

# 18. The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles

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## I. Introduction

On 9 December 2002 the Spanish frigate *Navarra* intercepted the freighter *So San* in international waters in the Arabian Sea. The freighter was registered in Cambodia, although sources differ as to whether or not the vessel was flying a Cambodian flag at the time of the interception.<sup>1</sup> On board the ship, underneath sacks of cement, the boarding party found hidden 15 short-range ballistic missiles of North Korean origin armed with conventional warheads and 23 containers of nitric acid, an oxidizer for rocket engines. The freighter was handed over to the US authorities and was escorted towards the US military base at Diego Garcia in the Indian Ocean for further investigation.<sup>2</sup> Soon thereafter Yemen sent a letter to the United States formally protesting against the interception of the *So San*. The Yemeni authorities declared that they were the intended recipients of the shipment, part of a long-standing order from North Korea, and demanded that the missiles be returned to Yemen.<sup>3</sup> This turn of events prompted a shift in focus on the interdiction of the freighter. Questions were raised as to the authority under which Spain and the USA had stopped, searched and seized the *So San*.

On 11 December 2002, the USA decided to release the freighter and allow it to proceed to Yemen with the ballistic missiles and nitric acid still on board. At a White House press briefing, a spokesperson gave the following explanation for the US decision: 'There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea. While there is authority to stop and search, in this instance *there is no clear authority to seize the shipment of Scud missiles* from North Korea to Yemen. And therefore, the merchant vessel is being released'.<sup>4</sup>

This about-face caused the USA considerable embarrassment and, furthermore, confounded the Spanish authorities, who apparently believed that the fact that the cargo manifest listed neither the ballistic missiles nor the nitric

<sup>1</sup> 'Spanish official details high seas drama', CNN.com, 11 Dec. 2002, URL <<http://www.cnn.com/2002/WORLD/europe/12/11/missile.ship.spain/index.html>>.

<sup>2</sup> *Keesing's Record of World Events*, vol. 48 (2002), p. 45139.

<sup>3</sup> 'Scud missiles are ours, says Yemen', CNN.com, 11 Dec. 2002, URL <<http://archives.cnn.com/2002/WORLD/asiapcf/east/12/11/scud.ship/>>; and 'Yemen protests over Scud seizure', BBC News World Edition, 11 Dec. 2002, URL <[http://news.bbc.co.uk/2/hi/middle\\_east/2566207.stm](http://news.bbc.co.uk/2/hi/middle_east/2566207.stm)>.

<sup>4</sup> Press Briefing by Ari Fleischer, The White House, Office of the Press Secretary, 11 Dec. 2002, URL <<http://www.whitehouse.gov/news/releases/2002/12/20021211-5.html>>. Emphasis added.

acid constituted a reason for holding the ship.<sup>5</sup> On 13 December 2002 the North Korean Ministry for Foreign Affairs issued a statement condemning the incident as an act of piracy.<sup>6</sup> The statement declared that the interdiction ‘had no legal ground’ and constituted ‘an unpardonable piracy that wantonly encroached upon the sovereignty of the DPRK’.<sup>7</sup> It also called on the USA to ‘apologize for its high-handed piracy committed against the DPRK’s trading ship and duly compensate for all the mental and material damage done to the ship and its crew’.<sup>8</sup>

The day before the US authorities decided to release the freighter, the White House had released the US National Strategy to Combat Weapons of Mass Destruction (WMD).<sup>9</sup> A significant aspect of this strategy was that, in contrast to more traditional non-proliferation efforts, it strongly emphasized counter-proliferation.<sup>10</sup> In particular, it highlighted that ‘effective interdiction is a critical part of the U.S. strategy to combat WMD and their delivery means’.<sup>11</sup> Given this clear policy statement, it was noteworthy that the White House had to admit the very next day not only that it lacked a clear legal authority to seize the missiles but also that there was no provision under international law prohibiting the delivery of such missiles. The *So San* incident seemed to demonstrate the limits of counter-proliferation policy in the light of existing international law. It thus provided an important impetus for the US authorities to formulate a policy response that would pave the way for more robust action against proliferators in future.<sup>12</sup>

Almost six months after the *So San* incident, on 31 May 2003, President George W. Bush announced a new multilateral initiative focusing on law enforcement cooperation for the interdiction and seizure of ‘illegal weapons or missile technologies’. This initiative became known as the Proliferation

<sup>5</sup> ‘Official: Spain perplexed by Scud decision’, CNN.com, 11 Dec. 2002, URL <<http://archives.cnn.com/2002/WORLD/europe/12/11/spain.ship.reax/>>.

<sup>6</sup> Korean Central News Agency (KCNA), ‘DPRK Foreign Ministry condemns U.S. piracy’, 13 Dec. 2002, URL <<http://www.kcna.co.jp/item/2002/200212/news12/14.htm#10>>. See also Kerr, P., ‘U.S. stops then releases shipment of N. Korean missiles’, *Arms Control Today*, vol. 33, no. 1 (Jan./Feb. 2003), p. 25, URL <[http://www.armscontrol.org/act/2003\\_01-02/yemen\\_janfeb03.asp](http://www.armscontrol.org/act/2003_01-02/yemen_janfeb03.asp)>.

<sup>7</sup> KCNA (note 6).

<sup>8</sup> KCNA (note 6).

<sup>9</sup> The White House, ‘National Strategy to Combat Weapons of Mass Destruction’, Washington, DC, Dec. 2002, URL <<http://www.state.gov/documents/organization/16092.pdf>>. See also Boese, W., ‘Bush Administration releases strategy on WMD threats’, *Arms Control Today*, vol. 33, no. 1 (Jan./Feb. 2003), p. 22, URL <[http://www.armscontrol.org/act/2003\\_01-02/wmdstrategy\\_janfeb03.asp](http://www.armscontrol.org/act/2003_01-02/wmdstrategy_janfeb03.asp)>.

<sup>10</sup> The current US focus on counter-proliferation activities (in the sense of anticipatory use of offensive military force in order to eliminate WMD capabilities) predates the 2002 National Strategy to Combat Weapons of Mass Destruction. For a conceptual discussion of the different meanings of the notion of counter-proliferation see, e.g., Müller, H. and Reiss, M., ‘Counterproliferation: putting new wine in old bottles’, ed. B. Roberts, *Weapons Proliferation in the 1990s* (MIT Press: Cambridge, Mass., 1995), pp. 139–50.

<sup>11</sup> The White House (note 9).

<sup>12</sup> Arms Control Association, ‘The new Proliferation Security Initiative: an interview with John Bolton’, Washington, DC, 4 Nov. 2003, URL <<http://www.armscontrol.org/aca/midmonth/November/Bolton.asp?print>>. See also Joyner, D. H., ‘The Proliferation Security Initiative and international law’, CITS Brief 1 (Center for International Trade and Security (CITS), University of Georgia, Atlanta, Ga., 22 June 2004), URL <[http://www.uga.edu/cits/documents/pdf/Briefs/CITSBrief\\_001.pdf](http://www.uga.edu/cits/documents/pdf/Briefs/CITSBrief_001.pdf)>; and Byers, M., ‘Policing the high seas: the Proliferation Security Initiative’, *American Journal of International Law*, vol. 98, no. 3 (July 2004), pp. 526–45, at p. 527.

Security Initiative (PSI).<sup>13</sup> Thus far, only a limited number of states participate in the ‘core group’ of this initiative, while a significant number of states have expressed support for the interdiction principles that have been developed within its framework. However, some states—notably China—have expressed concerns that the PSI may involve activities that do not conform with, or at least are not authorized by, the rules and principles of international law.<sup>14</sup> Scholars and other commentators have voiced similar concerns.<sup>15</sup>

Section II of this chapter describes the rather rapid development of the PSI during 2003 and 2004.<sup>16</sup> Section III analyses the PSI’s main output thus far—the Statement of Interdiction Principles (SOP), reproduced in appendix 18A. The task here is to compare the interdiction principles enshrined in the SOP with rules and principles of international law on enforcement jurisdiction at sea, in the air and on land, in order to discuss possible contradictions between the SOP and international law. State jurisdiction is a complex legal matter, however, and this chapter outlines only the main rules and principles.

One of the PSI’s goals was to establish a new normative situation in order to avoid a repetition of the outcome of the *So San* incident. To assess whether this goal has been met, the legal impact of the PSI itself must be addressed. The chapter concludes with an assessment of the PSI and some final observations in section IV.

