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The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea†

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I. INTRODUCTION

The oceans of the world at once separate and connect us. As much as the sea provides a formidable natural barrier between the continents, it also provides a means of contact and communication, a navigable expanse and plentiful resource that has long been exploited for both individual and collective gain.[1] Over the course of history, powerful maritime states have played the primary role in shaping the public order of the oceans. Although state practice continues to play a dramatic role, the twentieth century also witnessed prolonged and repeated efforts to codify that practice into a veritable treaty-based Law of the Sea.[2]

In 1967—between one international effort at codification and another—Malta's Ambassador to the United Nations, Arvid Pardo, famously urged the U.N. General Assembly to take "immediate action to prevent the breakdown of law and order on the oceans" in the face of growing concern that exactly such a breakdown was imminent.[3] On December 10, 1982, the United Nations Convention on the Law of the Sea ("UNCLOS"), the product of decade-long negotiations, was opened for signature at Montego Bay, Jamaica.[4] Hav-

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1. Professors McDougal and Burke describe this distinctive characteristic of the oceans as "the spatial-extension resource, principally useful as a domain for movement . . . ." MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS—A CONTEMPORARY INTERNATIONAL LAW OF THE SEA, at vii (1962).

2. For an overview of the efforts at codification leading up to and including the Third United Nations Conference on the Law of the Sea (UNCLOS III), see 1 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 20–28 (1982).

3. U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OCEANS: THE SOURCE OF LIFE—UNITED NATIONS CONVENTION ON THE LAW OF THE SEA—20TH ANNIVERSARY 9 (2002), *available at* http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf (last visited Nov. 17, 2004) [hereinafter OCEANS: THE SOURCE OF LIFE].

4. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, Dec. 10, 1982, 1833 U.N.T.S. 397

ing obtained the requisite sixty ratifications in 1993, UNCLOS entered into force on November 16, 1994.[5] Eight years later, the United Nations proudly proclaimed that "[UNCLOS] established for the first time one set of rules for the oceans, bringing order to a system fraught with political conflict."[6]

But while UNCLOS set forth a widely agreed-upon set of rules, it is less clear whether its broad prescriptions created order out of chaos. Since the end of the Cold War, disorder on the oceans appears resurgent.[7] This breakdown takes a variety of forms, including piracy,[8] trafficking in drugs or people,[9] illicit fishing,[10] and degradation of the marine environment.[11] The system of open registries, or flags of convenience, permits the facile concealment of ship ownership behind the corporate form. Lax flag state[12] enforcement of shipping regulations leads to sub-standard vessels that pose hazards to crew and coast, as well as to the marine environment.[13] A range of non-navigational practices also promotes and sustains disorder. These practices include unilateral, excessive claims over the extent of the territorial sea or the continental shelf, particularly through gross manipulation of the straight baselines method.[14] UNCLOS is

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[hereinafter UNCLOS].

5. OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 10.

6. *Id.* at 1. The U.N. office that oversees Law of the Sea affairs notes that UNCLOS has been "hailed as the most important international achievement since the approval of the United Nations Charter in 1945." U.N. Div. for Ocean Affairs and Law of the Sea, *The Oceans are the Very Foundation of Human Life . . . . , at* http://www.un.org/Depts/los/oceans_foundation.htm (last visited Nov. 17, 2004).

7. *See* William Langewiesche, *Anarchy at Sea*, ATLANTIC MONTHLY, Sept. 2003, at 63 ("During the 1990s, even as international regulations multiplied, disorder on the high seas grew dramatically.").

8. *See* OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 7 (providing recent statistics on reported incidents of piracy and related injuries); Vijay Sakhuja, *Maritime Order and Piracy*, STRATEGIC ANALYSIS, Aug. 2000, at 923 (attributing an increase in maritime piracy over the past decade to the shrinking post-Cold War naval presence of the United States and the Soviet Union in certain piracy "hot spots").

9. OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 8 (describing the rising profitability of smuggling migrants and the continuing and widespread practice of drug trafficking by sea).

10. *See* HÉLÈNE BOURS ET AL., GREENPEACE INTERNATIONAL, PIRATE FISHING PLUNDERING THE OCEANS (Luisa Colasimone et al. eds., 2001), *available at* http://archive.greenpeace.org/oceans/reports/pirateen.pdf (last visited Nov. 17, 2004) (explaining the connections between illegal fishing, piracy, and so-called "flags of convenience"); EUGENE PROULX, HIGH SEAS BOARDING AND INSPECTION OF FISHING VESSELS: A DISCUSSION OF GOALS, COMPARISON OF EXISTING SCHEMES AND DRAFT LANGUAGE 1 (FAO Legal Papers Online No. 33, Sept. 2003), *available at* http://www.fao.org/Legal/pub-e.htm (last visited Nov. 27, 2004) (describing the problem of "free riders" ignoring the complex high seas fisheries regulatory scheme); OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 5 (noting the "serious and worrisome dwindling of fish stocks" attributable in part to illegal, unregulated, and unreported fishing).

11. OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 3–4 (summarizing ongoing land-based and vessel-based pollution problems).

12. The flag state is the state that has conferred its nationality upon a particular vessel by virtue of registration; in turn, a registered ship flies the flag of its state of registration. Flag state control refers to the rights and duties of a flag state with respect to the vessels in its registry. *See infra* Parts II.B.2, V.A.

13. *See* J. Ashley Roach, *Salient Issues in the Implementation of Regimes Under the Law of the Sea Convention: An Overview, in* ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 435, 441 (Davor Vidas & Willy Ostreng eds., 1999) [hereinafter ORDER FOR THE OCEANS] (discussing "the persistent problem of sub-standard ships registered in states not carrying out their international responsibilities . . .").

14. The straight baselines method refers to a method of maritime border delimitation used to define the scope of a coastal state's internal waters and, consequently, the twelve-nautical-mile reach of its territorial sea. Straight baselines come into play where a state's coast fails to follow a smooth line or is "highly unstable." UNCLOS, *supra* note 4, art. 7. Baselines can be manipulated to enhance a coastal state's area of

widely considered "one of the most comprehensive and well-established bodies of international regulatory norms in existence . . . buttressed by longstanding international norms, and formal legal agreements, critical to creating a more secure international environment."[15] Nevertheless, the persistence of maritime disorder indicates a critical gap between the prescription of law and the capacity or will to make that prescription effective. Alternatively, in some instances, the prescription itself may be lacking, either in specificity, scope, or adaptability to evolving circumstances.[16] UNCLOS is undoubtedly an historic achievement, but its successful translation into an effective regime of international law is a process in need of frequent reassessment and adjustment.

The sea and its system of legal norms, however, risks characterization as a classic "out of sight, out of mind" problem. Simply because most activities on the oceans take place at some distance from our daily lives on land, issues of maritime law and oceans management are not cordoned off from transnational problems, particularly global security, that demand nearly constant attention. Renewed efforts by the United States and its allies to neutralize threats such as the proliferation of weapons of mass destruction ("WMD") have placed a new and sustained focus on the legal regime regulating maritime behavior.[17] The exploitation of the oceans for the transport and exchange of dangerous weaponry and technology is a global problem facilitated by the same freedom of navigation by sea that legal prescriptions have carefully preserved over time. Writing over forty years ago, Professors McDougal and Burke noted that "[t]he common interest in maintaining a large measure of freedom from interference on the high seas has not been seriously questioned for some decades."[18] This Article asks whether seriously questioning that freedom is now permissible and wise, or whether the intervening years have recalibrated the acceptable "measure of freedom from interference," on the high

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control by departing from both the spirit and letter of the UNCLOS provisions. This results in an "excessive claim." *See* 66 J. ASHLEY ROACH & ROBERT W. SMITH, INTERNATIONAL LAW STUDIES, EXCESSIVE MARITIME CLAIMS 41–80 (1994). *See also* W. MICHAEL REISMAN & GAYL WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION (1992).

15. Briefing, Nigel Chamberlain, British American Security Information Council, Interdiction Under the Proliferation Security Initiative: Counter-Proliferation or Counter-Productive? (Oct. 6, 2003), *available at* http://www.basicint.org/nuclear/UK_Policy/psi20031006.htm (last visited Nov. 18, 2004). *See also* OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 15 (concluding that "overall State practice complies largely with this major international instrument [UNCLOS], the importance of which, 20 years after its adoption, is ever increasing").

16. On the latter point, Professor Burke, for example, has criticized the viewpoint of some UNCLOS negotiating parties who hoped that "explicit agreement could anticipate all the pressures and tensions that accompany such developments and their effect on national social and economic processes[.]" William T. Burke, *State Practice, New Ocean Uses, and Ocean Governance under UNCLOS*, *in* OCEAN GOVERNANCE STRATEGIES AND APPROACHES FOR THE 21ST CENTURY 219, 219 (Thomas A. Mensah ed., 1996) [hereinafter OCEAN GOVERNANCE STRATEGIES]. The problems facing ocean governance discussed in this Article show that Professor Burke is quite clearly correct.

17. "States of concern" is the politically correct label for those states previously branded as "rogue states." After the defeat of Iraq's Saddam Hussein and the volte-face of Libya's Muammar Qaddafi, the leading "states of concern" are apparently Iran and North Korea.

18. MCDOUGAL & BURKE, *supra* note 1, at 869.

seas or elsewhere. The disorder lurking beneath the façade of legal order represented by UNCLOS—the troubling notion that "the entire structure built to regulate [the sea] is something of a fantasy floating free of the realities"[19]—exacerbates the difficulty of reconciling "the overriding principle of noninterference"[20] with the need to promote community well-being, both within and beyond the maritime context.

This Article examines the threat to world public order posed by the proliferation of WMD by exploitation of the freedom of the seas. In particular, the analysis concerns the Proliferation Security Initiative ("PSI"), a project announced by President George W. Bush on May 31, 2003, to combat that threat.[21] The PSI envisions the interception of illicit and dangerous cargo on land and in the air, but its primary focus has been the sea. Participating nations have pledged to pool their intelligence and physical resources to interdict vessels at sea that are believed to pose threats to the world community. When such threats are found, PSI participants will seek to board and search such vessels, with the possible result of seizing the vessel and its cargo.

Some interdictions could ostensibly violate international law, whether as prescribed by UNCLOS or customary international law.[22] PSI participants seek to amend municipal legal authorities to facilitate PSI operations, possibly further eroding legal guarantees that favor non-interference and the common use of most ocean space. For over two centuries, the apparent sanctity of free navigation on the high seas and the concomitant exclusive jurisdiction of flag states over their vessels have seemingly, but perhaps misleadingly, stood as rare beacons of certainty in international law. The extent to which the case for exclusive control over ships at sea has been overstated or misperceived will be examined in these pages. In addition, this Article revisits the calculus of interests that lies behind the non-interference principle and identifies relevant trends in the law of the sea that may indicate whether a new balance of interests is in the process of negotiation—or has already emerged.

The prospect of increased ship interdictions by PSI member states creates a secondary problem. Will PSI efforts to expand the range of situations in which interdictions are lawful and permissible lead to a more widespread breakdown in the public order of the oceans, as other states, acting outside

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19. Langeweische, *supra* note 7, at 63.

20. McDougal & Burke, *supra* note 1, at 869.

21. *See* Press Release, U.S. Department of State, Proliferation Security Initiative: Chairman's Statement at the First Meeting (June 12, 2003), *available at* http://www.state.gov/t/np/rls/other/25382.htm (last visited Nov. 17, 2004) [hereinafter Chairman's Statement].

22. Customary international law binds actors in the international system by virtue of the widespread adherence of states and other actors to a certain standard of conduct. That standard is identified by customary practice rather than by formal written rules or agreement. The contours of *how* customary international law is created or *when* the status of customary international law has been reached, however, are fluid and open to debate. It can strongly be argued that the bulk of UNCLOS has achieved the status of customary international law, excepting certain provisions pertaining to management of the ocean seabed in international waters. As such, UNCLOS binds even non-signatories, including the United States, to many of its provisions. For additional details on the U.S. relationship to UNCLOS, see *infra* note 186.

the PSI scheme, make unilateral claims to stop and search vessels on the high seas?[23] Alternatively, will such claims violate the right of innocent passage in the territorial sea? As this Article examines other maritime contexts in which jurisdiction has been lawfully established by parties previously excluded from the prescription or enforcement of legal norms, it will seek to determine what factors prevent the expansion of lawful jurisdiction from descending into chaos and, in turn, encourage manageable results with the acceptance of the wider community of nations. Ultimately, it may be necessary to ask whether the justifications for PSI interdictions—WMD and global security—differ sufficiently from concerns motivating other zones of "creeping jurisdiction"[24] to justify a new system of authority and control.

The oceans are marked by a blurry line between freedoms guaranteed by the presence of law and a more radical freedom—that is, a kind of anarchy—that flourishes in spite of prescribed legal norms.[25] Part II identifies the WMD threat and current problems with the international non-proliferation regime. In turn, it examines how exploitation of the oceans as "a domain for movement"[26] undermines existing non-proliferation mechanisms and poses additional threats specific to the maritime context. Part III then examines the PSI response to those threats.

Shifting to a broader view of public order and ocean governance, Part IV contextualizes the precarious balance between maritime principles of non-interference and more recently defined community goals and regulatory imperatives. In turn, Part V offers an appraisal of the existing legal authority under which the interdiction of ships at sea can take place. Part V compares the legal authorities that already permit non-WMD-related regulatory enforcement measures within the different maritime zones. Part VI analogizes PSI operations to maritime interdictions in times of war or under formal U.N. Security Council authorization.

Finally, Part VII offers conclusions regarding the lawfulness of PSI activities. Mindful of other maritime contexts in which jurisdiction has shifted from an exclusive to inclusive model of enforcement, it also offers recommenda-

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23. *See* MCDOUGAL & BURKE, *supra* note 1, at 869 ("If states were permitted a competence arbitrarily to apply authority to the vessels of any state, freedom of access could very quickly disappear."); Rachel Canty, *Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123, 131 (1998) (noting that expanding the jurisdiction of the U.S. Coast Guard into the high seas without the flag state consent "could be extremely damaging to U.S. national security and freedom of navigation rights worldwide"). The closely related question of whether the PSI will create new rights of interdiction under customary international law is examined in Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526 (2004). Byers hypothesizes that such a result is unlikely. *Id.* at 528.

24. "Creeping jurisdiction" refers to trends by which geographic zones or subject matter formerly within the exclusive jurisdiction of one state or entity are gradually opened up to the concurrent (or competing) jurisdiction of multiple states or entities. *See infra* note 200. It can also be seen as a recognition of the tendency of law-making or law-enforcing bodies to seek expansion of their zones of control over time, either through formal or informal channels.

25. Langewische, *supra* note 7, at 50.

26. MCDOUGAL & BURKE, *supra* note 1, at vii.

tions for improving the standing of the PSI as an instrument of international law-making. Aware of the undesirable consequences that PSI operations could provoke, Part VII asks how the initiative can operate in ways that are consistent with the project of a minimum public order, both for the oceans and the international system at large. Ultimately, the PSI would be best served by seeking additional legal authority through traditional channels such as the U.N. Security Council (an effort that has already produced some legal and political cover for the initiative[27]) and also by undertaking organizational reforms to enhance transparency and harmonization in its operations.

II. Threat Identification: WMD and Maritime Disorder

A. Failures of the Treaty-Based Non-Proliferation Regimes

Since the terrorist attacks of September 11, 2001, the global threat posed by weapons of mass destruction has fixed itself in daily discussion; the WMD acronym is surely now commonplace in the American vernacular. The September 11 attacks notably did *not* involve the use of WMD—meaning nuclear, chemical, or biological weapons—but the catastrophic scale of the attacks exposed both the glaring vulnerability of terrorist targets and the frightening willingness of determined enemies to inflict levels of damage previously imaginable only in the context of conventional state-to-state warfare.[28] In response, the United States and its allies have undertaken a reassessment of the threat potential posed by the production and dissemination of WMD. Such weapons in the possession of hostile or unstable states or terrorist organizations undoubtedly pose tremendous threats to world public order, especially given that the paradigm of Cold War–era deterrence may no longer provide much assurance against actual WMD use.[29]

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27. *See* S.C. Res. 1540, U.N. Doc. S/Res/1540 (Apr. 28, 2004) (calling on U.N. member states to improve legal and regulatory standards in order to impede weapons proliferation and endorsing cooperative state action to achieve that goal).

28. The anthrax attacks, which followed during the autumn of 2001, added new worries to already heightened public concern and provided a sense of the havoc a large-scale biological attack would create.

29. Continued dependence on deterrence seems *least* viable in the context of the threat posed by non-state actors, against whom the requisite decisive and proportionate response, especially given their geographic dispersion, would prove difficult. Even if it were not impossible to respond effectively, the phenomenon of the suicide bomber—raised to the scale of a WMD assault—is truly horrific to contemplate. *See, e.g.*, *Binding the Colossus*, Economist, Nov. 22, 2003, at 25 ("Containment and traditional deterrence, relied on for the past half-century, are clearly no longer adequate to deal with the new world of terrorists armed with weapons of mass destruction."). Although the National Strategy to Combat Weapons of Mass Destruction issued by the Bush administration in December 2002 acknowledges that "[t]oday's threats are far more diverse and less predictable than those of the past," the policy contemplates "new methods of deterrence" rather than conceding that there may be little to no deterrent effect against non-state actors. White House, National Strategy to Combat Weapons of Mass Destruction 3 (2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf [hereinafter National Strategy to Combat WMD]. *See also* Andrew C. Winner, *The PSI As Strategy*, Monitor, Spring 2004, at 10, *available at* http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf (last visited Nov. 18, 2004) [hereinafter Monitor, Spring 2004] (placing interdiction within the "rubric of deterrence"). Even with state actors, deterrence may have limits. Some have applied a "madman" theory to North Korea, whereby the state itself might irrationally launch a first strike nuclear attack despite the fatal consequences for the

The WMD threat is magnified by ongoing proliferation: the transport of WMD-related materials from producers to buyers. North Korea is recognized not only as a threat in its own right, but as a dangerous agent of proliferation whose customers have included Iran, Libya, Syria, Egypt, and Pakistan.[30] Admissions in February 2004 by Pakistan's leading nuclear scientist revealed a sinister global web of underground trafficking among private actors, so-called "secondary proliferation," in illicit materials and nuclear secrets.[31] Weapons proliferation has also been traced back to sources in China and Russia, as well as to European-based companies.[32] State-to-state provision of equipment or expertise is deeply problematic, but the ability of states or highly placed non-state actors within such states to furnish other non-state actors with weapons or technology may pose the greater threat. Osama bin Laden reportedly described the acquisition of nuclear weapons as a "religious duty."[33] President Bush has described WMD in the hands of terrorists as "a first resort—the preferred means to further their ideology of suicide and random murder."[34] The renewed focus on controlling WMD proliferation has placed increased scrutiny on the elaborate set of non-proliferation treaty arrangements and non-binding supplier groups, which are ad hoc agreements between various countries, already in place. Nuclear weapons and related technology are ostensibly controlled through the Nuclear Non-Proliferation Treaty ("NPT"), the Comprehensive Nuclear Test Ban Treaty ("CNTBT"), and the oversight

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regime. *See Nuclear Futures*, ECONOMIST, Jan. 24, 2004, at 74. Others dismiss the madman theory but envision alternative scenarios. *See* VICTOR D. CHA & DAVID C. KANG, NUCLEAR NORTH KOREA—A DEBATE ON ENGAGEMENT STRATEGIES 102 (2003).

30. Press Statement, John Chapman, International Institute for Strategic Studies, North Korea's Weapons Programmes: A Net Assessment (Jan. 21, 2004), *available at* http://www.iiss.org/showdocument.php?%20docID=324 (last visited Nov. 17, 2004).

31. *See* David Rohde & David E. Sanger, *Key Pakistani Is Said to Admit Atom Transfers*, N.Y. TIMES, Feb. 2, 2004, at A1. A. Q. Khan, popularly known as the father of Pakistan's nuclear program, was discovered to be the mastermind behind an extensive international black market for nuclear technologies and equipment. His clients included Iran, Libya, and North Korea. *See* President George W. Bush, Speech to the National Defense University (Feb. 11, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html (last visited Nov. 17, 2004) [hereinafter Bush Remarks to NDU] (describing the wide scope of the Khan network). Evidence gathered from Libya since the recent shutdown of the country's nuclear program similarly revealed "a remarkably sophisticated network of nuclear suppliers, spanning the globe from Malaysia to Dubai." David E. Sanger, *The Struggle for Iraq: Weapons Inspectors—The Nuclear Market: An Array of Vendors*, N.Y. TIMES, Jan. 25, 2004, at A12. It remains unclear whether Khan's network had direct contacts with non-state actors or terrorist organizations such as Al Qaeda. Despite the economic incentives that North Korea might have to sell nuclear secrets to terrorists, "no one has produced evidence to suggest that Pyongyang has ever attempted to sell nuclear material to terrorist groups." Daniel A. Pinkston & Phillip C. Saunders, *Seeing North Korea Clearly*, SURVIVAL, Autumn 2003, at 89–90. Nonetheless, North Korea has threatened to export nuclear weapons. *See* Press Release, U.S. Embassy, CIA Report Reviews Weapons Proliferation Trends—Report to U.S. Congress Documents Acquisition and Supply Activities (Nov. 13, 2003), *available at* http://www.usembassy-israel.org.il/publish/press/2003/november/111403.html (last visited Nov. 17, 2004) [hereinafter CIA Report].

32. *Rogues Step In*, ECONOMIST, Jan. 10, 2004, at 36. *See also* Michael E. Beck, *The Promise and Limits of the PSI*, MONITOR, Spring 2004, *supra* note 29, at 17 (describing companies in western countries as historically the principal sources of WMD proliferation); Rohde & Sanger, *supra* note 31 (noting the role played by German and Dutch middlemen in the Khan network).

33. *A World Wide Web of Nuclear Danger*, ECONOMIST, Feb. 28, 2004, at 25.

34. Bush Remarks to NDU, *supra* note 31.

provided by the International Atomic Energy Agency ("IAEA"). Export controls of the NPT are supplemented by oversight from the Zangger Committee and the Nuclear Suppliers Group ("NSG").[35] Biological weapons are banned by the Biological and Toxin Weapons Convention ("BTWC"),[36] and chemical weapons by the Chemical Weapons Convention ("CWC"), with compliance overseen by the Organization for the Prohibition of Chemical Weapons ("OPCW").[37] The Australia Group facilitates the harmonization of export controls for both the biological and chemical regimes.[38] Finally, the Missile Technology Control Regime ("MTCR") and the Hague Code of Conduct provide export guidelines for equipment and technology related to end-products including cruise missiles and unmanned air vehicles, while the Wassenaar Arrangement maintains control lists of items such as semiconductor lasers and navigation equipment.[39] Export control groups tend to operate informally on a consensual basis and do not necessarily impose binding legal obligations on their members. As a result, their records of success are mixed.[40]

While it is beyond the scope of this Article to examine the relative strengths and weaknesses of each component of the elaborate multilateral non-proliferation architecture,[41] American policy-makers are deeply concerned with inadequacies in the overall system, both in terms of its structure and the results it has achieved. A system of control based on multilateral treaties requires both widespread subscription and compliance, including enforcement procedures, in order to be effective. The NPT illustrates these difficulties. First, the fact that non-signatory states remain beyond the obligations prescribed by the aforementioned instruments creates an obvious problem. Nuclear states Israel, India, and Pakistan have not signed the NPT and are not formally subject to its restrictions, such as prohibitions on shipment of nuclear materials. North Korea has withdrawn from the treaty.[42] Even if a country has signed the

35. The IAEA administers safeguards on exported nuclear equipment and technology in importing states. The Zangger Committee and the NSG represent efforts by exporting states to interpret the restrictions imposed by Article III, paragraph 2 of the NPT. CHARLES F. PARKER, CONTROLLING WEAPONS OF MASS DESTRUCTION—AN EVALUATION OF INTERNATIONAL SECURITY REGIME SIGNIFICANCE 111 (2001).

36. *Id.* at 137.

37. *Id.* at 185, 198.

38. *Id.* at 140, 202.

39. *International Supplier Regimes*, NIS EXPORT CONTROL OBSERVER, Dec. 2003–Jan. 2004, at 10–11.

40. For example, after the NSG agreed to prohibit trade in nuclear-related materials with countries outside the IAEA safeguards regime, Russia abandoned its commitments in order to assist India, which is not a member of the NPT, with the construction of new nuclear reactors. *See A World Wide Web of Nuclear Danger*, *supra* note 33, at 27. Countries under severe financial pressures may predictably be more tempted to abandon non-binding non-proliferation commitments in pursuit of lucrative commercial deals. Similarly, in the context of non-nuclear conventional weapons, Western European countries have continued to negotiate sales to countries such as Libya, India, and Pakistan "to preserve their domestic defense industries." CIA Report, *supra* note 31. *But see* Seema Gahlaut, *The PSI Will Parallel the Multilateral Export Control Regimes*, MONITOR, Spring 2004, *supra* note 29, at 13 (describing the endurance of the export control groups and their increasing success over time).

41. For just such an analysis, see generally PARKER, *supra* note 35.

42. Sharon Otterman, Council on Foreign Relations, *WMD—U.S. Interdiction*, *at* http://www.cfr.org/background/wmd_interdict.php (last modified June 26, 2003).

NPT, another state can "redeploy" its nuclear weapons into the signatory state provided it still claims the weapons are under its control.[43] Second, the verification and enforcement mechanisms of the non-proliferation regimes appear weak, if only because several states such as Iran and Libya have successfully managed to circumvent the restrictions using both licit and illicit transfers. The ability of states to ratify the NPT and then abuse its provisions permitting the lawful acquisition of dual-use technology and equipment for civilian nuclear programs is perhaps the regime characteristic most irksome to American and European leaders.[44] Iran is a model of success in this regard, having acquired the bulk of its nuclear capabilities covertly, but in most instances, legally.[45]

Some observers blame the United States for hindering the effective development and reform of the multilateral treaty regimes, including the NPT. A perceived American hostility to treaty-based multilateral arms control efforts under the Bush presidency has been cited as a "significant obstacle" to effective reform,[46] and the Bush administration has been described as directly "undermining non-proliferation norms and alliances by its policies."[47] Whether or not recent U.S. policy has undermined the treaty-based arms control system, there appears to be a growing consensus within the international community that multilateral treaty instruments by themselves lack the necessary control intention to transform their prescriptions of legal norms into effective international law.[48] In the spirit of reform, the Bush administration has

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43. Henry Sokolski, *Nukes on the Loose—Time For a New Non-Proliferation Regime*, WEEKLY STANDARD, June 23, 2003, at 20.

44. John Bolton, U.S. Under Secretary of State for Arms Control and International Security, has expressed concern that gaps in the NPT allow "countries to undertake a lot of activity that brings them closer to nuclear weapons capability, but which don't violate any of the existing provisions of the NPT." Wade Boese & Miles Pomper, *The New Proliferation Security Initiative—An Interview with John Bolton*, ARMS CONTROL TODAY, Nov. 4, 2003, *available at* http://www.armscontrol.org/aca/midmonth/November/Bolton.asp (last visited Nov. 17, 2004) [hereinafter Bolton—Interview with ACT].

45. Sokolski, *supra* note 43. Syria and Egypt, for example, may view Iran's approach to the development of its nuclear capabilities as a model. *Id.* Even Brazil, which refuses to accept the mandatory inspection regime of the IAEA's Additional Protocol, may be considering restarting its abandoned nuclear program. *See A World Wide Web of Nuclear Danger*, *supra* note 33, at 26.

46. Jez Littlewood, *The EU Strategy Against Proliferation of Weapons of Mass Destruction*, 1 J. EUR. AFF. 1 (2003), *available at* http://www.eupolicynetwork.org.uk/JEA1-1.pdf (last visited Nov. 17, 2004).

47. Judith Miller, *Arms Control Racing Time and Technology*, N.Y. TIMES, Dec. 6, 2003, at B7 (describing critics who cite U.S. plans to develop an anti-ballistic missile shield and a new class of nuclear weapons as well as its abandonment of a six-year effort to bolster the BTWC as harmful to the non-proliferation agenda). It is important to note, however, that despite its resistance to the multilateral treaty approach, the Bush administration has worked through some traditional multilateral channels; examples include proposed amendments to the CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA CONVENTION], which would criminalize "the unlawful and intentional seaborne transfer" of WMD or related materials. Mark T. Esper & Charles A. Allen, *The PSI: Taking Action Against WMD Proliferation*, MONITOR, Spring 2004, at 5. *But see* Daniel H. Joyner, *The PSI and International Law*, MONITOR, Spring 2004, *supra* note 29, at 9 (describing the U.S. efforts to amend the SUA Convention as having "met with little success"). Indeed, the criminalization of materials already considered "unlawful" does not necessarily provide the clarity needed to transform political will into new law.

48. "Control intention" is a term borrowed from the policy-oriented approach of the New Haven School to

issued several proposals seeking to bolster the existing legal authorities governing non-proliferation.[49] Following President Bush's September 2003 proposal to the U.N. General Assembly that the Security Council adopt a resolution to criminalize the proliferation of weapons,[50] the Bush administration sent a draft resolution to the U.N. Security Council in March 2004 to prohibit the transfer of WMD to non-state actors, including terrorists or mercenaries, under Chapter VII of the U.N. Charter.[51] On April 28, 2004, the Security Council adopted Resolution 1540, declaring that all Member States have an obligation to adopt and enforce laws prohibiting any non-state actors to "manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical, biological weapons and their means of delivery, in particular for terrorist purposes."[52] The prohibitions also cover non-state actors participating as enablers or financiers to any such activities, and the resolution also demands that all States refrain from providing *any* form of support, even in unrelated areas, to non-state actors involved in proliferation-related activity.[53] In addition, Resolution 1540 includes a host of recommendations and prescriptions for enhanced domestic export control regulations, trans-shipment controls, and a temporary Committee of the Security Council to oversee progress on these initiatives.[54]

While these reforms might help to translate the non-proliferation consensus into political reality, enforcing the tightened regulations will remain problematic, especially given the physical means by which WMD-technology can

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international lawmaking. It refers to "power, the capacity and willingness to make a preferential expression effective." W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 110 (1981). Furthermore, even though the various counter-proliferation instruments all include explicit statements of policy content, it is arguable whether they all even carry lawmaking intention: "Explicit content does not automatically equal prescription." *Id.* at 109.

49. *See* Bush Remarks to NDU, *supra* note 31. The proposals include closing NPT loopholes and making accession to the IAEA's Additional Protocol, including inspection regimes, a precondition to imports relating to civilian nuclear programs.

50. President George W. Bush, Address at the United Nations General Assembly (Sept. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html (last visited Nov. 18, 2004).

51. Colum Lynch, *U.S. Urges Curb on Arms Traffic*, WASH. POST, Mar. 25, 2004, at A20.

52. S.C. Res. 1540, *supra* note 27, ¶ 2. As reports surrounding the draft version indicated, Resolution 1540 does not explicitly cover state-to-state transfers of sensitive technology in any way that conflicts or alters the rights and obligations of parties to the major counter-proliferation agreements already in place. *See id.* ¶ 5. A more far-reaching proposal would have seen the U.N. Security Council ban exports made by any country *outside* the export control groups. *See* Sokolski, *supra* note 43 (making such a proposal and noting that Israel, not a member of the Hague Code of Conduct restricting missile proliferation, has exported missile technology to China and India, despite the latter's military cooperation with Iran). An earlier draft Security Council resolution, which the permanent members were unable to agree on, was circulated by the United States in December 2003. That proposal also focused on criminalizing the flow of weapons to non-state actors and enacting stricter export controls, but rejected proposals by the British (for a U.N. counter-proliferation committee) and the French (for a permanent corps of U.N. weapons inspectors). Mark Turner, *U.S. Drafts U.N. Move to Reduce Flow of Weapons*, FIN. TIMES (London), Dec. 18, 2003, at 15. For additional discussion of Resolution 1540 and its omission of explicit authorization for ship interdiction activities, see *infra* text accompanying note 181.

53. S.C. Res. 1540, *supra* note 27, ¶¶ 1, 2.

54. *Id.* ¶¶ 3, 4 & 8.

be covertly transported to interested parties. One of the most prevalent means of transport is, of course, by sea.

B. Vulnerabilities at Sea

The freedom of the seas makes cracking down on illicit transfers of WMD-related technology all the more difficult. Policymakers have speculated with great concern about the variety of ways by which terrorist organizations or hostile states might exploit the traditional freedoms and anonymity of the global commercial shipping industry to increase their threat capabilities or even carry out threats directly. Before examining the specific nature of those threats, this Section describes two essential characteristics of maritime transport that expose the industry to possible abuse.

1. Shipping Containers

Global dependence on a fast and efficient maritime shipping industry can hardly be understated. Approximately ninety percent of international trade is transported by sea.[55] The large merchant vessels that crisscross the globe each day are indispensable components in the worldwide supply chains upon which major industries depend. Not surprisingly, the United States is "the most active sea-trading nation on earth."[56] The speed and efficiency with which the shipping industry operates are in large part attributable to the innovation of the shipping container.[57] By standardizing the containers in which goods are transported and making such containers easy to transfer directly from ship to ground transportation networks, "containerization" has allowed the industry to keep pace with demands for ever faster shipments at affordable levels. One estimate puts the number of containers either in transit (by land or sea) or awaiting delivery each day at fifteen million;[58] other reports estimate that cargo ships bring six to seven million containers into American ports each year.[59]

2. Open Registries and Flags of Convenience

Open registries and flags of convenience are a second essential pillar of the global shipping industry. In practice, all non-military sea-going vessels must

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55. OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 13.

56. Langewiesche, *supra* note 7, at 73.

57. For a brief historical overview of the emergence of containerization in the mid-1950s, see Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 347–48 (2002).

58. *When Trade and Security Clash—Container Trade*, ECONOMIST, Apr. 6, 2002, at 59 (also noting that cargo shipped by container accounts for approximately ninety percent of the world's traded goods by value).

59. *See* Langewiesche, *supra* note 7, at 74 (reporting six million); Press Release, U.S. Department of State, Bureau of International Information Programs, U.S. Expands Container Security Initiative to South Africa (Dec. 3, 2003), *available at* http://www.globalsecurity.org/security/library/news/2003/12/sec-031203-usia02.htm (last visited Nov. 18, 2004) [hereinafter CSI Expansion] (reporting seven million).

be registered with a national registry.[60] In theory, an unregistered vessel can set sail—and, indeed, such vessels do—but without registration and the ascription of "nationality" from the state of registry that follows, the vessel has virtually no rights or legal protections against the incursions of any other vessels it may encounter.[61] Furthermore, ship nationality functions as an administrative mechanism by which rules regulating ship safety, fish catch limits, or environmental protection can, in theory, be enforced. "Nationalist" or "closed" registries—such as that of the United States—place strict criteria on which vessels can be registered. Closed registry requirements might mandate majority ownership in the vessel by citizens of the registry state, that the ship's crew be composed entirely of flag state citizens, or that the ship have been manufactured within the flag state.[62] In contrast, open registries permit "the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels."[63] In 1997, it was estimated that half of the entire world's merchant fleet operated under flags of convenience.[64]

At around the same time that containerization revolutionized the shipping industry during the post–World War II economic boom, large numbers of ship-owners abandoned the ship registries of their own states to re-register in the open registries of countries such as Liberia and Panama.[65] The primary motivations for the migration were economic concerns such as tax avoidance, the availability of lower labor costs, and less stringent enforcement of maritime regulations.[66] In some circumstances, a desire to conceal criminal activ-

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60. Ship registration usually entails the provision of basic information regarding the ship to the registry in addition to the payment of a registration fee. The registry may also assist in certifying the ship to meet international safety standards.

61. Warships have the right to visit and board ships lacking nationality on the high seas. UNCLOS, *supra* note 4, art. 110. *See also infra* Part V.D.1. Domestic jurisprudence in both the United Kingdom and the United States confirms that stateless ships enjoy no protection under international law. *See* H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 MAR. LAW. 139, 141–43 (1996).

62. David Matlin, Note, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1027 (1991). Leading maritime states including Japan, the United Kingdom, and the United States all maintain closed registries. *Id. See also* Anderson, III, *supra* note 61, at 151–56 (comparing the closed registry requirements of the United States and the United Kingdom with the open registry requirements of Liberia and Panama and the hybrid requirements of Luxembourg).

63. BOLESLAW ADAM BOCZEK, FLAGS OF CONVENIENCE—AN INTERNATIONAL LEGAL STUDY 2 (1962).

64. *Flags of Peace?*, ECONOMIST, Sept. 13, 2003, at 57. Efforts to impose stricter controls on international shipping during the 1990s increased the ranks of the open registries, several of which operate almost completely outside their home state. Liberia's registry is maintained in Virginia, and the Bahamas registry is run out of London. Langewiesche, *supra* note 7, at 51.

