSI members on a case-specific basis upon showing that a particular shipment poses a significant proliferation threat. Furthermore, the Interdiction Council could hear grievances from states, which believe their shipments have been frivolously interdicted and order the release and return of improperly interdicted cargoes. In this way the Interdiction Council could provide international legal authority for PSI interdictions while maintaining operational flexibility and assuaging concerns about wrongful seizure of dual-use goods with legitimate end-uses. However, until PSI partners can convince China to participate in or at least to support the initiative, the establishment of an Interdiction Council is unlikely. Just as China used its veto in the Security Council to remove any direct references to the PSI from Resolution 1540, it is likely to do the same to block a resolution calling for the creation of an independent body to review and authorize interdiction operations.

PROMOTING PARTICIPATION IN PSI

In addition to an unsure footing in international law, which limits its operational flexibility, PSI's effectiveness as a partnership of like-minded nations dedicated to improving global capabilities for interdicting proliferation-sensitive goods in transit is further limited by lackluster participation from members and vocal opposition from non-members. In its current form and until international law expands to support forceful interdiction operations, PSI is

dependent upon national legal authorities and authorized boardings and its reach is primarily limited to shipments passing through or originating in participant states or transported on their flag vessels. A critical strategy for improving the efficacy of the PSI is therefore lies in increasing its membership. As more states join the initiative, its reach and capabilities not only increase, but so does its international legitimacy as fewer and fewer states remain outside critics. However, a simple political commitment to the Statement of Interdiction Principles has proven insufficient. Many PSI participants have merely paid lip service to the counterproliferation paradigm without actively engaging in PSI activities. Increased transparency surrounding the initiative and its activities coupled with a system of carrots and sticks might increase membership, active participation, and international legitimacy and make the PSI a more effective partnership.

A NEW MARKETING STRATEGY

Since its announcement by President Bush and unfortunate association with the previous U.S. presidential administration's perceived disregard for international law, the PSI has been the object of harsh criticism in the international community. However, despite frequent allegations that the PSI is a group of vigilante enforcers of a counterproliferation norm that has not yet achieved universal acceptance, the PSI has not yet run afoul of the law. Furthermore, the common claim that PSI is an arbitrary tool for powerful states to wield unilaterally against weaker states"¹¹² is unconvincing on its face, since seeking the assistance and constructive input of dozens of diverse nations of varying size and influence would not be an effective way for the United States to unilaterally exercise its discretionary world-policing powers. At its core, the PSI a voluntary coalition dedicated to improve operational capabilities to carry out interdiction operations and to facilitating the timely sharing of intelligence information among participants. When the PSI has reached out beyond its own membership and affected the interests of non-participant states through forcible interdiction operations, all available evidence suggests international law supported the operations and more often than not PSI partners had obtained permission from flag states or ship owners to conduct an interdiction. Withholding details about PSI interdictions has only generated suspicion of the initiative, costing it valuable international support. PSI members should be more forthcoming, where possible, in explaining how

¹¹² Shulman, 22.

interdiction operations have been conducted in accordance with international law to alleviate concerns that the PSI threatens freedom of navigation on the high seas and interferes with trade.

Furthermore, PSI can be marketed as not only consistent with but also supportive of states' international legal obligations. While China was able to remove a specific reference to participation in PSI activities from Resolution 1540, the Resolution nevertheless requires states to take action to prevent the proliferation of WMD to non-state actors. Though the Resolution does not specifically require membership in the PSI, active participation in PSI activities is an excellent way for states to demonstrate their commitment and enforcement of the principles articulated in the resolution, which has been closely monitored by the 1540 Oversight Committee.¹¹³ Customs training exercises and intelligence sharing through the PSI also reinforce states' obligations under other nonproliferation frameworks, including the NPT, CWC, and BWC, to prevent the spread of WMD materials and technology and should be highlighted as benefits of PSI participation.

In order to more effectively market the initiative, however, all PSI participants must play a role in lobbying for increased membership. One of the critical weaknesses of the PSI is the perception that it is a U.S. dominated activity, which makes it difficult for both non-aligned states that emphasize pursuit of an independent foreign policy, and states which define their foreign policy to act as a counterbalance to United States influence, most notably China, to accept and participate in the initiative. Though U.S. policymakers engineered the underpinnings of PSI, its current membership is diverse and operations are conducted through genuine coordination among all member states, especially those in a logistical position to assist in a particular operation, regardless of policy stance. The United States does not direct the activities of the PSI and should lobby its PSI partners to publicize the extremely decentralized nature of PSI decision-making and promote participation in the initiative to their allies, so the United States does not have to play the initiative's constant promoter.

