

Legal Basis for State Interception of Shipments on High Seas: Legality of the Naval Interdiction under the “Proliferation Security Initiative”

By Sue Soo-ha Yang
Brooklyn Law School
October 1, 2003

I. Introduction

The Proliferation Security Initiative (“PSI”) was first announced by President Bush as a step towards new legal agreements authorizing the search of planes and ships carrying suspect cargo. Existing international law, however, does not allow States to stop vessels on the high seas or ground aircraft in international airspace. The U.S. and its ten allies have claimed that the PSI is legal under the general rights of self-defense under the UN Charter and the UN Security Council Presidential Statement of January 1992. Neither of these gives them the authority to interdict shipments on the high seas. Another argument for the legality of the PSI might be modification of international law through the development of customary international law. However, this argument is also unlikely to be convincing because customary international law comes from a state practice that is almost universally followed out of legal obligation; the PSI was declared by one State and subsequently adopted by its ten allies. For this reason, at least in the early stage, the legality of Proliferation Security Initiative is based primarily on the “inventive use of national laws.”¹

In order for the U.S. and the coalition to legally intercept shipments on the high seas, they need to have the UN Security Council adopt a new resolution on anti-proliferation measures or seek to establish customary international law through widely accepted international convention.

II. The Proliferation Security Initiative

¹ Greg Sheridan, "US 'free' to tackle N Korea," *The Australian*, July 9, 2003 cited in Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Matériel*, Monterey Institute of International Studies, July 16, 2003.

On May 31, 2003, in Krakow, Poland, President Bush announced the Proliferation Security Initiative. He announced that the PSI would be a step towards “new legal agreements authorizing the search of planes and ships carrying suspect cargo.”²

On June 4, 2003, U.S., John R. Bolton, Under Secretary for Arms Control and International Security, testified before the House International Relations Committee hearing about the PSI. He stated that adverse consequences of acquiring weapons of mass destruction must fall not only on the States aspiring to possess those weapons, but on the States supplying them as well. He said the U.S. and its allies would cooperate to interdict transfers of internationally restricted weapons and related technologies at sea, in the air, and on land. Although the U.S. has officially taken the position that the PSI is not aimed at any specific country, it designed the Initiative mainly to create a mechanism to prevent North Korea from exporting to other State or groups materials, such as plutonium, that are used in the production of nuclear weapons. In fact, Bolton, during the testimony, gave examples of two recent interdiction successes: the U.S. interception of aluminum tubes likely bound for North Korea’s nuclear weapons program and a French and German combined effort to intercept sodium Cyanide likely bound for North Korea’s chemical weapons program.³

Since the first announcement of the PSI, there have been three formal meetings of the international coalition, the first on June 12 in Madrid, Spain, the second on July 9-10 in Brisbane, Australia, and the third on September 3-4 in Paris, France. The next meeting is scheduled for October 9-10 in London, the United Kingdom.⁴

Participants in the meetings were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. These eleven countries formed a coalition and agreed to work together for the PSI.

² Mike Nartker, Global Security Newswire, June 2, 2003.

³ Global Security, Proliferation Security Initiative, at <http://www.globalsecurity.org/military/ops/psi.htm>.

⁴ NTL, Global Security Newswire, “Officials Plan International WMD Cargo Interdiction Exercise for Tomorrow,” Sept. 12, 2003.

On June 17, 2003, right after the first meeting, Secretary of State Colin Powell promoted the concepts of PSI at the ASEAN Meeting. He particularly emphasized that North Korean trafficking in narcotics and other illicit materials must be curbed.⁵ The ASEAN Regional Forum released a joint-statement that highlighted the problems associated with maritime smuggling. Although the statement did not specifically mention North Korea or weapons of mass destruction (“WMD”), it was thought that North Korea was a target of the Initiative.⁶

At the second meeting in Brisbane, Australia, the coalition reiterated its strong political support for the Initiative and underscored that the PSI is a global initiative with global reach.⁷ There, the governments agreed:

- to improve the sharing of information that will allow the effective interdiction of shipments of WMD or missiles and related items;
- to cooperate on a series of interdiction training exercises to take place as soon as practicable.
- to work to strengthen the existing framework of national laws and export controls, multilateral treaties, and other tools that help prevent the spread of weapons of mass destruction and missiles.⁸

On July 23, 2003, *USA Today* reported that the United States had reached an agreement with Japan, Australia, Britain, France, Germany, Italy, Poland, the Netherlands, Bulgaria, and Spain to intercept North Korean ships suspected of carrying narcotics or weapons material.⁹

The focus of the third Paris meeting was on the development of a statement of interdiction principles that would enable countries to work together better within domestic and international law to enhance and expand efforts to prevent the flow of WMD, missiles and related technologies to and from countries of concern.¹⁰ Subsequently, interdiction principles for the

⁵ *Supra.*, note 3.