65. In terms of overall tonnage, Panama is the top flag of convenience and Liberia is second. Edward Harris, *Pact With Liberia Lets U.S. Search Ships*, ASSOCIATED PRESS, Feb. 13, 2004. *See also* INST. OF SHIPPING ECON. AND LOGISTICS, EXECUTIVE SUMMARY—SSMR MARKET ANALYSIS NO. 4: OWNERSHIP PATTERNS OF THE WORLD MERCHANT FLEET 3 (2003), *available at* http://www.isl.org/products_services/publications/pdf/ownership_short.pdf (last visited Nov. 18, 2004).

66. The lower cost of operating ships under a flag of convenience also gives many ship owners a competitive advantage over ships registered in states where regulations may be better enforced and more costly to comply with. *See* Langewiesche, *supra* note 7, at 51 (discussing the tax and labor cost advantages); Mellor, *supra* note 57, at 362 (describing how open registries help vessel owners "to crew the ships

ity also played a role.[67] Open registries have operated successfully despite the provisions in UNCLOS and the 1958 Geneva Convention on the High Seas ("1958 High Seas Convention"), which require "a genuine link between the State and the ship."[68] The requirements for determining what constitutes a "genuine link" have been left to the flag state[69] and the widely criticized provision has been reduced to a nullity.[70] "Genuine link" can be taken to mean nothing more than the fact of the legal act of registration,[71] al-

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with foreign nationals as a means to control costs"). *See also* Matlin, *supra* note 62, at 1020 (noting the negative media coverage that ships sailing under flags of convenience received in the 1970s following a series of oil tanker accidents blamed on ships and crews that fell short of regulatory standards). It is important to note that at least some leading flag states, such as Liberia, have apparently made serious efforts to improve safety records and ship standards, and the International Maritime Organization and various industry bodies have made improving the performance and image of flags of convenience a priority. *See, e.g.*, BIMCO ET AL., SHIPPING INDUSTRY GUIDELINES ON FLAG STATE PERFORMANCE (2003), *available at* http://www.marisec.org/flag-performance/flag-performance.pdf (last visited Nov. 18, 2004); Liberian Registry, *Liberia Excels in Paris MOU*, FLAGSHIP, Dec. 2003, at 2, *available at* http://www.liscr.com/display_files/newsletters/Flagship10.pdf (last visited Nov. 18, 2004). *See also* Mario Valenzuela, *Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction*, *in* ORDER FOR THE OCEANS, *supra* note 13, at 485, 488 (noting that flag states "have tried hard" to comply with standards). *But see, e.g.*, Emeka Duruigbo, *Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry*, 7 ANN. SURV. INT'L & COMP. L. 101, 108 (2001) (arguing that "[f]lag states appear reluctant to enforce standards against their ships").

67. *See* Jeremy Firestone & James Corbett, *Maritime Transportation: A Third Way For Port and Environmental Security*, 9 WIDENER L. SYMP. J. 419, 420 (2003).

68. UNCLOS, *supra* note 4, art. 91. *See also* GENEVA CONVENTION ON THE HIGH SEAS, art. 5, Apr. 29, 1958, 450 U.N.T.S. 82, *available at* http://www.oceanlaw.net/texts/genevahs.htm.

69. GENEVA CONVENTION ON THE HIGH SEAS, *supra* note 68, art. 5.

70. Criticisms of the "genuine link" requirement long predate the opening of UNCLOS for signature. Some of the most strident and persuasive criticisms were made by Professors McDougal and Burke, who attacked the vagueness of the provision as included in the 1958 Geneva Convention on the High Seas and raised concerns over the breakdown of order that would follow from the creation of a subjective standard by which states could unilaterally choose to recognize a particular vessel's nationality. By unilaterally not accepting another state's grant of nationality to a ship, a state could easily, and seemingly within the terms of the law, violate the supposed exclusive jurisdiction of the flag state over its ships on the high seas. *See* MCDOUGAL & BURKE, *supra* note 1, at 1013, 1032–35. Certain activities contemplated by the PSI, however, might be accused of producing the same consequences that McDougal and Burke feared would follow from a strict construction of the "genuine link" requirement. *See infra* text accompanying note 455.

71. *See* 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 106 (Myron H. Nordquist ed., 1995) [hereinafter Nordquist] (describing "nationality" as signifying only the "legal connection" between the ship and its state of registry and rejecting any analogy to the nationality of individuals or corporations); Anderson, *supra* note 61, at 149 (explaining that the act of registration establishes "reciprocal rights and duties" that satisfy the genuine link requirement). *But see* 2 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 761 (1982) (explaining that even in the era of UNCLOS negotiations, the genuine link was still understood to precede eligibility to register, "and the view is still prevalent that [registration] is merely evidence of nationality and is not creative of it"). Efforts to revive the requirement of a meaningful genuine link between vessel and registry have largely failed, as exemplified by the poor level of subscription to the 1986 United Nations Convention on Conditions for Registration of Ships ("Ship Registration Convention"), which is not yet in force. *See* Valenzuela, *supra* note 66, at 488. Article 8 of the Convention requires that flag state laws and regulations assure a level of ownership by the flag state or its nationals which is "sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag." UNITED NATIONS CONVENTION ON CONDITIONS FOR REGISTRATION OF SHIPS, art. 8(2), Feb. 7, 1986, 26 I.L.M. 1229 (1987), *available at* http://www.admiraltylawguide.com/conven/registration1986.html. Article 9 suggests a strong flag state duty, with certain exceptions, to regulate such that "a satisfactory part of the complement consisting of officers and crew . . . be nationals

though the ascription of nationality does place important obligations on the flag state.[72] The prevalence of the open registry system and the sometimes attenuated and mysterious links between the real parties controlling a given vessel and the vessel itself present obvious proliferation dangers.

3. The Costs of Success

The efficiency benefits that containers provide make them attractive tools for agents of WMD proliferation, or criminals more generally. Likewise, the relative anonymity of ship ownership under flags of convenience makes them useful tools for parties seeking to maintain low profiles and discreet operations. Overall, the likelihood that undetected WMD-related or conventional arms trafficking takes place by ordinary commercial shipping at sea appears high. Reports have estimated that perhaps only two percent of containers entering the United States by sea are opened and searched, although the total is probably slightly higher.[73] Moreover, shipping containers are tightly stacked on ships and not always physically accessible on short notice, making a search logistically difficult.

Invasive searches seem likely to cause significant and costly delays in an industry built on speed. One response has been the creation of the Container Security Initiative ("CSI"), whereby high-risk containers are identified and pre-screened well in advance of their entry into the United States, sometimes with U.S. Customs officials working out of major foreign shipping hubs.[74]

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or persons domiciled or lawfully in permanent residence" in the flag state. *Id.* art. 9(1). These standards exceed those specified by Article 94 of UNCLOS, which also requires that flag states shall effectively exercise jurisdiction and control over the ships flying their flags, but without specifying the role of nationality requirements in achieving that result. UNCLOS, *supra* note 4, art. 94. Over a span of eighteen years, only twelve states have become party to the Ship Registration Convention. For an up-to-date listing of convention participants and their respective statuses, see http://r0.unctad.org/ttl/docs-legal/unc-cml/status/Registration%20of%20Ships%201986.pdf (last visited Dec. 3, 2004).

72. UNCLOS, *supra* note 4, art. 94(3) (requiring flag states to "ensure safety at sea," the seaworthiness of vessels, the adequacy of crew training and working conditions, and the appropriate use of signals and communication equipment to avoid collisions). *But see infra* Parts V.A–.B (discussing the failure of many flag states to exercise effective jurisdiction over their vessels in accordance with Article 94 duties).

73. *See* Langewiesche, *supra* note 7, at 76; *When Trade and Security Clash*, *supra* note 58. *But see* Robert C. Bonner, Commissioner, U.S. Senate Committee on Commerce, Science, and Transportation, Hearing on Security at U.S. Seaports (Feb. 19, 2002), *available at* http://commerce.senate.gov/hearings/021902bonner.pdf (last visited Nov. 18, 2004) (noting that the percentage of containers searched is higher as of February 2002, but also that any low percentage is misleading because searches are not conducted randomly but targeted at high-risk shipments based on information provided by the Automated Manifest System, a vast database which tracks trading and shipping data).

74. As of December 2003, the CSI has received the cooperation of seventeen major international ports. CSI Expansion, *supra* note 59. The CSI also includes the introduction of "smart" containers, which will be fitted with anti-tampering sensors; the technology, however, will not enhance the ability to confirm that a container's contents are accurately listed. *Shipping Lines to Use "Smart" Containers*, MERCURY NEWS, *available at* http://www.mercurynews.com/mld/mercurynews/7150926.htm?1c (Oct. 31, 2003) (last visited Nov. 28, 2004). *See also* Mellor, *supra* note 57, at 355–59. Several additional responses were included in the Maritime Transportation Security Act of 2002 (in effect since July 1, 2004), Pub. L. No. 107-295, 116 Stat. 2064 (2002), including provisions for foreign port assessment, § 70108, 116 Stat. at 2079, enhanced crewmember identification mechanisms, § 70111, 116 Stat. at 2079, and the automatic identification system for large commercial vessels, § 70114, 116 Stat. at 2082. Furthermore, the Trade

Even if containers are scanned in foreign ports, however, it seems inevitable that certain shipments of dangerous materials are bound to penetrate whatever security measures are in place.[75]

The threat of terrorists or enemy states exploiting the efficiency and lack of transparency in the shipping industry to transport dangerous materials or equipment is not the only concern. The open registry system has made it relatively easy for Al Qaeda to maintain and operate its own fleet of merchant vessels. It is believed that Osama bin Laden and his associates control anywhere from a dozen to fifty freighters.[76] Not only could these vessels be used to smuggle conventional arms, WMD components, or other useful supplies to waiting operatives, they could also be used to attack other ships or coastal targets directly.[77] Some officials have considered the possibility of a September 11-type attack using merchant ships in place of commercial airliners; hijacked or terrorist-owned ships could be packed with explosives or dangerous chemicals and crashed into a harbor or populous coastal site. Aside

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Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002), created new advance notice requirements for vessel operators transporting cargo to U.S. ports; cargo declarations must be submitted twenty-four hours before cargo is loaded at the foreign port. *See* Documentation of Waterborne Cargo, 19 U.S.C.A. § 1431(a) (2002). Other legislation has provided for the submission of cargo manifests ninety-six hours in advance of arrival. The international commercial maritime shipping industry is in the process of adopting a "24-hour rule." Justin Stares, *Worldwide accord on 24-hour box rule: US cargo declaration scheme likely to be adopted*, LLOYD'S LIST, Aug. 6, 2004, *available at* LEXIS, News & Business file.

75. *See, e.g.*, ANDREW PROSSER, CENTER FOR DEFENSE INFORMATION, THE PROLIFERATION SECURITY INITIATIVE IN PERSPECTIVE 5 (2004), *at* www.cdi.org/pdfs/psi.pdf (describing the practical difficulties of comprehensive detection) (last visited Nov. 18, 2004); Otterman, *supra* note 42 (noting that "[c]hemical and biological weapons materials can be difficult to detect, and the relatively small amounts of fissile material needed for a basic nuclear weapon—a grapefruit-size ball of plutonium could be enough . . . —[are] easily concealed in a radiation-proof container"). Nonetheless, skepticism over a program like the CSI does not necessarily militate against its existence. It may, however, succeed more as an instrument of public relations—creating the perception of government vigilance at the borders—than by actually thwarting determined actors seeking to bring WMD-related materials into the United States. More worrisome, perhaps, is the stunt pulled off by ABC News in September 2003, when a shipment of uranium was sent from Indonesia into the Port of Los Angeles without detection, despite even being singled out for a check of its shipping papers and an X-ray scan. *See* Port Techonology International, *U.S. Port Security Called into Question by ABC's Radioactive Shipment*, *at* http://www.porttechnology.org/industry.news/2003/12.09.03.html (Sept. 12, 2003) (last visited Nov. 18, 2004).

76. *See* Colin Robinson, Center for Defense Information, *Al Qaedas' 'Navy'—How Much of a Threat?*, *at* http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1644 (Aug. 20, 2003) (last visited Nov. 18, 2004) (noting the estimated range of twelve to fifty Al Qaeda ships and citing reports dating to May 2003 that around twenty ships were raising suspicion); Vijay Sakhuja, *Maritime Terrorism—India Must Be Prepared*, *in* 12 FAULTLINES: WRITINGS ON CONFLICT & RESOLUTION (2002), *at* http://www.satp.org/satporgtp/publication/faultlines/volume12/Article4.htm (last visited Nov. 18, 2004) (discussing Al Qaeda's "phantom fleet").

77. The "Al Qaeda Navy" is alleged to have been involved in both types of activities. In the first, an Al Qaeda vessel reportedly delivered the explosives used in the 1998 African embassy bombings; in the second, small Al Qaeda boats—albeit not the large freighters that make up the "fleet"—were used in the *U.S.S. Cole* bombing in 2000 and in the October 2002 bombing of a French oil tanker. Both incidents resulted in casualties. John Mintz, *15 Freighters Believed to Be Linked to Al Qaeda—U.S. Fears Terrorists at Sea; Tracking Ships is Difficult*, WASH. POST, Dec. 31, 2002, at A1. *See also* Christopher Dickey, *Al Qaeda At Sea*, NEWSWEEK, Jan. 27, 2003, at 8 (noting that officials believe that if medium-sized Al Qaeda ships begin to find approaching military vessels too difficult, the next target could be tourist ships). Nonetheless, some commentators believe the exploitation of the oceans for proliferation is a far more serious and systemic threat. *See, e.g.*, Firestone & Corbett, *supra* note 67, at 435.

from this kind of direct security threat, it is widely acknowledged that the fleet helps finance the terrorist network, perhaps by smuggling drugs or diamonds to raise funds,[78] but also by engaging in otherwise legitimate business.[79] Tracing the ownership back to bin Laden, however, is no easy task given Al Qaeda's ability to register its ships in any open registry state under the name of empty corporate vehicles created solely for that purpose.[80] On a related point, officials might also do well to worry about the risk that dangerous individuals could exploit the maritime system by posing as the member of a crew to circumvent the usual border controls.[81] The shipping industry is notorious for lacking accurate information on the thousands of seamen who crew its vessels; entering the United States or the European Union might be easier by seaport than by airport.[82]

Whatever the means of exploitation, however, the international commercial shipping regime provides ample opportunities for abuse by the agents of proliferation and terrorism. It seems, however, that the full extent to which the "blind spots" of the international shipping regime undermine global secu-

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78. Pauline Jelinek, *U.S. Aims to Patrol World Seas—Proposal Focuses on Easing Rules During Pursuits*, ASSOCIATED PRESS, Aug. 10, 2002.

79. *See* Langewiesche, *supra* note 7, at 51 (noting the similarities between "shipowners, al Qaeda-style terrorists, and certain pirate groups—all of whom have learned . . . to escape the forces of law and order not by running away but by complying with the existing laws and regulations in order to hide in plain sight").

80. The United States is reportedly preoccupied with certain flags of convenience states such as Belize, Bolivia, Comoros, and St. Vincent and the Grenadines, which "ask for almost no information from shipping firms that 'flag' their vessels with them." Mintz, *supra* note 77. Belize, for example, permits online registration of its ships. *Id. See* International Marine Merchant Registry of Belize, *at* http://www.immarbe.com/intro.html (last visited Nov. 18, 2004). Security concerns raised by the United States and many European countries has already led to the shut down of the short-lived Tonga International Registry of Ships ("TIRS"), which closed in 2002 after numerous allegations that terrorists, including Al Qaeda, had used Tongan-flagged ships to facilitate operations. *See* Press Release, Government of Tonga, Tonga International Registry of Ships to Close (June 5, 2002), *available at* http://www.pmo.gov.to/gpr5June02.htm (last visited Nov. 18, 2004). Several Tongan-registered ships from a Delaware-incorporated shipping firm called Nova have been implicated in terrorist plots. *See* Mintz, *supra* note 77. Incidents included the discovery of a Tongan-flagged ship transporting weapons and munitions alleged for destination in Gaza; the illegal entry of eight alleged Al Qaeda operatives into Italy when a Nova-owned ship was docked in Trieste; and the takeover of another Nova ship and its crew by Al Qaeda-linked passengers whom the ship's captain was forced to take aboard during a stop in Casablanca. Philip Cornford & Sarah Crichton, *The Ships that Died of Shame*, SYDNEY MORNING HERALD, Jan. 14, 2003, at 13, *available at* http://www.smh.com.au/articles/2003/01/13/1041990234408.html (last visited Nov. 18, 2004).

81. Rather than joining a ship's crew in order to attempt entry into another country, one could simply stow away. The case of "Container Bob," in which a suspected Al Qaeda member was discovered inside a "luxury" shipping container while in an Italian port, raises the means of exploiting the container system to new—and seemingly drastic and unnecesary—levels. *See When Trade and Security Clash*, *supra* note 58, at 60.

82. One U.S. official has described the industry as "a shadowy underworld" in which "[y]ou can't swing a dead cat . . . without hitting somebody with phony papers." Mintz, *supra* note 77. As a response, the United States is seeking an amendment to Chapter XI of the INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278 [hereinafter SOLAS CONVENTION], to prohibit the hiring of crew members who have committed a "serious criminal offense." Mellor, *supra* note 57, at 363; *see also infra* note 268 (describing a proposed Seafarer's Identity Document to combat this problem).

rity—particularly the threats posed by WMD proliferation and cross-border terrorist activity—has only recently become apparent to policymakers.[83]

III. Response: The Proliferation Security Initiative

As described in Part I, the PSI is designed to encourage and enable participating states to intercept suspect merchant vessels at sea.[84] It functions as perhaps the most robust project among the several new initiatives that have emerged to address the threats identified in Part II. However, the potential of the PSI to encroach upon zones of exclusive jurisdiction as defined by custom and treaty has raised concerns about the lawfulness and policy consequences of PSI interdictions. This Part begins by examining the structure and objectives of the PSI. Next, it reviews the public activities of the PSI, acknowledging its continuation, in some ways, of naval operations already commenced in response to September 11. Finally, it identifies several legal ambiguities and policy concerns, focusing on global reaction to the PSI from participating and non-participating states.

A. Organization and Objectives

Despite the complex non-proliferation architecture described in Part II.A, the system is undermined by the lack of sufficient detection and enforcement capacities when actors either reject or seek to circumvent the rules. The PSI attempts to provide those capacities, particularly at sea where the lawfulness of jurisdiction by different national actors can be more difficult to determine. In the summer of 2003, U.N. Secretary-General Kofi Annan asked generally "whether the institutions and methods we are accustomed to are really adequate to deal with all the stresses of the last couple of years."[85] Supporters of the PSI argue that exactly because long-standing institutions and methods of non-proliferation have failed to exert adequate control, the PSI usefully supplements the existing legal framework while respecting the outer limits of international law.

The PSI was formally announced by President Bush on May 31, 2003, in Krakow, Poland.[86] At the outset, eleven countries pledged their support as members of a core group of participants.[87] The PSI's most visible public

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83. Mintz, *supra* note 77 (noting only sporadic attention paid by U.S. intelligence to foreign shipping before September 11, 2001).

84. *See* Chairman's Statement, *supra* note 21.

85. *Quoted in* Michael J. Glennon, *Sometimes a Great Notion*, Wilson Q., Autumn 2003, at 45.

86. *See* Chairman's Statement, *supra* note 21. Planning for the PSI dates back at least to the summer of 2002, when it was reported that the Pentagon was actively seeking to expand ship interdiction operations already taking place in the Arabian Sea that were intended to intercept Al Qaeda fugitives. *See* Jelinek, *supra* note 78.

87. The original eleven participating states were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. The relatively small number of core participants has been identified as an advantage because it gives participants greater confidence in intelligence-sharing and facilitates rapid response to intervention situations. *See* Alexander Downer,

champion has been American John R. Bolton, Under Secretary of State for Arms Control and International Security. Since its inception, the PSI has variously been described as "a coalition of the willing,"[88] a "political arrangement,"[89] "a concrete, operationally focused initiative,"[90] and an "activity" rather than an "organization."[91] Praise has ranged from calling the PSI "a step in the right direction"[92] to "a herald of the real new world order, multilateralism with teeth."[93] The emphasis is clearly on what the PSI is not—a bloated, top-heavy international organization whose decisionmaking capabilities or capacity to act are paralyzed by centralization and internal dissent. To its supporters, the PSI is distinctly *not* the U.N. Security Council or another "cumbersome, treaty-based bureaucrac[y]."[94] At the same time, statements about the PSI have underlined that the initiative is consistent with the U.N. Security Council Presidential Statement of January 1992,[95] declaring that WMD posed a global threat to international peace and security, as well as more recent statements by the Group of Eight ("G-8") and the European Union.[96] From the perspective of the United States, the passage of U.N. Secu-

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Australian Minister of Foreign Affairs, Weapons of Mass Destruction: The Greatest Threat to International Security, Address Before the Proliferation Security Initiative Meeting, Brisbane, Australia (July 9, 2003), *available at* http://www.foreignminister.gov.au/speeches/2003/030709_wmd.html (last visited Nov. 18, 2004).

88. Chamberlain, *supra* note 15.

89. Bolton—Interview with ACT, *supra* note 44.

90. John R. Bolton, Remarks at Proliferation Security Initiative Meeting, Paris, France (Sept. 4, 2003), *available at* http://www.state.gov/t/us/rm/23801.htm (last visited Nov. 18, 2004) [hereinafter Bolton—Paris Remarks].

91. John R. Bolton, Nuclear Weapons and Rogue States: Challenge and Response, Remarks to the Conference of the Institute for Foreign Policy Analysis and the Fletcher School's International Security Studies Program (Dec. 2, 2003), *available at* http://www.state.gov/t/us/rm/26786pf.htm (last visited Nov. 18, 2004).

92. Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan.–Feb. 2004, at 136, *available at* http://www.foreignaffairs.org/20040101faessay83113/lee-feinstein-anne-marie-slaughter/a-duty-to-prevent.html (last visited Nov. 18, 2004).

93. *The New Multilateralism*, Editorial, WALL ST. J., Jan. 8, 2004, at A22.

94. John R. Bolton, *An All-Out War on Proliferation*, FIN. TIMES (London), Sept. 7, 2004, at 21. As the Wall Street Journal enthusiastically explains, "[D]on't mistake PSI for a multilateral institution in the conventional sense. There's no headquarters, no secretary-general, no talkfests—and, perhaps most important of all, no French or Russian veto." *The New Multilateralism*, *supra* note 93. Unsurprisingly, however, the advent of the PSI is not the first occasion on which global cooperation for the purpose of policing the world's oceans has been suggested. Others have proposed the revival of an international maritime police force of the world's most powerful maritime nations, primarily to protect commercial shipping against piracy. *See, e.g.*, Barry Hart Dubner, *Piracy in Contemporary National and International Law*, 21 CAL. WEST. INT'L L.J. 139, 149 (1990). Another proposal from a Russian perspective—stressing the emergence of new cooperative security structures in the aftermath of the Cold War—urged that a coordinated maritime police force be created under the aegis of the United Nations "in the form of ad hoc UN Naval Units." Sergei Kortunov, *A Russian Perspective on Naval Arms Control and CSBMs*, *in* A PEACEFUL OCEAN? MARITIME SECURITY IN THE PACIFIC IN THE POST-COLD WAR ERA 104, 110 (Andrew Mack ed., 1993) [hereinafter A PEACEFUL OCEAN?].

95. Note by the President of the Security Council, U.N. SCOR, U.N. Doc. S/23500 (Jan. 31, 1992). There are indications that some PSI supporters believe the Presidential Statement provides sufficient legal cover to validate PSI activities, a position bolstered by the passage of Resolution 1540.

96. *See* Fact Sheet, White House, Office of the Press Secretary, Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003), *available at* http://www.state.gov/t/np/rls/fs/23764pf.htm

rity Council Resolution 1540 in April 2004 provides an ex post legal basis for the initiative, if not an express endorsement of the PSI.[97]

Since PSI participants do not sign any formal agreement and do not acquire long-term, legally binding responsibilities, the PSI is not a multilateral treaty regime.[98] However, participants are asked to support the Statement of Interdiction Principles, which was adopted at the fourth meeting of PSI participants on September 4, 2003, in Paris.[99] The guiding principle of the PSI is:

> to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the U.N. Security Council.[100]

The Statement identifies four practical ways that participating states can pursue the PSI's overall objective:

> (1) by undertaking effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD or related materials;
>
> (2) by adopting streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity;

(last visited Nov. 18, 2004) [hereinafter Statement of Interdiction Principles]; Group of Eight Declaration, Non Proliferation of Weapons of Mass Destruction (June 3, 2003), *available at* http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/non_proliferation_of_weapons_of_mass_destruction_-_a_g8_declaration.html (last visited Nov. 18, 2004); Council of the European Union, *Basic Principles for an EU Strategy Against Proliferation of Weapons of Mass Destruction*, Doc. No. 10352/03 (June 10, 2003), *available at* http://register.consilium.eu.int/pdf/en/03/st10/st10352en03.pdf (last visited Dec. 1, 2004).

97. *See* John R. Bolton, The Proliferation Security Initiative: A Vision Becomes Reality, Remarks to the First Anniversary Meeting of the Proliferation Security Initiative, Krakow, Poland (May 31, 2004), *available at* http://www.state.gov/t/us/rm/33046pf.htm (last visited Nov. 18, 2004) [hereinafter Bolton Anniversary Remarks] (describing Resolution 1540's "clear international acknowledgement that cooperation, such as PSI, is both useful and necessary").

98. The United States has emphasized that the PSI does not have "members," a budget or headquarters. Fact Sheet, U.S. Department of State, Bureau of Non-proliferation, Proliferation Security Initiative Frequently Asked Questions (May 24, 2004), *available at* http://www.state.gov/t/np/rls/fs/32725pf.htm (last visited Nov. 18, 2004) [hereinafter PSI FAQ]. That said, there is clearly a difference between states that actively and publicly participate in PSI planning and the larger number of states that endorse PSI objectives or methods, but are only willing to participate on a case-by-case basis, if at all. *See infra* note 104. It remains unclear, particularly due to the high degree of secrecy that surrounds many PSI activities, how the status of participating states, or "members," differs from states merely expressing their general support. *See* PROSSER, *supra* note 75, at 3. Disclaiming the existence of PSI "members," however, may be part of a careful effort to communicate that the initiative is not an exclusive club of limited membership, but is open to any and all states interested in participating, at whatever level or capacity.

99. Statement of Interdiction Principles, *supra* note 96.

100. *Id.*

> (3) by reviewing and working to strengthen relevant national and international legal authorities where necessary to accomplish these objectives; and
>
> (4) by taking specific actions in support of interdiction efforts regarding cargoes of WMD or related-materials.[101]

Guided by this agenda, PSI countries have held frequent meetings to update one another on their progress and to discuss new strategies for expanding the number of PSI participants, amending legal authorities to facilitate greater interdiction options, and refining interdiction techniques and logistics.[102] In addition, a variety of training exercises have taken place during the PSI's first year. The group of core participants has expanded to fifteen states,[103] and officials claim that many more governments support the principles behind the endeavor and will participate as needed on a case-by-case basis.[104]

Under Secretary Bolton has described the long-term objective of the PSI as "a web of counter-proliferation partnerships through which proliferators will have difficulty carrying out their trade in WMD and missile-related technology."[105]

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101. *Id.* The fourth provision mandating specific actions in support of interdiction efforts includes several subheadings, the lawfulness of which will be discussed in greater detail in Part IV. These include:

> (1) not transporting targeted cargoes to or from states or non-state actors of proliferation concern;
>
> (2) intercepting vessels flying the flag of the interdicting state if reasonable suspicion exists;
>
> (3) to seriously consider providing consent for other states to search one's own flag vessels under "appropriate circumstances"; and
>
> (4) stopping and searching any vessel in one's own internal waters, territorial sea, or contiguous zone if reasonable suspicion exists.

Id. The central role of interdiction in the PSI agenda is consistent with the Bush administration's stated plans in December 2002 to enhance interdiction capabilities. *See* NATIONAL STRATEGY TO COMBAT WMD, *supra* note 29, at 2.

102. Center for Nonproliferation Studies, Monterey Institute of International Studies, *Proliferation Security Initiative: Libyan Case Crowns First Year's Achievements*, 12 NIS EXPORT CONTROL OBSERVER 25 (Dec. 2003–Jan. 2004), *available at* http://cns.miis.edu/pubs/nisexcon/pdfs/ob_0401e.pdf (last visited Nov. 18, 2004) [hereinafter *First Year's Achievements*].

103. Canada, Norway, and Singapore joined the coalition in February 2004. Bush Remarks to NDU, *supra* note 31. Russia announced it was joining the PSI on June 1, 2004. Elena Volkova, *Russia Joins the WMD Proliferation Security Initiative*, ITAR-TASS NEWS AGENCY (Moscow), June 1, 2004, *available at* LEXIS TASS file. This contradicted previous Russian wariness toward the initiative. John Kerin, *Russia Spurns Weapons Hunt Plan*, AUSTRALIAN, Oct. 14, 2003, at 2.

104. Frequent reference to the far greater number of states supporting PSI principles is a means by which PSI participants have sought to demonstrate a wide-ranging consensus that extends beyond the core group. American authorities claim that more than sixty states express support for PSI principles. Esper & Allen, *supra* note 47, at 4. According to Under Secretary Bolton, the United States has actively pursued an inclusive strategy of "public outreach," seeking to engage a large number of countries in bilateral discussions to publicize the PSI and solicit assistance or agreements on boarding rights. *See* Bolton—Interview with ACT, *supra* note 44. Authorities also contend that China has made gestures of general support. Nonetheless, there may be strategic reasons that prevent major powers such as China and even core-participant Russia from embracing the PSI in anything other than the broadest terms. *See infra* text accompanying notes 169–181.

105. Bolton—Interview with ACT, *supra* note 44. Bolton has emphasized that PSI success is measured largely by "the foundation it provides for states to work together." Bolton Anniversary Remarks, *supra* note 97.

At the same time, PSI participants have repeatedly claimed that the PSI is not "trying to rewrite international law," but rather seeking to make "'creative' use" of existing law.[106] Yet while the PSI gives the impression of free-form multilateralism through its decentralized operating structure, the "arrangement" is more accurately understood as a mechanism through which the unilateral actions of participating states can be coordinated and facilitated.[107] It remains to be seen if the "filtering" role of the PSI might help legitimate such actions when they stretch or exceed the limits of recognized legal authority.

Would PSI issuance of a publicized set of harmonized standards and procedures for its operations—going beyond the general principles of the Statement of Interdiction Principles—enhance the lawfulness of PSI activities? Would the PSI, or the international system, be served better if it *were* an organization, rather than simply an "activity"? Whether or not this kind of subtle distinction is necessary to establish the limits of lawful interdictions under the PSI framework, it may be an important factor in distinguishing PSI interdictions from the unilateral interdiction activities of other parties, unrelated to the cause of counter-proliferation and based on questionable or unduly politicized grounds.

B. Activities Pre-Dating the First Year

Maritime interceptions did not originate with President Bush's May 31 declaration. There is a long history of wartime maritime interception operations, but, as indicated above, there is a more recent history of maritime interception relating to the post–September 11 security environment and the military engagements in Afghanistan and Iraq.[108] In November 2001, Pentagon officials announced that U.S. forces would stop and board cargo ships suspected of helping Al Qaeda leaders flee from Afghanistan, presumably under legal authority related to the specific military action in that country.[109] An operation involving four NATO member states not including the United States intercepted a ship in the Gulf of Oman in July 2002 that was

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106. *The Proliferation Security Initiative: An Interdiction Strategy*, IISS STRATEGIC COMMENTS, Aug. 2003, *available at* http://www.iiss.org/stratcom [hereinafter IISS Report]. The PSI does, however, appear highly interested in helping to rewrite the municipal law of many states.

107. *See* Andreas Persbo, British American Security Information Council, *The Proliferation Security Initiative: Dead in the Water or Steaming Ahead?*, *available at* http://www.basicint.org/pubs/Notes/BN031212.htm (Dec. 12, 2003) (last visited Nov. 18, 2004) (noting that the loose agreements among PSI participants will "make the PSI appear multilateral, when it, in essence, is unilateral"). Some might argue that the PSI typifies the American preference for operating through quasi-formalized modes of international *cooperation* as opposed to supranational institutions of international *law*. *Cf.* Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 36 (attributing American discomfort with the latter to the anti-democratic tendencies of multilateral institutions).

108. *See supra* note 86 (noting operations in the Arabian Sea in search of Al Qaeda terrorists). For a discussion of the history of wartime maritime interception, see *infra* Part VI.

109. *Navy to Begin Stopping Suspicious Vessels*, ASSOCIATED PRESS, Nov. 21, 2001; Jelinek, *supra* note 78.

transporting four suspected Al Qaeda terrorists.[110] This was achieved by the ongoing NATO naval operation "Active Endeavour," which now operates alongside the operations promoted by the PSI. Active Endeavour was initiated pursuant to NATO's invocation of Article 5, the Alliance's collective defense provision, following September 11.[111] Initially involved in "preparatory route surveys" in areas of important maritime traffic, Active Endeavour began escorting merchant vessels passing through the Straits of Gibraltar in March 2003. Ship masters feared the possibility of a terrorist attack along the lines of the *U.S.S. Cole* incident, when the detonation of a small Al Qaeda boat inflicted major damage on the much larger military vessel.[112] In April 2003, NATO expanded the mission to include the systematic boarding of suspect ships in the Eastern Mediterranean with flag state consent, although selected stop-and-visit operations were already taking place.[113] As of May 29, 2004, Task Force Endeavour had boarded sixty-one vessels, although no findings of illicit cargo have been reported publicly.[114]

The most highly publicized ship interdiction closely preceding the PSI was the *So San* incident, which involved NATO forces in the Arabian Sea and whose unsatisfactory outcome is given some credit for the PSI's emergence five months later.[115] On December 10, 2002, Spanish naval forces patrolling the Arabian Sea were alerted by U.S. intelligence to the presence of a suspicious cargo vessel in the Indian Ocean en route from North Korea. The ship displayed no flag and had painted over its name.[116] While the suspect vessel had initially undertaken evasive maneuvers, Spanish forces succeeded in intercepting and boarding the vessel 600 miles from the coast of Yemen. Upon

110. Langewiesche, *supra* note 7, at 64.

111. *See* NATO BRIEFING, COMBATING TERRORISM AT SEA 1–2 (Apr. 2004), *available at* http://www.nato.int/docu/briefing/terrorism_at_sea-e.pdf (last visited Nov. 18, 2004). For an explanation of Article 5 of the Washington Treaty and its invocation in September 2001, see NATO, *NATO and the Scourge of Terrorism—NATO Issues—What is Article 5?*, *at* http://www.nato.int/terrorism/five.htm (updated Sept. 21, 2001) (last visited Nov. 18, 2004).

112. NATO BRIEFING, *supra* note 111, at 3.

113. *Id.*

114. Allied Joint Force Command—Headquarters Naples, *Operation Active Endeavour*, NATO, *at* http://www.afsouth.nato.int/JFCN_Operations/ActiveEndeavour/Endeavour.htm (updated Oct. 27, 2004) (last visited Nov. 18, 2004). *See also* Denelle Balfour, *On Patrol in the Arabian Sea*, CTV.CA, *at* http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1042419602112_80?s-name=%no_ads (Jan. 14, 2003) (last visited Nov. 18, 2004) (reporting that Canadian ships patrolling the Arabian Sea—in search of terrorists or vessels fitting a suspect profile—have hailed approximately 12,000 ships and conducted nearly 300 boardings). These statistics indicate the high volume of stop-and-visit activity that may be taking place, through PSI channels, NATO, or otherwise, but the secrecy with which officials guard these operations makes an accurate count extremely difficult. *But see* Langewiesche, *supra* note 7, at 64 (reporting that NATO forces as of September 2003 had intercepted more than 16,000 ships, boarding and searching approximately 200 of those vessels).

115. *See* INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATIONS AND REGIMES, CENTER FOR NONPROLIFERATION STUDIES, PROLIFERATION SECURITY INITIATIVE (PSI) 1, *available at* http://cns.miis.edu/pubs/inven/pdfs/psi.pdf (last visited Nov. 13, 2004) [hereinafter CNS OVERVIEW]. *But see* Jelinek, *supra* note 78 (indicating plans predating the *So San*).