## II. Development of the Proliferation Security Initiative

On 31 May 2003 President Bush delivered a speech in Krakow, Poland, in which he declared that the ‘greatest threat to peace is the spread of nuclear, chemical and biological weapons’ and announced the Proliferation Security Initiative.<sup>17</sup>

When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight pro-

<sup>13</sup> For information and documents see the PSI Internet site of the US Department of State, Bureau of Nonproliferation, at URL <<http://www.state.gov/np/c10390.htm>>.

<sup>14</sup> See Ru’an, Y., ‘The PSI: Chinese thinking and concern’, *The Monitor*, vol. 10, no. 1 (spring 2004), p. 22; and Su Wei, ‘China’s views on PSI’, in ‘Countering the spread of weapons of mass destruction: the role of the Proliferation Security Initiative’, *Issues & Insights*, vol. 4, no. 5 (July 2004), p. 31.

<sup>15</sup> See *The Proliferation Security Initiative: The Legal Challenge*, Bipartisan Security Group Policy Brief (Bipartisan Security Group: Washington, DC, 2003), URL <[http://www.gsintstitute.org/gsi/pubs/09\\_03\\_psi\\_brief.pdf](http://www.gsintstitute.org/gsi/pubs/09_03_psi_brief.pdf)>; Persbo, A. ‘The Proliferation Security Initiative: dead in the water or steaming ahead?’, *BASIC Notes*, 12 Dec. 2003, URL <<http://www.basicint.org/pubs/Notes/BN031212.htm>>; and Persbo, A. and Davis, I., *Sailing into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea*, BASIC Research Report 2004.2 (BASIC: London/Washington, DC, June 2004), URL <<http://www.basicint.org/pubs/Research/04PSI.htm>>.

<sup>16</sup> See Anthony, I., ‘Major trends in arms control and non-proliferation’, *SIPRI Yearbook 2004: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2004), pp. 575–601, for a description of activities in 2003.

<sup>17</sup> The White House, Office of the Press Secretary, ‘Remarks by the President to the people of Poland’, Krakow, Poland, 31 May 2003, URL <<http://www.whitehouse.gov/news/releases/2003/05/print/20030531-3.html>>.

liferation 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.<sup>18</sup>

The *goal* of the initiative was to acquire the 'means and authority' to seize illegal WMD, missiles and components in transit. The *means* to achieve this goal would be a series of 'new agreements', initially to be worked out by the USA and some close allies but later to be opened for participation on a broad basis. The proposal thus acknowledged that the necessary means and authorities had yet to be developed. The proposal was ambiguous in that it did not define the terms 'suspect cargo' or 'illegal weapons and missile technologies'. Furthermore, the geographical scope was ambiguous: could such goods and technologies be seized wherever they are in transit?

The first PSI meeting at the policy level took place in Madrid on 12 June 2003. At this meeting a 'core group' of 11 countries discussed more active measures to stop the flow of WMD and missiles to and from states and non-state actors of proliferation concern.<sup>19</sup> Practical recommendations on how to achieve this goal were minimal: the first meeting resulted in only the broad statement that the participants should 'assess existing national authorities under which such practical measures could be pursued, and . . . encourage the various export control regimes to take this initiative into account in strengthening the regimes'. The outcome of the Madrid meeting must therefore be seen as preliminary. The task of the participants was to assess the fulfilment of the initiative's goal under existing domestic legislation. Furthermore, the public documents from the meeting do not clarify how the participating states foresaw the continuation of the PSI.

The next phase in the development of the PSI was the meeting in Brisbane, Australia, on 10 July 2003. Noting the preliminary nature of the Madrid meeting, the Brisbane meeting built on its results and 'moved forward in translating the collective political commitment of PSI members into practical measures'.<sup>20</sup> The meeting focused on defining actions necessary to interdict shipments at sea, in the air and on land. Participants emphasized their willingness to take robust and creative steps to prevent trafficking in such items, while 'reiterating that actions taken would be consistent with existing domestic and international legal frameworks'. The meeting also stressed the importance of sharing information and agreed to 'strengthen and improve capabilities for the exchange of information and analysis between participants as a basis for cooperative action to impede WMD and missile trade'. Furthermore,

<sup>18</sup> The White House (note 17).

<sup>19</sup> Proliferation Security Initiative, 'Chairman's statement at the first meeting', Madrid, Spain, 12 June 2003, URL <<http://www.state.gov/t/np/rls/other/25382.htm>>. The core group countries were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the USA.

<sup>20</sup> Proliferation Security Initiative, 'Chairman's statement at the second meeting', Brisbane, Australia, 10 July 2003, URL <<http://www.state.gov/t/np/rls/other/25377.htm>>.

the participants agreed to organize interdiction exercises involving both military and civilian assets.

Perhaps in order to allay concerns about the PSI's relationship to other elements of the non-proliferation regimes, the Brisbane meeting expressed strong support for the 'strengthening of the existing framework of national laws and export controls, multilateral treaties and other tools which remain the international community's main means for preventing the spread of WMD and missiles'. It was also emphasized that the increasing ability of proliferators to circumvent or thwart existing non-proliferation mechanisms warranted 'new and stronger enforcement action by law-abiding nations'.<sup>21</sup>

The third PSI meeting was held in Paris on 3–4 September 2003. The chairman's statement notes that the PSI 'is an initiative to develop political commitments and practical cooperation to help impede and stop the flow of WMD . . . , their delivery systems, and related materials to and from states and non-State actors of proliferation concern'.<sup>22</sup> The substantial output from the Paris meeting was a Statement of Interdiction Principles that identified concrete actions to collectively or individually interdict shipments of WMD, their delivery systems and related materials (see section III below).

The fourth meeting, held in London on 9–10 October 2003, had been preceded by outreach activities with non-participants of the SOP. It was noted that the initiative had been 'well received. Over 50 non-participating countries had already expressed support for the Statement of Principles'.<sup>23</sup> The London meeting focused on participation in the PSI, described as 'a global initiative with an inclusive mission'. States recognized that, in order for interdiction to be effective, participation in the PSI had to be expanded. The question of establishing international authority for the initiative was also raised. The chairman's statement noted that the participants were considering some form of international recognition of their work: 'recalling the 1992 UN Security Council Presidential Declaration on the proliferation of WMD, the meeting noted the value of securing an expression of support in relevant international fora for greater international co-operation against trafficking in WMD, their delivery systems and related materials'. Finally, the participants agreed that, in the light of the rapid development of the PSI, the high-level meetings need not be held as frequently in the future.

The fifth PSI plenary meeting took place in Lisbon on 4–5 March 2004. Canada, Norway and Singapore had joined the initiative, bringing the total number of participants to 14.<sup>24</sup> President Bush had presented new measures to counter the threat of WMD in a speech at the National Defense University in

<sup>21</sup> Proliferation Security Initiative (note 20).

<sup>22</sup> Proliferation Security Initiative, 'Chairman's statement at the third meeting', Paris, 3–4 Sep. 2003, URL <<http://www.state.gov/t/np/rls/other/25425.htm>>.

<sup>23</sup> Proliferation Security Initiative, 'Chairman's statement at the fourth meeting', London, 9–10 Oct. 2003, URL <<http://www.state.gov/t/np/rls/other/25373.htm>>.

<sup>24</sup> Proliferation Security Initiative, 'Chairman's statement at the fifth meeting', Lisbon, 4–5 Mar. 2004, URL <<http://www.state.gov/t/np/rls/other/30960.htm>>.

Washington, DC on 11 February 2004.<sup>25</sup> He proposed that the PSI should not focus only on shipments and transfers: 'PSI participants and other willing nations should use Interpol and all other means to bring to justice those who traffic in deadly weapons, to shut down their labs, to seize their materials, to freeze their assets'. This proposal received general support among the core group at the Lisbon meeting: they pledged to cooperate in 'preventing WMD proliferation facilitators (i.e. individuals, companies, and other entities) from engaging in this deadly trade. . . . Participants agreed to pursue greater cooperation through military and intelligence services and law enforcement to shut down proliferation facilitators and bring them to justice'.<sup>26</sup> More specifically, PSI participants agreed to begin examining the steps necessary for this expanded role. As of the end of December 2004, this work had not yet resulted in any tangible result similar to the SOP.