⁶ *Ib.*

⁷ *Id.*

⁸ US Department of State International Information Program, 02 Sept, 2003, at <http://usinfo.state.gov/topical/pol/arms/03090204.htm>.

⁹ USA Today, “11 Nations Join Plan to Stop N. Korean Ships,” July 23, 2003.

¹⁰ *Supra.*, note 8.

PSI were released on September 4, 2003. These principles stated that that the coalition states would:

- Effectively interdict WMD, delivery systems and related materials to and from entities of proliferation concern.
- Exchange information rapidly on suspected proliferation actions, dedicate sufficient resources to the effort and maximize coordination with other interdiction participants.
- Strengthen national legal authorities as well as international laws and frameworks to accomplish interdictions.
- Take specific actions in support of interdiction efforts, including:
 - i. Forego transporting targeted cargoes or aiding in their transport.
 - ii. Take the initiative to board and search any vessel suspected of carrying targeted cargoes that is under their jurisdiction in another state's waters.
 - iii. Seriously consider allowing their own vessels to be boarded and searched by other states when targeted cargo is suspected.
 - iv. Take steps to board and search other states' vessels in a coalition state's territorial water and harbors.
 - v. Require aircraft suspected of carrying targeted cargoes in transit over their airspace to land for inspection and possible seizure of such cargoes – or deny such aircraft transit rights in advance.
 - vi. If their ports, airfields or other facilities are used to ship proliferant cargo to suspected proliferators, inspect the suspected cargo craft and seize such cargo.¹¹

The members of the coalition will meet again in London on October 9-10 to discuss several issues, including levels of support and participation and reaction to the interdiction principles agreed upon during the Paris meeting.¹²

¹¹ Global Security, "Text: White House Statement, Fact Sheet on Proliferation Security Initiative," September 5, 2003, at <http://www.globalsecurity.org/wmd/library/news/usa/2003/usa-030905-usia01a.htm>.

¹² "Proliferation Security Initiative: Paris Meeting, 2-3 September," The Hon. Alexander Downer, MP, Minister for Foreign Affairs, Australia, Media Release, at http://www.foreignminister.gov.au/releases/2003/fa111_03.html.

In tandem with the meetings of coalition governments, a series of 10 interdiction exercises have been scheduled to occur through early next year. The exercises will involve air, land and sea interdiction and will occur at various international locations.¹³ The first maritime interdiction exercise took place on the second weekend of September 2003. The exercise was called “Pacific Protector.” The scenario of the exercise involved a U.S. ship posing as a commercial Japanese flag vessel suspected of trafficking WMD-related material.¹⁴ The ship was tracked, boarded, and searched on the high seas by law enforcement and military participants. The U.S. Government, once again, announced that the interdiction exercises are not aimed at any specific country but is part of a broader vision to promote active measures to stop the flow of weapons of mass destruction, their delivery systems, and related measures to and from states and non-state actors of proliferation concern.¹⁵

III. State Interception on the “High Seas”

When President Bush initially announced the PSI, he intended the Initiative to be a step towards “new legal agreements authorizing the search of planes and ships carrying suspect cargo.” However, at least in the early stage of PSI, it is most likely that PSI operation will be limited to naval activities.¹⁶

Specifically in the case of North Korea, the country is almost surrounded by South Korean, Japanese, Russian, and Chinese airspace, and each of those four countries has an operation fighter interception capability. What is required here to stop or greatly impair North Korean aerial transport of WMD is agreement by China (principally) and other countries to close their airspace to such flights, rather than a multilateral initiative [the PSI].¹⁷

With regard to the naval interception, states have jurisdiction to prescribe law within their territorial water, which extend 12 nautical miles from the shoreline.¹⁸ This means that the state

¹³ *Supra.*, note 3.

¹⁴ “Pacific exercise simulates interdiction on the high seas,” 12 Sept. 2003, at <http://usinfo.state.gov>.

¹⁵ *Ib.*

¹⁶ “The Proliferation Security Initiative: Naval Interception Bush-Style,” CDI center for defense information, Arms Control & Disarmament, August 25, 2003.