116. Sonni Efron & John Hendren, *Ship Seized: N. Korean Arms Found*, L.A. TIMES, Dec. 11, 2002, pt. 1 (Foreign Desk), at 1.

searching the vessel, the inspecting party discovered a cache of fifteen Scud missiles hidden under sacks of cement, although only the cement shipment was listed on the ship's manifest.[117] Because the vessel, which was later determined to be registered in Cambodia as the *So San*, was not flying its flag, the Spanish authorities acted lawfully under UNCLOS in boarding the ship.[118] On December 11, however, the vessel was released with its cargo and allowed to continue on to Yemen, the alleged destination. The United States acknowledged the lack of "clear authority" for seizing the missiles since the sale between North Korea and Yemen was not prohibited under any international agreement.[119] Furthermore, there is no provision in UNCLOS or other sources of international law that explicitly prohibits the transport of ballistic missiles or WMD-related materials by sea.[120]

The decision by the American authorities to release the ship was praised in some quarters as a demonstration of the willingness "to respect international law under the circumstances currently prevailing."[121] It also raised a red flag to international actors frustrated by the restraints that international law appeared to place on international security. Furthermore, it seems highly plausible that the United States may have been seeking to avoid confrontation with Yemen, on which the United States depends for cooperation and intelligence support in the war on terror.[122] This suggests that the U.S. expression of respect for international law in the *So San* case might simply be a convenient byproduct of separate American objectives, rather than a precedent for future U.S. compliance with international law in the case of ship interceptions. It seems likely that the United States would have approved seizure of the suspect cargo, in spite of international law, had there not been countervailing strategic interests at play whose value exceeded that of compliance for its own sake.

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117. Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, ASIL INSIGHTS, *at* http://www.asil.org/insights/insigh94.htm (Dec. 12, 2002) (last visited Nov. 18, 2004).

118. *Id.* But Professor Kirgis also notes that "questions relating to the purpose and consequences of the boarding" made it less clear if the entire operation was lawful under international law. *Id. See also supra* note 61 (explaining the status of stateless ships under UNCLOS). *But see* Efron & Hendren, *supra* note 116, at 1 (paraphrasing a Bush administration official claiming that "[t]he United States and other nations routinely stop [flagged] ships on the high seas if the ships are believed to be running drugs or other illicit cargo" and that intercepting states sometimes even fire across the bow of a ship to halt it).

119. Kirgis, *supra* note 117. Preliminary reports indicated that Yemen may have been a transfer or resale point for the missiles to Iraq. Efron & Hendren, *supra* note 116, at 1.

120. *See* Chamberlain, *supra* note 15. In fact, past actions by the United States have weighed against the prescription of a legal norm that would outlaw such activities. *See* Devon Chaffee, *Freedom or Force on the High Seas? Arms Interdiction and International Law*, WAGINGPEACE.ORG, *at* http://www.wagingpeace.org/articles/2003/08/15_chaffee_freedom-of-force.htm (Aug. 15, 2003) (last visited Nov. 18, 2004) (noting continuous efforts by France, the United Kingdom, and the United States to resist "nuclear weapons free zones" or other legal restrictions on their ability to transit nuclear weapons, or components such as reprocessed plutonium, through the high seas and EEZs).

121. *See* Byers, *supra* note 23, at 527 (describing the vessel's release as "reflective of the seriousness with which the high seas regime is taken by the United States"); Kirgis, *supra* note 117.

122. *See* Winner, *supra* note 29, at 10. *See also* sources cited *supra* note 121.

Whether or not the *So San* incident galvanized planning for the PSI, it provides one example of the interception operations that were already taking place and also a striking example of the limitations placed upon those operations. Even if the PSI has helped to expand interception capacities, however, it is less clear whether the PSI has enhanced the options for *seizure of cargo* after a boarding has taken place. The lawfulness of seizing cargo, not stopping and boarding the vessel, was the real issue in the *So San* incident.[123] The following timeline summarizes important events related to maritime interception activities that occurred between September 11, and the declaration of the PSI. Although not comprehensive, it aims to provide a sense of the context in which the PSI was declared.

TABLE ONE

Timeline of Relevant Events Preceding Declaration of the PSI

2001	
Sept. 11	Al Qaeda terrorists hijack and crash commercial airliners into the World Trade Center, the Pentagon, and western Pennsylvania.
October	A suspected Al Qaeda terrorist—nicknamed "Container Bob"—is discovered by NATO forces hiding in a shipping container in Gioia Tauro, Italy; NATO operation "Active Endeavour" begins Mediterranean patrols.
November	Establishment of Combined Joint Task Force Horn of Africa ("CJTF-HOA"); efforts to widen ship interdiction get underway in the Arabian Sea, but also in the Mediterranean and Red Seas.
Nov. 21	United States announces plans to board cargo ships suspected of carrying Osama bin Laden or other Al Qaeda fighters fleeing Afghanistan.

123. Comments from Under Secretary Bolton leave the lawfulness of seizing the cargo of a searched vessel unclear, and Bolton has indicated that the question can only be determined on a case-by-case basis. *See* John R. Bolton, "Legitimacy" in International Affairs: The American Perspective in Theory and Operation, Remarks to the Federalist Society (Nov. 13, 2003), *at* http://www.state.gov/t/us/rm/26143pf.htm (last visited Nov. 18, 2004) [hereinafter Bolton—Remarks to Federalist Soc.]. Bolton has also praised the "delay" value of interdiction—whereby even if cargo cannot be seized, it "can lengthen the time that proliferators will need to acquire new weapons capabilities [and] increase their cost." John R. Bolton, The Continuing Threat of Weapons of Mass Destruction, Remarks at the American Spectator Dinner (Nov. 12, 2003), *available at* http://www.state.gov/t/us/rm/26129pf.htm (last visited Nov. 18, 2004). The validity of this tactic by the PSI has been called into question: "What [Bolton] is saying, apparently, is that U.S. naval power may be used to harass legitimate shipping by boarding vessels, even if the cargo can't be confiscated." Persbo, *supra* note 107.

2002	
July	Four suspected Al Qaeda operatives discovered on freighters in Gulf of Oman.
December	Bush administration issues *National Strategy to Combat Weapons of Mass Destruction* (including plans to enhance interdiction capabilities).
Dec. 10	*So San* incident—North Korean vessel heading to Yemen with missiles intercepted by Spanish authorities; ship and cargo released Dec. 11.
2003	
April	Australian authorities board North Korean freighter on heroin smuggling suspicions;[124] French authorities order unloading of suspect cargo from a French ship in an Egyptian port and twenty-two metric tons of dual-use aluminum tubes are discovered;[125] NATO begins systematically boarding suspect ships in the Eastern Mediterranean with flag state consent in an expansion of Active Endeavor.
May 31	President Bush announces the PSI in Krakow, Poland.

C. Activities During the First Eighteen Months of the PSI

In the relatively short period of time since its public unveiling on May 31, 2003, the PSI has already achieved noteworthy results. Its most well-publicized success was the interception of the *BBC China*, a German ship transporting thousands of gas centrifuge components—equipment used for uranium enrichment—from Dubai to Libya in early October 2003. American and British intelligence learned of the suspected shipment in late September and contacted the German government, which in turn requested that the ship's owner, a German charter company, divert the vessel to an Italian port.[126] As a German-flagged vessel, the *BBC China* presented an easy legal case for intervention; Germany would have had the authority to stop and search the vessel on the high seas had the ship's owner been uncooperative.[127] But as good publicity for the PSI, the interdiction of the *BBC China* could hardly have been scripted better. The incident not only seemed to jus-

124. Steven R. Weisman, *U.S. to Send Signal to N. Koreans in Naval Exercise*, N.Y. TIMES, Aug. 18, 2003, at A1.

125. IISS Report, *supra* note 106.

126. Robin Wright, *Ship Incident May Have Swayed Libya; Centrifuges Intercepted in September*, WASH. POST, Jan. 1, 2004, at A18.

127. With some exceptions, flag states have exclusive jurisdiction over their vessels on the high seas. UNCLOS, *supra* note 4, art. 92. They almost always have at least concurrent jurisdiction to enforce.

tify the PSI's existence, but it validated its ability to facilitate international cooperation and produce tangible results. The perceived significance of the successful operation was magnified by the fact that on December 19, 2003, Libya renounced its weapons programs, ending its research into WMD production and promising to destroy all missiles exceeding MTCR guidelines.[128]

In addition to the *BBC China* incident, a handful of additional PSI-related interdictions have been reported, although details are scarce. In some instances, it is difficult to determine whether interdictions were purely national affairs, or whether they were collaborative PSI efforts. Reports indicate that ships headed to North Korea with equipment for uranium enrichment have been intercepted.[129] Moreover, in response to requests by American authorities, Taiwanese officials confiscated large quantities of a chemical weapon precursor from a North Korean freighter docked in port.[130] PSI leaders have been extremely tight-lipped about their operations, citing intelligence concerns.[131] The *BBC China* incident is a case in point: the successful operation and its possible role in the secret negotiations with Libya were not fully publicized until *after* Muammar Qaddafi's historic renouncement in December 2003. The following timeline indicates some representative key events from the first year and a half of the PSI.

128. *First Year's Achievements*, *supra* note 102, at 25. MTCR restrictions cover missiles able to carry a 500 kilogram payload to a range up to or beyond 300 kilometers, but also some shorter-range systems with likely WMD applications. *Id.* Fortuitous timing aside, there is debate over how much the interdiction contributed to Libya's decision. Some officials viewed the interception as a final straw for Libya, while others indicated at the time that they feared the seizure could have derailed negotiations. Wright, *supra* note 126. Secret talks had been ongoing for months between Libya, the United Kingdom, and the United States, although the fact that the shipment existed raises some doubts as to how likely Libya viewed a successful rapprochement with the West. Nonetheless, Libya had made several gestures since September 11, 2001, including intelligence support, that indicated a turnaround already in the works. *See Beating Swords into Oil Shares*, ECONOMIST, Jan. 3, 2004, at 32. Some Washington neoconservatives viewed Libya's decision as a positive byproduct of the war in Iraq, claiming that WMD programs had been proven to be magnets for negative attention, or worse. *Id. See also* David Sanger & Neil MacFarquhar, *Bush to Portray Libya as Example*, N.Y. TIMES, Jan. 20, 2004, at A1 (expressing similar doubts).

129. *Playing with Plutonium*, ECONOMIST, Jan. 24, 2004.

130. *N Korean Vessel Searched*, TAIPEI TIMES, Aug. 9, 2003, at 4, *available at* http://www.taipeitimes.com/News/taiwan/archives/2003/08/09/2003062916 (last visited Nov. 18, 2004); Michael Richardson, *Between a Rogue and a Hyperpower*, S. CHINA MORNING POST, Dec. 12, 2003, at 17.

131. Under Secretary Bolton acknowledged in November 2003 that some interdictions had been taking place, but that "they have not been made public—and won't be made public." Bolton—Interview with ACT, *supra* note 44.

TABLE TWO

Timeline of PSI-Related Events

2003	
May 31	President Bush announces creation of the PSI in Krakow, Poland.
June 12	Initial eleven PSI participants meet in Madrid.
June 23	Greek authorities intercept the *Baltic Sky* in Greek waters, discovering a large cache of explosives and detonators bound for Sudan.[132]
July 1	Spanish authorities seize ship carrying South Korean arms to Senegal.[133]
July 9–10	PSI participants meet in Brisbane to create information-sharing plans; interdiction training plans are agreed upon.
Aug. 8	Taiwanese authorities board North Korean freighter on the basis of a technical customs violation and discover and seize 158 barrels of phosphorus pentasulfide.
Sept. 3–4	PSI participants meet in Paris; Statement of Interdiction Principles issued.
Sept. 12–14	Australia leads "Operation Pacific Protector" training exercises in the South Pacific.
October	PSI participants divert a German vessel, the *BBC China*, into Italian waters while heading from Dubai to Libya. Centrifuge equipment capable of developing weapons-grade uranium is discovered and seized. Reports indicate that more than fifty countries "express support" for the PSI; Spain hosts maritime interdiction training exercise.
Oct. 8–10	London hosts first PSI air interdiction exercise; PSI participants meet in London, but fail to agree on a "model boarding agreement."
November	China cooperates with the United States to block a chemical shipment set to leave China for North Korea.[134]

132. *See* Mark J. Valencia, *Pressing for Sea Change*, WASH. TIMES, Aug. 25, 2003, at A15.
133. *Id.*
134. Richardson, *supra* note 132.

Dec. 16–17	PSI participants meet in Washington, D.C., for an "operational experts meeting"; Canada, Denmark, Norway, Singapore, and Turkey attend.
Dec. 19	U.S. authorities seize a boat carrying two tons of hashish in the Persian Gulf near the Strait of Hormuz, allegedly connected to Al Qaeda.[135]
2004	
January	United States leads "Operation Sea Sabre" training exercises in the Arabian Sea.
February	Italy hosts "Exercise Air Brake 04," the second PSI air interdiction exercises; Canada, Norway, and Singapore become core PSI participants.
Feb. 13	Liberia-U.S. Ship Boarding Agreement announced.[136]
Mar. 4–5	PSI participants meet in Lisbon.
March	Germany hosts "Operation Hawkeye," an airport-based interdiction exercise.
Apr. 28	U.N. Security Council Resolution 1540 is unanimously adopted.
May 12	U.S.-Panamanian Ship-Boarding Agreement announced.[137]
May 31	PSI participants meet in Krakow on the first anniversary of the PSI.
June 1	Russia becomes a core participant in the PSI.[138]
August	13 U.S.-Marshall Islands Shipboarding Agreement announced.[139]
October	Japan hosts joint naval exercises with PSI and non-PSI participants.[140]

135. Matt Kelley, *U.S. Nets Drug Boat with Terror Suspects*, CHI. TRIB., Dec. 20, 2003, at C3.

136. PROLIFERATION SECURITY INITIATIVE SHIP BOARDING AGREEMENT, U.S.-Liber., Feb. 11, 2004, *available at* http://www.state.gov/t/np/trty/32403.htm (last visited Nov. 18, 2004) [hereinafter LIBERIA AGREEMENT]. *See* discussion *infra* notes 232–250 and accompanying text.

137. PROLIFERATION SECURITY INITIATIVE SHIP BOARDING AGREEMENT, U.S.-PAN., May 12, 2004, *available at* http://www.state.gov/t/np/trty/32858pf.htm (last visited Nov. 18, 2004) [hereinafter PANAMA AGREEMENT].

138. Volkova, *supra* note 103.

139. Fact Sheet, U.S. Department of State, Office of the Spokesman, The United States and the Republic of the Marshall Islands Proliferation Security Initiative Shipboarding Agreement (Aug. 14, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/35236pf.htm (last visited Nov. 14, 2004).

140. James Brooke, *U.S.-Led Naval Exercises Sends Clear Message to North Korea*, N.Y. TIMES, Oct. 27, 2004, at A5.

D. Unanswered Questions

Amidst the mostly positive media coverage directed at the PSI, the scope of its objectives are less clear than the formal statements, or the actions undertaken thus far, would indicate. Conflicting or ambiguous comments from some government officials raise questions that may bear on whether certain PSI activities will ultimately be considered lawful exercises of state power. The PSI's objectives, methods, and the legal authority for a wide range of contemplated interdiction activities must be clarified.

1. The Scope of PSI Objectives: What Are Its Limits?

Doubts may linger as to whether the PSI is genuinely a global activity, or whether it has disproportionate, if not exclusive, designs on North Korea.[141] The difference is not trivial; the more clearly the PSI targets a particular state, the more hostile and aggressive that target state (or third-party states) may perceive PSI operations to be. If these operations disproportionately target North Korea, it becomes more plausible that North Korea will consider the PSI an unlawful act of military aggression. Under Secretary Bolton has acknowledged that PSI participants meeting in Brisbane in July 2003 agreed that North Korea and Iran were properly considered states of "proliferation concern," but Bolton has reiterated that "PSI efforts are not aimed at any one country" and that its goal is to halt "worldwide trafficking."[142]

A second, related concern involves not *who* but rather *what* can be targeted by the PSI. Again, the Statement of Interdiction Principles as well as comments from Under Secretary Bolton place the focus firmly on WMD, their delivery systems, and related material. Although "related material" presumably refers to WMD components such as chemical weapon ingredients or sensi-

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141. Numerous news reports expressly described the PSI as essentially a strategy to contain and apply pressure specifically to North Korea. *See, e.g.*, *High-Seas Heads-Up to North Korea*, CBSNEWS.COM, *at* http://www.cbsnews.com/stories/2003/08/25/world/printable569880.shtml (Aug. 18, 2003) (last visited Nov. 18, 2004) (reporting that U.S. officials acknowledged that the PSI naval exercises scheduled for September 2003 in the Pacific were "meant as a signal to North Korea to end its pursuit of nuclear weapons"); *U.S. and Its Allies Push on with Ship Interception Plan* (Radio Singapore International Broadcast, Sept. 5, 2003), *available at* http://www.channelnewsasia.com/cna/analysis/030905_interception.htm (last visited Nov. 18, 2004) (reporting an Australian military analyst's perspective that "people well and truly see this as an initiative that is aimed against North Korea"). In the spring of 2004, North Korea was still being suggested as the raison d'être of the PSI. *See, e.g.*, Takehiko Yamamoto, *Japanese Engagement in the PSI*, MONITOR, Spring 2004, *supra* note 29, at 20. Whether or not the initiative is specifically focused on North Korea, some members of the Bush administration believe it contributed to bringing North Korea back to the negotiating table in the ongoing six-party talks in the autumn of 2003. *See* Weisman, *supra* note 124.

142. Bolton—Paris Remarks, *supra* note 90. *See also* John R. Bolton, Stopping the Spread of Weapons of Mass Destruction in the Asian-Pacific Region: The Role of the Proliferation Security Initiative, Address Before the Tokyo American Center, Tokyo, Japan (Oct. 27, 2004), *available at* http://www.state.gov/t/us/rm/37480.htm (last visited Nov. 18, 2004) [hereinafter Bolton—Tokyo Remarks]. Bolton has seemingly contradicted these statements elsewhere, stating, for example, that Pakistan, an important American ally, was not necessarily a state of proliferation concern. *See* Bolton—Interview with ACT, *supra* note 44. This assessment may have changed after the revelations of Pakistan's role in Libya's WMD program emerged in early 2004.

tive dual-use equipment and technologies, there are indications that PSI interdictions may have other types of cargo in mind, including the illegal drugs or conventional arms that help keep states or non-state actors of proliferation concern financially afloat.[143] The question here is whether vessels can be stopped and certain shipments lawfully seized for the purpose of blocking that source of revenue to the exporting party.

While the sale of North Korean ballistic missiles may raise serious security concerns, the *So San* incident demonstrated that such sales may not run afoul of any international controls and may, in some broad respects, not have any different formal legal status from the sale of U.S.-manufactured arms to foreign buyers.[144] If the interception of North Korean missiles cannot necessarily be justified on the basis of the shipment's general threat to international security, and considering that several PSI member states are active suppliers of sophisticated arms to other states, then what legal basis can justify the interception of North Korean missiles? Can lawful cargo justifiably be intercepted merely to place economic pressure on the exporting state, absent, for example, specific U.N. Security Council authorization? In this respect, interdiction activities have muddied the waters by sending mixed signals as to whether the PSI mandate extends to non-WMD-related cargo, which would make PSI operations more closely resemble military embargos or blockades.[145]

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143. *See, e.g.*, *Hard Going*, ECONOMIST, Dec. 13, 2003 (noting U.S. efforts to interdict North Korean drug smuggling in the context of more general interdiction operations); Otterman, *supra* note 42 (describing the Bush administration's interest in interdiction as a means to crack down not only on possible WMD exports from North Korea, but also on the income stream generated by missile exports). Under Secretary Bolton, however, has explicitly denied these allegations: "We've never contemplated that the initiative would involve anything other than the trafficking of WMD-related material, and it was never contemplated as a blockade of any place." Bolton—Interview With ACT, *supra* note 44. Although UNCLOS includes a provision regarding high seas interventions to suppress illicit narcotics trafficking in certain situations, the targeted conduct must run afoul of other international conventions. UNCLOS, *supra* note 4, art. 108(1). Flag states are also permitted to request the cooperation of other states to help suppress such traffic. *Id.* art. 108(2). But the latter provision appears redundant given that flag states already have exclusive jurisdiction over vessels flying their flags; presumably, exclusive jurisdiction includes the authority to delegate a grant of jurisdiction to other states. For an analysis of the UNCLOS drug trafficking provisions, see *infra* Part V.A.

144. Under Secretary Bolton has recently remarked that a substantial decrease in the revenue North Korea earns from its trade in ballistic missiles and related technology can be attributed, in part, to PSI activities. *See* Bolton—Tokyo Remarks, *supra* note 142. Yet while Bolton described these sales as "illicit," the formal legal standard to which he is holding such sales is not clear (however dangerous such sales might be to U.S. and global security interests). Although such missile sales revenue may be funding North Korea's nuclear weapons programs, this does not necessarily provide a *legal* basis for preventing such sales where they do not otherwise run afoul of domestic or international law.

145. The implementation of a blockade outside a formal declaration of war or explicit U.N. Security Council authorization would be dangerously aggressive and presumptively unlawful. *See infra* Part VI.A. Not surprisingly, North Korea has responded with hostility to the PSI. North Korea's official daily newspaper, *Rodung Sinmun*, has alleged that the PSI is "part of a premeditated U.S. war plan" and described the PSI as a "brigandish [sic], naval blockade" akin to "terrorism in the sea and a gross violation of international law." Otterman, *supra* note 42. *See also North Korean Daily Criticizes US "Double Standards" on Proliferation*, BBC WORLDWIDE MONITORING, Mar. 3, 2004, *available at* LEXIS, Newsgroup File. North Korea also condemned Japan's plans to host October 2004 maritime exercises in Tokyo Bay as an example of the "sinister intention" of the Bush Administration to escalate its hostile blockade. *North Korean Party Organ Assails Japan's Projected Naval Exercises*, BBC WORLDWIDE MONITORING, Aug. 14, 2004, *available*

2. Procedures for Interdiction

The PSI objectives also raise questions about the procedures that will be used in interdiction operations. The Statement of Interdiction Principles targets "states and non-state actors of proliferation concern" and explains that PSI participants will determine which countries or entities fall under that heading based on their:

> (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or
>
> (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.[146]

These criteria inadequately explain how targets will be designated or what evidence will be required before a state or entity finds itself on the PSI list of suspect actors.[147] Some conduct that would appear to violate the PSI criteria for proliferation may nonetheless be lawful, especially if the involved states (or the states in which non-state entities are based) are neither signatories to the relevant non-proliferation treaties nor members of the relevant export control groups. The reference to "facilitating" WMD transfers is particularly problematic and raises complicated questions regarding the rights and duties of flag states, which may have little or no other connection to the ship's owner or a party that has chartered the vessel. Could PSI standards mean that if a flag of convenience vessel is identified as participating in WMD-related activities, other ships flying under the same flag of convenience might be broadly susceptible to visit and search operations, even without the flag state's consent? Can PSI standards plausibly support this kind of jurisdictional grab based on guilt by association? A PSI response might allege that the insufficient degree of oversight on the part of the open registry state implicitly concedes enforcement jurisdiction to other states.[148]

Related questions concern the factors that PSI participants will consider before stopping, boarding, or searching a ship in any particular case. The Statement of Interdiction Principles suggests that vessels "reasonably suspected of transporting [WMD or WMD-related] cargoes to or from states or

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at LEXIS, Newsgroup File. In the stop-and-start six-party negotiations, North Korea has demanded the lifting of all sanctions currently in effect, including the "blockade" it sees imposed by the PSI. *See Hard Going*, *supra* note 143. One reason for the reluctance of some other states such as China to back the PSI may be concern that it will push Pyongyang too far and force a breakdown in negotiations. *See* Chaffee, *supra* note 120.

146. Statement of Interdiction Principles, *supra* note 96.

147. The United States offers that the definition of "states or non-state actors of proliferation concern" that appears in the first paragraph of the Statement of Interdiction Principles "goes as far as it is necessary to go in defining what constitutes a 'state of proliferation concern' for PSI," although it is noted that membership in the multilateral non-proliferation regimes does not conclusively determine whether a state merits the "concern" label. PSI FAQ, *supra* note 98.

148. This theory of ineffective jurisdiction is explored in different subject matter contexts, *infra* Part V.

non-state actors of proliferation concern" are subject to interception and the seizure of their cargoes.[149] In addition, PSI participants are asked to act on a request by another state to initiate board-and-search actions upon the showing of "good cause."[150] Finally, flag states are asked "[t]o seriously consider providing consent *under the appropriate circumstances* to the boarding and searching of [their] own flag vessels by other states."[151] The procedures necessary to satisfy any of these standards remain unspecified, and the PSI reportedly has no plans "to establish a formal authorisation process prior to initiating interdictions . . . [nor] to codify a threshold of 'probable cause' or 'a burden of proof' for suspicions of WMD trafficking."[152] Instead, each individual state will be allowed to define those standards for itself and "will conduct interdictions according to its national authorisation for the time being."[153] It is not difficult to see how a framework which permits substantial deviation among interdiction practices creates potential problems, both for those attempting to assess the lawfulness of certain interdictions and also for non-PSI states that may be called upon to assist in operations.[154] If PSI participants work from different standards, will it be feasible for states to make fast decisions as to whether particular interdictions lawfully accord with their own municipal standards of "probable cause" or "reasonable suspicion?" Whose standard would apply to the showing of "good cause" required by one state's request to another?[155] Similar questions might apply to the appropriate rules of engagement for any given encounter[156] or to the diverse national legal positions regarding permissible restrictions on the freedom of navigation in the territorial sea or the exclusive economic zone ("EEZ").[157]

Under Secretary Bolton has frequently asserted that PSI participants have "exchanged extensive information about what we believe our respective national authorities are" and has emphasized that the interdiction principles of the PSI specifically require that interdictions follow those national authori-

149. Statement of Interdiction Principles, *supra* note 96.

150. *Id.*

151. *Id.* (emphasis added).

152. IISS Report, *supra* note 106.

153. Persbo, *supra* note 107.

154. *See* Beck, *supra* note 32, at 16 (speculating on the likelihood of states' disagreeing on whether to accept promises among buyers and sellers that sensitive technology is destined for legitimate end uses).

155. A State Department effort to address the definition of "good cause" simply provides that "each state will need to decide for itself whether good cause has been shown; i.e., each state will need to decide for itself whether the information provided by the requesting state warrants acceding to the request." PSI FAQ, *supra* note 98.

156. Rules of engagement refer to "the set of conditions under which a naval vessel may intercept, challenge, warn, board, or seize suspect ships, and have caused embarrassing incidents in the past[.]" Colin Robinson, *The Proliferation Security Initiative: Naval Interception Bush-Style*, Center for Defense Information, *at* http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1667 (Aug. 25, 2003) (last visited Nov. 28, 2004). Debates over rules of engagement have "bedevilled previous naval interception operations." *Id.*

157. Although UNCLOS or customary international law provides the contours for lawful regulation in these areas, individual states have developed their own approaches within the broader framework to curtail navigational rights in pursuit of other policy goals. *See infra* Part IV.

ties.[158] This implies that the PSI consciously seeks to rebut allegations that it adopts and imposes its own standards, which might have questionable international legal authority and exceed the national authority—or "comfort level"—of some participants. Nonetheless, it has been reported that the United States did circulate a "model boarding agreement"—a set of guidelines providing rules of engagement for ship interdictions—at the PSI meeting in London in mid-October 2003. PSI members were apparently unable to agree on acceptable phrasing at that time.[159] This leaves some doubt as to how politically or practically feasible the United States views the continued diversity of procedures in PSI-related operations.

3. *What Kind of Consensus?*

Under Secretary Bolton has asserted on numerous occasions that the PSI will draw on international law in search of legal authority for its operations,[160] but at least one report from late 2003 claimed that PSI participants had not "fully exchanged information on what they believe international authorities permit."[161] Shortly after the PSI was announced, Bolton created controversy among PSI members by claiming the existence of "'broad agreement within the group that we have [the] authority' to begin interdictions on the high seas."[162] Although the group seems to have developed and refined its position since then and has moved toward greater consensus on certain points, there is not universal agreement on the most sensitive questions, including interdictions on the high seas. Some European states may be less willing to promote aggressive PSI methods out of reluctance to weaken the international commitment to continued development of the multilateral treaty regimes already in place.[163] Another concern is the possibility that PSI counter-proli-

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158. *See, e.g.*, Bolton—Remarks to Federalist Soc., *supra* note 123.

159. *See First Year's Achievements*, *supra* note 102, at 26.

160. *See, e.g.*, Bolton—Interview with ACT, *supra* note 44; Bolton—Remarks to Federalist Soc., *supra* note 123.

161. Persbo, *supra* note 107.

162. Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Matériel*, Monterey Institute of International Studies, *at* http://cns.miis.edu/pubs/week/030716.htm (July 16, 2003) (last visited Nov. 18, 2004). *See also* Joyner, *supra* note 47, at 7–8 (noting the discrepancy between Bolton's public remarks and the text of the Statement of Interdiction Principles).

163. It seems notable that in the wake of the diplomatic chill brought about by the U.S.-led invasion of Iraq in March 2003, the PSI emerged as an informal area of collective security cooperation in which American policy-makers apparently managed to cooperate productively with their French and German counterparts. That said, one commentator has described the PSI as a starkly American-led operation that may be more dismissive of the multilateral non-proliferation treaty regime than many European leaders would like. European Union support for the PSI can be construed as indicating:

> that the EU is simply reacting to events and recognising the reality that its closest ally and partner, the US, has adopted strategies exogenous to the multilateral treaty regimes to pursue its non-proliferation agenda. The EU states still want multilateral treaties and only reluctantly will other approaches be considered.

Littlewood, *supra* note 46, at 25. This position may be overstated; some European states are more willing to follow the U.S. lead than others. Furthermore, the official EU strategy against proliferation affirmatively identified "coercive measures" as "key elements"—seemingly a willing nod in the direction of the PSI. *See* Feinstein & Slaughter, *supra* note 92, at 148. That said, it would be unwise to allow PSI promo-

feration objectives will weaken the international prohibition on the use of force. Furthermore, even within the coalition of the PSI core group, there may be divergent opinions as to which states merit greatest scrutiny. Although North Korea may be an obvious point of focus, participants may disagree on the toleration for proliferation-related activities that should be accorded to states such as Israel, India, and Pakistan. Under Secretary Bolton has stated that these countries possess proliferation-related materials "legitimately," although this does not necessarily accord with the Statement of Interdiction Principles.[164]

An additional concern is the notable absence of several strategic states. China, a permanent Security Council state, is not a core PSI participant involved in planning and oversight of the initiative. No states from the Middle East are core participants,[165] nor is emerging regional naval power India.[166] Indonesia and Malaysia, key states involved in controlling the chaotic maritime environment of Southeast Asia—and, in particular, the Straits of Malacca—have resisted the PSI and expressed hostility to its expansion.[167] That said, Bolton has noted that states such as New Zealand, the Philip-

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tion to supplant the attention and resources that other components of the non-proliferation and counter-proliferation regimes require. *See* PROSSER, *supra* note 75, at 9.

164. *See* Bolton—Interview with ACT, *supra* note 44. Furthermore, Russia's position with Iran—to whom Russia has supplied considerable support for an allegedly civilian nuclear program—may not mesh easily with the PSI's harder line.

165. It should be noted, however, that NATO's Operation Endeavour has enhanced security cooperation with several states in the Middle East and North Africa, including Algeria, Egypt, Israel, Jordan, Mauritania, Morocco, and Tunisia. *See* NATO BRIEFING, *supra* note 111, at 3.

166. There are indications that India has expressed interest in formally supporting the initiative. *See* Testimony of Adm. Tom Fargo, U.S. Navy Commander, U.S. Pacific Command, before the House Armed Services Committee (Mar. 31, 2004), *available at* http://www.pacom.mil/speeches/sst2004/040331hasc-qa.shtml (last visited Nov. 18, 2004) [hereinafter Fargo Testimony]. In 2003, India's External Affairs Minister stated concerns that the PSI would "try and lay down the law without taking the concerns of everyone else on board"; more troubling to India appears the possibility that PSI operations will turn a blind eye to proliferation emanating from Pakistan. P.S. Suryanarayana, *Sinha Speaks on India's Stand on U.S.-Led Anti-Proliferation Initiative*, GLOBAL NEWS WIRE, Sept. 4, 2003, *available at* LEXIS, Newsgroup File.

167. *See* PROSSER, *supra* note 75, at 5. In March 2004, the United States proposed the Regional Maritime Security Initiative (RMSI) as an offshoot of the PSI designed specifically to address terrorism concerns in the Malacca Strait separating Indonesia and Malaysia. *See* Fargo Testimony, *supra* note 166. Approximately one-quarter of world trade and half the world's oil shipments, accounting for most of the fuel headed to China, Japan, and South Korea, pass through the waterway. Ellen Nakashima & Alan Sipress, *Singapore Goes It Alone In Maritime Security Drill*, WASH. POST, June 2, 2004, at A12. Initial U.S. proposals to dispatch marines to the region were supported by PSI member Singapore, but harshly rejected by the governments of both Indonesia and Malaysia. Luo Yuan & Shi Xiaoqin, *Troubled Waters*, BEIJING REV., July 15, 2004, at 14–16, *available at* http://www.bjreview.com.cn/200428/World-200428(C).htm (last visited Nov. 18, 2004). Since 1971, Indonesia, Malaysia, and Singapore have claimed joint sovereignty over the waterway; fierce opposition to external interference may derive from the region's colonial legacy or present-day national rivalries. *Id.* In the face of firm opposition to PSI measures focusing on the Malacca Strait through the RMSI mechanisms, the United States has apparently scaled back RMSI plans. *Id. See also* C. S. KUPPUSWAMY, STRAITS OF MALACCA: SECURITY IMPLICATIONS (South Asia Analysis Group, Paper No. 1033, 2004), *at* http://www.saag.org/papers11/paper1033.html (last visited Nov. 30, 2004).

pines, and Thailand have all been "actively engaged" in PSI activities, despite not participating in the core group.[168]

China's relationship to the PSI, however, is most deserving of close scrutiny. China's initial response to the PSI was highly critical. The government mouthpiece, *The People's Daily*, described the PSI as "dangerous" and reported that "[t]he U.S.-led initiative [has] sneered at the U.N. and international law by sidestepping the organization."[169] The specter of "systematic" interdictions on the high seas was raised and armed conflict was predicted "if the legally-controversial detention and searching of vessels occur."[170] Other Chinese commentators have emphasized the U.S. domination of the PSI and pointed out that, the support of sixty countries notwithstanding, the majority of states in the world have not declared any level of support. The same commentators, as with commentators in the West, have also questioned both the legal basis for interdiction operations and the practical problems related to intelligence verification.[171] All told, China may be primarily concerned that PSI expansion will disproportionately disrupt its own commercial shipping industry or open the door for harassment by the United States and its allies, particularly if PSI operations were ever to expand to other areas of illicit trafficking.[172]

While the *People's Daily* provides fiery rhetoric for largely domestic consumption, the Chinese government's approach on the diplomatic front has appeared level-headed, if cautiously skeptical. In December 2003, China released a White Paper on Non-Proliferation Policy and Measures. Interestingly, the PSI was not once mentioned by name.[173] The report acknowledges that

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168. *See* Bolton—Tokyo Remarks, *supra* note 142.

169. *No Legal Grounds for Stopping N. Korean Ships*, PEOPLE'S DAILY (China), July 12, 2003, *at* http://english.peopledaily.com.cn/200307/12/print20030712_120082.html (last visited Nov. 18, 2004). *See also First Year's Achievements*, *supra* note 102 (reporting that "[o]utside critics, notably China, have expressed strong reservations about the initiative's legality"); Persbo, *supra* note 107, at 26 (noting that China has questioned the "negative aspects" of some PSI measures and asked PSI member states to "earnestly consider this").

170. *No Legal Grounds*, *supra* note 169.

171. Ye Ru'an & Zhao Qinghai, *The PSI: Chinese Thinking and Concern*, MONITOR, Spring 2004, *supra* note 29, at 22–24. The first claim, however, disregards the relative power of those states that do or do not support the PSI. Nonetheless, Ru'an and Qinghai legitimately question how much support can actually be expected from any given country expressing general support for PSI principles. *See id.* at 23. Interestingly, Ru'an and Qinghai also focus on the problem of PSI accountability, questioning how the intelligence basis for interdictions can be verified as accurate and made in good faith, particularly in light of recent American intelligence blunders regarding Iraq. *See id.* at 24. Finally, the authors are quick to recall the 1993 *Yinhe* incident, in which U.S. intelligence insisted on the search of a Chinese-flagged vessel in a Saudi Arabian port, alleging its involvement in chemical weapons trafficking. The search took place despite vehement Chinese objections, and the allegations proved false. *See id. See also* Press Release, Ministry of Foreign Affairs of the People's Republic of China, Statement on the "Yin He" Incident (Sept. 4, 2003), *available at* http://www.nti.org/db/china/engdocs/ynhe0993.htm (last visited Nov. 18, 2004).