THE FREE-RIDER PROBLEM AND INSTITUTIONALIZATION

The fact that PSI-led counterproliferation activities benefit the world community as a whole by staunching the spread of WMD materials and technologies presents a significant

¹¹³ Sharp at 1007.

challenge to recruiting new PSI participants. If states can benefit from PSI without assuming the risks and costs associated with active participation, there will be little incentive for them to seek membership in the initiative. “To overcome this free-rider problem, there must be specific benefits that accrue solely to those countries that formally endorse PSI and participate in PSI activities.”¹¹⁴ To promote participation in the initiative, PSI members should emphasize the members-only benefits of PSI, including intelligence sharing arrangements, opportunities to increase national military and customs administration capabilities, and input in PSI decision-making. For example, participation in PSI activities can improve national military and border protection capabilities through the conduct of joint training exercises and sharing of best practices among national militaries and customs agencies. In explaining why Indonesia should join the PSI, President Yudhoyono astutely “pointed out that PSI participation would assist Jakarta in building its military capacity to patrol the Strait of Malacca.”¹¹⁵

Furthermore, many states have resisted membership in PSI because they are concerned about the initiative’s potential impact on the freedom of navigation and international commerce. However, the decision not to participate in the initiative actually reduces such countries’ ability to influence PSI operations and ensure respect for international legal frameworks. States that currently oppose joining the initiative out of concern that their flag vessels or shipments on the high seas will be subject to interdiction operations in violation of international law are arguably in a better position to prevent the fears from coming to fruition as active participants in rather than outside critics of the PSI. As members, such states would be notified of intelligence information concerning proliferation-sensitive goods aboard their flag ships and would be given the opportunity to provide an alternative solution or permission for an interdiction under specific conditions to reduce the impact of PSI activities on their shipping and commerce activities. Finally, PSI members are in a better position to demand the release of wrongfully seized shipments and the establishment of an intra-PSI compensation fund for victims of unjustified interdiction operations could serve as an additional incentive for membership.

¹¹⁴ Wolf, Jr. (2009), 27.

¹¹⁵ Wolf, Jr. (2008), 7.

CIVIL NUCLEAR ENERGY COOPERATION AGREEMENTS AND OTHER INCENTIVES

Beyond emphasizing the inherent benefits of PSI participation, the United States and other PSI partners might extend indirect incentives to non-participant states to encourage membership in PSI. In particular, civil nuclear energy cooperation can be leveraged to increase participation in PSI among current members as well as non-participants. The United States is one of the primary providers of nuclear energy assistance, concluding agreements pursuant to Section 123 of the Atomic Energy Act of 1954 to coordinate the transfer of equipment and supply technical expertise to support civil nuclear energy programs abroad as required under the Nuclear Nonproliferation Treaty. Section 1234 agreements typically require a showing of commitment to nonproliferation principles as a prerequisite for assistance, including promises not to transfer nuclear technology to non-state actors or other states except under certain conditions, the adoption of IAEA Additional Protocols for increased inspections to verify nuclear energy will be used for peaceful purposes only, and compliance with international nuclear safety standards to secure fissile materials.

PSI participation is yet another way to demonstrate a serious commitment to nonproliferation and to increase the ability of states seeking to acquire peaceful nuclear technology to prevent the diversion and illicit export of sensitive materials. Requiring participation in PSI as a condition of peaceful nuclear energy assistance is one potential way to increase international support for the initiative. While this method of “coercing” states into supporting the PSI when they may have no ideological convictions in favor of counterproliferation, peaceful nuclear energy cooperation might serve primarily as an incentive for current PSI participants, which have already voiced their support for the PSI counterproliferation strategy, to participate more actively in the initiative’s activities.

