The Proliferation Security Initiative in the Maritime Domain

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Introduction

The Proliferation Security Initiative (PSI) is one of a number of measures taken by the international community in response to the heightened concern over terrorism since the attacks on the United States on September 11, 2001. The PSI is essentially part of a preventative strategy to deny weapons of mass destruction (WMD) to terrorist organizations by ensuring such weapons cannot be moved freely across the world’s oceans. This article will seek to consider the implications for the law of the sea, particularly the operation of the 1982 United Nations Convention on the Law of the Sea,1 generated by the PSI, and the possible implications of its vigorous pursuit.

Content of the PSI

The PSI was announced in Krakow, Poland on May 13, 2003 by President George W. Bush.2 It initially was a cooperative venture between eleven States,3 but has gradually widened its support base to include a number of additional States, including Russia.4 In addition to this direct support, the PSI received tacit approval from States attending an international conference directed at international

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security arrangements. This was demonstrated at the first anniversary meeting in Krakow on May 31 and June 1, 2004, which was attended by over sixty States.5

The thrust of the PSI is to prevent the proliferation of WMD by sea, land and air, although within the scope of this article, only the maritime aspect of the Initiative will be considered. The PSI is not a treaty, but rather a statement of intention on the part of participating States, and, of itself, it does not create formally binding international law obligations. Participating States have agreed to abide by a set of interdiction principles, set out in a formal Statement. The interdiction principles indicate States will undertake effective measures to combat the proliferation of WMD, delivery systems or related materials;6 cooperate on information exchange and coordination of activities to combat such proliferation;7 and review domestic and, if necessary, international law to strengthen these efforts.8

In terms of specific circumstances when interdiction will take place, the PSI provides a number of instances, and these are worth extracting:

Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

a. Not to transport or assist in the transport of any such cargoes to or from States or non-State actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

b. At their own initiative, or at the request of and good cause shown by another State, to take action to board and search any vessel flying their flag in their internal waters or territorial seas or areas beyond the territorial seas of any other State that is reasonably suspected of transporting such cargoes to or from States or non-State actors of proliferation concerns, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other States and to the seizure of such WMD-related cargoes in such vessels that may be identified by such States.

d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from States or non-State actors of proliferation concern and to seize such cargoes that are identified;
and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another State, to (1) require aircraft that are reasonably suspected of carrying such cargoes to or from States or non-State actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (2) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f. If their ports, airfields, or other facilities are used as transhipment points for shipment of such cargoes to or from States or non-State actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.9

These principles fall into a number of specific categories, in relation to shipping. Firstly, PSI States agree to undertake measures to prevent shipments of WMD, and to cooperate with other participants to achieve this end. Ships suspected of carrying WMD destined for non-State actors may be stopped and searched in three circumstances: where the ship flies the flag of a participating State in the PSI, either by the flag State itself, or in cooperation with other PSI States; where the ship is alongside in a port of a PSI participating State; and, where the ship is present in the internal waters, territorial sea or contiguous zone of a participating State. As is evident in e. and f. above, similar provisions exist for aircraft, although only at airfields of a PSI State, or the national airspace of a PSI State.

These categories were effectively widened in 2004, with bilateral agreements between the United States on the one hand, and Liberia and Panama on the other, with a view to permitting US vessels to stop and search suspect vessels flagged in the latter two countries.10 Liberia and Panama will not function as PSI States, but, in certain circumstances, they have agreed to allow the United States to inspect their flag vessels.11 Subsequently, similar agreements have been concluded with a number of other States, including Belize, Croatia, the Marshall Islands, and Cyprus.12

The PSI has also been the subject of consideration by the United Nations Security Council. On April 28, 2004, the Security Council unanimously adopted Resolution 1540 on the prevention of the proliferation of weapons of mass destruction
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to non-State actors. The Resolution provided that States could take all measures consistent with international law to prevent the proliferation of weapons of mass destruction, and that States were under an obligation to ensure that such weapons did not fall into the control of non-State actors. Significantly, there is no reference to interdiction of vessels, so the Resolution falls short of the range of measures contemplated within the PSI; however it is clear the Resolution would render the shipping of weapons in the circumstances contemplated to be addressed by the PSI unlawful.

Legal Justifications for Interdiction under the PSI

The PSI draws its legal support from a number of bases, some of which are straightforward and some that are more contentious. For this reason, it is necessary to consider each in turn. These will be done without reference to the positions of the PSI States per se, as they have largely simply asserted that the PSI itself is consistent with international law.

Flag State Jurisdiction
One of the oldest and most settled matters within the law of the sea is the notion that a flag State retains jurisdiction over a vessel flying its flag. This provides the basis for the identification of jurisdiction and legal authority over ships in waters beyond national jurisdiction. This principle is acknowledged in the Law of the Sea Convention, and is reinforced by the requirement that where a ship owner seeks to change the registration of their ship, this can only take place in port. This ensures that at sea, the flag State of a ship remains singular and constant, giving certainty in identification of the applicable law and authority aboard.