172. *See* Yamamoto, *supra* note 141, at 21 (noting the high volume of dual-use cargo that passes through Chinese ports).

173. *See* Government White Paper, Information Office of the State Council of the People's Republic Of China, China's Non-Proliferation Policy and Measures (Dec. 3, 2003), *available at* http://www.china.org.cn/e-white/20031202/index.htm (last visited Nov. 18, 2004).

non-proliferation has become the "consensus of the international community," but primarily focuses on enhancing the existing treaty system and export control regulations.[174] At one point, however, the report appears to address the emergence of the PSI with guarded criticism:

> Either the improvement of the existing [non-proliferation] regime or the establishment of a new one should be based on the universal participation of all countries and on their decisions made through a democratic process. Unilateralism and double standards must be abandoned, and great importance should be attached and full play given to the role of the United Nations.[175]

China is speaking here in the traditional language of multilateral non-proliferation. References to "universal participation" seem directed at the PSI's limited membership, and "double standards" are likely an accusation of Western hypocrisy over arms control and condemnation of discrimination against the vessels of certain states—an explicit and necessary part of the PSI approach. Just days after the White Paper was issued, a Chinese foreign ministry spokesman acknowledged China's cognizance of PSI objectives, but stated that China "was also mindful of concerns about the legitimacy, effectiveness and impact of the methods the group would use."[176] It is difficult to know how much the Chinese public position is directed by its precarious relationship with North Korea. These factors may have influenced the decision of China and South Korea to explicitly decline a PSI invitation to attend the October 2004 training exercises in the Sea of Japan as observers.[177] Nonetheless, Under Secretary Bolton had previously claimed that China is "reasonably positive" about the PSI,[178] and China is a participant in the Container Security Initiative.[179] Furthermore, Secretary of State Colin Powell has disclosed that Beijing cooperated with the United States to block a shipment of chemicals destined for North Korea leaving from China.[180]

Although this suggests a remarkable example of U.S.-Chinese information exchange, it does little to shed light on the willingness of China to back PSI initiatives more widely. The negotiations leading up to the adoption of Resolution 1540 provide a more telling indication of China's position. The draft resolution that was subsequently adopted broadly "criminalize[d] the proliferation of weapons," but China only agreed to the draft after the United

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174. *Id.*
175. *Id.*
176. Richardson, *supra* note 130.
177. *No Place to Hide, Maybe,* ECONOMIST, Oct. 30, 2004 at 47.
178. Bolton—Interview with ACT, *supra* note 44.
179. *See* Yamamoto, *supra* note 141, at 21.
180. *See* Richardson, *supra* note 130. *See also* John R. Bolton, International Security Issues, Arms Control Matters, and Non-Proliferation, Press Conference at the U.S. Embassy, Beijing, China (Feb. 16, 2004), *available at* http://www.state.gov/t/us/rm/29723.htm (last visited Nov. 18, 2004) (confirming past cooperation with China).

States removed a provision that would have explicitly authorized PSI-style interdictions of vessels at sea suspected of transporting WMD.[181] As a result, Resolution 1540 made no express reference to the PSI, but instead "welcom[ed] efforts in [the non-proliferation] context by multilateral arrangements" and called upon all states "to take cooperative action to prevent illicit trafficking" in WMD in accordance with national legal authorities and prevailing international law.[182] The Chinese government's successful efforts to remove any express authorization for PSI-type activities and the U.S. failure to see them included weigh against assertions that PSI interdictions might find a more general authorization within prevailing customary international law.

Indeed, as Michael Byers points out, in the absence of a Security Council authorization, "the conclusion of numerous bilateral and multilateral treaties relating to the trafficking of missiles and WMD by sea" is not likely to result in the development of new customary international law.[183] Developing new customary legal norms out of prior treaty practice requires an even higher standard of widespread endorsement when treaties already create exceptions to other well-established customary rules, such as the exclusive jurisdiction of the flag state.[184] Nonetheless, the sacrosanct notion of exclusive flag state jurisdiction may be overstated in several respects. Examining the modes by which this rule of customary law has been adapted through both state practice and treaty-making may reveal legal or political processes that work to the advantage of the PSI agenda.

It appears that the PSI has helped galvanize a widespread consensus on the preeminence of non-proliferation goals and the need for stronger forms of collective action to address the problem. But it is not clear that the PSI has effectively created a global consensus on acceptable standards and procedures for counter-proliferation interdiction operations at sea. The legal authority justifying the more controversial of these actions remains similarly unclear.

IV. Context: The Non-Interference Principle and Permissible Regulation

This Part identifies the central principles at stake in the delicate balance among competing claims over the exploitation and management of the oceans—evolving trends of decision in the balance between exclusive and inclusive claims of jurisdiction. This background provides essential context for an appraisal of the lawfulness of the PSI response to the WMD threat: the in-

181. Lynch, *supra* note 51. Wang Guangya, China's ambassador to the United Nations, described the provision as "kicked out" of the draft resolution. *Id.*

182. S.C. Res. 1540, *supra* note 27, pmbl., ¶ 10.

183. Byers, *supra* note 23, at 540. For these reasons, Byers identifies a "preference for the treaty approach" to numerous sea-related transnational problems. *Id.* at 534.

184. *See id.* at 534 (discussing, in particular, the International Court of Justice's decision in the North Sea Continental Shelf cases). That said, such developments have occurred within the law of the sea; one notable example is the appearance and legal sanction in both treaty and customary international law of the EEZ over a very short period of time numbering less than twenty years.

terdiction of commercial vessels and their cargo at sea.[185] At the outset, there are many interdiction situations that might be considered "easy" cases, where clear legal authority exists under UNCLOS or customary international law for interception of the suspect vessel.[186] Beyond these cases, there are areas where the lawfulness of interdiction is less clear, and where the ultimate determination of lawfulness may be influenced by recognizing other trends in oceans management. The latter analysis considers the variety of policy-driven jurisdictional rights that have emerged over the last half-century, including those explicitly codified by UNCLOS or created by the complementary treaty agreements supplementing the UNCLOS framework.[187]

The decisionmaking process in matters of the sea is described as an "effort over several centuries to accommodate the exclusive interests of individual states in maximizing areas of maritime sovereignty and the inclusive interests of all states in maximizing freedom of the seas."[188] This balance of interests necessarily informs the final appraisal of lawfulness for any interdiction falling outside the cases where jurisdiction is most clearly and explicitly assigned. Despite the traditional powerful legal status of navigational freedom at sea, countervailing trends in oceans management have qualified that freedom.[189] In turn, it may be necessary to reassess the fundamental balancing of

185. For the purpose of evaluating the lawfulness of PSI interdictions, the analysis in Part IV assumes the absence of explicit U.N. Security Council authorization for such operations, a topic that will be taken up in Part VI.B. Furthermore, the immediate focus here is the lawfulness of *intercepting* the ship, which includes the right to board and search the vessel. The second step—seizure of whatever illicit cargo is discovered—is a trickier question with fewer "easy" answers. Interdiction, however, must properly consider both interception and seizure, actions that may depend on independent legal authority.

186. This Article considers the freedom of navigation provisions of UNCLOS as binding upon the United States, even though the United States has not yet ratified UNCLOS; all other core PSI participants are state parties to UNCLOS, although supporting states including Denmark and Turkey are not. *See* UNCLOS, *supra* note 4. The United States initially refused to sign UNCLOS when the convention was opened for signature in 1982 because of disagreement over the provisions relating to international management of the deep seabed. Although the United States has since become a signatory to UNCLOS upon the redrafting of the disputed provisions in a new document, the AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982, July 28, 1994, 1836 U.N.T.S. 41 [hereinafter 1994 AGREEMENT], the United States has not ratified the Convention, although there are indications it will likely do so in the very near future. Nonetheless, in 1983, President Reagan committed the United States to abide by the provisions of UNCLOS relating to the freedom of navigation, which the United States accepted as customary international law. *See* President's Statement on United States Oceans Policy, PUB. PAPERS 378–79 (Mar. 10, 1983).

187. Supplemental treaty arrangements to UNCLOS include the AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982 RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, Aug. 4, 1995, 2167 U.N.T.S. 88 [hereinafter U.N. FISH STOCKS AGREEMENT] and the UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, Dec. 20, 1988, 1582 U.N.T.S. 164 [hereinafter U.N. NARCOTICS CONVENTION].

188. GAYL S. WESTERMAN, THE JURIDICAL BAY 181 (1987).

189. In the PSI context, the underlying inquiry asks how the expansion of enforcement jurisdiction to a greater number of parties in a variety of situations can be managed in such a way as to avoid descent into chaos. It may be that the advent of carefully planned and innovative new forms of jurisdiction have encouraged other states to transplant those jurisdictional models for unlawful ends; this would exact a net cost on the oceans system as a whole.

interests that UNCLOS is perceived to represent in evaluating the lawfulness of PSI operations, in easy and hard cases alike. Some of the more controversial activities that PSI members contemplate may be more lawful than a first reading of UNCLOS suggests, taking into account other trends in the expansion of jurisdictional rights. Nonetheless, this judgment requires careful consideration of the limiting factors that govern any claim for an expanded scope of the jurisdiction to prescribe or enforce.

The long-held "non-interference" principle, most clearly visible in the wide-ranging freedom of navigation over the oceans, has dominated the law of the sea for over two centuries.[190] In the numerous historical accounts of the development of the law of the sea, this is widely viewed as the triumph of Hugo Grotius' *Mare Liberum* over John Seldon's *Mare Clausum*—the rejection of the idea that national dominion could extend to the high seas and deny access and use to the rest of the world community, and the limitation of exclusive national sovereignty to the vessels flying the state's flag.[191] The debate played out amidst the rise of mercantilism, industrialization, and colonialism—each of which ultimately benefited from the emergent legal regime that juxtaposed a model of inclusive jurisdiction over the high seas (i.e., any state's ships could sail across the ocean or fish in its waters) with a model of exclusive jurisdiction over the vessels that entered that domain.[192] The principles were mutually reinforcing: reciprocal respect for the exclusive jurisdiction of states over their ships provided a sort of state-to-state equality of opportunity. All states met upon equal footing on the high seas and could make free use of the sea for maximum benefit, but no state could independently impose its legislative will upon the modalities of use.[193] The principle of *Mare Liberum* lives on, expressed by Professors McDougal and Burke as requiring that "the great bulk of the oceans of the world should be maintained as a common resource, freely open to all peoples upon a basis of complete equality in cooperative pursuit of the greatest possible production and sharing of values."[194]

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190. *See supra* text accompanying notes 18–20.

191. The intellectual and political history of this debate—and its legal implications—can be located in numerous sources. *See, e.g.*, R. P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA 96–106 (1982); THOMAS CLINGAN, THE LAW OF THE SEA: OCEAN LAW AND POLICY 10–21 (1994); O'CONNELL, *supra* note 2, at 1–18; WESTERMAN, *supra* note 188, at 3–13.

192. *See* R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 2 (3rd ed. 1999) (attributing the *laissez-faire* regime of the oceans during the eighteenth and nineteenth centuries to the interests of the leading European powers in promoting seaborne trade and inter-colonial communication).

193. The balance neatly represents a limitation of the jurisdiction to prescribe with a correspondingly limited jurisdiction to enforce. It was famously given judicial imprimatur in the *Le Louis* decision, which rejected British claims to enforce a national prohibition on the slave trade against foreign vessels. Sir William Scott, writing for the court, stated,

> all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.

Le Louis, 165 Eng. Rep. 1464, 1475 (1817).

194. MCDOUGAL & BURKE, *supra* note 1, at ix. It similarly finds continued expression in the references to "the common heritage of mankind" that appear in UNCLOS with respect to the controversial

But community preference for the absolute maximization of *Mare Liberum* shifted dramatically during the twentieth century, as technology enhanced the potential range of ocean uses and made new forms of resource exploitation possible.[195] In addition, decolonization and independence movements in the developing world greatly increased the number of coastal states eager to exert their control over territorial waters and to expand those zones of control. But the developed world and emerging open registry states benefited most from the regime of non-interference, which created minimal territorial seas, limited coastal or port state control, and maximum freedom of navigation. But even developed nations that had competed with each other for ocean resources in the fishing and mining industries came to see that absolute *Mare Liberum* was untenable.[196] Thus efforts to codify the law of the sea attempted to place controls on powerful maritime states competing to exploit newfound ocean riches. These efforts also sought to limit competition between maritime powers and the coastal states, the latter of which sought to expand their own zones of control at the expense of the freedom of navigation. By the middle of the twentieth century, lawmakers recognized that even freedoms to be shared by all parties required some form of regulation to ensure their enjoyment and to preserve a sort of equality of opportunity to their productive exploitation.[197] The 1955 Report by the International Law Commission, preparing for the First United Nations Convention on the Law of the Sea, explained,

> Any freedom that is to be exercised in the interests of all entitled to enjoy it must be regulated. Hence, the law of the seas contains certain rules, most of them already recognized in positive international law, which are designed not to limit or restrict the freedom of the high seas

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provisions governing exploitation of the deep seabed. *See, e.g.*, UNCLOS, *supra* note 4, pmbl., arts. 125, 136 & 140. The "common heritage" language was maintained in the 1994 Agreement, although the means to exploit "the Area" for the benefit of the common heritage were substantially revised. *See* 1994 AGREEMENT, *supra* note 186.

195. *See* CHURCHILL & LOWE, *supra* note 192, at 2 (noting the growing potential for conflict as demand for scarce ocean resources increased).

196. The shifting tide was summarized in 1950 by Professor Gidel in dramatic terms: "The expression 'freedom of the high seas' is in reality a purely negative worn-out concept, nothing more; it has no meaning for us, except as the antithesis of another, positive concept [i.e., *Mare Clausum*] which has long since disappeared." ANAND, *supra* note 191, at 232. *See also* O'CONNELL, *supra* note 71, at 797 (claiming that "rules and regulations, some of them international, others municipal, have enmeshed navigation so that it is free only in the qualified sense that it must not be unreasonably impeded"); Robert L. Friedheim, *A Proper Order for the Oceans: An Agenda for the New Century*, *in* ORDER FOR THE OCEANS, *supra* note 13, at 537, 539 (noting that "the Grotian notion of a right of ocean users to do as they please as long as the rights of others are not violated no longer has social utility" because such insulated forms of activity no longer exist).

197. The concession to the need for regulation at sea corresponds historically—or closely follows—the rapid rise and expansion of the administrative state throughout the West, following the era of economic depression and global war. One might analogize the partial rollback of *Mare Liberum* to the widespread acceptance that even capitalism and free markets could not be left completely unfettered and still serve the community welfare. *See* Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 398, 408 (1950).

> but to safeguard its exercise in the interests of the international community.[198]

The absence of law was no longer viewed as sufficient to preserve certain rights, such as freedom of navigation, in light of competing claims for access to and use of the oceans.[199] New institutions, practices, and rules became necessary to promote order in an increasingly chaotic and contested environment. Thus while navigation has remained a freedom "to be exercised in the interest of all entitled to enjoy it," it has increasingly been circumscribed over the past fifty years, in large part by the expansion of maritime zones. The increase of the territorial sea from three to twelve nautical miles from coastal baselines and the codification of the 200-mile EEZ under UNCLOS[200] have substantially reduced the total area of the high seas and, in turn, the zone in which freedom of navigation is most unfettered.[201]

That said, reports of the death of the non-interference principle may be exaggerated. Freedom of navigation remains an essential principle of the public order of the oceans, and the UNCLOS provisions relating to "innocent passage" and "transit passage" are reminders that the expansion of maritime zones—permitting varied degrees of national sovereignty and concurrent jurisdiction—has not eliminated the freedom of navigation, even in zones of substantial coastal state authority.[202] The United States has pursued a national policy dedicated to the preservation of "the rights and freedoms of the inter-

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198. OFFICE OF OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: NAVIGATION ON THE HIGH SEAS—LEGISLATIVE HISTORY OF PART VII, SECTION I (1989).

199. This recalls the famous *Lotus* case, in which the Permanent Court of International Justice described the extraterritorial jurisdiction of sovereign states as presumptively valid unless a specific rule of international law to the contrary could be shown. The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). "Freedom of the high seas" was well-established as international custom, and therefore precluded many claims of extraterritorial jurisdiction (with certain exceptions), but it became increasingly difficult to adhere to such bright line distinctions between national sovereignty over the territory and absolute freedom everywhere else as new claims arose. The *Lotus* case fails to allow for the lawfulness of state action that vindicates essential concerns of national sovereignty but runs afoul of more general international prescriptions of law, and this apparent lack of flexibility left international jurists ill-equipped to confront the increasingly complex problem of competing sea-related claims and their transnational consequences.

200. The inclusion of the EEZ in UNCLOS has been described as "the codification of . . . mare clausum over mare liberum." Scott Allen, *National Interest and Collective Security in the Ocean Regime*, *in* OCEAN GOVERNANCE STRATEGIES, *supra* note 16, at 20, 23. *See also* KEN BOOTH, LAW, FORCE & DIPLOMACY AT SEA 38 (1985) (describing the phenomenon of "creeping jurisdiction" embodied by the creation of the EEZ, which brought nearly one-third of the oceans "under some form of national administration").

201. The 200-mile EEZ places approximately one-third of the oceans—twenty-eight million square miles—under some degree of national supervision. *See* BOOTH, *supra* note 200, at 38 (estimating thirty-two percent); Friedheim, *supra* note 196, at 543 (estimating thirty-six percent). Professor Friedheim describes the UNCLOS III negotiations as a largely successful effort to return to a model based on "exclusive rights of access" that greatly benefited the coastal and archipelagic states. Friedheim, *supra* note 196, 542–43.

202. *See* UNCLOS, *supra* note 4, arts. 17, 38. Not only do innocent and transit passage weigh against too diminished a view of navigational freedoms, but the expanded national authority over the EEZ does not, in principle, change the status of the EEZ for navigational purposes. *See id.* art. 58(1) (preserving the core navigational freedoms provided for in the high seas to vessels in the EEZ).

national community in navigation" through its Freedom of Navigation Program, established in 1979, when the shifting balance of interests threatened to undermine navigational rights more severely.[203] The expansion of regulatory controls on rights of use and navigation has thus taken place within a larger effort to balance the non-interference principle against the legitimate and conflicting claims of coastal states or, sometimes, states at large. At the risk of oversimplification, it is possible to identify UNCLOS provisions that preserve the non-interference principle, including the preservation of the freedom of navigation against regulatory controls or claims of *inclusive* (i.e., non-flag state) jurisdiction over foreign vessels. At the same time, UNCLOS at several points either requires or permits non-flag states to impose regulatory controls that restrict the freedom of navigation or have the potential to do so. The following table lists a range of UNCLOS provisions that express the non-interference principle.

TABLE THREE[204]

Preservation of the Non-Interference Principle in UNCLOS

Article 24:	Restricting coastal states from interfering with innocent passage in the territorial sea.
Article 27:	Limiting coastal state grounds for exerting criminal jurisdiction over foreign ships engaged in innocent passage.
Articles 42, 44:	Restricting coastal states from interfering with transit passage through straits.
Article 52:	Restricting archipelagic states from interfering with innocent passage in archipelagic waters.
Article 58:	Restricting coastal states from denying Article 87 high seas freedoms to ships in the EEZ.
Article 60(7):	Restricting coastal states from interfering with international navigation through the establishment of ill-placed artificial islands, installations, or structures.

203. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Law of the Sea (U.S. Digest, Ch. 7, § 1) United States Ocean Policy*, 77 AM. J. INT'L L. 619, 620 (1983). France has made similar claims as to the exercise of navigational rights as a tool of protest and denial against excessive maritime claims. *See* ROACH & SMITH, *supra* note 14, at 4 n.7. For a description of the Freedom of Navigation Program's objectives and operations, see *id.* at 3–6. *See also* O'CONNELL, *supra* note 2, at 1 ("The primary aim of most of the naval Powers in time of peace has traditionally been to reinforce the 'freedom of the seas'—'to protect our ships upon their lawful occasions.'").

204. Tables Three and Four omit provisions from Part XI of UNCLOS governing management of the deep seabed, since it was supplanted by the 1994 Agreement. They also omit provisions from the nine annexes to UNCLOS.

Article 78:	Restricting coastal states from unjustifiable interference with navigation in the exercise of rights over the continental shelf.
Article 87:	Guaranteeing freedom of the high seas to all states, including freedom of navigation and freedom of overflight.
Article 89:	Invalidating claims of sovereignty over the high seas.
Article 90:	Providing every state with the right to sail ships flying its flag on the high seas.
Articles 95, 96:	Providing immunity to warships and non-commercial government ships on the high seas.
Article 116:	Reaffirming a qualified right to fish on the high seas.
Article 193:	Restricting external interference with coastal state exploitation of its own resources.
Article 194(4):	Restricting states taking anti-pollution measures from unjustifiably interfering with the activities of other states.
Article 226:	Restricting the ability of a state to delay a foreign vessel in the course of investigation.
Article 261:	Restricting states undertaking scientific research from interference with international shipping routes.

The provisions listed in Table Three do not provide an exhaustive representation of the non-interference principle in UNCLOS, but they support the idea that freedom of navigation persists, albeit qualified to reflect the emergence of competing national and international claims. The result is an effort to balance inclusive and exclusive jurisdiction in ways beneficial to an overall system of public order. Table Four provides the counterweight to Table Three, highlighting the provisions that require or strongly suggest the rights or duties of states to assert regulatory control.

TABLE FOUR[205]

Permissible Interference—Expanded Jurisdiction To Prescribe and Enforce Under UNCLOS

Article 21:	Permitting coastal states to regulate innocent passage in limited subject areas.
Article 42:	Permitting coastal states to regulate transit passage in limited subject areas.
Articles 52, 53:	Permitting archipelagic states to temporarily suspend innocent passage for security reasons and to establish sea lanes in archipelagic waters.
Article 56:	Permitting coastal states to regulate protection and preservation of the marine environment within the EEZ.
Articles 61–67:	Permitting coastal states to manage the living resources within the EEZ, including determination of the allowable catch (Article 61).
Article 73:	Permitting coastal states to board and inspect foreign vessels suspected of violating living resource regulations in the EEZ.
Article 88:	Reserving the high seas for peaceful purposes.
Article 92:	Suggesting that the exclusive jurisdiction of flag states over their vessels on the high seas can be abrogated by international treaty.
Article 94:	Requiring flag states to assume jurisdiction over their vessels and ensure that such vessels and crews adhere to national or international safety regulations.
Article 99:	Requiring flag states to prevent and punish the transport of slaves on their vessels.
Articles 100, 105:	Requiring *all* states to cooperate in the repression of piracy on the high seas and granting universal jurisdiction to seize pirate ships, their crew, and cargo.

205. Table Four is not exhaustive and does not include every UNCLOS provision that requires, suggests, or promotes regulatory cooperation between or among states. Instead, it tries to identify the provisions permitting unilateral state action to exert regulatory jurisdiction over maritime zones or the vessels therein. This form of unilateral state action, however, often flows from standards or practices that have been agreed to through multilateral and deliberative institutions, such as the International Maritime Organisation (IMO) in London or ad hoc treaty negotiations.

Article 108:	Requiring *all* states to cooperate in the suppression of illicit drug trafficking by ships on the high seas contrary to international conventions.
Article 109:	Requiring *all* states to cooperate in the suppression of unauthorized broadcasting from the high seas.
Article 110:	Authorizing right of visit by warships on the high seas against any non-exempt foreign vessel if reasonable ground exists for suspecting the vessel is engaged in piracy, the slave trade, unauthorized broadcasting, or if the ship is without nationality or not showing a flag.
Article 111:	Permitting coastal state "hot pursuit" into the high seas or another state's EEZ by foreign ships in violation of regulations covering the coastal state's territorial sea.
Article 194(2):	Requiring states to take anti-pollution measures.
Articles 210, 211:	Permitting coastal state regulation of pollution by dumping or from the operation of foreign vessels in the territorial sea or EEZ.
Articles 216–220:	Permitting the enforcement of anti-pollution regulations by coastal states, flag states of the vessels in violation, or port states.

Tables Three and Four demonstrate that the non-interference principle, and its primary manifestation in the freedom of navigation, remains well-represented under UNCLOS and is an important expression of community values, despite the variety of legal mechanisms that place limits on that freedom. As much as UNCLOS provides for new forms of regulation, it limits the extent of that regulation to promote the level of navigational freedom deemed optimal for commerce, trade, security, and science. This should make clear that neither *Mare Liberum* nor *Mare Clausum* adequately describes the complex system of oceans governance that has developed; neither model accounts for the balancing of interests that is currently and perhaps precariously protected by UNCLOS and its progeny.

V. Appraisal: UNCLOS and the Lawfulness of Ship Interdiction

This Part attempts to situate PSI interdiction objectives within the evolving dynamic between the non-interference principle and competing jurisdictional and regulatory claims. Appraising the lawfulness of PSI operations requires considering how the non-interference principles of UNCLOS limit the available options for the interdiction of commercial vessels at sea. In addition, the appraisal necessitates considering how the range of permissible modes of interference—that is, the jurisdiction to prescribe and to enforce—potentially

provides some degree of legal authority for PSI interdiction operations, but with uncertain consequences for the balance of interests in place. This Part will explain the various legal models of jurisdiction that constitute the public order of the oceans and will suggest how these different parts of the existing structure enhance or detract from the lawfulness of PSI claims.

The interception of a ship is most clearly lawful under two jurisdictional models: flag state control and port state control.[206] Although coastal state control over the ships in its waters, including the territorial sea, the contiguous zone, and the EEZ, shares a similar purpose, coastal state control is restrained by provisions promoting the non-interference principle in favor of navigational rights. Finally, the issue of high seas interdictions where freedom of navigation and access appear at their apex raises additional important questions. In some circumstances, these cases concern grants of universal jurisdiction over ships on the high seas. Another set of situations, implicating the regulatory response to problems of a transnational dimension, more directly places the focus on the current balance between non-interference and permissible regulation. As these Sections will make clear, even the "easy cases" raise some doubts about the lawfulness of PSI interdiction efforts and the extent to which the principles articulated by the prescription of legal norms can readily and lawfully be extended into new and different contexts.

A. Flag State Control

UNCLOS permits any state to determine the conditions for the grant of nationality to its ships,[207] and, "save in exceptional cases expressly provided for in international treaties or in this Convention, [such ships] shall be subject to its exclusive jurisdiction on the high seas."[208] Thus, on the high seas and in its own territorial sea,[209] the flag state has the legal authority to intercept and board any of its vessels that are suspected of trafficking in WMD-related materials or of any other recognized offense.[210] A ship is conceptually a floating

206. Although port state and coastal state control share similar mandates, unique qualities of the coastal state regime make it a "harder" case requiring treatment elsewhere. *See* Part V.C, *infra*.

207. UNCLOS, *supra* note 4, art. 91.

208. *Id.* art. 92. The few exceptions relate primarily to the limited grants of universal jurisdiction over ships on the high seas. *Id.* art. 110. It should also be noted, however, that Article 110 leaves states the option to enter into bilateral agreements expanding the grounds for interdiction, a strategy the PSI has targeted. *See* Joyner, *supra* note 47, at 8.

209. *See* UNCLOS, *supra* note 4, art. 3 (establishing the twelve-mile territorial sea); *id.* art. 21 (permitting certain coastal state regulations on ships in its territorial sea).

210. Even flag state interference, however, presumably requires that some standard of reasonable suspicion be met. That said, the flag state has greater discretion upon which to justify stopping one of its ships than does any other state, if only to verify that the ship meets the health and safety standards for which the flag state is responsible. *See id.* art. 94. Nonetheless, the lack of *any* reasonable grounds for stopping a vessel at sea might subject the flag state to liability. Another question is whether the state of registry could face liability specifically for negligently permitting the transport of WMD-related materials on its ships; if such liability exists, that possibility would almost certainly necessitate a lower threshold of reasonable suspicion for flag state inspections. If ships from registries with "bad reputations," however, are forced to endure more frequent and time-consuming inspections in the third-state ports they visit,

extension of the national territory, at least until it enters another state's zone of control. In the territorial sea or EEZ of another state, flag states maintain varied degrees of concurrent jurisdiction with the relevant coastal state. Neither treaty nor custom clearly provides for specific situations in which the flag state is actually stripped of its jurisdiction over the vessel.[211] Furthermore, UNCLOS dictates a subtle preference in some instances for the primacy of flag state jurisdiction over coastal state jurisdiction, even where concurrent jurisdiction exists.[212]

The relative strength of flag state jurisdiction makes it a formidable obstacle to PSI operations, but also a potentially powerful tool. Where flag state consent is available, it becomes considerably easier to presume the lawfulness of a particular interception. At the same time, where flag state consent is impossible to obtain, the lawfulness of any attempt to interdict the vessel must be presumptively suspect without reference to another source of clear legal authority. The Statement of Interdiction Principles relies heavily on the fact that flag states have the legal authority to intercept their own vessels, or to authorize another state's naval forces to do so.[213] PSI participants are asked to "take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state" if reasonable suspicions have been raised, or to "seriously consider providing consent" for other states to board and search their vessels.[214] Implicit in the latter commitment is the imperative that any state, PSI participant or not, may *seek* the flag state's consent to board and search, so long as the request has some reasonable basis.

Part II.B.2 has already described the prevalence of flags of convenience and their susceptibility to abuse by entities seeking to participate in WMD proliferation or other threatening activities.[215] As demonstrated by the *BBC China* incident, however, the cooperation of the flag state can greatly reduce the legal obstacles to diverting, inspecting, or seizing control of a suspect vessel. Nonetheless, flags of convenience raise difficulties for PSI participants be-

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the practical consequence may be ship owners shifting their flags to registries with better track records. This, in turn, would deprive negligent flag states of the registration fees that motivate states to create open registries in the first place.

211. In theory, however, the flag state can be held liable and the vessel can lose the full extent of the flag state's protections if the Article 94 duties of the flag state are not met. *See* Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 PACE INT'L L. REV. 27, 51 (2002).

212. This preference—a right of flag state preemption—is exemplified by Article 228(1). UNCLOS *supra* note 4, art. 228(1) (regarding the institution of proceedings against ships that have violated anti-pollution regulations protecting the marine environment). Under this UNCLOS provision, proceedings brought by another state to impose penalties on the polluting ship must be suspended if the flag state institutes its own proceedings within six months of the prior proceedings. Although certain exceptions can override the flag state's enforcement jurisdiction, this results in "not entirely concurrent jurisdiction." Valenzuela, *supra* note 66, at 497.

213. *See* CHURCHILL & LOWE, *supra* note 192, at 218 (noting the ability to depart from exclusive flag state control by specific agreement).

214. Statement of Interdiction Principles, *supra* note 96.

215. *See supra* Part II.B.2.

cause the leading open registry states remain outside the core PSI membership,[216] and most open registry states are unlikely to be able or willing to track and monitor suspect ships on a global basis. Commentators have suggested that because flag states may lack the resources or resolve to prevent or respond to a situation of WMD trafficking, "cooperative arrangements among interested nations" are essential tools to resolve potential problems caused by jurisdictional issues.[217]

A PSI participant seeking to intercept the flag vessel of another state generally needs to go through diplomatic channels to seek consent from the flag state before taking action.[218] Even if the flag state can be contacted directly, this can be a time-consuming and administratively difficult procedure, although advances in communications technology ostensibly make it much more feasible for requesting vessels to expect a prompt response from the flag state.[219] Nonetheless, the failure to receive a timely response can be critical; the requesting ship's authority to pursue and intercept the suspect vessel evaporates if the vessel reaches the territorial waters of a third state before interception can occur.[220]

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216. Despite not becoming core participants in the PSI, the largest open registries are PSI supporters, as evinced by the shipboarding agreements described *infra* in text accompanying notes 232 and 233.

217. B. A. H. Parritt, *Introduction and Overview* to VIOLENCE AT SEA 3, 12 (B. A. H. Parritt ed., 1986). Writing nearly twenty years before the PSI, Brigadier Parritt's recommendation for "informal cooperative arrangements" to permit interdictions and redress the problem of flag state impotence was prescient. *Id.* A similar logic informs the advent of regional port state control agreements, as described in Part V.B, *infra*.

218. *Pact Lets U.S. Search Liberia-Flagged Ships For WMDs*, CNN.COM (Feb. 13, 2004), *at* http://www.cnn.com/2004/WORLD/africa/02/13/liberia.shipsearches.ap/ (last visited Nov. 18, 2004) [hereinafter *Pact Lets U.S. Search*].

219. Where procedures for requesting and authorizing flag state consent are not predetermined by agreement, the process can be slow or, in the worst case, a failure if the target vessel is allowed to escape before operations can begin. *Id. See also* The Secretary-General, *Oceans and the Law of the Sea: Report of the Secretary-General*, U.N. GAOR, 58th Sess., Addendum, Agenda Item 53(a), at 18, U.N. Doc. A/58/65/Add.1 (2003) (noting the problem of significant delays in getting flag state consent in the context of drug-trafficking interdictions at sea); Joseph E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future?*, 31 U. MIAMI INTER-AM. L. REV. 121, 133 n.72 (2000) (describing the complicated consent procedure that can require convocation of a Presidential Directive process—a kind of inter-agency conference within the U.S. government).

220. A fleeing vessel may also seek refuge in the territorial waters of a friendly state, or at least a state which it knows is hostile to requests from other parties to conduct police operations inside the territorial sea. The pursuing state can then seek consent of the coastal state to continue operations, but this requires restarting the authorization process, and coastal states may have different jurisdictional prerogatives than flag states. *See* Kramek, *supra* note 219, at 123 (noting that getting consent to enter into another state's territorial waters in pursuit of a suspect vessel is also a "time consuming, and sometimes futile task"); Mark J. Salonia, *The U.S. Navy's Future in Drug Interdiction* (1990), GLOBALSECURITY.ORG, *at* http://www.globalsecurity.org/military/library/report/1990/SMJ.htm (last visited Nov. 18, 2004) (describing the "major obstacles" posed by the bureaucracy of the U.S. Department of State in seeking coastal state consent to pursue drug-traffickers in territorial waters). Some coastal states have shown unease with counter-drug operations occurring in the high seas off their coasts—despite lacking any legitimate claim to sovereignty over such waters. ROACH & SMITH, *supra* note 14, at 265. Nonetheless, states uncomfortable with interdictions in the high seas beyond their zones of control seem particularly unlikely to facilitate PSI-type operations within the territorial sea, or even the EEZ.

In pursuit of flag state consent, the United States and other PSI participants have sought bilateral agreements with the leading flag states. These agreements seek to clarify the grounds upon which PSI members may request visit and search rights and streamline the procedures necessary for flag state authorization of such actions.[221] The proposed agreements are modeled after existing "ship boarding" agreements in the counter-narcotics context.[222] Unlike certain activities for which UNCLOS provides universal jurisdiction on the high seas,[223] the legal authority for interdiction of vessels involved in the illicit trafficking of narcotics or psychotropic substances is suggested but not provided by UNCLOS. Article 108 provides only that "[a]ll states shall cooperate" in the suppression of such traffic on the high seas where it is contrary to international conventions.[224] To find the necessary international legal authority for interdictions related to illegal drugs, states must turn to the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("U.N. Narcotics Convention").[225] Article 17 of this agreement allows for "appropriate measures" to be taken, contingent on reasonable grounds for suspecting that a vessel on the high seas is engaged in illicit traffic and only after securing flag state consent.[226] Article 17 also authorizes parties to the Convention to "consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article."[227] The United States has pursued that option vigorously, entering into numerous bilateral agreements with states whose ships are of drug trafficking concern, thereby creating a variety of different options to facilitate lawful interdiction.[228]

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221. *See* CNS OVERVIEW, *supra* note 115. *See also Pact Frees US Navy to Search Ships for Terror Weapons*, IRISH EXAMINER, Feb. 13, 2004, *available at* http://www.irishexaminer.com/breaking/2004/02/13/story134125.html (last visited Nov. 18, 2004) [hereinafter *Pact Frees US Navy*] (noting that setting up bilateral boarding agreements is a less "painful process" than seeking a multilateral agreement). Bilateral agreements also obviously can obviate the requirement of negotiating for consent on a case-by-case basis, although some states readily provide consent in such cases anyway. *See* CHURCHILL & LOWE, *supra* note 192, at 218 (noting that claims to exceptional jurisdiction to seize and board foreign ships "are being received by other States with apparent equanimity" amidst widespread cooperation to repress drug smuggling); Matlin, *supra* note 62, at 1050 (describing high levels of cooperation on a case-to-case basis between flag states such as Panama and the Bahamas and the United States regarding U.S. requests for consent to interdict vessels suspected of illicit drug smuggling).