The question of widening international support for the PSI and the SOP was also raised at the Lisbon meeting. Participants agreed that it was essential to continue broadening international consensus in favour of the non-proliferation of WMD, their delivery systems and related materials. It was also deemed essential to widen the 'international political and operational support for PSI aims and actions'. Apart from outreach activities, it was recognized that this could be achieved by 'concluding bilateral agreements with interested States, notably in view of obtaining their consent for expeditious procedures for the boarding of vessels flying their flag, as required'.<sup>27</sup>

The Lisbon meeting also outlined in more detail the practical steps to be taken in order to lay the foundation for involvement in PSI activities. Prospective participants should: (a) formally commit to and publicly endorse the PSI and the SOP and indicate their willingness to take all available steps to support PSI efforts; (b) undertake a review and provide information on current national legal authorities to undertake interdictions at sea, in the air or on land and indicate their willingness to strengthen authorities where appropriate; (c) identify specific national assets that might contribute to PSI efforts (e.g., information sharing and military and/or law enforcement assets); (d) provide points of contact for PSI interdiction requests and other operational activities and establish appropriate internal government processes to coordinate PSI response efforts; (e) be willing to actively participate in PSI interdiction training exercises and actual operations as opportunities arise; and (f) be willing to consider signing relevant agreements (e.g., boarding agreements) or otherwise establish a concrete basis for cooperation with PSI efforts (e.g., memoranda of understanding on overflight denial).

Regarding the development of the initiative, the participants noted that the PSI had become 'operationally active' and that it had established itself as a 'crucial instrument to respond effectively to some of the most serious security

<sup>25</sup> The White House, Office of the Press Secretary, 'President announces new measures to counter the threat of WMD', 11 Feb. 2004, URL <<http://www.whitehouse.gov/news/releases/2004/02/print/20040211-4.html>>.

<sup>26</sup> Proliferation Security Initiative (note 24).

<sup>27</sup> Proliferation Security Initiative (note 24).

challenges of the XXI century'. As for its future, participants noted that 'the main lines of the PSI are now well established and that several directions of action can be pursued separately but still in a mutually reinforcing mode'.<sup>28</sup>

The meeting to mark the first anniversary of the PSI was held in Krakow on 31 May–1 June 2004, with representatives from over 60 countries.<sup>29</sup> The main purpose of the meeting was apparently to demonstrate the international support that the initiative had received over the past year, and the main development was the announcement on 31 May that Russia was to become a member of the 'core group'.<sup>30</sup> Like China, Russia had previously raised concerns about the legality of the interdiction measures envisaged under the PSI. A press statement issued by the Russian Ministry for Foreign Affairs noted that '[t]he Russian side intends to make its contribution to implementing the PSI with consideration for the compatibility of the actions with the rules of international law, for their conformance to national legislation and for the commonality of non-proliferation interests with the partners'.<sup>31</sup> The adoption of UN Security Council Resolution 1540 in April 2004 was also reflected in the chairman's statement, which noted that the PSI was consistent with the resolution's call for all states 'to take cooperative actions to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials'.<sup>32</sup>

In addition to these policy-level meetings, PSI participating states have held nine so-called Operational Experts Meetings, dealing *inter alia* with the planning of interdiction training exercises.<sup>33</sup> As of 31 December 2004, the participating states had held 13 interdiction exercises, of which seven were devoted to maritime interdiction. Two of the exercises involved interdiction of WMD and related goods on land, and three (including a so-called table-top exercise) involved the interdiction of aircraft. If the pattern of exercises is any indication of the intended activities, it is that the PSI is focusing primarily on maritime interdictions and giving less attention to interdictions on land and of aircraft in flight.

<sup>28</sup> Proliferation Security Initiative (note 24).

<sup>29</sup> Proliferation Security Initiative, 'Chairman's statement at the first anniversary Proliferation Security Initiative meeting', Krakow, Poland, 1 June 2004, URL <<http://www.state.gov/t/np/rls/other/33208.htm>>. See also *Cracow Initiative: Proceedings of the Conference*, First Anniversary Proliferation Security Initiative Meeting, Krakow, 31 May–1 June 2004 (Polish Ministry for Foreign Affairs: Warsaw, 2004).

<sup>30</sup> The number of 'founding members' of the PSI has risen from 11 to 17 countries, but 2 of these founding members (Denmark and Turkey) are apparently not considered to be 'core members' of the initiative. Squassoni, S., *Proliferation Security Initiative (PSI)*, (Library of Congress, Congressional Research Service: Washington, DC, 14 Jan. 2005), p. 2.

<sup>31</sup> 'Press release on Russia's participation in Proliferation Security Initiative (PSI)', No. 1224-31-05-2004, unofficial translation from Russian, Ministry of Foreign Affairs of the Russian Federation, Moscow, 1 June 2004, URL <<http://www.ln.mid.ru/bl.nsf/0/2e1470910be746b6c3256ea600359aef?OpenDocument>>.

<sup>32</sup> Proliferation Security Initiative (note 29). On US Security Council Resolution 1540, see also section III of this chapter and chapter 11 in this volume; the resolution is reproduced in appendix 11A.

<sup>33</sup> See US Department of State, Bureau of Nonproliferation, 'Calendar of events', URL <<http://www.state.gov/t/np/c12684.htm>>. See also the PSI Internet site maintained by the Canadian Government at URL <<http://www.proliferationsecurity.info>>.

Regarding actual interdictions, the PSI participants have adopted a policy of opacity. Participating states will not make public interdictions undertaken within the PSI framework.<sup>34</sup> One interdiction that has been credited to the cooperation within the PSI was the October 2003 seizure of uranium enrichment technology bound for Libya on board the *BBC China*. The *BBC China* was owned by a German shipping company and was flying a flag of convenience (Antigua and Barbuda). The British and US authorities suspected that it was carrying nuclear equipment to Libya. When the ship entered the Mediterranean Sea, the British and US authorities asked the German authorities for assistance. The German authorities asked the shipping company to voluntarily divert the vessel to an Italian port, where it was searched. The centrifuge equipment found on board was not listed on the ship's manifest and was subsequently confiscated.<sup>35</sup> No interdictions were reported in the public domain during 2004. In the light of this policy of opacity, it is difficult to make an independent assessment of the impact or success of the initiative.

### III. The Statement of Interdiction Principles

#### **State jurisdiction and the interdiction and seizure of weapons of mass destruction**

The purpose of the PSI is to establish the necessary authority to 'interdict' and 'seize' illegal WMD, missile technology and related materials when in transit on land, in the air or at sea to prevent them from falling into the hands of states, or non-state actors, of proliferation concern. The term 'interdiction' is normally used to describe the obstruction of an activity that should not be allowed to proceed, while 'seize' denotes the forcible taking into possession of items (typically in relation to a criminal act) that may be subject to confiscation. Interdiction, seizure and confiscation are acts of physical interference undertaken by the executive of a state, and the authority to undertake such measures should be assessed in relation to the rules and principles of international law pertaining to state jurisdiction. International law gives states the authority to exercise jurisdiction, but also sets limits on that authority.<sup>36</sup>

To assess a state's jurisdictional competences, it is important to take into account both the geographical location in which the physical interference takes place and the nationality of the interdicted vessel. The circumstances in which a state may seize and confiscate goods on a vessel with a different nationality are discussed below.

<sup>34</sup> Arms Control Association (note 12).

<sup>35</sup> See Persbo and Davis (note 15), p. 37.

<sup>36</sup> See, e.g., Brownlie, I., *Principles of Public International Law*, 4th edn (Clarendon Press: Oxford, 1990), pp. 298 ff; and Elsea, J. K., *Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft* (Library of Congress, Congressional Research Service: Washington, DC, 1 Oct. 2003).



*Land territory*

The authority of a state to exercise jurisdiction is strongest when it comes to its land territory. Few legal limits exist on a state's power to enact legislation that controls the import and export of weapons and dual-use goods. It may be necessary, however, to take account of existing international agreements governing trade (e.g., trade-related agreements on the movement of goods within the European Community).<sup>37</sup> Limits may also exist when it comes to the exercise of enforcement jurisdiction in the light of international agreements, for example, those on state and diplomatic immunity. In most situations, however, international law would not hinder the enactment and enforcement of laws and regulations on the interdiction and seizure of WMD-related goods on the land territory of a state.

There are many cases in which a state has seized goods and technologies destined for export but lacking the necessary licences. Often the domestic export control and customs legislation of a state stipulates that goods seized in such cases may be forfeited.

*Airspace*

Under the 1944 Convention on International Civil Aviation (Chicago Convention), a state possesses complete and exclusive sovereignty over the airspace above its land territory (which also includes the airspace over its territorial sea; Articles 1 and 2).<sup>38</sup> A *state-operated* aircraft enjoys immunity if it traverses the airspace of another state with prior approval from that state (Article 3:c). In contrast to the legal regime governing the territorial sea (see below), states do not have the right to 'innocent passage' through the airspace above another state. If a state receives a request for overflight and suspects that the state aircraft in question will carry prohibited goods, the state receiving the request may legally deny the overflight. The legal situation regarding *civil* aircraft is different. Non-scheduled flights have a right to fly into and transit a state without obtaining prior permission, but they must land if requested to do so by the territorial state. Scheduled air services are required to obtain special permission or other authorization from the territorial state. Such an authorization may include special terms defined by the territorial state.