The use of flag State jurisdiction under the PSI is entirely valid, as flag States clearly have the power to regulate affairs aboard vessels flying their flag, and therefore can direct masters of such vessels to comply with lawful directions. Accordingly, a flag State could direct a vessel flying its flag to heave to and be boarded by another PSI State’s nationals, submit to search and make for a designated port in a PSI State. With the authorization of the flag State, all the participating nations in the operation could be assured of the legality of their actions.

Port State Interdiction
The second approach to interdiction under the PSI is found through the medium of port State jurisdiction. A coastal State’s ports are part of its internal waters, or at least can be made so under the Law of the Sea Convention. Since the restrictions on assertion of the coastal State’s jurisdiction over vessels exercising a right of
innocent passage in the territorial sea do not apply to internal waters, the coastal State has a virtually unfettered jurisdiction to apply its law to ships visiting its ports, or to deny entry to its ports to foreign vessels if it chooses.

Historically, there have been some restrictions upon the port State from applying its laws to vessels that are alongside in its internal waters. With the exception of sovereign immunity, which will be considered separately, these restrictions derive largely from customary international law. For example, traditionally, vessels calling at a port as a result of distress are not subjected to the law of the coastal State.20 Similarly, States generally do not apply their labor laws to vessels calling at their ports, or interfere with matters that are generally regarded as internal to the operation of the vessel.21

It is unlikely that any of these restrictions existing in international custom would withstand the right of a coastal State to take steps to deal with a risk to its own security, or that of its allies, in its own port. Whether knowingly or not, in circumstances in which the visiting vessel poses a threat to the security of the coastal State, it would seem absurd that the State would not be able to address that threat within its own territory. Flag States have generally shown no objection to efforts by port States to take measures against vessels to curb the international drug trade, and the consequences in the context of the PSI for a failure to prevent a shipment reaching its destination are even higher.

On this basis, Port State efforts to implement the PSI would, with the caveat of respect for sovereign immune vessels, seem to be on very solid ground, and there would seem to be no difficulty in its implementation to vessels alongside in a PSI State.22

**Territorial Sea and Archipelagic Waters Interdiction**

One matter of significant concern surrounding the PSI relates to freedom of navigation. The Law of the Sea Convention provides substantial guarantees with respect to freedom of navigation, and the operation of the PSI to restrict the freedom of certain vessels to allow search and possible seizure of cargo presents a significant challenge. To place this challenge in context, it is useful to summarize the development and content of current arrangements in the law of the sea with respect to freedom of navigation.

Freedom of navigation has its origins in Hugo Grotius’ response to the Spanish and Portuguese claims of control over the oceans and territories outside of Europe by virtue of the Papal Bull23 and Treaty of Tordesillas.24 These documents purported not only to give control over territory outside of Europe, but also provided for exclusive seaborne trading rights in the South Atlantic and Indian Oceans.25 In reaction to this assertion, Grotius produced his seminal work, *Mare Liberum,*
asserting that the oceans were incapable of appropriation by States, and that the ships of any State could journey anywhere on the world’s oceans.26

In the modern law of the sea, freedom of navigation was equally perceived as important, and this status is reflected in the now superseded 1958 Geneva Conventions on the law of the sea. Article 14 of the Convention on the Territorial Sea and Contiguous Zone guaranteed a right of innocent passage to vessels, which was non-suspendable for waters in international straits, and Article 23 indicated explicitly that such rights were available to warships.27 Freedom of navigation on the high seas was guaranteed in Article 2 of the Convention on the High Seas,28 with Article 3 of the Continental Shelf Convention ensuring that the status of waters above a State’s continental shelf remained as high seas, therefore enjoying freedom of navigation.29 These efforts had been prefigured by the International Court of Justice in 1949 in the Corfu Channel Case, which confirmed the right of innocent passage, available even to warships, passing through “strait used for international navigation.”30 The Court was also prepared to state that foreign vessels, including warships, during peacetime had a right of innocent passage through all international straits.