222. Daily Press Briefing, Richard Boucher, U.S. Department of State (Feb. 13, 2004), *available at* http://www.state.gov/r/pa/prs/dpb/2004/29392.htm (last visited Nov. 18, 2004) [hereinafter Boucher, Press Briefing Feb. 13]. *See also* Byers, *supra* note 23, at 538–40 (describing the success of U.S. efforts to reach such bilateral agreements to combat drug trafficking). Byers argues that creating this exception to exclusive flag state jurisdiction is more easily achieved through treaties than it would be through attempts to identify new rights to enforce drug trafficking laws under customary international law. *Id.*

223. *See infra* Part V.D.

224. UNCLOS, *supra* note 4, art. 108.

225. U.N. NARCOTICS CONVENTION, *supra* note 187.

226. *Id.* art. 17(3).

227. *Id.* art. 17(9).

228. As of 1998, the United States had entered into nineteen drug interdiction agreements with other countries. Agreements either for presumed consent to board or for expedited consent procedures have been reached with Antigua and Barbuda, the Bahamas, Barbados, Belize, Colombia, Dominica, the Dominican Republic, Grenada, Jamaica, Netherlands Antilles, Panama, St. Kitts and Nevis, St. Lucia, St.

In this respect, the U.S. strategy to combat drug trafficking may offer helpful comparisons to the PSI strategy to combat WMD proliferation, especially in the context of negotiating WMD-related boarding agreements with key flag states. There may, however, be certain important differences. First, although bilateral boarding agreements for the purpose of interdicting illegal drugs would presumably be lawful even in the absence of Article 108 of UNCLOS and Article 17 of the U.N. Narcotics Convention, such boarding agreements only gained prominence and widespread acceptance *after* a series of multilateral treaty arrangements laid the foundation for interdictions at sea. In light of the delicate balance of interests described in Part IV, states are likely to proceed with caution before entering into bilateral boarding agreements that may, in practical terms, significantly reduce exclusive flag state sovereignty. Second, there is much wider consensus over the illegality of the controlled substances that are the subject of the U.N. Narcotics Convention. Two detailed tables are annexed to the treaty, providing in detail the precise materials that are illicit and thereby subject to interdiction. No similar list of clearly suspect—let alone illegal—materials exists in the counter-proliferation context of PSI operations, especially regarding dual-use items. Many cargoes of possible proliferation concern have justifiable uses, whereas most controlled substances treated by the U.N. Narcotics Convention do not. This uncertainty could make boarding agreements for the purpose of WMD counter-proliferation substantially less effective and more difficult to administer than their counterparts in the drug trafficking context.

The United States has stated that PSI interdiction activities are "not aimed against legitimate commerce, dual-use or otherwise . . . . PSI does not envision stopping and inspecting every shipment that might involve items that could be used in a WMD- or missile-related proliferation program; rather the United States intends to take action based on solid information."[229] The fact that PSI interdictions will be based on "solid information" does little to address the ambiguity surrounding dual-use items, and it raises questions about which items fall into this category—an assessment undoubtedly influenced by the specific parties involved.[230] Presumably, extrinsic evidence of the parties receiving the shipment or intelligence on the end use of the equipment will help separate innocuous dual-use cargo from material that could be the proper object of an interdiction. However, few if any measures provide oversight over these determinations. Promises that "[l]egitimate dual-use commerce will very rarely be affected by PSI" do not themselves provide legal

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Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos, the United Kingdom, and Venezuela. Canty, *supra* note 23, at 132 n.49. The agreements are adaptations of a six-part Model Maritime Agreement drafted by the United States; each agreement contains some combination of provisions authorizing shipboarding, entry-to-investigate, overflight, shipriders (law enforcement officers placed on board the ship of another state), pursuit, and order-to-land. *See* Kramek, *supra* note 219, at 133.

229. PSI FAQ, *supra* note 98.

230. *See* Beck, *supra* note 32, at 16 (noting this difficulty and the likelihood of divergent interpretations among key states). *See also* PROSSER, *supra* note 75, at 6–7 (same).

assurances against such interference or clarify the limits of what commerce is legitimate, nor do they explain how the intelligence that provides one country with the basis for a proposed interdiction will be adequately relayed to other national authorities faced with making a "good cause" determination, particularly given that the requesting state may be unwilling to divulge its intelligence sources in full.[231]

On a related note, there is a crucial difference between the types of threats posed by each of the targeted cargoes. Although drugs engender myriad societal problems in both exporting and importing states, anti-drug operations remain a typical law enforcement activity, while the counter-proliferation of WMD-related materials is a global security threat and essentially a military problem. States may be more predisposed to cooperate in law enforcement rather than in military action, where the incursions into state sovereignty are more intrusive.

Nonetheless, in some of the PSI's greatest public successes to date, the United States has reached ship-boarding agreements with three major ship registries and flags of convenience of high strategic value. On February 11, 2004, the United States signed the Proliferation Security Initiative Ship Boarding Agreement with Liberia, the world's second-largest ship registry.[232] This was followed three months later by a similar agreement with Panama, the world's largest ship registry.[233] Three months later, another such agreement was reached with the Marshall Islands.[234] Together, Liberia and Panama account for nearly fifteen percent of the roughly 50,000 large cargo ships in the world.[235] With the addition of the Marshall Islands—and taking account

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231. PSI FAQ, *supra* note 98.

232. Press Statement, Richard Boucher, U.S. Department of State, Proliferation Security Initiative Ship Boarding Agreement Signed With Liberia (Feb. 12, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/29338pf.htm (last visited Nov. 18, 2004) [hereinafter U.S.-Liberia Boarding Agreement Statement]. It is estimated that one-third of oil is transported into the United States by Liberian-flagged tankers. *See Pact Lets U.S. Search*, *supra* note 218.

233. U.S. Department of State, International Information Programs, U.S. Applauds Ship-Boarding Agreement with Panama (May 12, 2004), *at* http://usinfo.state.gov/is/Archive/2004/May/12-587534.html (last visited Nov. 18, 2004). Although predated by the agreement with Liberia, the U.S. agreement with Panama may have even greater strategic value. The Panamanian shipping industry has been plagued by suspicions of corruption, and its ships are not certified by the major safety certification groups, leading to an inference that its ships might be more easily manipulated for improper purposes. *See* Carol J. Williams, *Panama to Sign Shipping Accord; The Anti-Terrorism Deal Will Allow the U.S. Navy to Board the Nation's Commercial Vessels*, L.A. TIMES, May 12, 2004, at A4.

234. PROLIFERATION SECURITY INITIATIVE SHIP BOARDING AGREEMENT, U.S.-Marsh. Is., Aug. 13, 2004, *available at* http://www.state.gov/t/np/trty/35237pf.htm (last visited Dec. 2, 2004) [hereinafter MARSHALL ISLANDS AGREEMENT]. *See also* Fact Sheet, *supra* note 139.

235. *Panama Joins Proliferation Security Initiative*, GLOBAL SECURITY NEWSWIRE, May 11, 2004, *at* http://nti.org/d_newswire/issues/2004/5/11/85bd34b5-9203-4503-b9c3-5caafc489b70.html (last visited Nov. 18, 2004). It should be noted, however, that the ship-boarding agreement does not mean that Panama has become a PSI "member." The State Department specifically noted that membership was not necessary, as the purpose is "to have agreed procedures with Panama in advance" so that when a potential proliferation arises, "we're then able to go through these procedures with Panama relatively easily and quickly, and whoever is involved might—could do the boarding." Daily Press Briefing, Richard Boucher, U.S. Department of State (May 12, 2004), *available at* http://www.state.gov/r/pa/prs/dpb/2004/32428.htm (last visited Nov. 18, 2004) [hereinafter Boucher, Press Briefing May 12].

of commitments among core PSI participants—more than fifty percent of the world's commercial shipping fleet by dead weight tonnage is subject to "rapid action consent procedures for boarding."[236] Meanwhile, talks to create similar bilateral arrangements continue with as many as twenty additional states.[237]

Consistent with the stated goals of the PSI, the boarding agreements limit the coverage of legal authority for interdiction to vessels suspected of transporting WMD, their delivery systems, or related materials.[238] Clearly drawing on counter-narcotics experience, the boarding agreements cast light on the methods that PSI participants intend to pursue as their web of counter-proliferation mechanisms expands.[239] The agreements allow either the United States or the counter-party, Liberia, Panama, or the Marshall Islands respectively, to request that the other party confirm the nationality of the suspect vessel and, upon confirmation, "authorize[s] the boarding, searching and possible detention of the vessel and its cargo."[240] Nothing about the arrangements necessarily departs from the standard regime among all states, whereby flag state consent would be necessary prior to any high seas interdiction in circumstances not otherwise governed by another treaty or agreement. The U.S.-Liberia and the U.S.-Panama agreements, however, permit the requesting state to proceed with the interdiction if, after two hours have elapsed, no explicit consent from the other party has been received.[241] The Marshall Islands Agreement mandates a four-hour waiting period.[242] This transforms the boarding agreement from a formalized procedure for case-by-case flag state consent into a blanket grant of tacit consent. The burden shifts to the flag state to withdraw its consent in a particular case.

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236. *See* Fact Sheet, *supra* note 139. The Marshall Islands' flag registry is the eleventh largest in the world by gross tonnage. *Id.*

237. *See* Bolton—Tokyo Remarks, *supra* note 142.

238. MARSHALL ISLANDS AGREEMENT, *supra* note 234; PANAMA AGREEMENT, *supra* note 137; U.S.-Liberia Boarding Agreement Statement, *supra* note 232. It should be noted that the U.S.-Panama Agreement was created as an amendment to the pre-existing 2002 U.S.-Panama Supplementary Arrangement on U.S. Coast Guard Assistance, which itself was a treaty agreement designed to enhance U.S.-Panama cooperation on bilateral maritime law enforcement operations aimed at drug trafficking, illegal fishing, and other smuggling. *See* PANAMA AGREEMENT, *supra* note 137.

239. Agreements are being pursued "with a number of other key flag states." Boucher, Press Briefing Feb. 13, *supra* note 222. Both the agreement with Liberia and that with Panama are only bilateral agreements with the United States, meaning other PSI participants are not directly or expressly covered by the agreed-upon procedures, but they establish a basis for Liberia or Panama to "sign similar agreements with other governments, presumably, with very similar type[s] of arrangements." Boucher, Press Briefing May 12, *supra* note 235. The Marshall Islands Agreement, however, is slightly different in this respect. *See infra* text accompanying notes 246–247.

240. MARSHALL ISLANDS AGREEMENT, *supra* note 234; PANAMA AGREEMENT, *supra* note 137; Boucher, Press Briefing Feb. 13, *supra* note 222; U.S.-Liberia Boarding Agreement Statement, *supra* note 232.

241. U.S.-Liberia Boarding Agreement Statement, *supra* note 232; PANAMA AGREEMENT, *supra* note 137. *See also* Judith Miller, *Panama Joins Accord to Stem Ships' Transport of Illicit Arms*, N.Y. TIMES, May 11, 2004, at A11.

242. MARSHALL ISLANDS AGREEMENT, *supra* note 234, art. 4(3)(b).

The joint ship-boarding agreements leave certain critical questions unaddressed. According to U.S. State Department Spokesman Richard Boucher, the U.S.-Liberia agreement, for example, is predictably "not aimed against . . . legitimate commerce or dual-use items."[243] This vague reference to the exclusion of "dual-use items" is somewhat misleading; the "related material" prong of the PSI mandate certainly covers such items, at least in "illegitimate" situations. As stated above, without a clearer description of what dual-use equipment or technology are eligible for interception, it seems inevitable that legitimate commerce will be affected by the agreements.[244] Alternatively, if the list of suspect materials has been drawn too narrowly in order to exclude sensitive dual-use equipment, the PSI will fail to prevent the proliferation of materials it seeks to interdict.

Another important question is what status the ship-boarding agreements have vis-à-vis other PSI participants who may seek to intercept vessels registered with Liberia, the Marshall Islands, or Panama. The terms of the Liberia and Panama agreements do not directly extend to PSI member states other than the United States or to other states with which the United States reaches bilateral boarding agreements. Separate bilateral agreements would need to be reached between the open registry state and other "consent-seeking" states, and it does not appear that these agreements yet exist. The Liberia treaty's text does contemplate its replication for such a purpose.[245] A likely scenario envisions another PSI member state asking U.S. authorities to, in turn, request confirmation of nationality and boarding authorization from the Liberian registry. Based on the public details of the ship-boarding agreements, it is unclear whether Liberia or Panama would accept the jurisdiction of states other than the United States over its ships on the basis of an assignment of Liberian or Panamanian authorization from the United States to a third party. The Marshall Islands Agreement provides some clarification in this respect. Article 18 of the Agreement discusses "Rights for Third States," asserting that the Marshall Islands may extend similar rights (i.e., consent to board and search) subject to the other provisions of the treaty to third states "as it may deem

243. Boucher, Press Briefing Feb. 13, *supra* note 222. *See also supra* notes 229–231 and accompanying text.

244. Scott Bergeron, Chief Operating Officer of the Liberian ship registry addressed this concern: "We're getting this free protection, if you will, from the U.S. Navy. We see it as completely positive. This is not something that's going to hinder commerce; in the long run it's designed to facilitate commerce." Patrick Goodenough, *Board-and-Search WMD Initiative Strengthened By Deal with Liberia*, CYBERCAST NEWS SERVICE (Feb. 13, 2004), *at* http://www.cnsnews.com/ForeignBureaus/Archive/200402/FOR20040213a.html (last visited Nov. 18, 2004). *See also Pact Frees US Navy*, *supra* note 221 (quoting Yoram Cohen, head of the Liberian ship registry, stating, "[w]ith this accord, the U.S. and its allies can feel more secure, and our ships can feel more secure under the U.S. security umbrella"). Interestingly, H. E. Arnulfo Escalona, the Panamanian Minister of Government and Justice, framed Panama's participation in a bilateral boarding agreement with the United States more outwardly, specifically invoking Resolution 1540 and describing the ship-boarding agreement as "one tangible example of our efforts" in support of the resolution. *U.S. Applauds Ship-Boarding Agreement with Panama*, *supra* note 233.

245. Byers, *supra* note 23, at 530.

appropriate."[246] Article 18 appears to lay the foundation for additional PSI participants to invoke this bilateral treaty in initiating requests for consent. However, such grants to third parties presumably require explicit consent from the Marshall Islands, not the tacit consent provided for after four hours without a response.[247]

Furthermore, even though the terms of all three boarding agreements give either party the legal authority to reject any request for board-and-search authorization, it is difficult to imagine the circumstances in which Liberia, the Marshall Islands, or Panama would reject such a request, given the relative power dynamic between those states and the United States.[248] This raises a more general concern about the operational structure of the PSI. Have the PSI core participants entered into bilateral or multilateral agreements with each other providing for the kind of blanket, implicit consent to board ships that the United States has extracted from Liberia and Panama? It is unclear whether formal agreements have been signed, but cooperation appears to extend only to a mutual "understanding on procedures" among the PSI countries.[249] Although certain similar agreements among PSI member states with particularly close relations seem likely, it is difficult to imagine the United States, for example, preemptively submitting its ships to the jurisdiction of other PSI participants such as Russia or, for that matter, France. If these types of agreements proliferate among PSI participants and popular open registry states, or between states generally, the principle of exclusive flag state jurisdiction on the high seas might be seriously undermined, if not reduced to a nullity.[250] But even if the erosion of flag state control is justified by competing factors of decision, it is important to consider whether the reduction of flag state control should be permitted to take place on a highly inequitable basis among states. The result could be a situation in which the exclusivity of flag state jurisdiction is essentially a function of relative economic and geopolitical power, rather than a function of equitable and stable legal arrangements among states. To the extent this problem already exists, the creation of more bilateral boarding agreements between powerful and less-powerful states is likely to exacerbate the imbalance.

There is one more remaining problem. Although flag state jurisdiction clearly permits the right of visit, there is nothing inherent in flag state jurisdiction alone that provides the legal authority to *seize* the ship's cargo. The

246. MARSHALL ISLANDS AGREEMENT, *supra* note 234, art. 18(1).

247. *See id.* art. 4(3)(b).

248. *See* Anderson, *supra* note 61, at 160–61 (discussing the ability of developed countries to influence the internal politics of open registry countries because of the latter's dependence on the ship owners, ports, and commercial interests of the developed world).

249. Boucher, Press Briefing May 12, *supra* note 235. Such intra-PSI participant cooperation has also been implied by the U.S. State Department. *See* Fact Sheet, *supra* note 139.

250. The restraint on this undesirable development, however, would be that states whose ships are frequently—and perhaps too often—being boarded will begin to withdraw consent more actively. Alternatively, ship owners will re-register their ships with states that are not party to any boarding agreements at all. In a sense, the market for flags will monitor an acceptable level of interference.

seizure component of any flag state interdiction intended to block the transfer of WMD-related materials would require authorization from some other source of law. Many states already have such laws, particularly those states belonging to the major export control groups discussed in Part II.A. The leading flag states, however, are not well-represented within those groups.[251] In turn, one PSI strategy is to encourage leading flag states to alter their national legal authorities to prohibit the possession or transfer of certain materials, thereby authorizing the lawful seizure of such materials in the case of a successful board-and-search operation.

Nevertheless, criminalization of WMD-related materials under the flag state's municipal law, and the concomitant authority to seize those materials, creates some lingering uncertainty in the case of flag state consent to another state requesting permission to board a suspect ship. Does the delegation of authority to board and search also give the boarding party grounds to seize cargo that is illegal under the law of the flag state, but not necessarily under the law of the state whose naval forces have undertaken the operation (or vice versa)? Such conflict of law problems might suggest the superiority of a clear prohibition under international law authorizing which types of cargo can be lawfully seized. It remains to be seen whether U.S.-proposed amendments to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), an instrument providing for higher safety standards in maritime navigation, provide such clarity.[252]

Alternatively, Resolution 1540 may help considerably in this regard, at least as regards transfers involving non-state actors; the resolution explicitly criminalizes the transfer of WMD-related materials in those cases.[253] Where national authorities are weak or unclear, an intervening state may be able to bypass its own national authorities and seek legal justification pursuant to Resolution 1540, at least in some circumstances. Thus flag state control, and the delegation of that control, provides PSI member states with a powerful tool by which to intercept suspect ships and multiplies the number of (relatively) easy cases. Even with the adoption of Resolution 1540, the formula for interdiction remains incomplete until either national or international

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251. A notable exception is Greece, which is a participant in all the major non-proliferation export control groups. In addition, Cyprus, another major flag state, participates in the Australia Group. For lists of active members and participants in the major export control regimes, see Fact Sheet, Bureau of Nonproliferation, U.S. Department of State, The Australia Group (Aug. 10, 2004), *available at* http://www.state.gov/t/np/rls/fs/35052.htm (listing participants in the Australia Group); Nuclear Suppliers Group, *Nuclear Exports*, *at* www.nsg-online.org/member.htm (last visited Nov. 18, 2004) (listing participants of the Nuclear Suppliers Group); Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *Welcome to the Wassenaar Arrangement*, *at* http://www.wassenaar.org/welcomepage.html (last visited Nov. 18, 2004) (listing participants in the Wassenaar Arrangement); and Zangger Committee, *Zangger Committee—Members*, *at* http://www.zanggercommittee.org/Zangger/Members/default.htm (last visited Nov. 18, 2004) (listing members of the Zangger Committee).

252. *See* Esper & Allen, *supra* note 47; Joyner, *supra* note 47.

253. *See* Lynch, *supra* note 51.

authorities clearly designate the cargo to be lawfully seized and the procedures to be followed in making that determination.

B. Port State Control

From one perspective, port state control is akin to the sovereignty any state exerts over its national territory. In the vast majority of cases, ports are considered part of the coastal state's internal waters, where national sovereignty is at its greatest strength relative to other maritime zones.[254] In turn, a ship that has entered port is subject to the criminal and customs laws of the port state.[255] If the shipment of WMD-related materials violates the port state's national criminal law or customs regulations, the legal authority for seizing the cargo and detaining the ship would clearly exist. For this reason, it is in the interest of the PSI to establish working relationships with port states of important strategic value, particularly in South Asia, Southeast Asia, and the Persian Gulf region. Not only will the PSI encourage port state national officials to bolster their criminal codes and customs regulations, but it will undoubtedly emphasize increasing the level of port state security needed to enforce those regulations.[256]

In addition, port states now play the central role in maintaining health, safety, and anti-pollution standards—an exercise of jurisdiction over foreign vessels that largely reflects the corresponding failure of flag state control.[257] In light of the failure of open registry states to exercise effective jurisdiction over their vessels, UNCLOS provides explicitly in Article 218 for the enforcement of anti-pollution standards by port states.[258] In this way, Article 218 indicates an important trend away from the presumption of exclusive flag state jurisdiction:

> In contrast with the limited jurisdiction of coastal states, the more radical development is in Article 218 of [UNCLOS], which gives port states express power to investigate and prosecute discharge violations *wherever they have taken place* beyond their national jurisdiction. This power covers both high seas offences and violations within the coastal zones of an-

254. UNCLOS, *supra* note 4, art. 8 (stipulating that internal waters exist on the landward side of the baseline designating the territorial sea); *id.* art. 11 (noting that the outermost permanent structures of the harbor form part of the coast). Although national sovereignty of the coastal state also extends to the territorial sea, *see id.* art. 2, the right of innocent passage, and the legal protections it might provide against coastal state interference, is not a consideration once the vessel has docked in port.

255. UNCLOS, *supra* note 4, arts. 27, 33; Persbo, *supra* note 107.

256. This provides something of a counterweight to the concerns expressed with regard to the extraction of concessions from flag states. Individual port states, which are less fungible than flag states and more essential to shipping interests, may be in a better position to extract concessions from the PSI member states in return for a more robust port state regulatory regime.

257. *See* Ronald P. Barston, *Port State Control: Evolving Concepts*, *in* LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 87 (Harry N. Scheiber ed., 2000).

258. UNCLOS, *supra* note 4, art. 218. It should be noted that anti-pollution controls implicate the structural integrity of the ship. The reasons for this should be obvious, particularly in the case of oil tankers or any other vessels transporting hazardous cargoes.

> other state, although in this case the port state may only act in response to a request from the state concerned.[259]

It should be noted, however, that the powerful geographic expansion of enforcement jurisdiction contained in Article 218 pertains largely to those areas of regulatory authority that are specifically assigned to flag states under Articles 94 and 211(2) and relate to health, safety, or pollution controls.[260] Thus it provides an expansion of the jurisdiction to enforce, but a much more limited expansion of the jurisdiction to prescribe; it is not a broad grant of general police powers.[261]

Although port state control has experienced "spectacular growth" over the past twenty-five years, the extension of port state controls to replace the ineffective control efforts by flag states has not been the result of unilateral port state action.[262] Instead, port state control has developed piecemeal over time through a series of regional agreements, beginning with the Hague Memorandum of Understanding ("MOU") in 1978 and enhanced by the Paris MOU of 1982, the benchmark of port state control.[263] Other regions have followed suit, with the Tokyo MOU perhaps representing the most successful effort to follow the Paris MOUs lead in another region.[264] In effect, each regional MOU functions as a coordinated enforcement regime that endeavors both to inspect a large number of foreign vessels and to pinpoint those vessels most likely meriting closer scrutiny.[265] Port state control did not emerge out of thin air and was not dictated by any one particular party. Rather, it was the product of a protracted debate both before and after UNCLOS III, and it received extensive attention in the negotiations leading to several other sea-related international conventions of the 1970s, while UNCLOS III was under way.[266]

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259. Valenzuela, *supra* note 66, at 496.

260. *See* UNCLOS, *supra* note 4, art. 211(2) (requiring flag states to adopt laws and regulations meeting at least minimum international standards to prevent, reduce, and control pollution caused by vessels of their registry).

261. UNCLOS Article 218(3) provides the limited grant of expanded jurisdiction allowing port states to establish anti-pollution regulations that can be enforced by denying port access to ships violating the standards. *Id.* art. 218(3).

262. Barston, *supra* note 257, at 87.

263. *Id.* at 87–88. For background on the Paris MOU, see generally Paris MOU on Port State Control, *at* http://www.parismou.org (last visited Nov. 18, 2004).

264. The Tokyo MOU, the Latin American Agreement, the Caribbean MOU, and the Mediterranean MOU reflect the rapid expansion of the regional MOU approach to port state control. Barston, *supra* note 257, at 96. There is a fierce internal debate as to whether the proliferation of the regional MOU model is a good idea. Participants in the Paris MOU, for example, have questioned the involvement of flag states with notorious records of sub-standard vessels on their registries in port state control structures. *Id.* at 99–100.

265. *See id.* at 91–92 (discussing "priority inspection"). The topic of port state control is exceedingly complex and technical. A full discussion of the current port state control regime is beyond the scope of this Article.

266. Port state control was a major part of the discussions giving rise to the 1974 Safety of Life at Sea Convention ("SOLAS Convention"), *supra* note 82, as well as the INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, Nov. 2, 1973, 1340 U.N.T.S. 184, *modified by* PROTOCOL OF 1978 RELATING TO THE INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, Feb. 17, 1978, 1340 U.N.T.S. 61. *See also* Barston, *supra* note 257, at 87; Valenzuela, *supra* note

Importantly, UNCLOS itself gave explicit blessing to global and regional cooperation to protect the marine environment,[267] and port state enforcement was highlighted, and given the robust scope noted above, in Article 218. The contours of port state control and the regulations that port authorities enforce have since been supplied largely by multilateral treaties or regulatory codes promulgated by the International Maritime Organization ("IMO"), an international standard-setting body under the U.N. umbrella situated in London.[268]

Several factors make the growing port state control regime significant for the PSI and its battle against WMD proliferation. First, as in the case of flag state jurisdiction, PSI members may be able to exploit the advantages of strong port state enforcement jurisdiction to subject suspect ships to more intrusive inspections using legitimate safety checks as an opportunity for weapons searches.[269] Although an allegation of mere pretext might weigh against the lawfulness of such activities, it seems virtually unquestioned that port states have the right, if not the duty,[270] to inspect the vessels in their ports.[271] The PSI, as described above, seems to have used this tactic successfully in the case of the discovery by Taiwanese officials of a chemical weapons-related component on board a North Korean vessel.[272]

66, at 498.

267. UNCLOS, *supra* note 4, art. 197.

268. *See* Langewiesche, *supra* note 7, at 62. In particular, the IMO led the recent enactment of the International Ship and Port Facility Security (ISPS) Code, an amendment to the SOLAS Convention. The ISPS Code took effect in July 2004 and imposes additional responsibilities on flag and port states, as well as on industry. *See* International Chamber of Shipping, *Key Issues 2004—Delivering Maritime Security: ISPS and the Security Imperative*, *at* http://www.marisec.org/ics-isfkeyissues2004/maritimesecuritytext.htm (last visited Nov. 18, 2004). The International Labor Organization ("ILO") has also played an active role in establishing safety regulations. *See* Barston, *supra* note 257, at 88, 93–95 (discussing the ILO role in expanding port state jurisdiction). The December 2002 Conference of States Parties to the SOLAS Convention led to proposals for a joint IMO/ILO working group on enhancing port and ship security through tighter crew controls and the development of a standardized Seafarer's Identity Document. *See* Press Briefing, International Maritime Organization, IMO Adopts Comprehensive Security Measures (Dec. 17, 2002), *available at* http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689#resos (last visited Nov. 18, 2004).

269. According to Under Secretary Bolton, where flag state jurisdiction is not an option, PSI operations are reportedly more likely to take place "in national territory where national authorities are strongest" than in international waters where the authorities are less clear. Bolton—Interview with ACT, *supra* note 44.

270. As of the early 1990s, port state jurisdiction remained discretionary, not mandatory. *See* Matlin, *supra* note 62, at 1025 (discussing U.S. case law on this point). The expansion of port state regulations and widespread practice through the variety of MOU regimes might suggest that port states, or at least those which are members of a regional inspection group, do have binding legal obligations under international law.

271. The PSI must tread carefully here, however. Despite the long-arm provision of Article 218, UNCLOS Article 226 provides a structured sequence that inspections must follow. Beyond examination of the records or documents of the vessel to confirm regulatory compliance, additional physical inspections of the vessel may proceed only where those documents are insufficient or there are "clear grounds" for believing the documents do not correspond to the physical realities of the ship. UNCLOS, *supra* note 4, art. 226. The "clear grounds" standard seems subject to flexible interpretation and potential abuse.

272. *See* sources cited *supra* note 130. The North Korean vessel had initially been detained on customs violations, which may have provided the necessary authority under Taiwanese law to conduct a more thorough search of the vessel. This is not the situation contemplated by the inspection regime of UNCLOS Articles 218 and 226, which pertain only to the safety of the marine environment.

Port state control is also notable for frequently operating on the basis of "priority inspection," wherein vessels are targeted based on a variety of objective factors (e.g., vessel age and type or detention record of the state of registry), not selected randomly. Methods of "priority inspection" differ among the various MOU regimes, and both flag states and the shipping industry have at times questioned the apparent departure of targeting systems from the customary principle of "non-discrimination of flag."[273] Although UNCLOS does contain strong non-discrimination prescriptions, including a specific non-discrimination provision relating to the enforcement of regulations protecting the marine environment,[274] the practice of more frequently inspecting ships from flag states with higher safety violation rates, a practice developed extensively by the Paris MOU, seems largely to have been accepted by the international shipping community.[275]

For these reasons, PSI member states, or states with whom they lodge inspection requests, should be on relatively firm legal ground in exploiting the enforcement jurisdiction of port states.[276] Port state control also provides the PSI with at least one example of how legal innovation in response to a community-wide problem has overridden the principle of non-discrimination among vessels (and, implicitly, states). Because the PSI must monitor and intercept the ships of some states more than others, this could provide relevant, if not dispositive, support for the lawfulness of such profiling.

Certain underlying concerns that have perhaps been too easily swept aside by the port state control regime also merit consideration. Just as state practice in the Paris MOU may provide relevant evidence of a trend away from principles of non-discrimination among vessels, PSI member states might try to stretch the precedential value of other aspects of port state control further. By examining the root cause and justification for port state control—namely, the abdication of responsibility by leading flag states—PSI participants could argue that the port state control regime weighs strongly against the legal

273. *See* Barston, *supra* note 257, at 91–93. Even though priority targeting may subject some flag state ships to occasional inspection delays and possible detentions if violations are found, it also reduces the costs to the flag state of maintaining its own inspection program. This trade-off is presumably acceptable to the flag state, up until the point at which its own cost savings are outweighed by the number of ship owners who re-register elsewhere in search of less-targeted registries.

274. *See* UNCLOS, *supra* note 4, art. 227. For evidence of the non-discrimination principle elsewhere in UNCLOS, see, for example, art. 24(1)(b) (prohibiting coastal state discrimination in hampering innocent passage through the territorial sea); art. 42(2) (same in the context of transit passage).

275. *See* Barston, *supra* note 257, at 91–93 (discussing the promulgation of various EC maritime initiatives during the 1990s that have refined, but firmly established, the regional standards for priority inspection).

276. Despite the apparent lawfulness of differentiated inspection priorities, one could argue that unilateral requests by a PSI state for the port state to exert jurisdiction over a foreign vessel, even where the port state has the discretion to do so, are problematic if the request simply circumvents the system used for determining which vessels are inspected. The PSI would stand on weaker legal authority if it could be shown that despite the discretionary nature of port state enforcement jurisdiction over all foreign vessels in port, the extension of that jurisdiction is lawful only when exercised on the basis of either flagrant regulatory violations or on the objective basis of whatever permanent and consistent vessel inspection formula is in place.

obligation to respect exclusive flag state jurisdiction in other contexts. For example, in cases where requests for flag state consent to search-and-board operations are denied or ignored—or where communication of the request is simply not feasible—PSI member states may seek to acquire the legal authority now vested in port states *on the basis of flag state failure to act*. Following the port state control model and the international community's sanction of the regional MOU systems, PSI member states could argue that the failure of flag states to exercise effective jurisdiction over their vessels—to respond reasonably to legitimate claims of suspected WMD-related activity—transforms the legal regime from one of exclusive to inclusive jurisdiction. In this scenario, any state with reasonable grounds to suspect a foreign vessel could intercept and search that ship by claiming a grant of legal authority derivative of the flag state's failure, inability, or unwillingness to act reasonably.

The problem with this approach, however, is that the subject matter over which flag states are required to exercise effective jurisdiction has traditionally been limited in scope and pertains principally to administrative, technical, and social matters with respect to the vessel.[277] Emphasis is on the safety of the ship's physical plant, the qualifications and conditions of the crew, the ship's correct use of signals and communications equipment, and its conformity with anti-pollution measures.[278] Thus, while the concurrent jurisdiction of port states has arisen in response to the flag state's failure to regulate effectively in those specific areas, it does not explicitly provide independent grounds for general port state jurisdiction that are unrelated to Article 94 flag state duties. Generalizing the model of concurrent port state jurisdiction over foreign vessels to a model of universalized concurrent jurisdiction between flag states and PSI member states (or *any* interested state party) in regard to vessels suspected of WMD trafficking fails to take into account the limited nature of the flag state duties that have since been taken up by port states. UNCLOS does not explicitly prescribe a flag state duty to prevent the trafficking of WMD-related material.[279] In turn, the failure of a flag state to regulate its ships for the purpose of preventing WMD proliferation has not traditionally violated any clear legal obligation that flag states owe to the wider community. However, Resolution 1540, though cast in broader terms, could be construed to do so, at least where non-state actors are involved. Absent Resolution 1540, a PSI member state could not claim in good faith that its authority to "regulate" the ship (via board-and-search in pursuit of WMD)

277. UNCLOS, *supra* note 4, art. 94(1).

278. *Id.* arts. 211(2), 218(3)–(4).

279. Claims of obligations under customary international law or *implicit* prescriptions under UNCLOS of a duty to prevent WMD-trafficking, even absent Resolution 1540, raise another argument. This might require an analysis of UNCLOS Article 88, which reserves the high seas for peaceful purposes. The dominant interpretation, however, is that Article 88 does not proscribe military activity such as training operations or patrols. This is a strong manifestation of the resilient non-interference principle. For more on the relevant legal authority that might flow from Article 88, see *infra* Part VI.

vests from abdication by the flag state of its duties in that subject area; no such flag state duty has properly and convincingly been established. Whether Resolution 1540 fills that void remains uncertain. If only for the sake of legal clarity, it is in this sense unfortunate that Resolution 1540 did not make express reference to the duties of flag states in the counter-proliferation context, or to the maritime security aspects of that subject more generally. It is difficult to say what weight should be given to the deliberate omission of a reference to maritime interdiction or flag state duties.[280]

Whether flag states have a *moral* duty to prevent the use of their ships for WMD trafficking is a different question. However strongly the international jurist might feel that flag states *should* seek to advance the cause of counter-proliferation, a legal norm mandating the flag state's affirmative legal duty to participate in such efforts is not entirely apparent. It may, however, be emerging. Declarations of the PSI, taken together with statements from the European Union, the G-8, and even China, do not and should not independently place new obligations on flag states to prevent WMD trafficking.[281] That said, a U.N. Security Council resolution making more specific reference to flag state duties and interdiction rights (as well as outlawing specified kinds of *state-to-state* proliferation) *could* go a significant distance toward the creation of new legal duties for flag states. While the extent to which Resolution 1540 has this effect remains unclear, its passage strengthens the PSI's position. In turn, this end-run option around the exclusive jurisdiction of the flag state, taking port state control as a model, might now be more convincingly raised by the PSI.

C. Coastal State Control

1. Territorial Sea and Innocent Passage

Similar to port state control, coastal state control manifests the territorial principle of national sovereignty. UNCLOS makes it clear that state sovereignty extends "beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."[282] Although the territorial sea was long measured at three nautical miles from the baseline delimitation of the coast, UNCLOS III addressed the claims of many coastal states to a more substantial zone of sovereignty. The territorial sea was extended up to a limit "not exceeding 12 nautical miles" in UNCLOS.[283] State practice has

280. *See supra* notes 179–180 and accompanying text.