There are also important limitations on the actions that may be taken against civilian aircraft. In 1984, after the downing of the South Korean KAL 007

<sup>37</sup> Examples of such international trade agreements are the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR), URL <[http://www.unece.org/trans/conventn/cmr\\_e.pdf](http://www.unece.org/trans/conventn/cmr_e.pdf)>; and the regional 1975 Customs Convention on the International Transport of Goods Under Cover of TIR ('Transports Internationaux Routiers') Carnets, URL <<http://www.unece.org/trans/bcf/tir/handbook/english/newtirhand/10.pdf>>.

<sup>38</sup> The Convention on International Civil Aviation was signed at Chicago on 7 Dec. 1944. See *United Nations Treaty Series*, vol. 15 (1948), p. 295, and URL <<http://www.iasl.mcgill.ca/airlaw/public/chicago/chicago1944a.pdf>>. The international carriage of goods by air is governed by the 1929 Warsaw Convention as subsequently amended. The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), signed at Warsaw on 12 Oct. 1929, URL <<http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html>>.

civilian aircraft by a Soviet warplane, the following amendment was made to the Chicago Convention: ‘every State must refrain from resorting to the use of weapons against civil aircraft in flight and . . . in case of interception, the lives of persons on board and the safety of aircraft must not be endangered’ (Article 3 *bis*).<sup>39</sup>

There is little information in the public domain on interdictions in flight of civilian aircraft suspected of carrying dual-use goods over the territory of states. For practical purposes, most seizures of dual-use goods destined to be transported by air would occur during customs procedures before the aircraft departs.

### *Water areas*

The international law of the sea contains important provisions on the exercise of state jurisdiction in water areas. While the law of the sea is codified in several international treaties, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) is the most comprehensive and modern instrument.<sup>40</sup>

When a foreign vessel enters the port of a state, it subjects itself to the territorial jurisdiction of that state. This signifies that the coastal state ‘is entitled to enforce its laws against the ship and those on board’.<sup>41</sup> State practice includes several interdictions that have been carried out by local authorities when merchant vessels have entered the ports of other states. Such interdictions have also resulted in the seizure of goods—often because the goods in question were not listed on the ship’s manifest.<sup>42</sup> One example of such an interdiction was the 1999 *Ku Wol San* incident, in which Indian authorities boarded and searched a North Korean freighter that had called at an Indian port. The authorities found on board ballistic missile-related goods and technologies that were apparently destined for Pakistan and were subsequently confiscated on the grounds that they had not been declared.<sup>43</sup> The Indian authorities later made clear that they would not have seized the goods if they

<sup>39</sup> The Protocol Relating to an Amendment to the Convention on International Civil Aviation was signed at Montreal on 10 May 1984 and entered into force on 1 Oct. 1998. As of 31 Dec. 2004, 128 states were party to the Protocol, including a majority of PSI participants but excluding the USA.

<sup>40</sup> The UN Convention on the Law of the Sea was opened for signature at Montego Bay, Jamaica, on 10 Dec. 1982 and entered into force on 16 Nov. 1994; it is reproduced in *The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations: New York, 1983) and at URL <<http://www.un.org/Depts/los/index.htm>>. A UN Conference on the Law of the Sea was held in Geneva in 1958: it resulted in the adoption of 4 conventions, among them the Convention on the Territorial Sea and the Contiguous Zone; and the Convention on the High Seas. UNCLOS reiterates much of these 2 conventions. The USA is not among the 147 parties to UNCLOS as of 5 Jan. 2005, but it ratified the 1958 conventions in 1961. However, the USA considers parts of UNCLOS to reflect customary international law of the sea; see *Department of State Bulletin* vol. 83, no. 2075 (1983), pp. 70–71.

<sup>41</sup> Churchill, R. R. and Lowe, A. V., *The Law of the Sea*, 2nd edn (Manchester University Press: Manchester, 1988), p. 54.

<sup>42</sup> The ship’s manifest should contain details on the complete cargo of the vessel. It should be produced when calling on a port and shown to custom authorities. See Schmitthoff, C. M., *Schmitthoff’s International Trade: The Law and Practice of International Trade*, 9th edn (Stevens & Sons: London, 1990), p. 543. See also the 1924 Convention for the Unification of Certain Rules Relating to Bills of Lading, as amended in 1968 (the ‘Hague–Visby Rules’), available at URL <<http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>>.

<sup>43</sup> Persbo and Davies (note 15), p. 28.

had been properly declared, as the mere transit of war material to another country would not be sufficient grounds for a seizure.<sup>44</sup>

The sovereignty of a coastal state extends beyond its land territory and internal waters to the 'territorial sea'. The breadth of the territorial sea should not exceed 12 nautical miles from the coastal state's base-lines. Within the territorial sea, however, ships from all states enjoy a right of 'innocent passage'—that is, continuous and expeditious navigation through the territorial sea to either traverse the sea without entering internal waters or to proceed to and from internal waters. So long as such passage remains innocent, there are important limitations on what action a coastal state may take against the vessel. A passage should be deemed to be innocent so long as it is not prejudicial to the peace and good order of the coastal state. UNCLOS defines the circumstances in which a passage should not be seen as innocent (Article 19): the list does not specifically include the transfer of WMD, their delivery systems or components thereof, so long as they are not intended to be used against the coastal state. In fact, the USA itself previously stated (in another context) that Article 19 contains an exhaustive list of activities that would render a passage not innocent and that the right to innocent passage may be exercised irrespective of the cargo or armament of a vessel.<sup>45</sup> The mere fact that a ship is carrying dangerous goods should not in itself be seen as a circumstance that would render the passage non-innocent (Article 23). UNCLOS acknowledges that a coastal state may adopt laws and regulations relating to innocent passage through the territorial sea, and it defines the subject matter of such domestic legislation (Article 21). However, this permitted legislation should pertain to either safety of navigation or to conservation of the sea's living resources, not to extraneous issues such as the non-proliferation of WMD. Furthermore, such legislation may not be discriminatory against the ships of any state or against ships carrying cargoes to, from or on behalf of any state (Article 24).

The general rule of UNCLOS is that a coastal state's criminal jurisdiction should not be exercised on board a foreign ship passing through the territorial sea if the state's intention is to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage. However, there are four exceptions to this general rule: (a) if the consequences of the crime extend to the coastal state; (b) if the crime disturbs the peace of the country or the good order of the territorial sea; (c) if assistance from local authorities has been requested by the ship's master or by a diplomatic or consular agent of the flag state; or (d) if such measures are necessary for the suppression of illicit trafficking in narcotics or psychotropic substances. Again, the authority in UNCLOS for the exercise of criminal jurisdiction is not designed for combating the illicit trafficking of WMD-

<sup>44</sup> Persbo and Davies (note 15).

<sup>45</sup> The US-Soviet Joint Statement, with attached uniform interpretation of rules of international law governing innocent passage, was signed at Jackson Hole, Wyo., on 23 Sep. 1989. See *International Legal Materials*, vol. 28 (1989), p. 1444.

related goods and technologies. The explicit provision on the suppression of illicit trafficking refers solely to narcotics or psychotropic substances.

Under Article 33 of UNCLOS, a coastal state may declare a 'contiguous zone' outside its territorial sea. Such a contiguous zone must not extend beyond 24 nautical miles from the baselines from which the territorial sea is measured. In such a zone, the coastal state is authorized to exercise control to: (a) prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and (b) punish infringements on such laws and regulations committed within its territory and territorial waters. The control to be exercised by the coastal state is first of all confined to the four types of laws and regulations defined, but also with a view to their application and enforcement within the territory or the territorial sea.<sup>46</sup> A coastal state is authorized to exercise enforcement jurisdiction only in relation to infringements committed within its territory or territorial waters. Hence, under the legal regime governing a contiguous zone, the coastal state may exercise preventative or protective control concerning customs regulations in order to prevent attempted infringements of its customs regulations within its territory or territorial sea. However, the authority may not be exercised when there is no attempted infringement of the state's customs regulations—for example, when a ship is traversing a contiguous zone in order to exercise its right to innocent passage in the territorial sea without discharging any goods.