The current 1982 Convention on the Law of the Sea maintains the approaches found in the Corfu Channel Case and the 1958 Geneva law of the sea conventions. It deals with navigation in two distinct contexts. First, it examines freedom of navigation in the territorial sea and archipelagic waters. Three passage regimes are established in these waters: innocent passage, transit passage and archipelagic sea lanes passage. It then considers freedom of navigation in areas beyond national sovereignty in Article 87.31

The regime of innocent passage deals with navigation by ships only in the territorial sea of a coastal or archipelagic State and archipelagic waters of an archipelagic State, and as noted above, it retains the same approach as that used in the Territorial Sea Convention and the Corfu Channel Case. Article 17 of the Law of the Sea Convention grants ships the right of innocent passage through the territorial sea, while the remaining articles in Subsection 3(A) of the Convention indicate how the right is circumscribed. Essentially, vessels are required to transit in a continuous and expeditious fashion, on the surface of the ocean. Such passage cannot be impeded, except on a non-discriminatory and temporary basis for essential security purposes.32

The coastal State has ability to regulate certain matters with respect to a vessel exercising a right of innocent passage. These are listed in Article 21(1) of the Law of the Sea Convention:
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The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

(a) the safety of navigation and the regulation of maritime traffic;
(b) the protection of navigational aids and facilities and other facilities or installations;
(c) the protection of cables and pipelines;
(d) the conservation of the living resources of the sea;
(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
(g) marine scientific research and hydrographic surveys;
(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

Upon their face, these controls do not provide a basis for a coastal State to assert jurisdiction over a passing vessel in its territorial sea for the purposes of the PSI. The matters Article 21 permits regulation of are clearly restricted to matters pertaining to the safe navigation of the ship, the protection of the surrounding marine environment, and the maintenance of customs, fiscal, sanitation (health) and immigration controls of the coastal State. Unless there was a clear intention to illegally import WMD into the coastal State, which could be accomplished when the vessel came alongside in any case, there is no authority drawn from Article 21 to assist coastal States to implement the PSI.

Other articles within the Law of the Sea Convention may be of more utility. Article 19 requires that a ship’s passage cannot be prejudicial to the peace, good order or security of the coastal State. A range of activities that fall outside this requirement are explicitly listed, including “any other activity not having a direct bearing on passage.” Clearly the delivery of WMD to terrorists may well be highly prejudicial to the peace, good order and security of a coastal State, and an argument
could be made that such a passage is therefore not innocent, and the restrictions on coastal State authority over the passing vessel are removed.

On the other hand, there may be goods on board of which the master and crew know little or nothing, and their only relationship with terrorists comes from an anonymous and unremarkable bill of lading. In these circumstances, it may seem unduly harsh to argue the vessel’s right of innocent passage is open to question. However, the awareness of the crew does not render the vessel’s cargo safe, nor make it any less of a security threat. The possible lack of knowledge of the crew should be a factor in their interaction with the boarding party, but should not be the determining factor in the ability of a coastal State to intercept the vessel.

The ability of a coastal State to close territorial waters for essential security purposes on a temporary basis will not assist the PSI. Such closures are to be nondiscriminatory in their application, and clearly this is not possible with the PSI. The PSI’s objective is to interdict suspect vessels, not to institute what resembles a blockade and compel the inspection of every passing ship. Further, Article 25(3) is intended to clear areas of the sea temporarily, not to authorize an inspection regime.34

Coastal State criminal jurisdiction, which would usually encompass preparations to undertake terrorist activities, can also be exercised under Article 27 of the Law of the Sea Convention for vessels passing through the territorial sea. This can occur in four circumstances:

(a) if the consequences of the crime extend to the coastal State;

(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.35

Of these categories, only (a) and (b) will be of direct relevance to the PSI, since if the master or flag State seeks assistance as in (c), there is no issue of legality. For (a) and (b), it may be conspiracy to commit a terrorist act and preparatory steps towards such an act, the consequences of which might extend to the coastal State, or disturb its peace or good order that are the criminal matters. However, the materials may be intended for a third State, which nullifies Article 27, which is specific to the coastal State.
For transit passage and archipelagic sea lanes passage, the same concerns apply, save that such passage cannot be interrupted for any reason, not even the essential security concerns of the coastal State. This would make the stopping of a vessel in an international strait or archipelagic sea lane of greater significance. Further, the categories of applicable coastal State law to such vessels, as described in Article 42, are more limited than those for innocent passage. However, Article 39 does require vessels to refrain from any violation of the principles of the United Nations Charter, as in Article 19, so the above discussion there would similarly be applicable.36

**Interception in the Contiguous Zone**

The PSI also includes interdiction within the contiguous zone of a participating coastal State. This raises additional issues with respect of freedom of navigation. While vessels in the territorial sea are obliged to observe the regime of innocent passage or be subject to the wider law of the coastal State, the contiguous zone is unfettered by such concerns.

Beyond the territorial sea, the Law of the Sea Convention also confirms there is freedom of navigation for all vessels. Article 87 provides:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

   (a) freedom of navigation;

   (b) freedom of overflight;

   (c) freedom to lay submarine cables and pipelines, subject to Part VI;

   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

   (e) freedom of fishing, subject to the conditions laid down in section 2;

   (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.
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The impact of this provision finds its way into the regime of the EEZ by virtue of Article 58, which expressly incorporates rights of freedom of navigation and overflight. While a coastal State has additional jurisdictional reach in the contiguous zone, it is part of the EEZ and the navigational freedoms which exist on the high seas and the EEZ apply there as well.