281. Although such declarations and statements indicate that a significant number of major world powers support both expanded counter-proliferation efforts and interdiction procedures, such statements alone are only factors to consider in an overall assessment of whether future actions to enforce those obligations will be considered lawful. The specific details of interdiction procedures contemplated by the PSI are too far removed from these general statements of political support to independently create legally binding obligations upon non-participating flag or port states. Any states that have explicitly rejected such obligations must certainly be seen as exempt from any implied obligations.

282. UNCLOS, *supra* note 4, art. 2.

283. *Id.* art. 3.

largely conformed to this limit since UNCLOS entered into force, with "one hundred and forty-four States now claiming a territorial sea of 12 nautical miles or less," and "only a few states claiming a territorial sea in excess" of the limit.[284] Although the coastal state is duly permitted to enact laws and regulations with respect to the conduct of foreign vessels within its territorial sea,[285] the scope of these regulations is limited and the pre-eminence of the foreign vessel's "right of innocent passage" is emphasized by UNCLOS.[286] That said, a number of conditions attach to innocent passage,[287] and the coastal state "may take the necessary steps in its territorial sea to prevent passage which is not innocent."[288] There is a delicate balance at stake in the innocent passage provisions,[289] policed by standards of reasonableness and comity.[290] In general, PSI policy-makers should move carefully as they seek to influence state interpretations of innocent passage and its limits.

The interdiction of foreign vessels by the coastal state is largely based on two separate but closely related grounds of legal authority: foreign vessel violation of innocent passage or foreign vessel violation of coastal state laws or regulations adopted in conformity with UNCLOS.[291] The UNCLOS provi-

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284. OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 15.

285. UNCLOS, *supra* note 4, art. 21. Coastal states are given explicit authority to regulate innocent passage as it relates to the following grounds:

> (1) the safety of navigation and the regulation of maritime traffic;
>
> (2) the protection of navigational aids and facilities and other facilities or installations;
>
> (3) the protection of cables and pipelines;
>
> (4) the conservation of the living resources of the sea;
>
> (5) the prevention of infringement of the fisheries laws and regulations of the coastal State;
>
> (6) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
>
> (7) marine scientific research and hydrographic surveys;
>
> (8) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Id.

286. *See id.* art. 17 (establishing the right of innocent passage for ships of all states); *id.* art. 24 (emphasizing that permissible coastal state regulation of ships engaged in innocent passage shall not "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage").

287. *Id.* arts. 18, 19.

288. *Id.* art. 25.

289. For example, commercial shipping has an acute interest in having access to waters closest to the coast, where navigation may be easier. "While there are . . . good reasons why coastal States may wish to protect their environmental and political interests by more intensive control over passing shipping, there are equally good reasons why such shipping should be subjected to no more constraint than is consistent with good design and seamanship." O'CONNELL, *supra* note 2, at 259 (also describing the advantages of better weather, advantageous currents, and more economical and convenient voyages overall).

290. *See* GEORGE P. SMITH, II, RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED 38 (1980) (describing the application of a reasonableness standard to coastal state abrogation of innocent passage). *See also* CHURCHILL & LOWE, *supra* note 192, at 95 (arguing that even if coastal states do retain the right to legislate over the territorial sea in non-navigational matters, they likely refrain from doing so on the basis of comity).

291. These grounds for violation are not necessarily mutually exclusive.

sions on innocent passage developed the previous rules from the 1958 Territorial Sea Convention, which were comparatively sparse and vague.[292] The specific list of non-innocent activities provided by UNCLOS was intended to produce "a more objective definition, allowing coastal States less scope for interpretation and so less opportunity for abuse of their right to prevent non-innocent passage."[293] Although the list of permissible areas of regulation in Article 21 is considered exhaustive and inclusive,[294] UNCLOS has not created a bright-line rule of guidance to limit an individual state's interpretation of what activities other than those enumerated in Article 19(2) are prejudicial to its peace and security. Furthermore, all restrictions on innocent passage are strictly subject to a non-discrimination standard, pertaining both to the vessel's flag as well as its points of origin and destination.[295]

In the PSI context, it remains uncertain how far a coastal state can lawfully narrow the concept of innocent passage to facilitate PSI interdictions. One PSI strategy may be simply to encourage coastal states to declare the transit of WMD or missiles a security threat in their domestic law, thus potentially rendering the passage non-innocent.[296] Under Article 19 of UNCLOS, innocent passage cannot be "prejudicial to the peace, good order or security of the coastal State."[297] For the PSI, the most relevant grounds upon which prejudice to the peace can be established are "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations."[298] This appears to leave the coastal state a wide degree of discretion and a possible legal opening for counter-proliferation efforts. One could argue that the transit of WMD or other weapons represents a per se threat to the peace and security of the coastal state.[299] It remains unclear how direct or proximately the threat posed would

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292. *See* SMITH, II, *supra* note 290, at 9 (noting that UNCLOS III efforts "to raise the issues of innocent passage and free transit to a cognizable level of compatible coexistence" were being met with "qualified success"). *But see* CHURCHILL & LOWE, *supra* note 192, at 95 (noting some continued uncertainty); Arvid Pardo, *An Opportunity Lost*, *in* LAW OF THE SEA: U.S. POLICY DILEMMA 13, 17 (Bernard H. Oxman et al. eds., 1983) [hereinafter U.S. POLICY DILEMMA] (harshly criticizing those who believe Article 19 creates the desired objective standard and lamenting the reality that "the right of innocent passage remains subject to the discretion of the coastal state concerned").

293. CHURCHILL & LOWE, *supra* note 192, at 85. Professors Churchill and Lowe point to two important improvements in the UNCLOS provisions. First, the provisions of Article 19(2) now render the passage per se non-innocent; it is no longer necessary for the coastal state also to demonstrate prejudice to peace, good order, or security. Second, threats of force conceivably can include threats to states other than the coastal state. *Id.* This second contention follows from the specific reference in Article 19(2)(a) to "the principles of international law embodied in the Charter of the United Nations." UNCLOS, *supra* note 4, art. 19(2)(a). *But see* CHURCHILL & LOWE, *supra* note 192, at 95; Pardo, *supra* note 292, at 17.

294. *See* ROACH & SMITH, *supra* note 14, at 144.

295. UNCLOS, *supra* note 4, art. 24(1)(b).

296. *See* Chaffee, *supra* note 120. It is not entirely clear if this kind of regulation would run afoul of Article 21, if the latter is properly considered exhaustive and inclusive. *See* Joyner, *supra* note 47, at 8 (arguing that adjusting national law to overcome innocent passage should not pose a problem to the PSI).

297. UNCLOS, *supra* note 4, art. 19(1).

298. *Id.* art. 19(2)(a).

299. *See* Joyner, *supra* note 47, at 8 (characterizing this argument as "straightforward").

need to be, or whether one could successfully argue that any WMD implicitly threatens the global community (including the threat of direct or indirect harm against the coastal state and its interests). Alternatively, one could argue that trafficking in WMD or related materials violates the principles embodied by the U.N. Charter, particularly its mandate "to maintain international peace and security."[300]

These arguments, however, are difficult to sustain given the requirements of reasonableness and non-discrimination that apply to any restriction on innocent passage. The parties receiving shipments of any suspect goods, so long as such goods are *not* subject to a universal prohibition by some authoritative organ, such as the U.N. Security Council, might equally claim the protection of the U.N. Charter through recourse to Article 51, the inherent right to self-defense.[301] Furthermore, as already noted, a high percentage of WMD-related materials will be dual-use items of potential legitimate benefit to the importing state.[302] Criminalizing the transfer of such materials in the municipal law for the purpose of carving out new exceptions to the baseline standard of innocent passage risks being overbroad.[303] Shipments of sensitive dual-use technology between non-threatening parties might become prohibited. Even if such shipments involved a party of concern, they might become prohibited without further evidence of the importer's planned application of the product; no evidence would be required to indicate that an item of dual-use technology was destined for illicit military rather than civilian use. To the extent the weapons being transported cannot be tied directly to an imminent act of unlawful aggression, claims to prohibit the shipment of such weapons seem of dubious legal authority. In turn, the right of innocent passage could not be lawfully abrogated for their interdiction.

On this basis, the wide discretion that coastal states may possess in the territorial sea seems of somewhat limited utility for PSI purposes.[304] To the extent a coastal state could amend its national laws to create new opportunities to declare passage non-innocent—a tactic potentially at odds with the spirit if not the letter of Article 21—the legislation would need to be narrowly tailored to have an impact only on such cargoes of highly probable, and not merely potential, threat. That said, it seems legally tricky to fit a prohibition on the transit of WMD-related material into the Article 21 provisions.[305] Article 23 already specifically provides for innocent passage by ships

300. U.N. CHARTER art. 1, ¶ 1.

301. *Id.* art. 51.

302. Ninety-five percent of WMD "ingredients" are dual-use in nature, with legitimate civilian applications. Beck, *supra* note 32, at 16.

303. The simple counterargument asserts that the security benefits of wide-ranging restrictions on sensitive technology as a means of circumventing innocent passage protections outweigh the costs to commercial shipping and trade. Such costs include the effect of such restrictions on the free flow of sophisticated technology as well as a dilution of the role innocent passage plays in promoting unfettered commercial shipping on a wider basis.

304. *See* Persbo, *supra* note 107.

305. An alternative approach through the municipal law would be to enact domestic legislation mak-

carrying nuclear or other inherently dangerous or noxious substances.[306] This would seemingly make it even more difficult to justify the non-innocent passage of WMD shipments, so long as the passage meets all other requirements of the innocent passage provisions.[307]

2. *Coastal State Control Beyond the Territorial Sea*

Beyond the territorial sea, the coastal state continues to extend certain degrees of legal authority to prescribe and enforce. Prior to the establishment of the EEZ, the furthest extent of coastal state control was the contiguous zone, a regulatory "buffer" extending not more than 12 nautical miles from the outward limits of the territorial sea.[308] For navigational purposes, the contiguous zone is treated like the high seas. In principle, vessels would be able to engage in activities there that might otherwise render passage non-innocent within the territorial sea. The coastal state's jurisdiction in this zone extends to prevention and punishment of violations of the coastal state's customs, fiscal, immigration, or sanitary laws or regulations.[309]

Moving seaward, the coastal state continues to possess certain rights of permissible regulation over the EEZ, which extends up to 200 nautical miles from the coastal baselines.[310] The primary purpose of the EEZ is to provide coastal states with sovereignty over the economic management and exploitation of the natural resources of those waters.[311] Above all, this includes management of the living resources; primarily, of course, this means fish.[312] Navigational rights, however, are preserved under UNCLOS for all states within the EEZ

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ing participation in the trafficking of WMD a criminal offense. Under Article 27 of UNCLOS, criminal jurisdiction can be exercised by the coastal state upon a ship engaged in innocent passage in limited circumstances, although the presumption lies in favor of exclusive flag state jurisdiction over crimes on board the vessel. That said, exceptions exist if the consequences of the crime extend to the coastal state or "if the crime is of a kind to disturb the peace of the country of the good order of the territorial sea." UNCLOS, *supra* note 4, art. 27(1)(a)(b). These exceptions seem sufficiently vague as to permit the creative use of a domestic criminal code to create grounds for coastal state interdiction of a vessel trafficking in dangerous, criminalized materials.

306. *Id.* art. 23.

307. For example, innocent passage must, by definition, be "continuous and expeditious." *Id.* art. 18(2).

308. *Id.* art. 33(2).

309. *Id.* art. 33(1)(a)–(b). The United States, for example, proclaimed the allowable extension of its contiguous zone only in 1999, when President Clinton extended it to the twenty-four nautical mile maximum from coastal baselines. Proclamation No. 7219, 64 Fed. Reg. 48,701 (Sept. 8, 1999). The Proclamation was aimed at promoting the U.S. Coast Guard's ability to enforce laws and regulations relating to pollution, drugs, and illegal immigration, as well as at preventing the removal of cultural heritage items found within the expanded zone. *See* Esper & Allen, *supra* note 47, at 5 (describing U.S. jurisdiction over ships in its contiguous zone in the PSI context).

310. UNCLOS, *supra* note 4, art. 57.

311. *Id.* art. 56(1)(a).

312. *See* Bardin, *supra* note 211, at 41 ("In summary, we can say that the EEZ created by UNCLOS Article 56 provides the coastal State with exclusive jurisdiction over the economic uses of the 188 miles located seaward of the territorial sea, where fishing is most important."). Coastal states also have jurisdiction over the establishment and use of artificial islands, installations and structures; marine scientific research; and, importantly, protection and preservation of the marine environment. UNCLOS, *supra* note 4, art. 56(1)(b).

of any coastal state; all the freedoms of navigation pertaining to the high seas are maintained within the EEZ.[313]

a. Uncertainty of Jurisdiction in the EEZ

Establishment of the EEZ could be viewed as both a great victory for the coastal states, but also a historic, if not troubling, vindication of the power of unilateral state claims to shape the law of the sea.[314] Furthermore, despite the detailed regime laid out in UNCLOS, the EEZ remains the maritime zone with perhaps the least degree of global consensus, at least as measured by state practice, over the proper content and extent of coastal state jurisdiction: the EEZ "does not follow either the concept of sovereignty, prevailing in the territorial sea, or the concept of freedom, which characterizes the high seas."[315]

Coastal state competence can be separated into different subject areas, each extending its own degree of coastal state legal authority. For example, coastal state control over pollution controls, and the legal authority of the coastal state to intercept suspect ships for the enforcement of those controls, is stronger in the territorial sea than in the EEZ. This has been described as a jurisdictional "gradation scheme."[316] In the territorial sea, the coastal state can undertake physical inspection, including boarding and possibly detaining the ship, where it has "clear grounds" for believing that a violation of anti-pollution measures has occurred.[317] In the EEZ, however, similar suspicions meeting the "clear grounds" standard require the coastal state first to seek information from the suspect vessel.[318] Although physical inspection can then take place if clear grounds for a suspected violation remain, the ship can only be detained if the violation discovered has caused "major damage or threat of major damage" to the interests of the coastal state.[319] The procedural differences and degree of control may appear subtle, but they indicate the careful balancing of interests between non-interference and regulation that the final provisions of the EEZ were intended to achieve.

Lingering disputes over the appropriate degree of coastal state jurisdiction over the EEZ present both problems and opportunities for the PSI. Several states have made excessive claims with respect to their jurisdiction to prescribe and enforce within the EEZ, including claims that have a negative impact on the freedom of navigation. Such claims sometimes include the right

313. UNCLOS, *supra* note 4, art. 58(1).

314. As of 2002, 110 states had proclaimed an EEZ in accordance with UNCLOS. OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 15. Professor O'Connell describes the creation of the EEZ as "the triumph of individualism over collectivism in international relations." O'CONNELL, *supra* note 2, at 552.

315. Tullio Scovazzi, *Coastal State Practice in the Exclusive Economic Zone: The Right of Foreign States to Use This Zone*, *in* THE LAW OF THE SEA: WHAT LIES AHEAD? 310, 310 (Thomas A. Clingan ed., 1986).

316. Barston, *supra* note 257, at 495–96.

317. UNCLOS, *supra* note 4, art. 220(2).

318. *Id.* art. 220(3).

319. *Id.* art. 220(6).

to regulate the military activities of other states, a position the United States has long rejected.[320] Some states have declared that innocent passage rights, but not the full navigational rights of the high seas, will be respected in the EEZ.[321] Many more states, including countries such as Pakistan that have been implicated in WMD proliferation, claim a general competence over the EEZ which exceeds the UNCLOS regime.[322] China, furthermore, at one point adopted an "offshore defense doctrine" with the intention of effectively extending its rights over the territorial sea to the full extent of its EEZ.[323]

It is unclear whether this kind of uncertainty helps or hinders PSI efforts. State practice has played an important role in developing the legal content of the EEZ since its establishment,[324] and the United States could now shift gears and argue in favor of greater coastal state rights to interdict vessels within the EEZ, perhaps by asserting rights akin to those possessed by costal states in the territorial sea. Such a strategy, however, would neither be lawful under the letter of UNCLOS, nor would it generally coincide with other U.S. interests, shared by many other PSI states, in a limited coastal state claim to the EEZ.[325] It would seem dangerously short-sighted to justify particular coastal state interdiction efforts in the EEZ against vessels suspected of WMD-related trafficking as lawful solely on the basis of a security-based coastal state sovereignty over the zone. Furthermore, the United States has long dismissed the lawfulness of coastal state claims to limit military activities in the EEZ,[326] and it may prefer to depend on the strategy of obtaining flag state, rather than coastal state, consent to conduct interdictions. This strategy, in turn, requires keeping the EEZ open to the interdiction activities of PSI members, not closing it off in favor of a more robust coastal state jurisdiction to enforce. It remains to be seen, however, whether coastal states will accept the lawfulness of PSI interdictions within their EEZ waters. Although, in principle, the PSI would be under no greater obligation within the EEZ to alert the coastal state of its activities than it would be on the high seas,[327] a disgruntled coastal state could take action to impair future PSI efforts or generate negative publicity.

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320. *See* ROACH & SMITH, *supra* note 14, at 249.

321. CHURCHILL & LOWE, *supra* note 192, at 171 (attributing this policy, for example, to the Maldives and Portugal).

322. *Id.* at 172.

323. *See* Tai Ming Cheung, *Emerging Chinese Perspectives on Naval Arms Control and Confidence-building Measures*, *in* A PEACEFUL OCEAN?, *supra* note 94, at 112, 119.

324. Professor Burke has argued strenuously that UNCLOS, in general, should not be read as a static document. Rather, state practice over time "is what determines the purport of the treaty" and "is really what determines the 'law,'" including in regards to matters relating to coastal state jurisdiction in the EEZ over fisheries, pollution, *and* navigation. Burke, *supra* note 16, at 222.

325. *See supra* note 203 and accompanying text and source cited *supra* note 320.

326. *See supra* note 203 and accompanying text and source cited *supra* note 320.

327. Any such notification is inconsistent with U.S. policy. *See* ROACH & SMITH, *supra* note 14, at 265. Several commentators on the PSI assert that the EEZ should be treated no differently than the high seas for interdiction purposes. *See, e.g.*, Joyner, *supra* note 47, at 9 n.12.

b. Fisheries Regulation and Ship Interdiction

Arguably, the EEZ primarily concerns fishing rights and responds to the legal regime that preceded it, under which fishing rights over the entirety of the high seas were guided by the non-interference principle. Along with the expansive jurisdictional rights granted to port and coastal states with respect to protecting the marine environment and vessel safety, the international fishing regime highlights some of the most interesting trends in the shifting balance of state interests over the oceans.[328] UNCLOS provides that the coastal state "shall determine the allowable catch of the living resources" in its EEZ.[329] Nonetheless, the UNCLOS provisions cannot be construed as a complete shift from non-interference to the unfettered and exclusive control of the coastal state. Rather, the UNCLOS provisions place particular emphasis on system concerns: how coastal states must manage their living resources in the EEZ while keeping in mind the needs of the international system as a whole.[330]

Although UNCLOS also mandated cooperation to address the difficult problems of highly migratory species or straddling fish stocks,[331] the EEZ initially served to exacerbate the problem.[332] The U.N. Straddling and Highly Migratory Fish Stocks Agreement ("U.N. Fish Stocks Agreement") was adopted in 1995 to address these problems and supplement the UNCLOS regime.[333] The Agreement provides schemes to facilitate more effective coordination between coastal states and states with vessels fishing on the high seas to set sustainable and sensible allowable catch limits.[334] It is generally considered to have improved the regulations that conserve and manage fish stocks for

328. "Interesting" would perhaps be too charitable a term to commentators particularly wary of moving too far away from the ordering principle of non-interference. Professor O'Connell seemed to express some dismay during UNCLOS III when negotiations over the EEZ indicated that a right of visit and search in the zone would not even require "suspicion of breach of law." O'CONNELL, *supra* note 2, at 578. "This asserted power of visit and search," wrote Professor O'Connell, "stands at the present limits of legal plausibility, even if it is restricted to fishing boats." *Id.* at 579.

329. UNCLOS, *supra* note 4, art. 61.

330. *See, e.g., id.* arts. 61(3), 62 (describing conditions that coastal states must meet to achieve optimum utilization of living resources in the EEZ, including taking into account the needs of other states in the region). *See also* Jonathan I. Charney, *Commentary*, *in* OCEAN GOVERNANCE STRATEGIES, *supra* note 16, at 76, 87 (describing how the legal understanding of coastal state rights in the EEZ has evolved to show that rather than coastal states having "unilateral authority to control" the fisheries in their EEZs, "[t]here is a requirement to take into account the impact regionally and even globally"). According to Professor Charney, this reflects the actual quid pro quo behind the concession of some states, such as the United States, to the EEZ; coastal states were required to invest in the serious study and analysis required for the proper management of their new spheres of regulatory control. *Id.*

331. *See* CHURCHILL & LOWE, *supra* note 192, at 305 (defining "straddling stocks" as "stocks of fish that migrate between, or occur in both, the EEZ of one or more states and the high seas").

332. *See* Burke, *supra* note 16, at 225–26 (describing how under UNCLOS, "numerous valuable fishery stocks [were] subject to completely inconsistent regulatory regimes .... [UNCLOS] actually helped create the difficulty by extending sovereign rights to 200 miles, but preserving freedom to fish beyond subject only to uncertain and debatable restrictions to recognize coastal state rights.").

333. U.N. FISH STOCKS AGREEMENT, *supra* note 187.

334. The text places a premium on the use of scientific evidence and adheres to the notion of the precautionary principle. *Id.* arts. 5–7.

optimal utilization and sustainable growth. In turn, these regulations are most often administered by Regional Fisheries Management Organizations ("RFMO"), groups of states that collectively manage and police the waters to which their regulations apply. Out of practical necessity, this requires a sort of RFMO dominion over portions of the high seas, perhaps aptly described as a fine-tuned *Mare Clausum* in the limited context of fisheries regulation enforcement.

Despite these developments, illegal, unreported, and unregulated fishing ("IUU fishing") on the high seas continue to undermine international, coastal state, and RFMO efforts.[335] In turn, policymakers are pursuing a variety of strategies to improve use of the innovative enforcement mechanisms that the U.N. Fish Stocks Agreement provides, including the authorization to board and inspect vessels in the high seas that are in possible violation of the regional or sub-regional regulatory schemes created pursuant to the U.N. Fish Stocks Agreement.[336] In some respects, these provisions are extraordinary. First, vessels can be boarded so long as their flag states are parties to the Agreement, regardless of whether they belong to the local RFMO exerting the jurisdiction to enforce.[337] Second, no standard of "reasonable suspicion" or "clear grounds" is applied; inspection can take place merely because the vessel is in the regulated area, which includes parts of the high seas.[338] Third, the Agreement permits boarding and inspection to take place *before* the flag state is contacted.[339] The inspecting party is only obligated to notify the flag state *after* the vessel has been boarded if "clear grounds" exist for believing that the vessel has engaged in any activity contrary to the relevant conservation and management measures.[340] The flag state then has three working days during which it can commence its own investigation or authorize the inspecting state to do so. If the flag state fails to take action, the inspecting party is authorized by the Agreement to continue its own investigation and can escort the ship to port.[341] There it is detained under another set of procedures providing for prompt release upon the posting of a reasonable bond.[342]

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335. *See* OCEANS: THE SOURCE OF LIFE, *supra* note 3, at 11.

336. U.N. FISH STOCKS AGREEMENT, *supra* note 187, art. 21. The agreement has been described as "most forceful and explicit in legal terms in its *requirement* for a high seas boarding and inspection regime that will be implemented through a RFMO." PROULX, *supra* note 10, at 2 (emphasis added).

337. U.N. FISH STOCKS AGREEMENT, *supra* note 187, art. 21(1). This provision represents a compromise, it seems, with Canada's previous position. In the mid-1990s, Canada sought to enforce RFMO regulations on the high seas against the vessels of *any* offending state; these efforts to enforce the regulations of the North Atlantic Fisheries Organization (NAFO) created at least one serious international incident. For an account of Canada's attempts at unilateral law-making and the subsequent treaty arrangements, see Byers, *supra* note 23, at 536–38.

338. Under the fisheries regime, inspection is treated as a procedural step preliminary to further investigation. "Requiring a threshold of probable cause before boarding defeats the concept of inspection and replaces it with investigation." PROULX, *supra* note 10, at 18.

339. U.N. FISH STOCKS AGREEMENT, *supra* note 187, art. 21(5).

340. *Id.* art. 21(5).

341. *Id.* art. 21(6)–(8).

342. These situations have already given rise to a developing jurisprudence in the short history of the International Tribunal for the Law of the Sea ("ITLOS"). Although there are a limited number of decisions to

These provisions have the potential for extraordinary impact upon the effective enforcement of fisheries regulations; active implementation of these provisions could also be interpreted as a loud signal of a shifting balance of interests leaning ever further away from the non-interference principle.[343] Nonetheless, the major RFMOs do not seem to have implemented the enforcement provisions of the U.N. Fish Stocks Agreement to their full effect. For example, States Parties to the Convention on the Conservation of Antarctic Marine Living Resources ("CCAMLR") do maintain an active inspection authority, but boarding activity is limited primarily to the territorial sea and the EEZ (although some incidents of high seas pursuit arising from suspicious behavior in the EEZ have been well-publicized).[344] The Northwest Atlantic Fisheries Organization ("NAFO") has perhaps the best-developed scheme of joint international inspection and surveillance under which "an authorized inspector of one NAFO member may board and inspect a fishing vessel of any other member to see if that vessel is complying with NAFO measures."[345] In that sense, the scheme closely resembles the ship-boarding agreements in the counter-narcotics context, except that consent has been granted on a multilateral rather than bilateral basis. On the other hand, NAFO procedures do not appear to take maximum advantage of the permissible enforcement methods pertaining, for example, to non-NAFO states who are nonetheless parties to the U.N. Fish Stocks Agreement. Other major RFMOs have not developed high seas inspection regimes at all.[346] The current state of affairs can be summarized as follows:

> [T]he range of schemes, or in some cases the lack of schemes, with which to accomplish high seas inspections of fishing vessels should illustrate that high seas inspections are not yet a commonly used enforcement tool worldwide despite the specific language contained within Articles 21 and 22 of the 1995 U.N. Fish Stocks Agreement. General trends tend to favor the less onerous options of Port State inspections and trade-related measures. The sophistication of any high seas B&I

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examine, there may already be a trend emerging in the prompt release cases indicating greater tolerance for robust enforcement of regulatory controls, encompassing both pollution and fisheries, at the considerable expense of the non-interference principle. Although trends in ocean governance have perhaps more traditionally developed through a combination of unilateral state practice followed by efforts at multilateral codification, the advent of a permanent decision-making body specializing in the law of the sea now provides a new and important source of trend identification.

343. An additional strong signal is the bilateral treaty between Canada and the European Union on fisheries management and conservation which involves each party's placing its own inspectors on the counterparty's vessels. *See* Byers, *supra* note 23, at 538.

344. *See* PROULX, *supra* note 10, at 13. *See also, e.g.*, Patrick Goodenough, *Board-and-Search Exercises Set to Begin*, CYBERCAST NEWS SERVICE, *at* http://www.cnsnews.com/ForeignBureaus/Archive/200309/FOR20030909b.html (Sept. 9, 2003) (last visited Nov. 18, 2004) (describing the three-week pursuit by Australian authorities of an Uruguayan ship "suspected of poaching rare fish").

345. CHURCHILL & LOWE, *supra* note 192, at 298. *See also* PROULX, *supra* note 10, at 14–15.

346. Neither the International Commission for the Conservation of Atlantic Tunas nor the Indian Ocean Tuna Commission has developed "board and inspection" procedures. *See* PROULX, *supra* note 10, at 13–15.

> [boarding and inspection] scheme is a reflection of the willingness of the members to tolerate this form of enforcement.[347]

This leads to the conclusion that while the U.N. Fish Stocks Agreement provides some indication of an emerging norm favoring the extension of specific regulatory controls into the area of the high seas when essential to the regulatory objective at stake, the actual practice of states—not seizing the opportunity to effect that extension—indicates a considerable degree of caution, restraint, and perhaps even discomfort with a type of legal authority that could fundamentally define a new balancing of interests over the oceans.[348]

There is much here relevant to the PSI. Even if states have not pursued their options under the U.N. Fish Stocks Agreement to the limit, the fact that such provisions exist in a multilateral convention that has received wide subscription appears significant. Although the PSI has not explicitly endorsed interdiction of vessels on the high seas *without* flag state consent, lawyers may turn to the fish stocks provisions to demonstrate that while WMD-related interdictions on the high seas may be at the law's limit, similar operations have been contemplated and, in theory, widely agreed to in other contexts. Although uranium enrichment equipment may seem a far cry from an illegal catch of bluefin tuna, the broad justification for a high seas boarding regime in the fisheries context could be roughly analogized to PSI interdictions in search of WMD-related materials. Both can be considered "a necessary component of the overall management, control and surveillance activities necessary to police" their respective target activities.[349] Both RFMOs and the PSI function as much as organs of cooperation and information-sharing as they do of interdiction.[350]

There are, nonetheless, several structural differences between the fisheries regime and the counter-proliferation regime the PSI seeks to develop. Most obviously, the broad-ranging regulation of high seas activity located in the U.N. Fish Stocks Agreement is the product, once again, of a multilateral treaty with wide subscription from the international community.[351] It was negotiated openly and with the participation of concerned parties representing a variety of divergent interests. Furthermore, the Agreement is, in a sense, the manifestation of an authorization located initially in UNCLOS, which clearly made the effective management of global fisheries a central

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347. *Id.* at 15.

348. *But see* Byers, *supra* note 23, at 358 (noting a dramatic increase in fishing vessel seizures worldwide, and particularly by Australia, since adoption of the U.N. Fish Stocks Agreement).

349. PROULX, *supra* note 10, at 30.

350. The closest parallel to the PSI in the fisheries context may be the International Monitoring, Control, and Surveillance ("MCS") Network, an informal and voluntary "arrangement of national organizations/institutions in charge of fisheries-related MCS activities, which have been authorized by their States to coordinate and cooperate in order to prevent [illicit] fishing," with an emphasis on information collection and exchange. *Id.* at 10 n.9.

351. As Byers has argued, this is another example weighing against the prospects of finding legal authority for PSI activities in customary international law as opposed to treaty innovations. Byers, *supra* note 23, at 538.

pillar of the codified law of the sea. The PSI focus on counter-proliferation as it relates to potential interdictions within an EEZ or on the high seas can find no similarly specific authorization in UNCLOS.

Moreover, to the extent the U.N. Fish Stocks Agreement appears to abrogate the principle of flag state consent, the break is actually only partial. Although vessels may be boarded pursuant to the enforcement of regulations by which their states of registry did not directly agree to abide (as signatories to the Agreement as a whole), consent can be located at one step removed. This might provide an argument by which the PSI could claim legal authority to board vessels on the high seas without flag state consent where the flag state is also a party to the relevant non-proliferation treaty regulating the transported cargo. In other words, if country *X* is a party to the CWC, and PSI intelligence indicates that a ship flying country *X*'s flag is transporting chemical weapons components that are regulated or banned by the CWC, the PSI could perhaps look to the U.N. Fish Stocks Agreement and, by analogy, locate a sort of implied consent by country *X* through its ratification of the CWC. The analogy is more useful as an indication of trends and shifting attitudes, however, than as any kind of hard or controlling precedent. The situations are too different to sustain that sort of legal transplant of logic.

In addition, the arrangements and procedures set down by the U.N. Fish Stocks Agreement and the subsidiary agreements and regulations of the various RFMOs are detailed, specific, and create a number of important safeguards to enhance their effectiveness and limit potential abuses.[352] Although the jurisdictional expansion and potential enforcement powers of the current fisheries regime both in the EEZ and the high seas appear far-reaching, the mechanisms in place are far more proceduralized and transparent than PSI activities appear to be. This difference might be an important consideration in weighing the lawfulness of PSI interdictions in light of the interdiction-friendly fisheries regime.

D. Universal Jurisdiction on the High Seas

The analysis up to this point has focused on a variety of situations where the presence of legal authority for lawful vessel interdiction depends primarily on the nationalities of the parties involved, their geographic location, and their corresponding rights and duties. Another set of cases provides clearer grounds for ship interdiction on the high seas despite the general status of the high seas as the maritime zone *least* compromised by non-flag state con-

352. For example, Article 21 of the U.N. Fish Stocks Agreement still contemplates an active role for the flag state, should it choose to exercise its jurisdiction. Furthermore, the Agreement contains a detailed section relating to the settlement of disputes and provides procedures relating to technical disputes and provisional measures. U.N. FISH STOCKS AGREEMENT, *supra* note 187, arts. 27–31. Within the RFMO context, procedures have been tailored to increase effective communication between inspectors and target vessels. The CCAMLR, for instance, requires its inspectors to be able to communicate in the language of the flag state of vessels they might board. *See* PROULX, *supra* note 10, at 12.

trol.[353] For a moment, recall the classic *Mare Liberum* characterization of the high seas as articulated by Professors McDougal and Burke:

> Traditionally, the "freedom of the seas" has been somewhat rigidly conceived as embracing both the protection of certain, particular, relatively fixed uses of the oceans, considered open and free to all nations in areas denominated as "high seas," and the general immunization of ships of one state from the authority of other states.[354]

They note that "[o]n occasion, however, the prescribing function is performed through explicit agreement among states, providing for specific regulations of events on the high seas."[355] As the analysis has thus far demonstrated, such occasions now appear to arise with increasing frequency, but it remains to be seen whether the prescribing function of the PSI has created anything properly characterized as an "explicit agreement" with the authority to provide lawful departures from the non-interference principle upon the high seas. The PSI, as opposed to its constituent core participants in their own dealings with other states, seems to have worked hard to avoid such rigid characterizations of its efforts. Nonetheless, the PSI will likely try to justify some of its activities on the basis that the targeted activities represent a threat to all nations, rather than to the provincial national interests of the few.[356] These are the kinds of harms or threats to global public order that have previously emerged as activities subject to the universal jurisdiction of any state upon the high seas.

UNCLOS provides a set of specific circumstances in which all states have universal jurisdiction over ships on the high seas.[357] Article 110 provides a

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353. It should be noted that the U.S. Congress has in fact granted broad law enforcement authority to the U.S. Coast Guard to enforce U.S. law against foreign vessels, even in the high seas and without flag state consent. *See* 14 U.S.C. § 89(a) (1990). Case law has determined, however, that such extraterritorial jurisdiction may be lawfully exercised by the Coast Guard only in compliance with U.S. obligations under international law. Thus, the perception of broad claims to abrogate the non-interference principle is substantially cabined and the lawful extent of U.S. jurisdiction on the high seas is restricted to that which is permitted by customary international law and the relevant provisions of UNCLOS. This interpretation is consistent with the so-called *Charming Betsy* doctrine, under which "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *See also* Canty, *supra* note 23, at 127–28, 136–37. The policy risks of interpreting 14 U.S.C. § 89 any other way have been described as "extremely damaging," particularly in light of the likelihood of reciprocal claims by other states against the United States. *Id.* at 131. According to a former legal advisor in the Coast Guard's Office of Law Enforcement, "Freedom of navigation is too important a right to jeopardize solely for the hope of a possible prosecution of suspected criminals." *Id.* at 137.

354. MCDOUGAL & BURKE, *supra* note 1, at 743.

355. *Id.* at 34.

356. This seems to recall the inherent problem articulated by Professor Laswell—a "syndrome of parochialism" that PSI participants need to overcome. For a discussion of the "syndrome of parochialism" and its manifestation in unlawful claims at sea, including interdictions, see Scott Allen, *National Interest and Collective Security in the Ocean Regime*, *in* OCEAN GOVERNANCE STRATEGIES, *supra* note 16, at 20, 27–29.

357. This follows from what Professors McDougal and Burke describe as an inclusive category of claim: "[E]ach state claims competence to apply authority to any foreign vessel engaging in certain con-

right of visit pursuant to which the naval vessels of *any* state may intercept and board ships on the high seas if there are reasonable grounds to suspect that the ship is engaged in piracy, the slave trade, or unauthorized broadcasting (in certain circumstances),[358] or if the ship is without proper nationality.[359] Upon a boarding party's arrival at the suspect vessel, the inspecting party must first "verify the ship's right to fly its flag" and may only undertake further examination of the ship if suspicion remains.[360] Where the search proves fruitless, any damages caused by the interference provide grounds for compensation.[361] These specific prescriptions for the lawful interdiction of ships on the high seas may have limited direct utility for the PSI. Unless proliferation actors engage in piracy to facilitate the trafficking of dangerous materials, or if the trafficking somehow involves manifestations of the modern slave trade (e.g., trafficking in sex workers), these clear expressions of legal authority to override the non-interference principle on the high seas will not have direct application.