The sea area beyond and adjacent to the territorial sea may, according to UNCLOS Article 55, be claimed by a coastal state as an 'exclusive economic zone' (EEZ). Such a zone shall not extend beyond 200 nautical miles from the baselines from which the territorial sea is measured. In an EEZ the coastal state has sovereign rights over natural resources. For navigation in such a zone, Article 58 declares that, in essence, the regime of freedom of navigation will apply. In other words, the jurisdictional competence accorded to a coastal state under the regime of EEZ does not apply to combating illicit trafficking in WMD and related goods.

All parts of the sea that are not included in the EEZ, the territorial sea or the internal waters of a state are part of the 'high seas'. Ships from all states enjoy several freedoms on the high seas. One is the 'freedom of navigation' (Article 87), expressed in the right for all states to sail ships flying their flag on the high seas (Article 90). A ship navigating the high seas should fly the flag of a state in order to demonstrate its nationality (Article 91). The general rule is that only the flag state may exercise legislative and enforcement jurisdiction on vessels flying its flag:<sup>47</sup> 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas' (Article 92). UNCLOS itself defines several such exceptional cases in which third states are entitled to exercise jurisdiction: piracy (Articles 100–107), unauthorized broadcasting (Article 109), the slave

<sup>46</sup> Jennings, R. and Watts, A. (eds), *Oppenheim's International Law*, vol. 1, *Peace*, 9th edn (Longman: London, 1996), p. 625.

<sup>47</sup> Churchill and Lowe (note 41), p. 168.

trade (Article 99) and illicit trafficking in narcotics or psychotropic substances (Article 108). These exceptions should be read in conjunction with Article 110, which gives warships the 'right of visit'. A warship which encounters a foreign ship (not enjoying immunity) on the high seas is not justified in boarding the ship unless there are reasonable grounds to suspect that the ship: (a) is engaged in piracy, (b) is engaged in the slave trade, (c) is engaged in unauthorized broadcasting, (d) is without nationality, or (e) although flying a foreign flag or refusing to show its flag, the ship is of the same nationality as the warship. These are defined exceptions to the general rule of exclusive flag state jurisdiction, and as such they should not be subject to wide interpretation. Trafficking in WMD and related goods does not fall within the scope of the recognized exceptions to the general rule.

Self-defence has also been cited as a legitimate justification for interfering with foreign ships on the high seas.<sup>48</sup> In the late 1950s and 1960s, on the basis of its right to self-defence under Article 51 of the United Nations Charter, France asserted its right to visit and search ships on the high seas that were suspected of carrying arms to Algeria. However, France's actions were strongly criticized by the flag states of the interdicted vessels.<sup>49</sup> Another example was the January 2002 interdiction by Israeli authorities of the freighter *Karine A* in the Red Sea.<sup>50</sup> The freighter was carrying significant quantities of conventional weapons, and Israel maintained that the cargo was destined for the Palestinian Authority. Israel argued that its action amounted to an exercise of self-defence against an imminent threat.<sup>51</sup> States have also invoked provisions of regional organizations in support of interdictions at sea, like the 1962 Cuban quarantine.<sup>52</sup>

Article 51 of the UN Charter gives states the right to use military force in self-defence 'if an armed attack occurs'. However, state practice has included cases in which states have used armed force outside the context of a direct response to an imminent threat—so-called 'anticipatory self-defence'.<sup>53</sup> The notion of anticipatory self-defence remains highly controversial, however, and the International Court of Justice (ICJ) has stressed that the right to use force in self-defence is limited by necessity.<sup>54</sup>

<sup>48</sup> Fidler, D. P., 'Weapons of mass destruction and international law', *ASIL Insights*, Feb. 2003, URL <<http://www.asil.org/insights/insigh97.htm>>.

<sup>49</sup> Churchill and Lowe (note 41), p. 174.

<sup>50</sup> Israel Defense Forces, 'A briefing following the seizure of *Karin A*, a Palestinian weapons ship', 19 Oct. 2004, URL <<http://www1.idf.il/DOVER/site/mainpage.asp?clr=1&sl=EN&id=7&docid=34484>>.

<sup>51</sup> Byers (note 12), p. 533.

<sup>52</sup> On the legal argument in support of the Cuban quarantine see Henkin, L., *How Nations Behave: Law and Foreign Policy*, 2nd edn (Columbia University Press: New York, 1979), p. 290.

<sup>53</sup> One prominent example with a direct bearing on WMD was the 1981 Israeli attack against the Osirak nuclear reactor in Iraq. Israel claimed that it had used force in order to prevent Iraq from acquiring plutonium for a nuclear weapon that would probably be used against it. However, the UN Security Council did not accept the Israeli argument and condemned the attack as a 'clear violation of the Charter of the United Nations and the norms of international conduct'. United Nations Security Council Resolution 487, 19 June 1981, URL <<http://www.un.org/Docs/scres/1981/scres81.htm>>.

<sup>54</sup> See International Court of Justice (ICJ), *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports 1986*, p. 14, para. 176; *Legality of the*

The right of visit on the basis of powers explicitly conferred by a treaty is also recognized as grounds for interference with a foreign vessel on the high seas (UNCLOS Article 110). State practice includes several examples of treaties—bilateral as well as multilateral—that confer on the parties the right of visit to ships of other flag states in order to uphold their material provisions. One multilateral example is Article 17 of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>55</sup> Another is Article 8:2 of the 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 UN Convention Against Transnational Organized Crime.<sup>56</sup> Treaties explicitly conferring the right of visit need not be multilateral. The USA has concluded several such agreements bilaterally with other states for the purpose of combating illicit trafficking in narcotics.<sup>57</sup>

### *Seizure and confiscation of goods*

Domestic legislation often includes provisions for the seizure and confiscation of goods that have been used in connection with a crime. Dual-use goods discovered in customs checks without proper licences are usually confiscated. Such measures undertaken against activities on a state's own territory, or vessels with its own nationality, would normally not raise questions from the perspective of international law. The seizure of goods carried on vessels of another nationality is a different matter, however. It is typically an international treaty that endows a state with the necessary authority to take action against foreign vessels outside its own territory.<sup>58</sup> Examples are found in international agreements on mutual legal assistance in relation to certain defined offences. One is the above-mentioned UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: the parties are obliged to adopt such measures as may be necessary in their domestic legislation to enable the confiscation of narcotic drugs and related materials and equipment (Article 5). They should also afford other parties the widest possible measure of mutual legal assistance, *inter alia* by seizing property under their jurisdiction that is

*Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 26, para. 41; and Gray, C., *International Law and the Use of Force* (Oxford University Press: Oxford, 2000), p. 106.

<sup>55</sup> The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed at Vienna on 20 Dec. 1988, is reproduced at URL <<http://www.incb.org/e/conv/1988/index.htm>>.

<sup>56</sup> The Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 UN Convention against Transnational Organized Crime, is reproduced in UN General Assembly Resolution A/RES/55/25, 8 Jan. 2001, Annex III.

<sup>57</sup> Byers (note 12), p. 538.

<sup>58</sup> The argument that the ballistic missiles on board the *So San* should have been seized as 'contraband' has been discarded by legal experts. See Kirgis, F. L., 'Boarding of North Korean vessel on the high seas', *ASIL Insights*, 12 Dec. 2002, URL <<http://www.asil.org/insights/insigh94.htm>>. Contraband is a concept under the law of naval warfare specifying which goods a state may interdict and seize if the goods are destined for territory belonging to or occupied by an enemy state. The concept of contraband is, however, inadequate in relation to the non-proliferation of WMD. First, it only applies to wartime situations and, second, the definition of contraband is hopelessly outdated. See 'Declaration Concerning the Laws of Naval War', London, 26 Feb. 1909, reprinted in Schindler, D. and Toman, J., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff: Dordrecht, 1988), p. 843. See also Doswald-Beck, L. (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press: Cambridge, 1995).

the object of a criminal investigation in another state party (Article 7). Similar provisions are found in the above-mentioned UN Convention Against Transnational Organized Crime: Article 12 states that the parties should adopt within their domestic legal systems such measures as may be necessary to enable the confiscation of ‘property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention’. The convention also provides for international cooperation on confiscation (Article 13). A common denominator in these two instances is that seizure and confiscation are identified as measures to be undertaken in accordance with domestic laws and procedures in relation to offences defined in multilateral instruments. What is the position of the formal instruments dealing with the non-proliferation of WMD—do they provide for mutual legal assistance, seizure and confiscation of WMD and related equipment?