¹⁷ *Id.*

¹⁸ Bipartisan Security Group, “The Proliferation Security Initiative: The Legal Challenge,” Policy Brief, September 2003.

can theoretically set rules for what constitutes illegal cargo in this area and when ships can be boarded.¹⁹ But, at the same time, states have long allowed ships a right of innocent passage through their waters. States recognized this right so widely that it became part of customary international law and is now codified in the Article 17, 18 and 19 of the Law of the Sea Convention. “Ships of all States ... enjoy the right of innocent passage through the territorial sea.”²⁰ “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.”²¹ Accordingly, it would be legally difficult for the allies to intercept suspect shipments in their territorial waters so long as the intention of passage is innocent.

The naval interception on the “high seas” would be more difficult because all states enjoy freedom of the seas, including freedom of overflight. Even the international coalition recognizes the problems associated with the naval interception plans on the high seas. For instance, after the Brisbane meeting, Australian Foreign Minister Alexander Downer said, “it was more likely that short-term efforts would be confined to PSI member states’ territorial waters.”²²

IV. Legal Basis for Interdiction on the High Seas under International Law

The PSI nations have repeatedly stated that they are committed to acting in a manner consistent with national legal authorities and international law.²³ They have also said, “legal authority is derived from existing laws and treaties, but we will work over time with our PSI partners to broaden the legal authorities as we see the need ...” However, it is not clear what legal basis the international coalition is relying on in support of their Initiative. They fail to clearly put forward the legal reasoning in support of the measures they intend to implement under the name of the PSI.

The following sub-sections analyze existing and possible arguments for the legality of the PSI.

¹⁹ *Id.*

²⁰ The United Nations Law of the Sea Convention, Article 17.

²¹ *Id.*, Article 19.

²² *Supra.*, note 16.

a. United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (“Law of the Sea”) preserves freedom over the high seas. Article 87 provides that the high seas are open to all states, thereby preserving freedom of navigation on the high seas. Article 89 states that no State may subject any part of the high seas to its sovereignty. Moreover, the Law of the Sea provides, in Article 90, that all States have the right to sail ships on the high seas. States are prohibited from exerting control over the vessels of other States on the high seas.²⁴

Although the Law of the Sea prohibits a select number of illegal activities, such as piracy and slave trade, it does not prohibit transit of WMD, which is a concern to the U.S. and the international coalition. Moreover, the Law does not give States the right to interdict such transit. Any interdiction outside those explicitly allowed for in the Law of the Sea clearly violates the freedom of navigation on the high seas.²⁵

Arguably, the Law of the Sea does not bind the U.S. or North Korea, since neither is a party to this Convention. However, the International Law of the Sea has developed into customary international law that binds even non-parties to the Convention. It is one of the most comprehensive and well-established conglomerations of international regulatory norms in existence, which is also buttressed by long standing formal legal agreements.²⁶

Even the international coalition acknowledges that, in general, existing international law does not allow state interdiction on the high seas. Foreign Minister of Australia Alexander Downer has recognized that there is a “very real difficulty in terms of vessels that might be going through the high seas because international law requires that those ships should not be intercepted.”²⁷

²³ *Supra.*, note 3.

²⁴ Joseph E. Kramek, “Bilateral Maritime Counter-drug and Immigrant Interdiction Agreements,” 31 U. Miami Inter-Am. L. Rev. 121.

²⁵ Devon Chaffee, “Freedom or Force on the High Seas?,” IALANA Newsletter, Oct. 2003.

²⁶ *Id.*

²⁷ *Id.*

b. General Right of Self-Defense under the United Nations Charter

After the first meeting of the 11 PSI States in Madrid, Under Secretary for Arms Control and International Security John R. Bolton stated that “there is broad agreement within the group that we have the authority” to begin interdictions on the high seas and in international airspace. The U.S. feels it has such authorization in three cases: 1) when ships do not display a nation’s flag, they effectively become pirate ships that can be seized; 2) when ships use a “flag of convenience” and the nation chosen gives the United States or its allies permission, the ships can be stopped and searched; and 3) when a serious belief that the vessels carry WMD material invokes a “general right of self-defense.”²⁸

The first two cases presented by Bolton recognize the legal limitations facing the U.S. When looked at from the opposite perspective, they express the proposition that if ships *do* display a nation’s flag, and if the flag nation *does not* give permission to the U.S. or its allies to stop and search the ship, there can be no interdiction on the high seas. This is why the U.S. puts more weight on the third case, the argument for self-defense. Michael Levi and Michael O’Hanlon stated in the *Financial Times*²⁹:

If the US knew that a given North Korean ship or aircraft was carrying plutonium outside the country, it would simply stop it, justifying the action as self-defense under Article 51 of the UN charter. Since North Korea has recently threatened to export plutonium, since it has a history of exporting weaponry to nasty customers and since the US has been attacked by a terrorist organization that has a stated desire for nuclear weapons, the legal and political cases would be solid.