In terms of jurisdiction, under Article 33(1) of the Law of the Sea Convention the contiguous zone grants a coastal State power over four types of activity:

In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

Were WMD destined to be imported into the coastal State for use in a terrorist attack, it would seem to fall clearly within the rubric of prevention of infringement of customs and possibly immigration laws and regulations under Article 33. The coastal State could therefore argue a right to stop, search, and seize was necessary to uphold its customs laws, and prevent the delivery of highly dangerous and undesirable materials to its territory.

A more difficult situation arises where the WMD are destined for another State. It would not be open to a coastal State to assert its customs laws were to be infringed by a passing vessel carrying WMD, as the vessel’s master might never have had any intention to enter the territorial sea of the coastal State. It would seem an unreasonable expansion of Article 33 to have it include not mere prevention of infringement of customs of the coastal State, but of other States as well. This is particularly the case given the freedom of navigation guaranteed for vessels in the contiguous zone, as a foreign flag vessel will have breached no law of the coastal State, and should be entitled to transit through the zone without interference.

Self-Defense and the Use of Force

Utilizing the PSI, based on application of the doctrine of self-defense and the use of force in international law raises a number of issues. Among these issues are whether the transfer of WMD might amount to a preparatory act to the use of force that might permit intervention by the PSI States, and whether the interdiction of suspected WMD vessels amounts to a use of force in the sense it is used in the
United Nations Charter. In order to explore these effectively, it is necessary to consider the doctrine of self-defense in international law, and the use of force.

Contemporary international law is predicated on the notion that the use of the force should be extremely limited, in an effort to promote international peace and security. One of the most significant changes to the international law surrounding armed conflict over the past 150 years has been the effective abolition of the right of States to use force against others in pursuance of their territorial or diplomatic aims. This restriction is explicitly restated in the United Nations Charter in Article 2(4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” This ban is only modified by the authorization to use force when approved by the Security Council under Chapter VII of the United Nations Charter in order to preserve international peace and security, or, with notification to the Security Council, in the exercise of a right of individual or collective self-defense under Article 51 of the Charter.\(^{38}\)

One issue for the PSI is whether interdictions of vessels constitute an unauthorized use of force. In stopping and searching a vessel, there may be the necessity to use force, in circumstances where the vessel refuses to heave to and its crew resists the boarding. If the flag State is not a PSI State, and has not given its consent to the boarding, it is likely that some degree of force will have to be used to take control of and search the suspect vessel.

However, it is important to note that the prohibition on the use of force contained in Article 2(4) of the Charter is not a blanket restriction on the use of force, but rather is a prohibition of the use of force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” Clearly the PSI does not infringe the territorial integrity of a State, unless the ship was considered part of its territory, which in this context would seem inappropriate. Even if a State can exercise prescriptive and enforcement jurisdiction over its vessels on the high seas, it cannot exercise its enforcement jurisdiction within the territorial sea of another State. The ship can hardly be said to be integral to the territory of its flag State, if the State cannot undertake efforts to enforce its law in certain locations. Similarly, the political independence of a State is unlikely to be threatened by unusual instances of vessels being stopped and boarded in the territorial sea of another State.

The key issue is whether such a boarding would be inconsistent with the Purposes of the United Nations. Certainly the United Nations is dedicated to the maintenance of international peace and security, and this is not inconsistent with the stated aims of the PSI. This is underscored by the fact that the Security Council
has considered the PSI and has adopted Resolution 1540, which supports some aspects of its operation. What is needed is a careful and considered approach to the issue of boardings pursuant to the PSI to ensure there is never any question that they are being undertaken in a fashion that would run afoul of the principles of the United Nations.

If force can be used, there is also a requirement it be in proportion to the interference with the sovereignty of the State concerned.\textsuperscript{39} This concept finds support in the\textit{ Caroline Principles},\textsuperscript{40} and also has been used by the International Court of Justice: “[T]here is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”\textsuperscript{41}

In the case of the PSI, it is submitted the level of force used is relatively slight. A ship after it has been boarded and searched, can be permitted to continue on its way,\textsuperscript{42} and if wrongfully detained, be the subject of a compensation claim by the flag State against the detaining State. In proportion to the potential harm of an attack which WMD would cause, the interference with the flag State is minimal.

\textbf{Anticipatory Self-Defense}

The controversial doctrine of anticipatory self-defense is also potentially of application. The doctrine is based on the notion that the use of WMD leads to such destructive consequences for the State liable to imminent attack, that it ought to be able to utilize conventional weapons to remove the threat. Waiting until an actual attack may effectively be too late, as the State attacked might be largely destroyed or have millions of its citizens killed. In response, a small-scale conventional attack to remove the threat, it can be argued, is a reasonable compromise.