The 1993 Chemical Weapons Convention (CWC) established a general obligation that the parties ‘shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations’ of the treaty (Article VII:2).<sup>59</sup> However, both the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT)<sup>60</sup> and the 1972 Biological and Toxin Weapons Convention (BTWC)<sup>61</sup> are silent on the matter of legal assistance. Furthermore, the shipment of goods and materials that may be used for the production of WMD (so-called ‘dual-use’ goods) is not necessarily a violation of the treaties in question. In fact, all three treaties provide for the right to transfer dual-use goods for peaceful purposes.

#### *Bilateral ship-boarding agreements*

The USA has concluded three bilateral agreements on cooperation to combat the proliferation of WMD: with Liberia,<sup>62</sup> the Marshall Islands<sup>63</sup> and Pan-

<sup>59</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction is reproduced in *International Legal Materials*, vol. 32 (1993), p. 800, and is available on the SIPRI Internet site at URL <[http://www.sipri.org/contents/cbwarfare/cbw\\_research\\_doc/cbw-resdoc.html](http://www.sipri.org/contents/cbwarfare/cbw_research_doc/cbw-resdoc.html)>. See also Yepes-Enriquez, R. and Tabassi, L., *Treaty Enforcement and International Cooperation in Criminal Matters: With Special Reference to the Organisation for the Prohibition of Chemical Weapons, Chemical Weapons Convention* (T. M. C. Asser Press: The Hague, 2002). For the parties to the CWC see annex A in this volume.

<sup>60</sup> The Treaty on the Non-proliferation of Nuclear Weapons is reproduced in *United Nations Treaty Series* vol. 729 (1970), p. 161, and is available at URL <<http://www.iaea.org/Publications/Documents/Treaties/npt.html>>. For the parties to the NPT see annex A in this volume.

<sup>61</sup> The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction is reproduced in *United Nations Treaty Series* vol. 1015 (1976), p. 163, and is available on the SIPRI Internet site at URL <[http://www.sipri.org/contents/cbwarfare/cbw\\_research\\_doc/cbw-resdoc.html](http://www.sipri.org/contents/cbwarfare/cbw_research_doc/cbw-resdoc.html)>. For the parties to the BTWC see annex A in this volume.

<sup>62</sup> The US–Liberian Agreement Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea was signed on 11 Feb. 2004 and entered into force on 9 Dec. 2004. See URL <<http://www.state.gov/tnp/trty/32403.htm>>.

<sup>63</sup> The US–Marshall Islands Agreement Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea was signed on 13 Aug. 2004 and entered into force on 24 Nov. 2004. See URL <<http://www.state.gov/tnp/trty/35237.htm>>.

ama.<sup>64</sup> The agreement with Panama is an amendment of the 2002 US–Panama Supplementary Arrangement on US Coast Guard Assistance.<sup>65</sup>

The agreements with Liberia and the Marshall Islands are almost identical in substance. They deal with the boarding in international waters of suspect vessels claiming the nationality of a party to the bilateral agreement. A party encountering a suspect vessel should request authority from the other party to: (a) confirm the claim of nationality of the suspect vessel, and (b) if the claim of nationality is confirmed, to board and search the vessel and, if evidence of WMD proliferation is found, detain the vessel, its crew and the goods. However, this is not an absolute right conferred under the agreements. The other party may decide to conduct the boarding and search of the vessel with its own personnel. It may also deny permission to board and search. Authorization may, however, be presumed if two hours (in the cases of the agreements with Liberia and Panama) or four hours (in the case of the Marshall Islands) have elapsed since receipt of the request to board and search was acknowledged. The agreements stipulate that the flag state has ‘the primary right to exercise jurisdiction over a detained vessel, cargo or other items and persons on board (including seizure, forfeiture, arrest and prosecution)’. The flag state may, however, waive this right. The boarding party is accorded the primary right to exercise jurisdiction in a contiguous zone, except in the case of ‘hot pursuit’ (i.e., a case in which a vessel involved in a crime committed in territorial waters is pursued into international waters). The agreements also state that they may be used as a model for agreements with third states (this presumably refers to other PSI participants).

In the spring of 2004 the USA put forward the Regional Maritime Security Initiative (RMSI) for South-East Asia (with a particular focus on the Malacca Strait) as an extension of the PSI. The initiative proposed the use of US special forces to police sea traffic in the strait. However, this initiative was not acceptable to Indonesia and Malaysia,<sup>66</sup> although it appears that the USA is still pursuing the idea of an RMSI in South-East Asia.

<sup>64</sup>The Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice was signed on 12 May 2004 and entered into force on 1 Dec. 2004. See URL <<http://www.state.gov/np/trty/32858.htm>>.

<sup>65</sup>The Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice was signed at Panama City, Panama, on 5 Feb. 2002 and entered into force on the same day. See URL <<http://www.state.gov/np/trty/32859.htm>>.

<sup>66</sup>Shie, T. R., ‘Ports in a storm?: the nexus between counterterrorism, counterproliferation, and maritime security in Southeast Asia’, *Issues & Insights*, vol. 4, no. 4 (June 2004), p. 23, URL <[http://www.csis.org/pacfor/issues/v04n04\\_pdf.pdf](http://www.csis.org/pacfor/issues/v04n04_pdf.pdf)>.



### **The substance of the Statement of Interdiction Principles**

The SOP constitutes the most concrete result of the PSI thus far in that it outlines the actions to be taken by the participants (see appendix 18A). The SOP notes that PSI participants ‘are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council’. The interdiction principles are thus based on a correspondence between the various national legal authorities of the PSI participating states and relevant international law and frameworks, including the UN Security Council. It may seem obvious that ‘relevant’ international law should be considered, but the modifier ‘relevant’ may be interpreted by outsiders as an indication that PSI participating states have reserved for themselves the authority to decide which international law may be deemed relevant for the interdiction of WMD. It goes without saying that such an assumption of interpretative powers in relation to multilateral frameworks could raise legitimate concerns among other states.

In the first paragraph of the SOP, the participants commit themselves to taking ‘effective measures’ to interdict trafficking in WMD, their delivery systems, and related materials to and from ‘states and non-state actors of proliferation concern’. ‘States of proliferation concern’ are not defined by the PSI states collectively. Rather, it is up to those ‘involved’ in the interdiction effort to determine which states are of concern. Furthermore, the formulation ‘to and from’ would seem to limit PSI activities to cases in which both the exporter and the recipient are entities ‘of proliferation concern’. However, since other provisions of the SOP contain the formulation ‘to or from’, it appears that this formulation is merely a drafting oversight. The material field of application of the SOP is also vague in that it does not provide a more specific definition of ‘WMD, their delivery systems, and related materials’.

More importantly, the definition of ‘states and non-state actors of proliferation concern’ does not take into consideration the treaty obligations of the entity in question—that is, the question of whether or not efforts to develop or acquire chemical, biological or nuclear weapons and their associated delivery systems would violate the entity’s international obligations. The ICJ has stated that, regarding limitations on the armaments of states, it is important to consider the limitations that states have accepted.<sup>67</sup> However, some states are not party to all the treaties relevant to arms limitations. Furthermore, while the non-proliferation obligations in these treaties prohibit the transfer of the weapons themselves, they do not prohibit the transfer of ‘related materials’ (i.e., dual-use goods). Rather, the opposite applies—the parties have the right

<sup>67</sup> See International Court of Justice (ICJ), *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports 1986*, p. 14, para. 269.

to participate in the widest possible sharing of such goods so long as they are intended for peaceful purposes.<sup>68</sup>

Paragraph 2 of the SOP focuses first on information exchanges on proliferation activities. The participants have agreed to adopt 'streamlined procedures' for the rapid exchange of such information and have committed themselves to protecting the confidential nature of this information when it is provided by other PSI participants. They will also 'dedicate appropriate resources and efforts' to interdiction operations and maximize coordination among themselves in interdiction efforts.

In paragraph 3 the participants commit themselves to reviewing and strengthening their 'relevant national legal authorities' where deemed necessary to accomplish the goals of the PSI. They have assumed a similar commitment to work to strengthen, where deemed necessary, 'relevant international law and frameworks in appropriate ways' to support the SOP commitments. The level of commitment is therefore relatively low. The participants should first review their national legal authorities—and if these are found to be wanting, they are committed merely to 'working' to strengthen them. In other words, the SOP includes no clear obligation to produce a tangible result. This also applies to the development of international law. It is noteworthy that the participants have committed themselves to work for the strengthening of international legal frameworks 'in appropriate ways'—which must be understood to mean that amendments should be in accordance with the procedures prescribed by international law.

Paragraph 4 is more specific, outlining specific action to be taken in support of interdiction efforts regarding 'cargoes of WMD, their delivery systems or related materials'. However, it includes an important qualification: specific actions are to be taken 'to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks'. This formulation is important for two reasons: first, no new authority is envisaged under domestic or international law; and second, the subjection of the activities to pre-existing domestic legislation is used here, as in other cases, to indicate that there is no intent for the commitments to become legally binding under international law.