Article 51 of the UN Charter states:

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

²⁸ Greg Sheridan, *supra.*, note 1.

²⁹ Financial Times, July 11, 2003.

any time such action as it deems necessary in order to maintain or restore international peace and security.
[Emphasis added.]

Although Levi and O’Hanlon rely on Article 51 of the UN Charter as their legal basis for interdiction in the case of North Korea’s suspected export of plutonium, the language of the Charter only allows an action of self-defense “*if an armed attack occurs.*” Strict reliance on the language of the Charter would counter or weaken the self-defense argument of the U.S.; exporting plutonium to another State or group is not equivalent to making an “*armed attack.*” Whether other circumstances, such as North Korea’s threat to export plutonium and the U.S. being the target of a terrorist attack, make the export of plutonium an “armed attack” remains questionable.

In addition, Article 51 of the Charter only allows self-defensive action during an interim period, until the UN Security Council takes necessary measures. Thus, the U.S. does not automatically have legal authority to interdict solely under the self-defense rationale based on the Charter.

The fact that the PSI does not address the standard of proof necessary to implement interdiction makes this self-defense argument more problematic. While the U.S. and the coalition may claim self-defense when boarding and inspecting, to do so on the high seas without plausible proof of weapons material will be a legal stretch.³⁰ Furthermore, given the state of technology, making the case that a given shipment is threatening will be exceedingly difficult, particularly under the current climate of distrust towards American intelligence.³¹ In addition, there will be further complication if it is not illegal for the flag state to possess and transfer the “suspect” material the coalition intends to inspect. For example, possessing or transferring nuclear weapons is not illegal *per se* under the international law. In fact, nuclear weapons states such as the U.S., UK and France have continuously worked to ensure that their ability to transit nuclear weapons is not hindered by regional nuclear weapons free zones or by UN efforts to create a Nuclear Weapon

³⁰ Michael O’Hanlon & Michael A. Levi, Preempting North Korean Threat in the Sea,” Yale Global Online, June 20, 2003.

³¹ *Id.*

Free Southern Hemisphere.³² The U.S., UK and France, along with Japan, have also asserted their right to transit nuclear materials, such as reprocessed plutonium, through the high seas.³³

c. The United Nations Security Council Presidential Statement of January 1992

In support of the legality of the PSI, the U.S. stated that “the PSI 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.”³⁴ It added that the PSI is “also consistent with recent statements of the G8 and the EU, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials.”³⁵ The statements of the G8 and the EU, standing on their own, do not have international law significance. However, the UN Security Council Presidential Statement may have legal implication since the Security Council is a quasi-judicial organ that plays a role in shaping international law.

Statements and resolutions are the two principal channels through which the UN Security Council expresses itself.³⁶ Resolutions are documents expressing the Council’s will and giving rise to commitments. The legal implication of a Security Council resolution will be dealt with in further detail in the next sub-section.

One form of statement issued by the Security Council is a presidential statement. Presidential statements are defined at informal meetings on the basis of general guidelines, or the President of the Security Council may also issue a statement on his own initiative. The Security Council has never defined the scope, content or nature of presidential statements, in its rules of procedure or in its interpretative documents or elsewhere.³⁷ However, since presidential statements are a product of informal consultations between the Council President and the members and not a

³² *Supra.*, note 21.

³³ *Id.*

³⁴ U.S. Dept. of State: Fact Sheet, Sept 4, 2003 (Proliferation Security Initiative Meeting, Paris, September 3-4)

³⁵ *Id.*

³⁶ Sydney D. Bailey & Sam Davis, *The Procedure of the UN Security Council* 547 (3d ed., 1998).

³⁷ *Id.*

decision by the body as whole³⁸, presidential statements should not be interpreted as creating the same legal obligations as resolutions. The fact that the Security Council procedural rules make no reference to presidential statements further supports the argument that it has no independent legal status under the international law.