Taking into account the long-standing sanctity of freedom on the high seas, however, the enumerated grounds for universal jurisdiction reflect careful policy choices, each with its own history. The underlying motivations for creating universal jurisdiction over certain types of conduct on the high seas may be instructive in trying to determine whether a universal right to board ships suspected of WMD trafficking on the high seas can be discerned or carved out of the existing balance of interests reflected by the law of the sea.

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duct and acknowledges reciprocally that its vessels engaged in the same act are subject to the authority of any other state." MCDOUGAL & BURKE, *supra* note 1, at 868. The notion of reciprocity described here is not, however, necessarily the same as a notion of universality. The formulation suggested by Professors McDougal and Burke seems to leave room for certain states to opt out of the system, and so it might have been in an era where the law was more custom-based than treaty-based. The codification of widespread state practice as it pertained, in particular, to piracy and the slave trade has created a norm of universal jurisdiction rising, it would seem, to the level of *jus cogens* from which no state can derogate.

358. For reasons of economy, this Article omits further analysis of the prohibition on unauthorized broadcasting from sea.

359. UNCLOS, *supra* note 4, art. 110(1). The offenses listed here are those contained in Article 110, which instructs that all other grounds given for boarding a ship on the high seas are presumptively not justified. The exceptions to this rule are "acts of interference [deriving] from powers conferred by treaty," which would include agreements such as the Liberia-U.S. Boarding Agreement or the U.S.-Panamanian Ship-Boarding Agreement, *see supra* notes 232–249 and accompanying text, or arrangements relating to bilateral or multilateral conventions in contexts such as counter-narcotics or fishing regulation enforcement. Nonetheless, it seems curious that a right of visit in the context of counter-drug operations was not specifically included in Article 110, given that Article 108 specifically requires state-to-state cooperation in the suppression of drug trafficking on the high seas. *See supra* note 143 (discussing the limited expansion of jurisdiction under Article 108).

360. UNCLOS, *supra* note 4, art. 110(2). The meaning of "if suspicion remains" is somewhat unclear. Does this refer only to suspicion generated by the check of documents and the confirmation of nationality, or does it extend to whatever other suspicions led to the boarding in the first place? Presumably, the answers to these questions must be yes, given that any of the offenses named in Article 110 other than the lack of nationality itself can be carried out by a properly registered ship.

361. *Id.* art. 110(3).

1. Stateless Vessels

From the perspective of the PSI, the most directly useful provision of Article 110 is its explicit grant of legal authority to board ships without nationality.[362] The basis for non-exclusive claims to stop stateless ships on the high seas derives from the basic notion of a system of order founded on exclusive flag state control. For the maintenance of a functional public order of the oceans, it would be unworkable for some ships to operate beyond the maritime zones within which some measure of national sovereignty extends, but remain free from any residual accountability to some national authority. The logical result is the permissibility of any state's assumption of jurisdiction over a stateless ship.[363]

This provision, for example, provided the legal authority for the aforementioned Spanish interception of the *So San*. Although the ship was not, in fact, without nationality, its failure to display the Cambodian flag provided reasonable grounds to suspect that it lacked any registration, leading to the subsequent boarding of the vessel.[364] As noted, however, questions were raised as to whether the "reasonable suspicion" required for the extensive search that followed was justifiable. After the ship's actual Cambodian registration was confirmed, unless the *So San* was suspected of violating the other prohibitions of Article 110, it is dubious that search and detention were lawful exercises of power, even though the ship was released promptly thereafter.[365]

Nonetheless, the right to visit stateless ships has counter-proliferation value primarily when suspicions of statelessness prove accurate. In those cases, Article 110(1)(d) provides a useful tool to all states seeking to police the oceans for a variety of offenses.[366] To the extent wrongdoers are unwilling even to hide

362. *Id.* art. 110(1)(d). Stateless ships include both those that are not registered with any state and those that sail under the flag of two or more states. *Id.* art. 92(2).

363. *See* MCDOUGAL & BURKE, *supra* note 1, at 1084 ("So great a premium is placed upon the certain identification of vessels for purposes of maintaining minimum order upon the high seas . . . that extraordinary deprivational measures are permitted with respect to stateless ships."). One could argue that jurisdiction over stateless ships should not, in fact, be universal, but should be granted only to states that have already suffered injury based on the ship's conduct, or that can show a high likelihood of imminent harm. This kind of reactive jurisdiction, however, might be insufficient to support a system of order requiring proactive regulation that can discourage and prevent anti-social behavior.

364. *See supra* notes 115–123 and accompanying text.

365. *See* Kirgis, *supra* note 117 (noting that weapons-trafficking is not one of the permissible grounds for suspicion). As Professor Kirgis points out, "[t]he carrying of weapons at sea, even on a merchant ship, is not a violation of international law unless the carriage is in violation of a treaty obligation of the transporting state." *Id.*

366. Article 110 does not, however, provide instructions as to what action the boarding state may take upon confirmation that the boarded ship is without nationality. The UNCLOS provisions on the right of hot pursuit provide some indication, however, that ships that have lawfully exerted jurisdiction over stateless ships on the high seas may escort them to the territorial waters or port of the boarding state for purposes of an inquiry. UNCLOS, *supra* note 4, art. 111(7). As in other situations where ships are lawfully seized and detained, the ship in violation of international or municipal law is presumably held validly until a reasonable bond has been posted and registration obtained. It seems odd, however, that the seizure of pirate ships is treated in explicit detail. UNCLOS, *supra* note 4, art. 105. Given that the crime of piracy is more serious than the lack of nationality, however, it also seems reasonable to assume that standards of deprivation and detention will be varied accordingly by the national authorities.

behind the relative anonymity that a flag of convenience might provide, they become legitimate targets for law enforcement at sea. The downside to this reality is that after the well-publicized *So San* incident, would-be smugglers, especially the most highly sophisticated smugglers trafficking in WMD-related materials, will surely realize that working within the system provides greater benefits of anonymity and legal protection against non-exclusive claims than does outright violation of the rules.

2. Piracy

Piracy is a long-standing menace to the safe and productive commercial use of the oceans as a domain for movement.[367] Flags of convenience, modern technology, and, in some places, lax port security have all contributed to the persistence and reemergence of piracy as a substantial threat to commercial shipping in certain regions. Building on a 200-year-old tradition, UNCLOS deals specifically with piracy in a number of provisions, setting forth rules for the repression of piracy that follow well-established state practice and law.[368] In particular, UNCLOS mandates cooperation among states to repress piracy on the high seas and provides an explicit and unambiguous grant of universal jurisdiction to enforce the prohibition on piracy against all such ships on the high seas, regardless of their nationality.[369]

As noted above, this in itself is not of particularly high value to the campaign against trafficking in WMD. Commentators have lamented the fact that UNCLOS "made no special provision for terrorism," and it remains debatable whether WMD trafficking could be construed as maritime terrorism or whether such terrorism could even fall within the ambit of piracy.[370] The UNCLOS definition of piracy requires that the illegal acts be "committed for private ends," leaving it unclear whether politically motivated terrorism, as opposed to the basic conversion of vessel and cargo, even qualifies as piracy.[371] That said, understanding the rationale behind the piracy exception to

367. *See* Sakhuja, *supra* note 8 (describing the resurgence of modern piracy over the past fifteen years).

368. *See* UNCLOS, *supra* note 4, art. 101 (defining piracy); *id.* art. 102 (defining piracy by government ships whose crew has mutinied); *id.* art. 103 (defining a pirate ship); *id.* art. 104 (determining nationality of pirate ships by law of the original flag state). *See generally* ALFRED P. RUBIN, THE LAW OF PIRACY (2nd ed. 1998) (describing the legal history of British and American efforts to outlaw and suppress piracy).

369. UNCLOS, *supra* note 4, arts. 100, 105. *But see* RUBIN, *supra* note 368, at 388–96. Professor Rubin describes the UNCLOS provisions on piracy, which were largely adopted directly from the 1958 Geneva Convention on the High Seas, as "incomprehensible," and argues that the label of universal jurisdiction to describe the international prohibitions on piracy are misleading—an inaccurate simplification of a complex system of jurisdiction to prescribe and jurisdiction to enforce. *Id.* at 393. In particular, Professor Rubin argues that the idea of "universal jurisdiction" as applied to piracy reflects an anachronistic and self-serving Anglo-American convention of the mid-nineteenth century. *Id.* at 391. That said, it is unclear why Professor Rubin is hostile to the notion of permitting any state to enforce the prohibitions on piracy, even if some states prefer to limit their constabulary function to the territorial sea and their legal authority to the municipal law.

370. Mellor, *supra* note 57, at 377. In many circumstances such as most state-to-state transfers, this would not be the case.

371. UNCLOS, *supra* note 4, art. 101(a). *See also* Mellor, *supra* note 57, at 378.

the non-interference principle provides a useful comparison to the PSI campaign against WMD trafficking. In simplest terms, the emphasis on suppression of piracy in the law of the sea reflects a long-shared view among states that the menace of piracy operates to the detriment of the community at large,[372] and that the community benefits more from a shared capacity to police the seas against this threat than it is hurt by the limited exception to exclusive jurisdiction over vessels at sea.[373] Two characteristics of the anti-piracy rules help limit the potential consequences of the exception from negating the benefits otherwise gained. First, the nature of the jurisdiction to enforce with regard to piracy is largely reactive, rather than preventive. Although intelligence forces might uncover a plot that has yet to have been executed and can advise naval authorities to intercept the ship that will be involved in the piracy,[374] most acts of interception on the basis of suspected piracy will take place after a crime has been committed and reported (or after the hijacked ship has been reported missing or converted into a "phantom ship").[375] Second, UNCLOS provisions specifically provide for liability against any party that seizes a ship on suspicions of piracy without adequate grounds.[376] This creates obvious disincentives for over-zealous or arbitrary enforcement and needless interference with otherwise legitimate commerce and navigation.

All told, the greatest significance of the piracy provisions may be their indication of the lawfulness of consensual "shared authority" for the repression of violence. Writing in an era in which piracy may have seemed on the wane,

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372. One historic formulation of this idea is found in the *Le Louis* decision. *See supra* note 193. The decision, which invalidated British efforts to intercept foreign vessels taking part in the slave trade on the high seas, distinguished the suppression of piracy from that of the slave trade on the basis of the different rules of conduct that apply in times of war. Sir William Scott's opinion explained that, "[w]ith professed pirates, there is no state of peace. They are enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war." *Le Louis*, 165 Eng. Rep. 1464, 1475 (1817).

373. The right of visit related to suspected piracy is limited to the high seas, a limitation which reflects the balance of infringements upon the non-interference principle and exclusive jurisdiction. Unfortunately, however, the balance may be ill-calculated to suppress the scourge of piracy most effectively. Modern pirates operate with "exceptional nautical skill" and move quickly from one territorial sea to another, frustrating the efforts of navies or coast guards to intercept the pirate ship in either territorial waters or the high seas. *See* Sakhuja, *supra* note 8. The right of hot pursuit does not extend into another country's territorial waters, meaning pirates can head for the next territorial sea to evade capture. One commentator ascribes the perpetuation of piracy in recent times to the lack of bilateral and multilateral agreements among states to permit the navies or coast guards of other states "to indulge in hot pursuit into each other's waters." *Id.*

374. Both the ship used to approach and the ship that is hijacked by pirates fall under the UNCLOS definition of a pirate ship. UNCLOS, *supra* note 4, art. 103.

375. *See* Langewiesche, *supra* note 7, at 66. "Phantom ships" are those that have been hijacked, offloaded, and renamed and reregistered, potentially extinguishing traceability. *Id. See also* Peter C. Unsinger, *Phantom Ships, A Growing Menace*, Council for Current Events Analysis, *at* http://www.councilcea.org/articles/global/phantomships.html (last visited Nov. 18, 2004) (tying the phantom ship problem to global arms smuggling and Al Qaeda operations as well as piracy).

376. UNCLOS, *supra* note 4, art. 106. Article 106 does not make clear whether liability attaches to the intercepting party *only* if the grounds of suspicion are proven inadequate—that is, whether adequate suspicions can immunize a party from liability even if no piracy or criminal activity was uncovered during the search or seizure of the suspect vessel.

Professors McDougal and Burke noted that "[w]hile piracy is no longer a major menace to sea travel, the use of private violence is not merely an historical curiosity, and the shared authority of states to repress such violence may continue to prove to be highly useful in particular circumstances."[377] This comment seems prescient when one thinks of maritime terrorism (especially if one can conceptualize it as another form of piracy, albeit for non-private ends). Again, however, the logical leap to shared authority for the interdiction of ships transporting dangerous weapons is not assured. Acts of piracy or maritime terrorism implicate actual acts of violence upon the seas. Despite the violence it may facilitate, WMD trafficking takes place peacefully, without in itself endangering the safety of navigation or sea access. The interdiction is by nature preemptive. This may be a crucial distinction between the allowances made for the suppression of piracy and those withheld from the proponents of a more aggressive and proactive weapons interdiction program.

3. The Slave Trade

Whereas piracy's designation as a crime against nations presents a relatively uncontroversial historical claim, the development of the legal norm against slave-trading over the oceans provides a more contested history and a story of potentially greater relevance to the unfolding PSI debate. Over the course of the nineteenth century, the British Empire, the preeminent military and maritime power of the day, led efforts to stamp out the transatlantic slave trade by interdicting slave trade vessels on the high seas. The British made no claim to a right under customary international law, but rather sought to achieve a particular policy end.[378] The British combined unilateral acts of interdiction, which were greeted with deep suspicion and protest by other states, with ongoing efforts to reach bilateral and multilateral agreements with certain other states.[379] This was an effort to transform unilateral acts of legal prescription into lawful manifestations of a universally accepted legal norm. A legal setback to the British effort came early on in the aforementioned *Le Louis* decision. In *Le Louis*, the English court invalidated the interdiction by an English ship of a French vessel engaged in the slave trade. The opinion by Sir William Scott urged that the right of visit was strictly limited to the wartime context, and that peacetime incursions impermissibly infringed on the right of foreign vessels to the exclusive jurisdiction of their

377. MCDOUGAL & BURKE, *supra* note 1, at 876.

378. *See* MCDOUGAL & BURKE, *supra* note 1, at 881. For additional details on the United Kingdom's efforts to develop a right of high seas interdiction in the transatlantic slave trade context, see Byers, *supra* note 23, at 534–36.

379. British agreements with Portugal and Spain provided for the unlawfulness of the slave trade, and the agreement with Spain created a reciprocal ship boarding agreement for its suppression. More agreements followed. *See* Byers, *supra* note 23, at 535–36. International events such as the Congress of Vienna contributed to the progress of an international legal norm against the slave trade, and the demise of slavery after the American Civil War gave momentum to the effort.

own states.[380] The decision was careful to point out that the municipal law of England, which had prohibited its own ships from participating in the slave trade, did not create a right to search any ship upon the high seas for the purpose of confirming that it was not British, and therefore clearing it of violating the prohibition. The decision pointed out that if the only means of enforcing the municipal law was to intrude upon the rights of freedom and equality enjoyed by all nations on the high seas, "then you ought not to make regulations which you cannot enforce without trespassing on the rights of others."[381]

The court's decision did not dissuade the British government from its policy agenda, and ship interdiction continued, sometimes unlawfully, as did efforts to treat the slave trade as an injustice that ought to be accorded the same treatment as piracy—a universal offense.[382] In this respect, the 1890 Brussels Conference was a significant effort at signaling that the slave trade had achieved wide condemnation. In a somewhat interesting parallel to the development of the PSI, seventeen states came together at Brussels to call for a halt to the slave trade, and the conference designated a specific zone in which visit and search operations could be conducted.[383] Even in the face of widespread condemnation of the practice in question, the agreement was carefully structured to limit the erosion of the preference for the preeminence of the flag state in all matters of enforcement. The visit and search provisions of the General Act promulgated by the 1890 Conference permitted only the inspection of papers upon boarding, unless the flag state of the boarded vessel was party to some other treaty arrangement, which would allow a roll call of the crew and passengers.[384] If sufficient suspicion remained, and the inspecting officer was "convinced" that a violation had occurred, the ship could be escorted into port, but *only* a magistrate of the flag state could adjudicate the matter.[385] Over the course of the next half-century, general statements condemning the slave trade remained a permanent fixture, but jurisdiction to enforce that general prescription of a legal norm was not advanced, and, in some cases, appeared to be diminished.[386] Only in the 1958 High Seas Convention was the right to interdict vessels on the high seas for the purpose of suppressing the slave trade convincingly re-established.[387]

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380. *Le Louis*, 165 Eng. Rep. 1464, 1478–79 (1817).

381. *Id.* at 1479.

382. Perhaps mindful of the reasoning in *Le Louis*, however, the lawfulness of interdicting vessels engaged in the slave trade was achieved, in part, by characterizing the slave trade as an act of piracy. In particular, the Quintuple Treaty for the Suppression of the African Slave Trade treated the slave trade as a crime of piracy. *See* Byers, *supra* note 23, at 536.

383. *See* MCDOUGAL & BURKE, *supra* note 1, at 882.

384. *Id.*

385. *Id.*

386. For example, the Slavery Convention of 1926 by the League of Nations failed to include the robust provisions proposed by Great Britain on a re-established right to visit, search, and capture vessels implicated in the slave trade. *Id.* at 883.

387. *Id.* at 884.

Curiously, however, the position of UNCLOS on the matter of repressing the slave trade remains less clear than the unambiguous UNCLOS treatment of piracy. The general UNCLOS prohibition on slave trade, taken from the 1958 High Seas Convention, states: "Every State shall adopt effective measures to prevent and punish the transport of slaves *in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose.*"[388] Reading Article 99 on its own might suggest that while flag states have a duty to provide for the prohibition of the slave trade in their municipal laws and to enforce that provision against their own ships, no other state has a valid claim to enforce the prohibition. This seems somewhat at odds with the provision in Article 110 that lists a ship's engagement in the slave trade as one of the few justifications for an act of interference by any state against a foreign vessel.[389] Despite this ambiguity, slavery is one of the few crimes today that is well-fixed as violating a *jus cogens* norm, giving rise to universal jurisdiction and making lawful any interdiction based on reasonable suspicion.

What is the significance to the PSI of the prohibition on the slave trade and its manifestation in the law of the sea? Again, the direct relevance may be minimal. But as an indication of trends in international lawmaking—and particularly unilateral acts of legal prescription in the maritime context—the development of the norm against the slave trade is instructive. In the most general terms, the slave trade prohibitions exemplify the lawfulness of applying policy to foreign vessels in the case of a widely condemned practice.[390] More specifically, however, the rejection by the English court of the early attempts by Great Britain to enforce its own legal prescription unilaterally are noteworthy, as are the secondary channels of bilateral agreements and multilateral conventions with which the British sought to convert their practice of vigilante justice into a lawful act in accord with the larger framework of the public order of the oceans.[391] The course of history came to justify the British actions, and the lawfulness of enforcing the prescription of a legal norm became less contentious and more widely accepted when few states had a competing interest in favor of preserving the practice. Similarly, one might argue that when the non-proliferation treaties and export control groups have received universal, or nearly universal subscription, the interdiction of WMD shipments on the high seas would be a less controversial proposition.

The actions of Great Britain in the nineteenth century fall into a category that Michael Byers describes as "exceptional illegality," whereby states act in violation of the law, but, presumably, for purposes of the greater good: "By doing so, they allow their action to be assess [sic] subsequently, not in terms

388. UNCLOS, *supra* note 4, art. 99 (emphasis added).

389. *Id.* art. 110(1)(b).

390. MCDOUGAL & BURKE, *supra* note 1, at 34.

391. Byers also argues that the history of Great Britain's efforts here demonstrates the difficulty of creating new customary international law. Byers, *supra* note 23, at 536. Nonetheless, evolving state practice, in combination with several bilateral treaty arrangements, undoubtedly contributed to the development of a customary norm favoring high seas interdictions in this context.

of law, but in terms of its political and moral legitimacy, with a view to mitigating their responsibility rather than exculpating themselves."[392] PSI operations may also fall under this rubric in exceptional circumstances. The likelihood of a subsequent finding of "political and moral" legitimacy may be more probable, however, if the initiative takes greater care today to explain its procedures and account for their potential impact on the international system as a whole.

VI. Alternative Sources of Legal Authority for Ship Interdiction

The analysis of UNCLOS in Part V suggests that in certain, well-defined situations, PSI interdictions have solid legal authority under international law. This is especially the case where flag states, port states, or coastal states actively participate in PSI activities and can take advantage of their jurisdictional rights under UNCLOS. In numerous other situations, interdiction seems at odds with the non-interference principle and the letter of the law as prescribed by UNCLOS. In these cases, such as high seas interdictions without flag state consent, PSI operations may push too far ahead of the cautious trends favoring increased regulation and jurisdiction to prescribe and enforce in non-security-related subject areas. This Part will examine alternative sources of legal authority for possible PSI activities, focusing especially on high seas interdictions. Part V has analyzed the PSI as an instrument of law enforcement—despite the fact that neither the law nor the means to enforce it are necessarily clear. Part VI briefly looks to the PSI as not only a military operation, but as an instrument of warfare.

It is widely recognized that UNCLOS has relatively little to say on military matters.[393] Article 88 dictates that "[t]he high seas shall be reserved for peaceful purposes," but offers no further elaboration.[394] Article 301 goes slightly further by requiring that parties to UNCLOS "refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations."[395] Although debate lingered over the ultimate meaning of these provisions after UNCLOS was opened for signature, state practice and subsequent declarations appear to

392. *Id.* at 543. The 1999 Kosovo intervention is another example. *Id.*

393. *See, e.g.*, Booth, *supra* note 200, at 4 (describing the UNCLOS negotiations as treating "military considerations rather like Victorians in Britain treated sex, that is, as 'an inexplicable incursion which must occasionally be indulged, but which should always be ignored'"). *See also* Ove Bring, *Naval Arms Control and the Convention on the Law of the Sea*, *in* Security At Sea: Naval Forces and Arms Control 137, 138 (Richard Fieldhouse ed., 1990); Pardo, *supra* note 292, at 18; Ivan Shearer, *The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime*, *in* The Law of Armed Conflict: Into the Next Millennium 429, 430 (Michael N. Schmitt & Leslie C. Green eds., 1998).

394. UNCLOS, *supra* note 4, art. 88.

395. *Id.* art. 301.

confirm that any activity on the oceans is broadly considered "peaceful" if it is in accordance with the U.N. Charter and other obligations under international law.[396] This is strong evidence of another strand of the non-interference principle at work. Despite the silence of UNCLOS on the relationship between military activities and the oceans, the laws of war and customary international law have long provided for the use of the sea as an instrument of military and political power.[397] The Sections that follow will extend the assessment of when ship interdictions are lawful exercises of power by examining how the exercise of belligerent rights during wartime, the doctrine of self-defense, and the authority of the U.N. Security Council provide possible alternative sources of legal authority for PSI interdictions, even on the high seas.[398] It is also necessary to consider how interpreting these strategies to better account for the lawfulness of some range of PSI activities potentially imposes costs elsewhere within the international system, and particularly in the oceans context.

A. The Exercise of Belligerent Rights in Wartime

In a state of declared war, belligerents generally have the right to intercept the commercial vessels of neutral flag states to determine whether contraband goods are being transported to enemy parties.[399] Contraband covers "goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict"; belligerents

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396. Nordquist, *supra* note 71, at 89–91. Other positions interpreted Articles 88 and 301 to require either complete demilitarization of the oceans, or, alternatively, a prohibition on military activities for aggressive purposes. *Id.* at 90–91. Some commentators worry, however, that under the standard now used to measure compliance with Article 88, "[g]overnments can undertake almost any action, and justify it as 'peaceful.'" BOOTH, *supra* note 200, at 83. *But see* Bring, *supra* note 393, at 139 (noting that the UNCLOS reference to the U.N. Charter "confirms that there do exist certain fundamental restrictions on the utilization of naval capacity").

397. *See* D. P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 3 (1975) ("Navies alone afford governments the means of exerting pressures more vigorous than diplomacy and less dangerous and unpredictable in its results than other forms of force, because the freedom of the seas makes them locally available while leaving them uncommitted.").

398. *See* Shearer, *supra* note 393, at 437 (acknowledging these bodies of law as alternative sources of authority for ship interception, boarding, and arrest on the high seas).

399. *See* CHURCHILL & LOWE, *supra* note 192, at 421–22; GEORGE K. WALKER, THE TANKER WAR, 1980–88: LAW AND POLICY 430 (2000). A neutral merchant vessel, meaning a ship flying the flag of a neutral state rather than the flag of a declared enemy state, can be intercepted only for the purpose of search and possible capture if the belligerent has "reasonable grounds" for suspecting the vessel. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 118 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]. This position, however, may be based on an assumption that the Article 51 right to self-defense under the U.N. Charter has been invoked. Professors Churchill and Lowe argue that under traditional laws of war and neutrality, a belligerent could systematically search neutral merchant vessels, whereas combatants who invoke Article 51 will be obligated to apply a test of reasonableness. *See* CHURCHILL & LOWE, *supra* note 192, at 422–23. The *San Remo Manual* is a non-binding, comprehensive international instrument that attempts to consolidate the contemporary customary international law on the law of armed naval conflict. The drafters of the document did not believe sufficient consensus existed to undertake multilateral treaty negotiations because of the substantial uncertainty that surrounds several aspects of the subject.

are expected to publish "contraband lists" prior to undertaking visit and search operations.[400] The concept of "belligerent's rights" was pushed forcefully by Great Britain in the nineteenth century, when the British were the preeminent maritime power and generally the strongest proponent of the freedom of the seas:[401]

> In principle, the British wished to use the sea "freely," but since blockade and the other strategies of trade warfare represented one of their major options during conflict, they also wanted special rights. This inconsistency in law (if not in national interest) led to the jibe that "In peace Britain ruled the waves: in war Britain waived the rules."[402]

This characterization of the British position in the nineteenth century is striking because it seems to offer a suitable description in the eyes of some observers of the status of the United States today and actions, in turn, contemplated by the PSI. There are at least two problems, however, with trying to justify a separate set of rules for the PSI on the basis of the special rules that apply to naval warfare. First, PSI participants are not "belligerents" in any coherent sense of the term, at least not in the context of the PSI's worldwide counter-proliferation project. The United States is not at war with North Korea, nor with Iran, Syria, or Pakistan. And while the United States may be at "war" with Al Qaeda, the legal definition of war runs into difficulties here.[403] Although the Bush Administration frequently invokes the vocabulary of war to describe its ongoing efforts to combat terrorism, the laws of war are not equipped to deal with an open-ended conflict that lacks any clear geographical limits and in which the enemies are primarily, if not entirely, non-state actors.[404] To the extent the PSI targets not terrorism but WMD prolif-

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400. SAN REMO MANUAL, *supra* note 399, ¶¶ 148–49. *But see* Michael J. Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, 2 A.F. J. LEG. STUD. 21, 22 (1991) (indicating that list publication is optional). Contraband can also be broken into "absolute contraband" consisting of arms, ammunition, and military equipment, and "conditional contraband," which includes dual-use cargoes, such as oil, which could have military applications for the enemy; conditional contraband should only be seized if there is reason to believe it is, in fact, destined for military use. Frederic Kirgis, *NATO Interdiction of Oil Tankers Bound for Yugoslavia*, ASIL INSIGHTS (Apr. 1999), *available at* http://asil.org/insights/insigh33.htm (last visited Nov. 18, 2004).

401. Of course, the British sought other exceptions from the generally applicable freedom of the seas, as demonstrated by their crusade against the transatlantic slave trade and their claims to right of visit in pursuit of that objective. *See supra* Part V.D.3.

402. BOOTH, *supra* note 200, at 13.

403. The fact that the traditional conditions for war are not met by the global counter-proliferation campaign does not necessarily mean, however, that a uniform set of rules applies to all non-wartime conduct. As Professors McDougal and Burke noted:

> It is no longer new . . . to suggest that this supposedly dichotomous state of affairs [between war and peace] does not accurately depict the many nuances of contemporary state practice, and that "peace" and "war" are but the polar terms for the extremes of a continuum in exercise of coercion.

MCDOUGAL & BURKE, *supra* note 1, at 22–23.

404. The full implications of this question are well beyond the scope of this Article. That said, the much-publicized controversy over how to classify detainees from the war in Afghanistan and from domestic counter-terrorism operations indicates the degree of uncertainty as to how much and in what legal arenas the "War on Terrorism" can or should be treated as a conventional armed conflict for purposes of

eration *writ large*, meaning that states such as North Korea and Iran are primary objects of the strategy, the case is even less plausible for the laws of war or the laws of armed conflict applying to PSI operations.[405] Second, as observed in the discussions of flag state consent and joint ship-boarding agreements, the PSI has not sufficiently defined what cargoes it seeks to interdict or what cargoes it believes it has the authority to seize lawfully.[406] There has been no equivalent to a "contraband list" made publicly available, and it is unclear whether such a list could bind non-belligerent parties who have not independently undertaken an obligation to abstain from transporting such goods. The failure to produce a list that can then be clearly and consistently enforced will continue to undermine PSI operations and cast doubt over the lawfulness of certain interdictions.[407]

B. Self-Defense and the U.N. Security Council

The PSI is not by any means the first effort to assert extraordinary rights of visit and search on ships in the high seas in situations that may fall short of open armed conflict. In several instances and with greater frequency since the end of the Cold War, the U.N. Security Council has passed resolutions to authorize operations encompassing ship interdiction in order to help move

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law and adjudication.

405. A note here is warranted to address the ill-made comparisons of the PSI to a naval blockade. As was pointed out in note 145, *supra*, initial reaction to the PSI viewed its operations as equivalent to a naval blockade. This apparently remains North Korea's position. Nonetheless, this is, simply put, a mischaracterization. First, while "[b]elligerent visit and search interdicts the flow of contraband goods," the purpose of a blockade, by definition, is "to prevent ships . . . regardless of cargo, from crossing an established, publicized line separating an enemy from international waters." WALKER, *supra* note 399, at 389–90. *See also* Lois Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LA. L. REV. 1191, 1195–96 (1993) (describing the legal history of the blockade and its five classic characteristics); Schmitt, *supra* note 400, at 21. Second, as in the case of the rights of belligerent parties more generally, PSI states are not belligerents and undertaking an actual blockade meeting the legal definition would constitute an aggressive act that could, in fact, be interpreted as an outright unlawful declaration of war. *See* Fielding, *supra*, at 1199 (noting that blockade is an act of aggression, regardless of a formal declaration of war). PSI operations, with no defined limit on target states, no set duration, and no geographic lines or limitations, are far more vague and undefined than are the operations of a military blockade. Furthermore, "[t]he most time-honored principle of blockades is that to be legal they must be effective." Schmitt, *supra* note 400, at 44. Even if other criteria of the blockade definition could be met by the PSI, there would be little hope of meeting the fundamental requirement of effectiveness. The nature of PSI operations renders it impossible to know how much WMD-related material is avoiding PSI detection and interdiction. With this in mind, the suggestion that the PSI could conduct blockades from time to time appears not to take these requirements into account. *See* John J. Klein, *Command of the Sea: Implications for the PSI*, MONITOR, Spring 2004, *supra* note 29, at 18–19 (suggesting that PSI effectiveness would be enhanced by occasional port-based or "distant" blockades).

406. For discussion of this key weakness in the PSI strategy, see *supra* text accompanying notes 243–251.

407. The built-in ambiguity of PSI operations on both this question and others regarding its procedures and decision-making modalities, may be part of the initiative's design. For a description of how this ambiguity may work to the advantage of the PSI's architects, see Byers, *supra* note 23, at 545. At the same time, the secrecy and lack of clarity that intentional ambiguity entails may prevent PSI operations, at least on the high seas, from achieving the level of international support sufficient to transform customary international law on anything more than a case-by-case basis. *See* PROSSER, *supra* note 75, at 1.

conflicts toward resolution.[408] In other instances, states have acted without Security Council participation in the name of self-defense.[409] The international response to these various operations is instructive to an assessment of PSI prospects for the future.

First, consider the Security Council's 1951 rejection of Egyptian claims to visit and search Israeli ships. Given that Egypt's claim was advanced more than two years after open conflict had ended, the Security Council found that such claims "represented unjustified interference with the rights of nations to navigate the seas and to trade freely with one another."[410] This indicates a possible requirement of timeliness and necessity to justify ongoing interdiction operations. More to the point, perhaps, it signals an unwillingness of the Security Council to authorize an ongoing and open-ended state practice that impinges on the non-interference principle without necessarily producing concrete benefits for peace and security.

Second, consider the American quarantine of Cuba during the 1962 Missile Crisis. President Kennedy neither sought authorization from the Security Council—a futile exercise given the Soviet veto—nor made a self-defense claim under Article 51. Rather, the United States sought and claimed the legal authority for its activities on the basis of a regional call for action from the Organization of American States ("OAS"), a course of action contemplated by Article 33 of the U.N. Charter.[411] As a result of the OAS measure, the United States, Argentina, the Dominican Republic, and Venezuela all participated in ship interdiction operations to inspect cargoes for "offensive military equipment."[412] Without delving into the details of this well-documented event, the key question for the PSI is whether the Cuban Missile Crisis provides a helpful precedent for international lawmaking. The answer, of course, is mixed. The event's greatest value may be that it demonstrates how a regional group can effectively authorize lawful multilateral conduct in pursuit of regional goals such as security.[413] The PSI is not a regional group, but it represents a subset of the states most interested in prescribing and enforcing a stronger counter-proliferation norm; these states are also likely to be in the strongest position

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408. Article 51 of the U.N. Charter authorizes individual or collective self-defense in the case of an armed attack and until the Security Council has had the opportunity to act. For the maintenance of international peace and security, furthermore, Articles 41 and 42 of the U.N. Charter provide for Security Council authorization of military action by the member states, including blockades and other operations at sea.

409. Some commentators have argued that with or without the participation of the Security Council, states are better served by claiming a state of necessity doctrine to justify such actions. *See, e.g.*, John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.J. 1023 (1999); George K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals*, 18 AM. U. INT'L L. REV. 35 (2002).

410. WALKER, *supra* note 399, at 124.

411. *See* O'CONNELL, *supra* note 71, at 807–08.

412. CHURCHILL & LOWE, *supra* note 192, at 217 (internal quotation marks omitted).

413. A variety of factors, such as the quarantine's reasonableness, the scope of the threat, and the fact that it embodied a "collective claim for a temporary and special use of a limited area of the high seas" have been put together to flesh out the legal basis for the U.S. activities. O'CONNELL, *supra* note 71, at 808 (internal marks omitted).

to enforce such a norm effectively. That said, the American strategy in 1962 of seeking authorization from the OAS rather than the Security Council seems to be a relic of the Cold War and an era in which paralysis at the Security Council prevented it from acting as an effective international lawmaking body.[414] For these reasons, the Kennedy strategy may not have outlived the Cold War.[415]

One might, however, plausibly argue in the future that continued Chinese recalcitrance over the issues at the heart of the PSI somehow justifies recourse to parallel sources of international legal authority (e.g., the OAS, NATO). This argument seems weak, however, considering China's willing political support for other parts of the non-proliferation regime and the legitimate reasons it may have for opposing aggressive interdiction tactics that could destabilize East Asia.[416] As China has acknowledged the global WMD threat and the imperative that nations cooperate to meet that threat, it would indicate brazen disrespect for the Security Council as an institution for the United States to circumvent its authority over a secondary dispute—the means of enforcing non-proliferation norms through interdictions at sea. That said, the United States may well be in the process of trying to avoid reliance on the Security Council, and the hostile attitude of the Bush Administration toward the institution seems clear from other contexts. Indeed, the war in Iraq and the allied coalition that the United States pieced together in some way resembles President Kennedy's recourse to the OAS. Of course, the Bush Administration did not seek authorization from *any* alternative standing body when the Security Council failed to deliver the Resolution that was sought; rather, the United States and its allies sought to provide their own legal authorization simply through action. Is the PSI a standing body, or do its pronouncements simply represent the thinly veiled statements of the United States? This distinction may affect the prospects of international willingness to accept the PSI agenda.

Third, consider the self-defense claims of France in the 1960s in the context of the Algerian War and its aftermath. Facing a dangerous and hostile insurgency in Algeria, France invoked its right to self-defense in intercepting approximately 4775 ships during a single year in order to search for cargo headed to Algerian rebels; of those ships, 1300 were actually searched, approximately 180 were diverted, and just one ship was captured.[417] Interdictions occurred on the high seas and extended into the Atlantic Ocean and as

414. *See* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 84–86 (1993) (describing the long period during which the Security Council was rendered an ineffective international actor, leading to an expanded role for other U.N.-related organs in prescribing and enforcing legal norms).