In subparagraph 4:a the participants commit themselves 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'. This commitment should not be difficult for the participating governments to implement, since they are under no obligation to facilitate or participate in such transports. However, the participants also commit themselves to preventing any persons subject to their jurisdiction from doing so. Such a prohibition on individuals would normally be implemented by domestic legislation binding on subjects under the national legal system. The potential problem here is that the related materials are not adequately defined. While WMD and delivery systems can be defined in general terms, the same

<sup>68</sup> See Article IV of the NPT, Article X of the BTWC and Article XI of the CWC.

does not apply for ‘related materials’.<sup>69</sup> Given the relatively large number of goods and technologies that may have implications for the manufacture of WMD, and the manifest dual-use nature of several of these, an effective prohibition on transport by individuals requires more precision. One way to resolve this issue would be to base domestic legislation on the lists of dual-use goods developed within the framework of multilateral export control regimes such as the Australia Group, the Missile Technology Control Regime and the Nuclear Suppliers Group.<sup>70</sup> However, it must be borne in mind that these lists were developed with a different purpose—to control exports, not to prohibit them.

Subparagraph 4:b commits the participants, at their own initiative or at the request and good cause shown by another state, to take action to ‘board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified’. The commitment accurately reflects what is to be seen as the present state of international law under UNCLOS. It focuses on the flag state as the country taking the action against the suspected vessel and therefore follows the legal principle of flag state jurisdiction. The commitment does not add anything to the present legal situation.

A common factor between the SOP and the present state of international law under UNCLOS is also evident in subparagraph 4:c. Under this provision, each participant should ‘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’. The boarding and searching of another participant’s vessel are contingent on that participant’s prior consent, however. As noted above, UNCLOS provides for an extension of the right of visit by means of a treaty conferring such powers (Article 110). The SOP does not in itself qualify as an instrument that confers a right of visit to other participants: first, the participants commit themselves only to ‘seriously considering’ such an act; and second, as apparent from the discussion below, the SOP hardly qualifies in itself as the legal transaction (i.e., a treaty) that UNCLOS requires.

Subparagraph 4:d gives rise to more legal questions. Unlike the previous two subparagraphs, this provision does not address a situation in which a state undertakes enforcement measures against vessels carrying its own flag or a case in which the flag state has given prior approval to board and search the

<sup>69</sup> In this context it should also be noted that this issue would also arise in relation to the national implementation of UN Security Council 1540, which provides the following general definition of ‘related materials’: ‘materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery’. See appendix 18A.

<sup>70</sup> The control lists of the export control regimes are available on the SIPRI Internet site at URL <<http://www.sipri.org/contents/expcon/expcon.html>>; see also chapter 17 in this volume.

vessel. The provision also bundles together three distinct geographical areas with equally distinct legal regimes. The use of the qualification 'appropriate' is important, as it must be interpreted as 'appropriate' under both domestic and international legal authorities. As noted above, a vessel that enters the internal waters of a state and is not entitled to immunity subjects itself to the enforcement jurisdiction of the coastal state: that state may board and search the vessel and seize goods that are being smuggled into the country. Such actions would typically not raise questions in relation to the law of the sea. This is not the case, however, in the territorial sea, where there are limits on what actions a state may take against a vessel exercising its right to innocent passage. Limits also exist on what actions a coastal state may take in a contiguous zone. It is significant that the provision does not refer to interdictions on the high seas. This could be interpreted as an indication that the PSI participating states have realized that, at present, the legal authority for such measures in a non-cooperative setting is simply too weak.

Subparagraph 4:e deals with interdiction of aircraft. PSI participants should at their own initiative or on the request and good cause shown by another state require aircraft to land for inspection if they are reasonably suspected of carrying cargoes of WMD, their delivery systems or related materials to or from states or non-state actors of proliferation concern and that are transiting their airspace. States should then seize any such cargoes that are identified. Alternatively, PSI participating states could deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

The final subparagraph deals with trans-shipments of WMD, their delivery systems or related materials to or from countries of proliferation concern. If a PSI participant has ports or airfields that are used as trans-shipment points for shipments of such cargoes to or from states or non-state actors of proliferation concern, it must inspect vessels reasonably suspected of carrying such cargoes and seize such cargoes that are identified.

Overall, the SOP complies with the current state of international law as reflected in multilateral instruments. However, it also contains interdiction principles whose application could come into conflict with the legal regime governing 'innocent passage' in the territorial sea as well as the limits on authority of a coastal state in the contiguous zone.

### **The legal status of the SOP and the question of legal authority**

The development of the PSI has brought to the fore the challenge of reconciling two interests that, at least *prima facie*, appear difficult to reconcile: the interest in taking robust and creative steps to prevent the proliferation of WMD (which would require changes and new developments in the existing rules and principles of international law); and the apparent preference of most concerned governments to take these measures within existing domestic and international legal frameworks (which, as exemplified by the *So San* incident,

might not support overly robust and creative steps). The process of developing the initiative seems to have resulted in a shift in emphasis—from the recognition of a need to change the law to a focus on what actions may legally be taken under existing international and domestic legislation. Because the issue of the legality of interdiction measures was raised at an early stage in the development of the PSI, the participants have devoted some effort to the question of what legal authority they have. The formal status of the PSI and the SOP should also be addressed: do they establish legally binding obligations under international law, or do they reflect a non-legally binding commitment?<sup>71</sup>

It has been recognized in international legal scholarship that not every agreement concluded between states should necessarily be considered binding under international law,<sup>72</sup> but less attention has been devoted to the question of how to differentiate non-legally binding agreements from treaties.<sup>73</sup> It should first be noted that the process of concluding legally binding agreements under international law is a markedly informal process. There are few requirements regarding the form of the act in order for it to have binding effects under the law of treaties. The conclusion of a treaty normally evinces a number of formal indicators of a legally binding undertaking, such as its existence in written form; its use of stringent language (formulating rights, obligations and entitlements); and the processes of signature, ratification and registration in national and multilateral treaty registers. However, many of these formal acts are technically not required for an agreement to be legally binding. The key aspect for the distinction between what is legally binding and what is not is the subjective intentions of the parties to enter into a legally binding relationship. While the language and the context of an ambiguous arrangement may be useful for assessing its normative status, the profound diversity of state practice renders it difficult to accord any of these elements a decisive importance. Thus, an external assessment of whether or not an ambiguous agreement amounts to a legally binding treaty is indeed a complicated task. It essentially requires knowing the subjective intentions of the parties—a task which cannot realistically be carried out—rather than an analysis of the formal appearance of the instrument that records the agreement.

There seems to be no specific statement from the participants in the ‘core group’ regarding the formal status of the PSI and the SOP. The status of the cooperation has generally been couched in startlingly vague terms. The PSI has been described by its participants as a ‘collective political commitment’ (at the Brisbane meeting) and as an ‘initiative to develop political commit-

<sup>71</sup> For a discussion of the distinction between legally and non-legally binding agreements in international cooperation generally, see Ahlström, C., *The Status of Multilateral Export Control Regimes: An Examination of Legal and Non-Legal Agreements in International Co-operation* (Iustus Förlag: Uppsala, 1999).

<sup>72</sup> See, e.g., Aust, A., *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge, 2000); and Shelton, D. (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press: Oxford, 2003).

<sup>73</sup> See Widdows, K., ‘What is an agreement in international law?’, *British Yearbook on International Law*, vol. 50 (1979), pp. 117–49.

ments' (at Paris).<sup>74</sup> It has also been said that the PSI 'is an activity, not an organization'.<sup>75</sup> A variation on this theme is that the 'PSI is not a formal institution, nor is it a treaty organization. It is a statement of purpose'.<sup>76</sup> The documentation from the various meetings at the political level has a distinct character of *punctationes*—it lists what the chairman deems to have been the main points of agreement during the meeting. There is nothing to indicate that the participants intended to accept the points as legally binding. Hence, the nature of the cooperation within the PSI may be described as informal and not based on a legally binding agreement.

Although the SOP is formulated along the lines of an agreement, its hortatory language and consistent use of 'commitments'—rather than 'obligations'—indicate that the PSI participants did not believe that they were setting out legally binding obligations for themselves in the document. The main reason why the PSI core group did not use legally binding agreements as the basis for its cooperation was probably that the participating states wanted to reach a quick resolution to their discussions. Negotiations on legally binding agreements often become time-consuming. The group may also have sought to avoid the delays involved in getting the imprimatur of their respective parliamentary bodies in cases where they shared treaty-making powers under constitutional law.