Even if a presidential statement has a formal legal effect, the question remains as to whether the U.S. and the coalition can rely on the 1992 Presidential Statement for the interdiction on the high seas without later approval from the Security Council. The 1992 UN Security Council Presidential Statement states:

The members of the Council underline the need for all Member States to fulfill their obligations in relation to arms control and disarmament; to prevent the proliferation in all its aspects of all weapons of mass destruction; to avoid excessive and destabilizing accumulations and transfer of arms; and to resolve peacefully in accordance with the Charter any problems concerning these matters threatening or disrupting the maintenance of regional and global stability. They emphasize the importance of regional and global arms control arrangements, especially the START and CFE Treaties.³⁹

It goes on to state:

The proliferation of all weapons of mass destruction constitutes a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end.⁴⁰

The Statement does not explicitly authorize selective states, the U.S. and the coalition governments, to interdict shipments on the high seas. It is unconvincing to argue that the Statement of 1992 changes existing international law on freedom of navigation and gives selective states, the U.S. and the coalition governments, the power to interdict shipments of particular states, such as North Korea, on the high seas. Article 53 of the UN Charter states:

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But *no enforcement action shall be taken under regional*

³⁸ Id.

³⁹ United Nations Security Council, Note by the President of the Security Council, S/23500, 31 January 1992.

arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. [Emphasis Added]

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.⁴¹

The 1992 Presidential Statement cannot be considered as “the authorization of the Security Council” under which the U.S. and the coalition governments can interdict on the high seas.

d. A United Nations Security Council Resolution as a Basis for Interdiction

Most states currently believe that only a UN Security Council resolution can authorize state interception on the high seas.⁴² A UN Security Council resolution declaring North Korea’s weapons program illegal, for example, would give the member states some basis to interdict.

This option is being pursued in a recent strategy taken by the Council of the European Union calling on the EU to support a Security Council Resolution that would permit arms interdiction when appropriate.⁴³

In an effort to gain UN support, President Bush addressed the challenges of the proliferation of weapons of mass destruction at the UN General Assembly of September 23, 2003.⁴⁴ He reiterated the commitment to improve its capability to interdict lethal materials in transit, under the PSI. He, once again, emphasized that the interdiction principles agreed upon by the coalition are consistent with current legal authorities, without presenting what those authorities are. Then he went on to say:

⁴⁰ *Id.*

⁴¹ UN Charter.

⁴² *Supra.*, note 16.

⁴³ *Supra.*, note 21.

⁴⁴ U.S. Department of State, <http://www.state.gov/p/io/rls/rm/2003/24321.htm>.

Today, I ask the U.N. Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the U.N. to criminalize the proliferation weapons – weapons of mass destruction, to enact strict export controls consistent with the international standards, and to secure any and all sensitive materials within their own borders. The United States stands ready to help any nation draft these new laws, and to assist in their enforcement.⁴⁵

In general, the adoption of a new anti-proliferation resolution would be a positive development. However, a few States' unilateral actions that are inconsistent with the international law should not precede adoption of a new resolution. The U.S. and selective other states should not declare an interdiction principle and simply assert that it is consistent with the legal authorities. U.S. officials have said that the PSI countries are ready to conduct real missions today⁴⁶, but if they are, they are ready to violate the international law.

e. Modification of International Law through the Development of Customary International Law

New international norms are required for the U.S. and the coalition governments to legally interdict suspected cargo ships on the high seas. The existing international law may be modified without a UN Security Council resolution or multilateral treaty, when a certain state practice develops into international custom. Article 38 of the Statute of the International Court of Justice states “international custom” as one source of international law.⁴⁷ Simplistically, when a certain state practice is almost universally followed out of legal obligation, that practice becomes international custom binding on all states.

The U.S. and the coalition must show drastic change in the state practice with regard to interdiction on the high seas in order to legitimize naval interception on the high seas under the PSI, since the state practice on this issue illustrates otherwise. For example, last December, Spanish authorities, at U.S. request, stopped a North Korean cargo vessel bearing Scud missiles, but had to set it free when the U.S. and Spain recognized they had no legal basis for their action, as ballistic missiles are not illegal. In addition, the Spanish naval ship was able to stop and board

⁴⁵ *Id.*

⁴⁶ *Id.*

a North Korean cargo vessel only because it flew no flag.⁴⁸ However, less than a year later, U.S. officials are advocating for a policy of interdiction on the high seas.