The response to this notion is that it is predicated on the imminent attack of one State on another, an event that may never occur. The possession of weaponry and a climate of international tension do not necessarily demonstrate an intention to launch a hostile and devastating attack in the near future.\textsuperscript{43} Further, the use of anticipatory self-defense would not seem to advance international peace and security, as it uses the suspicion of an imminent attack, rather than the reality of such an attack, as the justification for the use of force. There does not appear to be any support for the concept directly within the United Nations Charter.\textsuperscript{44}

Anticipatory self-defense is supported by relatively few States in international law, and there are few instances of State practice relying upon it, at least since the end of World War II.\textsuperscript{45} One of the more direct examples of it came on June 7, 1981, with the Israeli attack upon the Iraqi nuclear facility at Osirak, outside of Baghdad. Israel had argued that the facility would have given Iraq the ability to manufacture nuclear weapons in the near future, and it was the most likely target for the use of
such weapons.\textsuperscript{46} Most of the international community rejected Israel’s position, including a large number of the PSI States,\textsuperscript{47} and there has been no change in this viewpoint evident in the international community since 1988. Concerns that the doctrine was too fluid with difficulties of what might be judged as imminent,\textsuperscript{48} harmful to world peace in potentially authorizing unprovoked attacks on States suspected of having WMD they might wish to use, and capable of misapplication by States seeking an excuse to attack their neighbors are cited for the lack of any rise in support for anticipatory self-defense.\textsuperscript{49} While academic opinion on the issue is divided, there is a not insubstantial volume of scholarship against the validity of the doctrine.\textsuperscript{50}

In theory, the doctrine of anticipatory self-defense could be adapted to the interdiction of vessels. A PSI State could argue that the shipping of WMD to a terrorist organization would lead to attack by that terrorist organization on the PSI State or its allies, and therefore stopping and boarding suspect vessels and removing WMD would be incidental to aiding in the defense of that State from an imminent attack, albeit at some undefined point of time in the future, and not necessarily on the State itself.

It is submitted that such an argument would not be acceptable to the bulk of the international community, including most of the PSI States. The uncertainty as to the date and location of a terrorist attack would make it difficult to meet the requirement of the imminent nature of the threat. The international repugnance surrounding the doctrine of anticipatory self-defense would be sufficient to ensure that none of the PSI States would seek to use it to justify their PSI activities, if any other ground was available.

Necessity
One approach to the PSI that could be used to justify interdiction of vessels is the doctrine of necessity. Necessity has been the subject of consideration by international legal scholars for some decades, and is neatly dealt with in the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 25 of the Draft Articles provides that an otherwise unlawful act of a State can be justified if it meets two criteria: (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act does not seriously impair an essential interest of the State towards which the obligation existed.\textsuperscript{51} This principle has more than just the imprimatur of the International Law Commission to support its status within public international law. The identical predecessor of Article 25, Article 33 of the Draft Articles on State Responsibility,\textsuperscript{52} was cited with approval by the International Court of
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Justice in the *Gabcíkovo-Nagymaros Project* case, and was itself cited with approval by the International Tribunal for the Law of the Sea in *M/V Saiga (No. 2)*.

When applied to the PSI, necessity can provide a justification for actions that might otherwise be unlawful at international law. While it is clear that much of the PSI in relation to interdiction is valid, such as the interception of vessels flying the flag of a PSI State, or where there is a treaty between the flag State and the PSI States, such as between Liberia, Panama and the United States, some aspects of its operation may be problematic. The interception of a vessel, flagged in a third State, government operated and on a non-commercial charter, while exercising a right of innocent passage, is one example where the legality of the stop and search of a suspect vessel presents difficulties.

In such a situation, a PSI State could note that the only way to prevent the transit of WMD to a non-State actor would be to stop a vessel en route at sea in its waters, meeting the first of the criteria in Article 25. Certainly the possession of WMD by hostile terrorists would amount to a “grave and imminent peril” to the State. On the second criterion, provided the vessel was released and allowed to continue, albeit without its deadly cargo, the essential interests of the flag State would not be seriously impaired.

The PSI States have not shown much enthusiasm for utilizing necessity as a means to legitimize possible operations under the Initiative. This may be the case for a number of reasons. First, the Draft Articles remain contentious, and there might be a reluctance by some PSI States to show direct support for part of a document about which they have serious reservations. Second, to rely upon the concept of necessity would be a tacit admission that some contemplated actions under the PSI are unlawful. As the Initiative is designed to combat unlawful behavior, and is seeking to gain as much support from the international community as possible, it may not be politic for the PSI States to indicate that the PSI might in certain circumstances encompass unlawful action. This would be particularly the case for the United States, Britain and Australia, where the lawfulness of the intervention in Iraq by the “Coalition of the Willing” has become a major political issue, and the governments of those three States might be unwilling to highlight the lawfulness or otherwise of future measures in the global “war on terror.”