For example, the United Arab Emirates is a critical PSI partner because the port of Dubai serves as the primary transshipment center in the Middle East and has proven a hotspot for proliferation activities. However, the U.A.E.’s pledge of commitment to the Interdiction Principles has meant little in practice, since the Emirati government has been hesitant to conduct thorough inspections of cargo transiting through its ports fearing that the resultant delays and possible interruption of commercial activity may cause shippers to choose other ports, jeopardizing revenue streams from the Dubai and Abu Dhabi free trade zones. The U.A.E. is

also interested in developing nuclear power plants to fulfill its energy needs and is looking to the United States to provide assistance. Including a provision in any eventual U.S.-U.A.E §123 agreement requiring the Emirati government to take increased steps to monitor activities in its ports as part of its commitment to the PSI could provide a much needed incentive for greater PSI support from the U.A.E. The proposed U.S.-U.A.E. §123 agreement submitted to the Senate by President Obama in March did not contain such a provision, however, Congress can still advise a revision before approving the agreement.¹¹⁶ Similar leverage might have been exerted on India under the provisions of the Hyde Act for peaceful nuclear energy cooperation and might have added a geostrategically important nuclear weapon state to the ranks of PSI partners.¹¹⁷

Finally, in addition to incentives such as peaceful nuclear cooperation and other indirect forms of foreign aid contingent upon PSI participation, the United States might make provisions of equipment necessary to conduct interdiction operations to encourage membership in PSI or enable PSI partners to better fulfill their commitments to arresting the spread of WMD materials and technology. One particularly poignant example of how providing equipment to support PSI activities could promote increased participation in interdiction operations pertains to aerial interdictions over the Asian continent. All of the former-Soviet Central Asian Republics, including Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan are already important PSI participants. These states are strategically located at the heart of Asia between most of the world's nuclear powers, including China, Russia, India, and Pakistan. Many primary commercial aviation routes connecting prominent nuclear supplier and recipient countries travel through the airspace over these states, bringing shipments of proliferation-sensitive goods from Russia and parts of Europe to Pakistan and India and from China and North Korea to Syria, Saudi Arabia, and other parts of the Middle East under the purview of the PSI. To increase the ability of the Central Asian Republics to carry out aerial interdiction operations against proliferation-sensitive shipments in their airspace pursuant to international law as described above, the United States and other PSI participants might consider providing loaning fighter jets to the governments of the republics on the condition that they be made available whenever

¹¹⁶ "President Obama Advances US-UAE Peaceful Nuclear Energy Agreement." July 29, 2009. *Embassy of the United Arab Emirates*. Available online at: <http://www.uae-embassy.org/media/press-releases/21-May-2009>. Accessed 1 December 2009.

¹¹⁷ *Id.* 18.

required to support PSI activities. The United States need not act alone; instead, a PSI-wide fund could be established and contributed to by PSI participants with the means to do so to procure necessary equipment to support operations by PSI partners. In either case, congressional participation would be required to authorize peaceful nuclear energy cooperation incentives and to appropriate funds for equipment transfers, highlighting the need for more extensive legislative participation in U.S. implementation of the PSI.

CONCLUSION

The Proliferation Security Initiative represents an important shift from the traditional nonproliferation framework, which has proven incapable of preventing the spread of WMD materials and technology, to a more active strategy of intercepting restricted goods in transit. While international legal support for PSI activities is inchoate at best and domestic legal authorities have not been fully exploited, “the greatest value of PSI continues to be marked by the expanding group of PSI participant states that declare their commitment to PSI and then take affirmative actions to work together to combat global WMD proliferation.”¹¹⁸ PSI partners are developing real-world capabilities to respond to perhaps the most serious threat to international peace and security, and a shift in the PSI’s anti-legalistic approach to one that embraces and guides the development of international law in support of counterproliferation operations could dramatically expand the ability of initiative partners to staunch the flow of WMD to rogue states and terrorist organizations.

In addition, an expression of international legal obligation by PSI participants to counterproliferation activities will enable PSI partners to eventually “formulate a base norm that could eventually rise to the level of a universal norm, much as the bans on piracy and the slave trade did,”¹¹⁹ and create a new source of international legal authority for interdiction operations in customary international law. The development of a customary norm supporting counterproliferation activities is critical given that state concerns for sovereignty and freedom of navigation are likely to frustrate efforts to institutionalize the PSI partnership in a legally binding treaty framework.

¹¹⁸ Sharp at 1025.

¹¹⁹ Shulman, 13.