415. Others disagree. *See, e.g.*, Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 584–85 (2003).

416. *See supra* notes 173–176 and accompanying text.

417. CHURCHILL & LOWE, *supra* note 192, at 217; O'CONNELL, *supra* note 397, at 123; WALKER, *supra* note 399, at 125.

far away as the English Channel.[418] Flag states protested vigorously, and the interdictions were widely viewed as unlawful. The operations harmed diplomatic relations with various states, including Germany, who saw seventeen of its ships visited.[419] The Security Council did not, however, declare the actions illegal. Thus, in some respects, the France-Algeria example seems like an aberration, and can hardly be held up as any kind of precedent for ship interdictions in the name of self-defense.[420] Rather, the case provides a compelling example of the dangers inherent to stretching the meaning of Article 51 and the self-defense doctrine to cover virtually any circumstance, disregarding essential questions of necessity, proportionality, or imminent harm. It seems the French argument would have failed on all those counts and that the acts ultimately would have been deemed unlawful incursions onto the freedom of the seas. Had any domestic or international court reached a decision on the merits, it is difficult to imagine a different result.[421] It is unclear what we should take from the fact, however, that little real action was taken to counteract the French operations. That said, it is also important to note that this limited period of unlawful naval force did not seemingly lead to similar claims by other states. In that way, the balance of interests was temporarily disregarded and then restored.

Another set of cases follows a different route: the Security Council has also played a direct role in using its powers under Articles 41 and 42 to explicitly authorize operations at sea in pursuit of peace and security objectives. From authorization for the British oil embargo against Rhodesia in the 1960s[422] to more recent ship interdictions related to the First Gulf War and the sanctions that followed, the refugee crisis related to political turmoil in Haiti, and the NATO actions against Yugoslavia, the Security Council looks increasingly willing to legitimize interdiction efforts where it appears that such

418. Walker, *supra* note 399, at 125.

419. O'CONNELL, *supra* note 397, at 123.

420. *See* Byers, *supra* note 23, at 533 (reaching the same conclusion).

421. Over the course of twenty years, the limits of Article 51 were perhaps restored. During the Falklands War, for example, the United Kingdom refrained from interfering with a French vessel delivering arms to Argentina, presumably because it felt such actions would exceed the scope of permissible action under Article 51. *See* CHURCHILL & LOWE, *supra* note 192, at 217.

422. The so-called "Beira Patrol" has been described as a "cautionary tale for states that must decide upon, and commanders who must then orchestrate, maritime interception operations." Richard Mobley, *The Beira Patrol—Britain's Broken Blockade against Rhodesia*, NAVAL WAR C. REV. (Winter 2002), *at* http://www.nwc.navy.mil/press/Review/2002/winter/art4-w02.htm (last visited Nov. 18, 2004). The Beira Patrol case suggests several reasons why PSI participants might prefer to continue operating without explicit U.N. Security Council authorization. Difficulties in defining the scope of acceptable interdiction powers and the rules of engagement in the authorizing resolution required follow-up resolutions when vessels sought to circumvent the British patrol, a situation that led to armed conflict off the African coast. *See* O'CONNELL, *supra* note 397, at 137, 174–75; Alfred H. A. Soons, *The United Nations Security Council and the Law of the Sea*, *in* OCEAN GOVERNANCE STRATEGIES, *supra* note 16, at 279, 284. Although a more robust resolution was passed to provide enhanced legal authority for more aggressive enforcement against vessels violating the embargo, the British then found it difficult to disengage from the operation when political winds had shifted. "As it proved, Britain learned that while such a resolution can be the ultimate stamp of international legitimacy, it can also be oppressively binding." Mobley, *supra*.

efforts can be effective. For the purpose of this analysis, a detailed assessment of the rules and procedures that guide these military operations would be useful, but is not necessary. Rather, it is important for the purpose of assessing PSI operations to face the following reality:

> [I]n combination with the persistent abstention of member states to enforce mandatory embargoes against foreign ships where the Security Council has not adopted specific authorizations—South Africa, Libya, Somalia, Liberia—[this] leads to the conclusion that enforcement actions against foreign ships are only allowed with explicit Security Council authorization.[423]

The relevance of this revelation to PSI efforts is clear. Despite the increasing frequency with which the United Nations seems willing to enact and enforce embargoes to counter discrete threats, there are indications that the international community places significant weight on the source of the authority for such impositions into navigational freedoms and the free flow of commerce. Although some Security Council embargoes are left in place over considerable periods of time, the specificity of their objectives and the clarity of their procedures appear to enhance the lawfulness of an otherwise troubling exploitation of the oceans for non-maritime—albeit important—purposes. Under Secretary Bolton has stated that in situations where there are "gaps or ambiguities in our authorities," the PSI may seek additional legal authority; however, "[w]hat we do not believe . . . is that only the Security Council can grant the authority we need."[424] Bolton is undoubtedly correct to say that in *some* situations where the authorities remain unclear, recourse to the Security Council will not be necessary either in a technical, legal sense or for political reasons. But even if trends of decision and shifts in state practice indicate that the most controversial PSI interdictions on the high seas might be gaining acceptance from the international community—and this is not a foregone conclusion—it seems both unwise and unnecessary to disregard the stamp of lawfulness that Security Council authorization could provide. In this sense, the decision to drop the explicit authorization for high seas ship interdictions from Resolution 1540 might be construed as a significant setback for the PSI.[425] In turn, it might be understood as a sign that the new global security imperative to stem the flow of WMD to and from state and non-state actors alike, a notion partially embodied by Resolution 1540, has not yet achieved the degree of urgency and total commitment sufficient to upset the balance of interests at stake elsewhere in the law of the sea.

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423. Soons, *supra* note 422, at 286.
424. Bolton—Remarks to Federalist Soc., *supra* note 123.
425. *See supra* text accompanying notes 181–184.

VII. Conclusions and Recommendations

This Article has sought to explain the underlying motivations behind the PSI and to frame the debate over its implementation in the wider context of ocean governance and management.[426] It has attempted to depict the complex structure of complementary and competing jurisdictional models and their underlying sources of legal authority that form the contemporary public order of the oceans. The analysis has examined broader trends in the multiplication of lawful jurisdictional claims in order to identify shifts in the balance between the venerable non-interference principle and the panoply of varied claims over access, management, and use. The purpose of this endeavor is not only to assess the lawfulness of this or that PSI interdiction, but to make a case for what else is at stake, a complex balance of diverse interests, in any attempt to alter the oceans system in pursuit of one set of policy goals.

The PSI will be on stronger legal footing if the U.N. Security Council adopts an additional resolution that explicitly authorizes interdictions anywhere on the oceans for the purpose of finding WMD and related materials. Although Resolution 1540 is an important instrument in the context of stemming the flow of WMD-related material and building a stronger international consensus, its focus is not the maritime security and shipping component of the larger problem. More specific guidance and authorization are therefore desirable from the standpoint of creating clear legal authority to undertake various counter-proliferation activities at sea. Even a broadly worded Security Council authorization, however, will fail to address several of the other concerns raised in this Article as to how decisions will be made in particular cases, or how PSI activities as a whole can be held to some standard of accountability.[427] In other words, the Security Council is not a panacea to problems raised by the PSI.[428] Other legal strategies described throughout the Article—joint boarding agreements, robust national authorities criminalizing WMD cargo, the enactment of proposed amendments to the SUA Convention—will all help advance PSI objectives as well, primarily through creative use and adaptation of existing legal authorities and mechanisms.

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426. Other accounts of the PSI have taken on the approach of a legal brief, working through each hypothetical PSI scenario and assessing the range of legal arguments by which its actors can assert the lawfulness of a given interdiction (although much of that should be apparent); still others have sought to identify and evaluate the international solutions that could—in summary fashion—create a wide-ranging basis for the lawfulness and reasonableness of virtually all PSI operations. *See* Prosser, *supra* note 75; Byers, *supra* note 23; Joyner, *supra* note 47. *See also* Benjamin Friedman, Bipartisan Security Group, The Proliferation Security Initiative: The Legal Challenge (Sept. 4, 2003), *available at* http://www.gsinstitute.org/gsi/pubs/09_03_psi_brief.pdf (last visited Nov. 18, 2004); Valencia, *supra* note 132; Persbo, *supra* note 107.

427. *See* Prosser, *supra* note 75, at 8 (issuing this warning and suggesting the creation of either a Security Council committee or an extra-U.N. body "to rapidly assess the facts of specific cases for interdiction and offer recommendations to the Security Council regarding authorizations for individual interdictions").

428. A more specific Security Council resolution under Chapter VII to authorize PSI might still prove elusive, and not only because China remains a non-participant. According to some accounts, the support of even PSI participants France and Russia might be lacking. *See* Byers, *supra* note 23, at 531.

The question that lurks behind the policy debate is what risks and consequences are entailed in changing the system to make lawful what otherwise might not be lawful. PSI interdiction operations might encourage unilateral and unjustifiable claims of jurisdiction and control by other actors. How can the PSI differentiate its own interpretation (or, in some quarters, manipulation) of the rules from those that other states, or groups of states, might seek to create? In simplest terms, would the broad authorization of PSI interdiction operations represent the exchange of one kind of disorder for another? As one observer has cautioned, "[i]f leaders of the states participating in the PSI attempt to exchange [Law of the Sea] norms for selective non-proliferation measures, they should realize that such a trade-off could eventually restrict their own country's access to international waters," and it is unlikely that such concessions could be easily reversed.[429] This trade-off is not only between a reduction in WMD trafficking and the rise of unilateral claims by other states to intercept and harass ships engaged in legitimate activities. The problem can be cast more widely, thinking back to the manifestations of maritime disorder that have already been identified: piracy, illegal migration, illicit fishing, the rampant smuggling of drugs, and substandard, unsafe, and dirty ships.[430] Trade-offs have already been made, but the responses thus far have *not* exhibited a willingness to discard the non-interference principle arbitrarily or completely in favor of the open and pervasive policing of the oceans, from port to high seas. In each control area this Article has examined, a gradual "creeping jurisdiction" of sorts has been identified: the supplanting of exclusive flag state jurisdiction by port state control over vessel safety and compliance with pollution controls; individual bilateral boarding agreements to create concurrent jurisdiction over drug traffickers; and the more robust role for coastal states in managing the marine environment and the difficult problem of migratory and straddling fish stocks. These trends to inclusive jurisdiction embody shifts that have occurred over the past half century in the balance of maritime interests. Although new parties have acquired jurisdiction to prescribe legal norms or to enforce such norms through innovations such as the Paris MOU, the EEZ, the marine environment provisions of UNCLOS, the 1988 U.N. Narcotics Convention, or the 1995 U.N. Fish Stocks Agreement, the rise of inclusive jurisdiction has not come without the wide participation and deliberation of interested and concerned parties. In each case, the methods by which exclusive jurisdiction was made inclusive—in light of the realization that underlying interests had become inclusive—was measured and limited to the particular policy problem at hand.

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429. Chaffee, *supra* note 120. *See also* ROACH & SMITH, *supra* note 14, at 5 ("The United States has more to lose than any other nation if its maritime rights are undercut."); Canty, *supra* note 23, at 131 (discussing the real possibility that the boarding of foreign vessels on the high seas without flag state consent "could be extremely damaging to U.S. national security and freedom of navigation rights worldwide"). Furthermore, "a reciprocally available customary right of interdiction" would not be commensurate to American interests. Byers, *supra* note 23, at 540.

430. *See supra* notes 7–11.

The PSI offers compelling justifications for its agenda. The WMD problem is global and the consequences of unchecked proliferation are profound. Furthermore, the PSI core membership is made up of important and powerful states, without whose participation the intelligence-sharing scheme and coordination of physical assets for interdiction purposes would be severely undermined, if not impossible. With all this in mind, it is not certain that in the absence of both wider international participation and institutional safeguards to restrain its own power, the PSI has yet met the burden of justifying the widest potential scope of its operations against the possible harms to the international system. That is not to say, however, that such a burden could not be met.

In several ways, debate over the PSI is a debate concerning unilateralism. This Article has pointed to the perception that behind a façade of multilateral cooperation, the PSI is ultimately a loose instrument by which to facilitate more effective unilateral action by individual states to make possible and lawful the claims of one state upon vessels of another. There is nothing per se wrong with unilateralism of a certain form, and in the international landscape, unilateral actions are frequently the necessary spur to inclusive multilateral decisionmaking and execution: "While it might seem paradoxical at first, unilateral action can play an important role in regime construction. Indeed, traditionally the unilateral actions of great powers were sources of regime formulation . . . . Leadership often requires that someone go first."[431] This is particularly the case in the Law of the Sea, where unilateral claims have become highly visible tools for shaping the regime, setting the agenda when parties come together, and continuing to shape the content of the prescriptions once the parties have come apart.[432] Professor O'Connell noted that such unilateral claims are not necessarily the product of ambiguity in the content of the law, but deliberate attempts to break the law in order to change the system.[433] In its efforts to police the high seas or circumvent the exclusive jurisdiction of the flag state, the PSI could be viewed in this light. The law is clear, but it may no longer work to address compelling claims of the wider community. Professors McDougal and Burke considered the high seas problem in this light and provided the following guidelines:

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431. Joseph S. Nye, Jr., *Political Lessons of the New Law of the Sea Regime*, *in* U.S. POLICY DILEMMA, *supra* note 292, at 113, 123. *See also* MCDOUGAL & BURKE, *supra* note 1, at 1047 ("Though there is frequent explicit multilateral prescription of community policies, most decisions in application are taken by states acting unilaterally."); Barry Hart Dubner, *On the Interplay of International Law of the Sea and the Prevention of Maritime Pollution—How Far Can a State Proceed in Protecting Itself from Conflicting Norms in International Law*, 11 GEO. INT'L ENVTL. L. REV. 137, 137 (1998) (noting the value and necessity of unilateral state actions "in order to achieve national and international legal congruity, depending on the urgency of the danger").

432. *Cf.* Burke, *supra* note 16, at 224.

433. *See* O'CONNELL, *supra* note 2, at ix ("Governments in the matter of the Law of the Sea no longer act by reference to what they think the law is: they set out deliberately to break with the traditional rules in order to bring about the changes which they seek."). Although such actions may often be motivated by self-interest, they are not necessarily detached from considerations of how the system would best serve the needs of a wider community of interests.

> The allocation of authority to prescribe unilaterally for activities on the high seas may sometimes be desirable, when impacts are especially intense, though exclusive decision should be strictly limited to protection of the more highly important exclusive interests. The authorization of unilateral prescription does not of course imply arbitrary decision, since such authority must be exercised only subject to review by the rest of the community.[434]
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> . . . .
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> Under some circumstances, principally coupling exclusive interests of prime importance with an exclusive use that involves minimal deprivation of free navigation (or other components of inclusive use), it would appear in the common benefit to declare such exclusive use to be permissible. The standard or criterion by which such determinations are made is, of course, by reference to the familiar prescription of reasonableness. The specific question in concrete situations is whether the heavy weight placed upon free access is counterbalanced by factors supporting the reasonableness of the competing claim to exclusive use.[435]

It would seem that the WMD problem is correctly considered one of "intense" impact or "prime importance." But it is the set of limiting criteria and conditions that attach to unilateral decisionmaking that has the greater significance for the PSI going forward. Unilateralism is unlikely to sustain itself over time, and the failure to do so might also be considered the failure, ultimately, to make effective law.[436] In the sense that PSI unilateralism will exploit the currently available exceptions to the non-interference principle however possible, the PSI could "exacerbate growing concerns that the initiative . . . is, in fact, a US circumvention of formal international treaties and legal restraints in order to bring pressure on the 'axis of evil' states."[437] Such

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434. MCDOUGAL & BURKE, *supra* note 1, at 750.

435. *Id.* at 764–65. The reasonableness standard set forth has been criticized in other circles, notably by Professor O'Connell, as too subjective, despite Professor McDougal's counterclaim that "self-defence has a primordial superiority in the hierarchy of legal values." O'CONNELL, *supra* note 71, at 795. But is the reasonableness of PSI activities to be assessed against the operation as a whole, or against the individual incidents that take place over time? If the latter, the case-by-case assessment of reasonableness and lawfulness might significantly hamper PSI interests, but it would certainly preserve a greater balance in favor of the old-style freedom of the seas. Furthermore, if counter-proliferation *cannot* be framed as self-defense, where does it fall in "the hierarchy of legal values?" *Id.*

436. That said, there is an argument to be made in favor of the depth rather than the breadth of international support for a unilateral claim. As much as any other factor, the ability of the party or parties prescribing a legal norm to enforce that norm can be equally persuasive in demonstrating that a rule of international law has been prescribed, at least early on:

> While unanimity is not a requirement in fact, neither is there special significance in the notion of "widespread support," for, although all States may be equal legislators, not all are equal actors, and a rule may be more dependent upon the conduct of a small group of States than upon the proclamations of the great majority . . . . While it is untrue to suggest that the doctrine of effectiveness has become a substitute for the traditional doctrine of *opinio juris* . . . that doctrine has assumed greater prominence in the processes of empirical judgment.

O'CONNELL, *supra* note 2, at 36.

437. IISS Report, *supra* note 106.

perceptions could damage the prospect for future international or multilateral solutions to transnational problems. Such a reality might lead to increased international tension or conflict without even producing worthwhile gains in counter-proliferation. To prevent these kind of damaging long-term consequences, unilateralism requires some measure of international acceptance and "some inducement for others to follow" in order to function as an effective lawmaking tool.[438] Do the unilateral actions ostensibly encouraged by the PSI "promote a reasonable community response to [the] . . . problem?"[439]

To this question, the answer seems like a qualified yes. PSI promotion of national legal reform and a loose harmonization of national standards and practices suggests a reasonable and logical response to the threat, although questions remain as to whether the extent of the guidance provided thus far is commensurate to the enforcement objectives and implicit prescriptions set forth. To the extent a gap exists between what the PSI asks nations to do and what the law, logistics, and the reality of trying to police the vast oceans hinder them from accomplishing, "PSI lawmaking" seems less unassailable and more open to serious scrutiny, if not skepticism.

In this respect, the United States and the other participants have more work to do in fostering the PSI into an instrument of norm enforcement that will acquire acceptance by the wider community and incorporation into the law of the sea for the foreseeable future. This is not to be confused with a position requiring multilateralism at every turn, but is a pragmatic view of how the PSI can best integrate itself into the public order of the oceans with minimal disruption to the structure in place.[440] Bold statements from Under Secretary Bolton as to the PSI's unquestioned legitimacy are unhelpful distractions from the reforms that the PSI should be undertaking to earn unqualified support from the wider international community.[441] They may also tend to alienate those states such as China, India, or even core participants like Russia, that have raised legitimate questions about how or when PSI interdictions will take place. The fact that the United States or one of its allies may be the party making the jurisdictional claim is insufficient in itself to galvanize that action into the lawful exercise of power. Given the long-standing U.S. position to "not acquiesce in unilateral acts of other states that unlawfully

438. Nye, *supra* note 431, at 123. *See also* MCDOUGAL & BURKE, *supra* note 1, at 48 n.125 ("It is not the unilateral claim, but the acceptance by other states, even when manifested in reciprocal tolerances, which creates the expectations of uniformity and 'rightness' in decision which we commonly call international law.").

439. Dubner, *supra* note 431, at 160–61 (setting this condition on the lawfulness of unilateral action).

440. *See* Bruce W. Jentleson, *Tough Love Multilateralism*, WASH. Q., Winter 2003-04, at 9 ("Multilateralism's greatest strength lies in its very logic. Any strategy's reach must measure up to the scope of the problems it seeks to address. Given the global scope of so many of the threats and challenges in today's world, one nation acting alone simply cannot solve or even manage them.").

441. *See* Bolton—Remarks to Federalist Soc., *supra* note 123 ("Without question, the PSI is legitimate and will, I predict, be extremely efficient in its efforts against WMD."). Comments like these also create unreasonably high expectations for what the PSI can hope to accomplish. PROSSER, *supra* note 75, at 1.

restrict the rights and freedoms of the international community in navigation" over the high seas, the PSI must more carefully demonstrate to the international community why some incursions would be lawful and some incursions would not.[442] It is particularly problematic if, contrary to the PSI's declarations, PSI operations have in fact routinely violated certain well-established norms. Some reports have indicated that the United States is "already stopping and searching vessels on the high seas at will," although these claims have not been widely repeated.[443] Whether these allegations can be substantiated or not, the *perception* of brazen American disregard for the rules in place is cause for concern. It undermines the ability of core participants in the PSI to make a stronger case for the lawfulness of operations on the high seas or to promote more favorable interpretations of existing law where such possibilities already exist. It also blunts the aforementioned likelihood of an act of "exceptional illegality" finding subsequent political or moral blessing, or, at the very least, quiet acquiescence.[444]

The extension of non-exclusive jurisdiction, even to ships on the high seas, for the limited purpose of WMD counter-proliferation potentially meets the test for a new set of rules. This conclusion is bolstered by Resolution 1540, but it might have been reached even before the resolution was adopted. Because the threat is open-ended in duration, decentralized in organization, and geographically disperse, old solutions may not be suitable. Furthermore, the WMD threat is overwhelming in a way that the other modes of disorder addressed by oceans policy—piracy, over-fishing, drug smuggling, and pollution—simply are not. Although those problems are serious, the impact of any one instance of over-fishing or drug smuggling has a marginal negative impact on world public order. The same could be said for some shipments of WMD-related materials; the final product of consequence could be many years and many more shipments away. But the risk of one successful attack, or the danger of certain states or non-state actors even acquiring the capability to make credible threats, sets the WMD threat apart from the other problems constituting the disorder of the oceans. Although some have suggested that principles of self-defense alone suffice to justify PSI operations, this risks stretching the already ambiguous limits of the doctrine of self-defense to an untenable degree.[445] A better political and legal justification may be what

442. Dennis Mandsager et al., *Cooperative Engagement and the Oceans: Policy and Process*, *in* OCEAN GOVERNANCE STRATEGIES, *supra* note 16, at 39, 51 (quoting LES ASPIN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS, at Appendix G (1994)).

443. *Pact Frees US Navy*, *supra* note 221. David Osler of *Lloyd's List* in London, for example, has been reported as claiming that the U.S.-Liberia Boarding Agreement "puts existing practice on a friendlier footing. The U.S. Navy will continue to board vessels when they want to . . . [b]ut at least in the case of Liberia, they'll be able to do it legally." *Id.*

444. *See supra* text accompanying note 392.

445. *See* Efron & Hendren, *supra* note 116 (noting that Deputy Secretary of State Richard Armitage has described the self-defense principles enshrined in the U.N. Charter as sufficient grounds for searching ships at sea); Weiner, *supra* note 162 (noting John Bolton's support for the self-defense justification for interdicting North Korean ships). *But see* Robert T. Grey, Jr., *North Korea Up in Arms*, WASH. TIMES,

scholars have termed "the duty to prevent,"[446] a close cousin to the doctrine of preemptive war.[447]

Based on this Article's review of the multiple types of non-exclusive jurisdiction that have emerged to manage the shared problems of the oceans, it seems reasonable that the adoption of certain safeguard measures will enable the PSI to mitigate the undesirable consequences its actions might otherwise unleash. Without taking such precautions, PSI policy assumes serious risks. The following suggestions aim to mitigate the extent to which the non-interference principle will be diminished by PSI operations, as well as the potential harms to the international decisionmaking process at large. Balancing the PSI against the other interests at stake requires the creation of clearer standards, procedural restraints, and accountability measures. The implementation of these reforms would improve the capacity of the PSI to function effectively and would help reduce the number of legal ambiguities that many of its operations create or exploit. If the PSI is going to clarify the permissible boundaries of a functional, widely accepted doctrine of preemptive self-defense, these measures might assist policymakers and scholars to articulate those bounds more effectively.[448]

1. *Clarified Statement of Materials Considered Eligible for Seizure.* PSI participants should publish public guidelines explaining what materials are considered contraband and subject to seizure via interdiction. If the legality of seizure depends on the zone of interdiction or the nationality of the parties involved, any published guidelines should at the very least clearly delineate the different relevant categories for seizures. For matters of dual-use materials or technology, guidelines should also be clear, though flexible. Even if extrinsic evidence regarding the parties involved or the claimed (or corrobo-

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Aug. 14, 2003, at A19 (arguing that defending interdictions on the basis of Article 51 "pushes the self-defense doctrine well beyond its narrow limits and creates a dangerous precedent"); Joyner, *supra* note 47, at 7 (arguing that the international law of the sea—not the more general right to self-defense—should be the basis of analysis). Of course, in some situations a claim of self-defense will provide adequate justification for an interdiction at sea as long as the traditional requirements of imminence and proportionality are met. In many situations, however, the cargo targeted in an interdiction might be too tenuously linked to the ultimate threat of imminent harm to give rise to a traditional self-defense claim. Furthermore, claims of self-defense may create problems where the sovereignty of a non-threatening third-party—i.e., the state whose ship may unwittingly be the vessel for the transport of WMD-related materials—is invaded, rather than the sovereignty of the state from which the threat derives.

446. *See* Feinstein & Slaughter, *supra* note 92. The "duty to prevent" derives from the idea that states have a duty to protect their citizens; if they cannot, the "international community" has a responsibility to intervene. Its proponents also apply criteria to limit the application of a "duty to prevent" to "governments that lack internal checks on their power from acquiring WMDs or the means to deliver them." *Id.* Preventive measures, in turn, are urged "to be exercised collectively, through a global or regional organization." *Id.*

447. For a brief overview of this controversial doctrine, see Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599 (2003). For a discussion of preemptive self-defense in the context of the PSI, see Byers, *supra* note 23, at 540–42.

448. These proposals are not meant to imply that the PSI can attain "legitimacy" *only* if it adopts the traditional trappings of the multilateral intergovernmental organization, including a headquarters or fully funded secretariat. At the same time, as currently structured, the PSI may never attain the scope of participation and support it requires to be at its most effective, or least costly.

rated) end use is dispositive, the manner in which these additional factors define the status of dual-use technology must be adequately explained. This includes explaining why the proliferation of WMD-related materials by countries such as Pakistan, or from the United States to Israel, might be considered acceptable in certain instances, but are likely never considered acceptable when emanating from, for example, North Korea or Syria. Specific provisions could be included to permit dual-use material transfers where authentic and verifiable documentation meets PSI standards and provides some safeguards as to legitimate end-uses.

2. *Harmonized Standards for Identification of Suspect Vessels.* PSI participants should issue a statement to clarify whether the "suspect" or "of concern" label attaches to ships based on state of registry, nationality of ownership, or points of on-loading or off-loading. To the extent that the entire fleets of certain "suspect" nations or registries may be highlighted for heightened scrutiny and more frequent or rigorous inspection, mechanisms should be developed to allow for "suspect ships" to petition for "normal" treatment upon a showing of regulatory compliance and cargo transparency.

3. *Harmonized Standards for Interdictions in Internal Waters and the Territorial Sea.* Under the status quo, various municipal law and diverse standards of proof permit much more invasive interdiction exercises in some coastal state zones than in others. Harmonization is already in progress, albeit in a piecemeal fashion. Although gradual harmonization may be preferable to a uniform standard handed down summarily by outside actors (such as the PSI), it would be beneficial to offer additional support for what qualifies as "reasonable suspicion" in particular situations.[449] A listing of relevant factors to consider and pre-interdiction procedures that should be followed might be a useful step toward harmonization of diverse evidentiary standards. Judicial notions such as "reasonable suspicion" may carry very different connotations under different legal systems. The PSI dependence on such vague threshold standards would benefit from further explication as to not only what constitutes sufficient concern to undertake an interdiction, but also through what channels such information should be obtained and by what procedures such decisions should be made. In many municipal systems, notions of evidentiary sufficiency and appropriate police procedures are developed over time through judicial oversight or a symbiotic relationship between common law rule-making and national legislatures. Given the absence of a viable equivalent at the international level,[450] proactive efforts by the PSI members to clarify permissible standards for action would be well-received.

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449. It remains unclear if the U.S.-proposed amendments to the SUA Convention would accomplish harmonization of these standards embedded in national criminal codes. On the SUA Convention amendments, see discussion and sources cited *supra* note 47.

450. That said, the creation of dispute resolution or compensation procedures through some international body could provide the kind of judicial oversight that would develop generally agreed upon evidentiary standards over time. Of course, concerns with protecting the intelligence sources that may lead to interdiction operations are likely to pose a significant obstacle to forthright explanations of why a

4. *Restatement of Flag State Rights of Pre-Emption or Continued Engagement.* As has been noted in the context of non-flag state enforcement of international fishing regulations and environmental regulations, there is a strong residual preference for the active involvement of flag states where ships violate international standards. Although the nature of WMD and terrorism threats suggests a less pressing need to defer to flag state jurisdiction, a lack of deference need not exclude flag states from the process of enforcement and sanction. It would behoove the PSI to continue involving leading flag states in counter-proliferation efforts and to seek flag state assistance in monitoring suspicious activity. Where ships have been identified as proliferation threats or where interdictions have taken place, flag states should in all circumstances be kept abreast of PSI activities and should be consulted during each stage of the interdiction process. By involving open registry states in PSI operations, the PSI may be able to encourage greater open registry vigilance and convey the importance of open registry states acting as stake-holders in the counter-proliferation effort.

5. *Dispute Resolution and Compensation Procedures.* The law of the sea, including UNCLOS and its related conventions, is replete with provisions relating to the peaceful resolution of disputes and appropriate compensation procedures where vessel detention, seizure, or damage can be shown to have taken place unlawfully or without cause. Decisions from the International Tribunal for the Law of the Sea ("ITLOS") have addressed the subject, and there is no reason why PSI interdictions should immunize the interdicting parties from legal liability where an interdiction takes place without merit or proves mistaken.[451] Furthermore, procedures for compensation in the case of unjustified or unlawful interceptions and the associated delays may help allay shipping industry concerns as to possible damages. It remains unclear under the status quo, however, how targets of PSI operations could successfully pursue claims. The option of seeking civil redress in any of the national courts who would likely have jurisdiction over a particular dispute is not necessarily realistic, given the problems inherent to litigation in foreign courts and the potential difficulty of even getting PSI defendants into court and surmounting sovereign immunity obstacles. The lack of reference to dispute resolution or compensation procedures in the available PSI public statements and documents is a concern. Although there are many options for a dispute resolution mechanism to adjudicate PSI-related claims, one tactic might be for the PSI to arrange ITLOS

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given operation was undertaken.

451. ITLOS has rendered judgments in six "prompt release" cases where parties sought remedies for alleged illegal vessel interdictions or detentions. These decisions include the Tribunal's first case, M/V Saiga Case (No. 1) (St. Vincent v. Guinea), 110 I.L.R. 736 (Int'l Trib. L. of the Sea 1997), and, most recently, The "Volga" Case (Russ. v. Austl.), 42 I.L.M. 159 (Int'l Trib. L. of the Sea 2002). For the full text of both judgments, see http://www.itlos.org/start2_en.html. *See also supra* note 342. Where the United States has reached joint shipboarding agreements with other states, provisions for claims and dispute resolution have been provided, but not necessarily with recourse to international tribunals. *See, e.g.*, MARSHALL ISLANDS AGREEMENT, *supra* note 234, arts. 13–14.

jurisdiction over such disputes, specifically noting the power of the tribunal to issue binding orders requiring the payment of monetary damages. Alternatively, an ad hoc claims tribunal could be created to arbitrate PSI-related claims with rules of procedure specifically developed to address the likely problem of intelligence concerns interfering with the transparent explication of such claims.[452] This might be an appropriate role for the temporary committee created by Resolution 1540.[453] Nonetheless, any kind of standing body adjudicating such claims could help develop the necessary jurisprudence as to where one must "draw the line" between acceptable security-based activities of interference and impermissible encroachments on navigational and commercial freedoms.

6. *Reporting Requirements with External Oversight.* Finally, reporting requirements would help identify the extent to which PSI operations abide by the recognized legal authorities, can provide a record to show that PSI operations are proceeding with discretion and restraint (i.e., truly targeting high-risk vessels), and may help decisionmakers evaluate the effectiveness and value of PSI operations in the aggregate. A central reporting body could be established under the aegis of the U.N. or could operate as a free-standing "PSI Reporting Body" which would issue periodic public reports on PSI operations and statistics. Again, this might be an appropriate role for the temporary committee created under Resolution 1540.[454] A committee analysis of *every* PSI interdiction could provide a means of establishing standards and expectations. Unfortunately, this information remains shrouded in secrecy. While Under Secretary Bolton has emphasized that it is imperative that the full extent of interdiction activities be concealed for intelligence purposes, such statements cannot help but fuel the suspicions of those who sense ulterior motives behind U.S. policy. An alternative review by an international body could still provide for some nominal record of PSI interdiction activities. Quantitative, non-specific information need not undermine the operation or intelligence security. Basic reports on the number of incidents, certain geographical indicators, positive or negative results, and some idea of the basis for such operations would be a useful step toward transparency and might quell the criticisms of those who fear the PSI is just another attempt to circumvent international safeguards without regard for basic notions of accountability.

In the end, the decisions facing the PSI and the international community raise fundamental questions of where the counter-proliferation imperative requires the line to be drawn. What is the limit of acceptable interference with the freedom of navigation? What methods or procedures are overly burdensome? What operations are justified by the complexity and magnitude of the threat at hand? In the domestic context, we see similar hand-wringing and

452. *See* discussion *supra* note 450.
453. S.C. Res. 1540, *supra* note 27, ¶ 4.
454. *Id.*

legal jousting over analogous issues in the criminal law. For example, the bulk of Fourth Amendment jurisprudence is focused on similar line-drawing questions that balance freedom and security. But the international system has no single constitution or supreme court to declare what the law is in a single stroke of legal decisionmaking. Rather, the lawfulness and wisdom of interdictions at sea remains exceedingly complex and requires taking into account the full range of voices, interests, and competing norms.

In many respects, concerns surrounding the PSI echo the voices of Professors McDougal and Burke in their adamant rejection of what many perceived to be a heavy-handed and ill-designed response to disorder on the oceans—the requirement of a genuine link between flag state and ship as instituted by the Geneva Conference in 1958:

> A final demand, clearly irrational, is to be seen in the challenge to the basic organizing principle by which states have maintained public order at sea, namely the completely exclusive competence accorded states to confer their national character upon ships. Some of the older maritime states, in conjunction with other interests, have sought to undermine this traditional exclusive competence by recommending conferment upon states of an exclusive competence unilaterally to refuse recognition of ascriptions of national character unless it is shown that there is a "genuine link," usually left wholly undefined, between the ship and the according state.[455]

Of course, as these pages have argued, the exclusive competence of the flag state, though left intact for the purpose of granting nationality to its ships, has been substantially eroded in other ways, leading to a variety of different types of concurrent jurisdiction and inclusive competence to maintain public order at sea. The PSI potentially advances that erosion further and creates new space for the inclusive enforcement of an emerging norm. Can its efforts, however, be distinguished from a grant of "exclusive competence unilaterally to refuse" the national character of other ships at sea? This may depend on its ability to function *more* as an "organization" with rules and standards and less as a mere "activity."

Ultimately, if the United States and its PSI allies suspect that a vessel is transporting a WMD shipment at sea, they are going to act.[456] Even without the legal authority flowing from UNCLOS, customary international law, or U.N. Security Council resolutions that this Article has described, "[w]here it is generally thought acceptable that States should insist upon certain conduct on or over the high seas, the abstract freedom of the seas will not stand in

455. MCDOUGAL & BURKE, *supra* note 1, at 5–6.

456. This was conceded by Under Secretary Bolton early on. *See* Michael Evans, *U.S. Plans to Seize Suspects at Will*, TIMES (London), July 11, 2003, at 23 (quoting Bolton as saying that "if that opportunity arises, if we had actionable intelligence and it was appropriate, we would [interdict a vessel] now").

the way."[457] If this course of action seems inevitable, the question becomes whether it will take place with or without the sanction of the wider community. The former option stands a better chance of making it more effective, less costly, and its consequences easier to contain.[458] Balancing new claims of jurisdiction to prescribe and enforce against the principle of navigational freedom will be an uneasy exercise in lawmaking, but there is room for a more aggressive interdiction regime to the extent that its proponents keep in mind the needs and claims of the system as a whole. The non-interference principle merits respect, but only to the extent that it remains a valuable and effective tool for promoting the general welfare of the international system and all its participants.

457. O'CONNELL, *supra* note 71, at 797.

458. *Cf.* ROACH & SMITH, *supra* note 14, at 5. ("Even though the United States may have the military power to operate where and in what manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful.").