A present unwillingness to utilize arguments based on necessity would not necessarily preclude their use in the future to justify an interception. In the face of the aftermath of action against a third State vessel, where WMD had been found, the PSI States would seemingly have a strong argument that even if other justifications for interdiction had failed, necessity would cure the legitimacy of their action. Whether necessity would operate to provide such protection in the event WMD were not found is not so simple, as without WMD in the mix, it is difficult to
construct what the “grave and imminent peril” to the interest of the coastal State might be.

**Security Council Resolution 1540**

Another possible justification for the PSI might be derived from Security Council Resolution 1540. As already noted in the context of self-defense, one of the legitimate ways for a State to utilize force against another is through the adoption of a resolution by the Security Council, authorizing the use of force. The Council may make such a resolution pursuant to Chapter VII of the United Nations Charter, if it feels the application of force would assist in combating a threat to international peace and security.55

However, while the Security Council could pass a resolution seeking to search and detain vessels suspected of carrying WMD bound for non-State actors, as such vessels would clearly constitute a threat to international peace and security, it has not done so to the present point in time. Resolution 1540 extols States not to permit the transit of WMD to non-State actors, but it does not create any positive duty upon States to undertake interdiction of such vessels. Indeed, the resolution only goes so far as to authorize actions which are “consistent with international law.”56 The PSI States may contend that the Initiative is of itself lawful, and therefore is consistent with Resolution 1540, which appears to be the case, but it does not provide for an explicit authorization of interdiction that would otherwise be unlawful.

One additional point in relation to Security Council Resolution 1540 can be made. Were an unlawful interdiction to take place, and WMD discovered to be on board, even if the interdiction was unlawful, the presence of WMD would mean the flag State was in material breach of a Security Council resolution. While not advocating the adoption of two international wrongs making a right into the lexicon, one imagines that the issue of the interdiction would be regarded as secondary at the political level, in comparison to the tremendous risk to international peace and security posed by the shipment itself.

**Interaction of the PSI with the Law of the Sea Convention**

**Sovereign Immunity**

One great challenge to the operation of the PSI comes from the operation of the doctrine of sovereign immunity. The doctrine is one of great age and significance within the law of the sea, requiring that warships and government vessels on non-commercial service be considered inviolate at international law. A warship is exempt from the operation of law of a port State or coastal State, unless its commander voluntarily permits the application of such law. If the warship breaches the
law of a coastal State, no sanction can be imposed directly on it, nor can it be stopped or boarded. The only measure permitted is an order directing the immediate departure of the vessel from the territorial waters of the coastal State. Any harm it may have caused can only be the subject of international claim.

The rules with respect to sovereign immunity of vessels have their origins back in history well prior to the 20th century. An attempt at codification of the old rules took place in the 1920s, and led to the adoption of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships. Article 3(1) of that Convention provides that warships, State-owned vessels on non-commercial service, hospital ships, fleet auxiliaries, and other vessels are to receive immunity in respect of claims brought against them. Such protection is confirmed in the Law of the Sea Convention, which provides explicit protection for such vessels on the high seas in Articles 95 and 96, and in the context of the territorial sea in Part II, section 3(C). These provisions make it clear that only flag States have jurisdiction over sovereign immune vessels, and that in the event of the vessel breaching an applicable law of the coastal State, there is flag State responsibility for such breaches, but the only action permissible against the vessel itself is to require it to leave immediately.

Interference with a sovereign immune vessel, without the consent of the flag State, would amount to a clear breach of international law. For PSI States, this has the potential to be a serious problem. While it is unlikely that a State would ship WMD to non-State actors on a warship, there is a possibility of a State-owned vessel, on non-commercial service being used in such a fashion, particularly in the case of a communist State where most vessels will be State-owned. While the English courts have been prepared to look behind the activity a vessel is engaged in to determine its status, a third State actively engaged in supplying WMD to terrorists is likely to claim sovereign immune status.

It is submitted that the potential use of sovereign immune vessels to ship WMD to non-State actors represent the greatest challenge posed by the PSI to the law of the sea. Such vessels cannot, under international law, be interfered with by port States or coastal States without the consent of the flag State or the master. The PSI States will have a difficult decision to make in considering whether to act against such a vessel and thereby potentially undermine the status of their own naval vessels elsewhere in the world.