Despite the fact that the PSI core group has opted for informal cooperation, it has devoted significant attention to the legal framework for its activities. As noted above, the question of the legal authority for the group's engagement in interdiction arose early in the process of developing the initiative. The first attempt to argue for the existence of such authority fell somewhat short. The chairman's conclusions from the Paris meeting noted that:

the PSI is consistent with and a step in the implementation of the UN Security Council Presidential statement of 31 January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need to prevent proliferation. It is also in line with the Kananaskis and Evian G-8 Summit declarations as well as recent EU (European Union) statements, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials.<sup>77</sup>

While the 1992 UN Security Council presidential statement<sup>78</sup> carries significant *political* value, the *legal* impact of such a statement is limited, as it was not adopted in the form of a binding resolution under Chapter VII of the UN Charter. The fact that the PSI is in line with declarations of the Kananaskis and Evian summit meetings of the Group of Eight (G8) industri-

<sup>74</sup> See Proliferation Security Initiative (notes 20 and 22).

<sup>75</sup> US Department of State, 'Proliferation Security Initiative Frequently Asked Questions', Fact Sheet, Bureau of Nonproliferation, Washington DC, 11 Jan. 2005, URL <<http://www.state.gov/t/np/rls/fs/32725.htm>>.

<sup>76</sup> See URL <<http://www.proliferationsecurity.info/introduction.php>>.

<sup>77</sup> Proliferation Security Initiative (note 22).

<sup>78</sup> Note by the President of the UN Security Council, UN Security Council document S/23500, 31 Jan. 1992, reproduced in *International Legal Materials*, vol. 31 (1992), p. 762.

alized nations and with statements of the European Union does not provide much authority since, whatever legal significance such declarations and statements may carry, it would only apply in relation to the limited number of members of the G8 and the EU.

The question of international authority should also be seen in connection with developments within the UN. In his speech before the General Assembly on 23 September 2003, President Bush urged the Security Council to adopt a new 'anti-proliferation' resolution that would call on UN member states to criminalize the proliferation of WMD.<sup>79</sup> After seven months of negotiations, UN Security Council Resolution 1540 was adopted by consensus on 28 April 2004. The resolution was adopted under Chapter VII of the UN Charter—and is legally binding on the members of the organization (Article 25). It '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'.<sup>80</sup>

The USA had sought to include a formulation in the draft resolution that would have provided authority for the interdiction of suspect vessels. However, this proposal met resistance within the UN Security Council (notably from China) and was ultimately withdrawn in order to achieve consensus. As discussed above, the chairman's statement at the anniversary meeting in Krakow noted that the PSI is consistent with Resolution 1540. However, that resolution also clearly states that the cooperation must be 'in accordance with their national legal authorities and legislation and consistent with international law'. This signifies that Resolution 1540 does not provide any authority where none already exists under international law. It also implies that the PSI has not yet been endowed with any legal authority that would override the applicable international agreements.

In an effort to strengthen the legal authority for interdiction activities, the PSI participating states have also discussed proposed amendments to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).<sup>81</sup> The main purpose of the SUA Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships. The convention requires that the parties either extradite or prosecute alleged offenders. The proposed amendments aim to expand the SUA Convention by criminalizing the transport of WMD, their delivery systems and related materials on commercial vessels at sea and to provide a treaty-based right to board vessels suspected of involvement in such acts. However, objections have been raised regarding these proposed amendments: *inter alia*, that they are not specific enough; that they may hamper

<sup>79</sup> The White House, Office of the Press Secretary, 'President Bush addresses United Nations General Assembly', 23 Sep. 2003, URL <<http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>>.

<sup>80</sup> For the resolution see appendix 11A in this volume.

<sup>81</sup> The Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, was adopted by the International Maritime Organization (IMO) on 10 Mar. 1988 and entered into force on 1 Mar. 1992; the convention is reproduced in *International Legal Materials*, vol. 27 (1988), p. 668. See also the IMO Internet site at URL <<http://www.imo.org>>.

legitimate trade; and that the International Maritime Organization (IMO) is not the correct forum in which to discuss these matters.<sup>82</sup> Furthermore, the question of the relationship between an amended SUA Convention and UNCLOS has also been discussed, particularly the need to avoid infringing the principles contained in that treaty (e.g., on flag state jurisdiction and freedom of navigation).

The IMO will convene a diplomatic conference in 2005 to consider the adoption of two protocols incorporating amendments intended to strengthen the SUA Convention in response to the increasing risks posed to maritime navigation by international terrorism. Proposed amendments to the treaties in the revised draft Protocols include a substantial broadening of the range of offences (Article 3 *bis*) and the introduction of provisions for boarding vessels suspected of being involved in terrorist activities (Article 8 *bis*). The SUA amendments are intended to complement the 2004 International Ship and Port Facilities Security (ISPS) Code. The ISPS Code was signed in 2002 together with amendments to the 1974 International Convention for the Safety of Life at Sea (SOLAS).<sup>83</sup> The ISPS Code entered into force on 1 July 2004. The purpose of the Code is to provide a framework for the assessment of security risks to ships and to enhance maritime security.<sup>84</sup>

#### IV. Conclusions

This chapter shows that the law of the sea establishes important limitations on states' authority to exercise enforcement jurisdiction against vessels suspected of carrying WMD and related goods. This has been seen by some commentators as a serious defect in the law of the sea.<sup>85</sup> However, such criticism fails to acknowledge the fact that the legal rules and principles on 'innocent passage', 'flag-state jurisdiction' and 'freedom of navigation on the high seas' have evolved over hundreds of years in order to serve important interests that the international community considers legitimate and worthy of protection—primarily to facilitate interaction and trade between states and to avoid friction and conflict. Over the years, the law of the sea has been adapted to changed priorities. Today, the general rule of flag-state jurisdiction has yielded to the universal interest of combating the slave trade, piracy and drug

<sup>82</sup> See Cirincione, J., 'A new, effective non-proliferation strategy for the United States', Testimony before the Committee on International Relations, US House of Representatives, 30 Mar. 2004, URL <[http://www.house.gov/international\\_relations/108/ciri033004.htm](http://www.house.gov/international_relations/108/ciri033004.htm)>.

<sup>83</sup> The SOLAS convention entered into force on 25 May 1980; it is reproduced at URL <[http://www.imo.org/Conventions/contents.asp?topic\\_id=257&doc\\_id=647](http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647)>.

<sup>84</sup> The code is available on the IMO Internet site at URL <<http://www.imo.org>>.

<sup>85</sup> Lehrman concludes that 'international maritime law and its traditional interpretations have failed to provide a clear justification for interdicting foreign flag ships reasonably suspected of transporting WMD on the high seas. Traditional legal principles such as freedom of the seas and the right of innocent passage have created an environment in which rogue states and non-state actors face relatively few obstacles to the transport of WMD-related technology'. Lehrman, T. D., 'Rethinking interdiction: the future of the Proliferation Security Initiative', *Nonproliferation Review*, vol. 11, no. 2 (summer 2004), pp. 1–45, at p. 1.



trafficking. In future, the non-proliferation of WMD may also be added to this list.

The PSI participating states have tried to remedy their lack of legal authority by means of quick fixes (such as UN Security Council resolutions) or ‘out-flanking’, as in the case of amendments to conventions that do not directly deal with the fundamental rules and principles of the law of the sea (such as the SUA Convention). In order to gain legitimacy, however, the process should be more inclusive as regards participation.<sup>86</sup> Furthermore, the process should directly focus on the most relevant treaty—UNCLOS.

<sup>86</sup> The UN High-level Panel on Threats, Challenges and Change recommended that ‘all States should be encouraged to join this voluntary initiative’. United Nations High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the UN High-level Panel on Threats, Challenges and Change*, reproduced in UN General Assembly document A/59/565, 2 Dec. 2004, p. 43, and at URL <<http://www.un.org/secureworld/>>.

# Appendix 18A. The PSI Statement of Interdiction Principles

*Issued at Paris on 4 September 2003*

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

The PSI seeks to involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing non-proliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the following set of 'Interdiction Principles.'

## **Interdiction Principles for the Proliferation Security Initiative**

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

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. 'States or non-state actors of proliferation concern' generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (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.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.

3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments.

4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
- a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
  - b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas or areas beyond the territorial 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 transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

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*Source:* US Department of State, Bureau of Nonproliferation, Proliferation Security Initiative, at URL <<http://www.state.gov/t/np/c10390.htm>>.

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