Contrary to what the U.S. is advocating under the PSI, it has actively opposed the development of prohibitive norms or interpretations of international law that would prohibit the transit of weapons of mass destruction by sea or air, and cited the rights and privileges established in the Law of the Sea to affirm their unhindered military use of the oceans.⁴⁹ Inconsistent with its general assertion of these rights, the U.S. is currently advocating for the selective interdiction of “suspect” materials to or from certain states of concern to the Bush Administration.⁵⁰ After the Brisbane meeting on PSI, Japan, one of the PSI States, expressed its concern that the level of focus on North Korea, rather than an approach addressing all trade, involving countries like Iran, Syria, and Cuba,⁵¹ could trigger North Korea into starting a conflict.

No new custom has developed that gives the international coalition the authority to intercept North Korean cargo vessels on the high seas. Neither has any such custom started to develop. First of all, it is hard to argue that “universal” custom on this issue has started to develop because no Middle Eastern countries have taken part. Secondly, it is hard to argue that even regional custom has started to develop, at least in the context of interdiction of North Korean vessels on the high seas, since its major neighboring countries, such as China, South Korea, and Russia have not joined the coalition.

When asked about future expectations, a U.S. government official said “the more countries that are on board, the better the changes of successful interdictions. However, that doesn’t mean we will sacrifice our standards or our principles to get more.”⁵² Customary international law does not come into existence by one superpower declaring its standards or principles. No one state can unilaterally legislate international law.

⁴⁷ Statute of International Court of Justice.

⁴⁸ Frederic L. Kirgis, “Boarding of North Korean Vessel on the High Seas,” ASIL Insight, Dec. 12, 2002.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ John Kerin, “Fear US will push N Korea,” July 10, 2003, at News.com.au.

⁵² *Supra.*, note 14.

f. Multilateral Convention

The coalition may organize an international convention to reach an international agreement on the issue of interdiction in order to facilitate the type of interdictions promoted under the PSI. For example, the U.S. and its allies could put forward a new treaty or protocol to the Law of the Convention itself.⁵³ While arriving at an international agreement would involve a long process of extensive negotiations, it would be worth the effort, since it will not erode and manipulate the existing international law. However, any agreement that is likely to be produced from the forum of international convention is unlikely to be the “discriminatory approach desired by the PSI of allowing transit by certain States but not others.”⁵⁴

Even if the treaty in support of the PSI is signed and ratified, North Korea and those states receiving North Korea’s shipments are not likely to become parties to the treaty. Hence their ships would not be subject to seizure.⁵⁵ Nevertheless, there are two ways such treaty may help PSI states. First, if the treaty is accepted by almost every other state, it might be considered customary international law binding on all states. Second, the treaty may prompt the Security Council to authorize interdiction.⁵⁶

V. Conclusion

Davon Chaffee’s statement in his article “Freedom or Force on the High Seas?”⁵⁷ accurately summarizes the current legal status of the PSI:

Restricting the transit of WMD would be a positive development in furthering arms control and stemming proliferation, if such norms were carefully developed by the international community and applied uniformly. International law cannot maintain its integrity, however, if applied whimsically or discriminately, or if defined by a small “coalition of willing.” If leaders of the states participating in the PSI attempt to exchange Law of the Sea norms for selective nonproliferation measure, it could eventually restrict their own access to international waters. If members of the international community begin to allow the erosion of the law of the

⁵³ *Supra.*, note 18.

⁵⁴ *Supra.*, note 21.

⁵⁵ *Supra.*, note 18.

⁵⁶ *Id.*

sea to suit the policy goal of the sole existing superpower, they should not expect that such concessions would be easily reversed.

Although the PSI is of great importance to the Bush administration, a major change in international law is required for the U.S. and the international coalition to intercept shipments on the high seas. The Law of the Sea, a well-established conglomeration of international regulatory norms, prohibits state interdiction on the high seas. The PSI States, either implicitly or explicitly, have presented unconvincing legal basis: general rights of self-defense under the UN Charter, the UN Security Council Presidential Statement of January 1992, or modification of international law through the development of customary international law.

In order for the U.S. and the coalition to legally intercept shipments on the high seas, they need to have the UN Security Council adopt a resolution on this issue. However, the extent to which they can act legally under a Security Council resolution depends on the nature and scope of the resolution. Alternatively, they may seek to establish customary international law on state interception of shipments on high seas through multilateral convention. However, getting the level of support needed to create customary international law is unlikely.⁵⁸

This paper builds on the paper “ Legal Basis for State Interception of Shipments on High Seas,” written as a legal intern at the Lawyer’s Committee on Nuclear Policy, August 1, 2003.

⁵⁷ *Supra.*, note 21.

⁵⁸ *Supra.*, note 18.