**Freedom of Navigation**

Of distinct concern is the impact of the PSI on security notifications. A number of States have asserted that prior to entry into their territorial waters, foreign flagged vessels are obliged to give notice of their passage. Most restrict this to foreign
warships, but some, notably North Korea, require it in the case of any foreign vessel. The reason most frequently cited for such action is that it is incidental to the security of the coastal State, and a transiting foreign warship passing close to the littoral State without prior warning represents a security threat. There is no authority in the Law of the Sea Convention to support such an interpretation.

For the maritime powers, this could set an awkward precedent. The PSI would be encouraging them to stop and search vessels that posed a security risk because of the possible presence of WMD on board. A similar description, from the point of view of China or North Korea could describe a US, British or French warship in their territorial waters. The warship might be carrying WMD, in the form of nuclear weapons, and may also be seen as a threat to the coastal State’s security. In comparison to stopping and searching the vessel, the requirement of a warning seems relatively modest, and in time, this may provide support to the security warning advocates. Such a result would not be a desirable one to the maritime powers, most of whom are PSI States.

In its present form, with the lack of a binding treaty, and the reiteration that it is consistent with international law, the PSI does not erode the position of the maritime powers with respect to security notification. Unless and until an actual interception, without some other ground based on flag or port State control, takes place and the maritime powers assert the legality of their actions, those States seeking security notification will remain without concrete action upon which to base their objections.

Military Exercises
The issue of military activities, including surveillance, in the exclusive economic zone (EEZ) of another State is one not directly dealt with in the Law of the Sea Convention. While the Convention makes it plain that military exercises and weapons testing in the territorial sea of a coastal State would be contrary to the regime of innocent passage, there is no equivalent restriction articulated with respect to other maritime zones. However, neither is there any specific authorization with respect to such activities, which are not included within the Article 87 of the Law of the Sea Convention list of freedoms.

The lack of direct reference to military activities is not fatal to the case for the conduct of such exercises in the EEZ of another State. The rights listed in Article 87(1) are by no means an exhaustive list, and are merely specifically enunciated examples. This is explicit in the use of the phrase “inter alia.” Further, the freedoms of the high seas are described as being subject to the conditions set down in the Convention and “other rules of international law.” The use of this language makes it
clear that the Law of the Sea Convention is not intended to be the only source of law in relation to the use of the high seas or EEZ.

If the case for freedom to undertake military exercises in another State’s EEZ can be made, it is clearly subject to some qualification. For this the crux of the issue will essentially turn on the meaning of the phrase “with due regard.” This qualification is applied to high seas freedoms generally in Article 87(2), and it would seem logical that one must have due regard to the rights of others while navigating through the EEZ.63

One issue that could be relevant in assessing the legitimacy of interdiction under the PSI in the contiguous zone relates to whether passage by a suspect vessel might constitute a threat to international peace and security, and therefore be illegitimate and capable of being intercepted. The Law of the Sea Convention provides limited assistance through Article 88 which provides: “The high seas shall be reserved for peaceful purposes.”

A wide reading of this provision would, in theory, see great limitation of the uses of warships on the high seas, and the potential circumscription on all military activities, particularly when read with the Preamble, which invokes the Convention’s role in the furtherance of peace and security in the world.64 suggesting only peaceful uses of the sea are permissible. By extension this could be drawn into the EEZ, as Article 58 adopts the high seas freedoms in the Convention, and explicitly includes Article 88 in this list.65 Similarly, the provisions with respect to marine scientific research under Part XIII of the Convention indicate that marine scientific research can only be undertaken for peaceful purposes.66 A case could be made that military activity from the high seas or another State’s EEZ were incompatible with the Law of the Sea Convention.

Such an interpretation has not been favored by many States or publicists.67 The San Remo Manual on Armed Conflicts at Sea, which sought to update and consolidate the law of armed conflict at sea, makes it clear that armed conflict at sea can take place on the high seas, and, in certain circumstances, in the EEZ of a neutral State.68 The Manual provides that belligerents must have due regard to the uses to which another State may wish to put its EEZ and avoid damage to the coastal State.

If the motivation for interception is international security, then an argument may be placed in the hands of those States that claim military exercises cannot legitimately take place in their EEZs. Such States have typically observed that foreign military activity prevents them from utilizing their EEZ and is a threat to the security of the sovereign rights they possess in the EEZ. If security concerns can override navigational rights under the PSI, these States may have a stronger case to argue that security and due regard are inconsistent, and that permission should be sought to exercise in the EEZ. This is particularly the case in so-called “security
zones” that may be attached to the contiguous zones of some States. These have been the subject of protest by the United States and other maritime States.  

Conclusion

The PSI represents a practical solution to the threats posed by the changed security environment since the 9/11 attacks. By virtue of the speed and manner of its introduction, it is yet to be structured into formally binding obligations within international law. Were it to be implemented, to the full extent indicated in its interdiction principles, it could be justified, albeit not without difficulty under international law. However, the implications of that justification would create challenges which the law of the sea would struggle to accommodate, and might create precedents which would undermine key principles the maritime powers would not wish to see damaged.

Notes

2. President Bush stated:
   When weapons of mass destruction or their components are in transit, we must have the means and the authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world’s most destructive weapons away from our shores and out of the hands of our common enemies.
3. Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the United States.
4. As of the date of this writing, the additional States are Canada, Denmark, Norway, Russia, Singapore and Turkey.
6. Paragraph 1 of the Statement of Interdiction Principles calls on all concerned States to:
   Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. “States or non-state actors of proliferation concern” generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through:
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(a) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or
(b) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.


7. Paragraph 2 of the Interdiction Principles calls on all concerned States to: “Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.” Id.

8. Paragraph 3 of the Interdiction Principles calls on all concerned States to: “Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments.” Id.


11. Liberia will also have the right to inspect United States flag vessels, but it is unlikely this right will be exercised.


13. This omission was at the request of China.


16. See Law of the Sea Convention, supra note 1, arts. 91 and 92.
17. Id., art. 94.
18. A shipowner could also direct a vessel that it heave to, be boarded and to proceed to a designated port, providing the flag state did not object, as was the case with the BBC China. For the facts surrounding the interception and boarding of the BBC China, see Mark Esper & Charles Allen, The PSI: Taking Action Against WMD Proliferation, 10 THE MONITOR 4, 6 (Spring 2004). See also discussion at Michael Byers, Policing the High Seas: The Proliferation Security Initiative, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526, 529 (2004).
19. If a port were not already within the internal waters of a State, by virtue of being in a closed bay or river, the Law of the Sea Convention allows areas associated with ports to be enclosed by territorial sea baselines. Article 11 provides that harbor works and other areas “forming an integral part of the harbor system” may be enclosed, while Article 12 explicitly permits the enclosure of roadsteads.
32. Law of the Sea Convention, supra note 1, art. 25(3).
33. Article 19(2) of the Law of Sea Convention also provides, inter alia:
   Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
   (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.
35. Law of the Sea Convention, supra note 1, art. 27(1).
36. Articles 39 and 42 of the Law of the Sea Convention apply to transit passage. For archipelagic sea lanes passage, Article 54 provides: "Articles 39, 40, 42 and 44 apply mutatis mutandis to archipelagic sea lanes passage."
37. Immigration laws might pertain to a situation where terrorists accompanied the WMD aboard the ship.
38. Article 51 of the Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

40. See the discussion in Robert Y. Jennings, The Caroline and McLeod Cases, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (1938).
42. This occurred with the detaining and subsequent release of a North Korean vessel carrying missiles bound for Yemen. After it was clear no treaty violation was taking place, and Yemen was procuring the weapons for its own defense, the vessel was allowed to continue by the detaining Spanish warships. See Van Dyke, supra note 22, at 25–27.
43. A number of eminent publicists have given qualified support to the concept of anticipatory self-defense in the context particularly of the imminent use of nuclear weapons against a State. See Christopher Greenwood, International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7, 14–15 (2003). See also THOMAS M. FRANCK, RECREO SE FORCE 102–107 (2002) and 1 OPPENHEIM’S INTERNATIONAL LAW 421 (Robert Jennings & Arthur Watts eds., 1994) who have argued that there is a right of anticipatory self-defense against an imminent armed attack. See also ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994).
46. See the statements by the Israeli Ambassador to the United Nations extracted in id. at 30.
47. See Security Council Resolution 487 of June 19, 1981. This resolution condemned the Israeli attack, and was adopted by the Council unanimously.
55. See supra p. 147 and note 33.
56. Operative paragraph 10 provides: “Further to counter that threat, calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.”
58. Law of the Sea Convention, supra note 1, art. 30.
59. The Philippine Admiral v Wallem Shipping (Hong Kong) Ltd [1977] AC 373.
60. Article 5 of the 1926 Brussels Convention, supra note 57, establishes a system whereby States can issue a certificate indicating the non-commercial status of the ship or cargo.
61. China, for example, has enacted legislation (Article 13 of the Law of the Territorial Sea and the Contiguous Zone of February 25, 1992) that asserts its authority to exercise jurisdiction over security within the contiguous zone, and to seek prior notification of entry therein. This is rejected by the United States as inconsistent with Article 33 of the Law of the Sea Convention, which has no reference to a security jurisdiction in respect of the contiguous zone. The 1992 US protest is cited in ANNOTATED SUPPLEMENT, supra note 39, at 108.
64. The Preamble states in part:

Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this

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Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.

66. Article 240, Law of the Sea Convention provides: “In the conduct of marine scientific research the following principles shall apply: (a) marine scientific research shall be conducted exclusively for peaceful purposes.”