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“ADDITIONAL APPROACHES TO NON-PROLIFERATION:  
THE PROLIFERATION SECURITY INITIATIVE”

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In December 2002, Spanish marines, acting on a request from the United States, boarded the *So San*, a North Korean freighter crossing the Arabian Sea. Hidden under the bags of cement listed on the manifest were fifteen Scud missiles. However, when Yemeni officials declared that they had purchased the missiles, the Spanish and U.S. governments allowed the delivery to proceed. White House spokesman Ari Fleischer explained, “We have looked at this matter thoroughly, and there is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea.” Stopping and searching the *So San* was probably legal, because the vessel was not flying a flag and the name and home port on its hull had been obscured. But seizing the cargo from a properly registered vessel was an entirely different matter.

The principle of exclusive flag state jurisdiction on the high seas was identified by the Permanent Court of International Justice as long ago as 1927: “It is certainly true that--apart from certain special cases which are defined by international law--vessels on the high seas are subject to no authority except that of the State whose flag they fly.”

A state may consent to another state exercising jurisdiction over one or more of its vessels; indeed, Article 110 of the Law of the Sea Convention begins: “Except where acts of interference derive from powers conferred by treaty . . . .” Such delegations of jurisdiction are increasingly common, particularly with respect to vessels suspected of smuggling drugs. Yet the requirement of flag state consent, and the reluctance of some states to provide consent, create an opportunity for those who would traffic in the world’s most dangerous weapons. Traffickers can take advantage of flags of convenience--registering their vessels in states that provide little in the way of regulation and oversight--or use vessels flagged by states that steadfastly refuse to consent to the exercise of high seas jurisdiction by others. North Korea, with its long-range missiles and active nuclear program, is the proliferating state of greatest concern; potential recipients include Iran, Syria, and a variety of terrorist groups and other non-state actors.

Key members of the U.S. government were clearly rankled by having to release the *So San*. President George W. Bush himself was described as “a very, very unhappy man.” Yet the release of the vessel was reflective of the seriousness with which the high seas regime is taken by the United States. That regime forms the legal foundation for the global mobility of U.S. forces. And U.S. merchant vessels, whether flagged at home or abroad, depend on the protection afforded by the requirement of flag state consent, as do foreign vessels carrying goods to or from the United States. The *So San* incident demonstrated the need to curtail the opportunities available to traffickers of weapons of mass destruction (WMD) and associated technologies under the existing rules, while retaining the benefits to those engaged in less threatening forms of trade. John Bolton, Undersecretary of State for Arms Control and International Security, was tasked with leading a multilateral response. The result is the Proliferation Security Initiative (PSI), a collective effort to strengthen the political commitment, practical capacities, and legal authorities necessary to stop, search, and, if necessary, seize vessels and aircraft believed to be transporting “weapons of mass destruction, their delivery systems, and related materials.”

## I. PROLIFERATION SECURITY INITIATIVE

Announced by President Bush in Krakow, Poland, on May 31, 2003, PSI now comprises fifteen countries: Australia, Britain, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, and the United States. Five rounds of talks have already taken place in Madrid, Brisbane, Paris, London, and Lisbon, the most recent on March 4-5, 2004. Ten “operational experts” meetings have also been held. So far, states have agreed to exchange information concerning suspected proliferation, to review and strengthen their national laws, and to undertake a number of specific interdiction measures.

Apart from not trafficking in missiles and WMD themselves, these measures include cooperating in the search and seizure of suspect vessels that are flying the flags of participating states, searching suspect foreign vessels that enter their ports, denying transit rights to suspect aircraft, and requiring any such planes that do enter their airspace to land for inspection. Thirteen operational exercises have taken place, including several mock interdictions at sea; a further exercise, led by Singapore, is scheduled for July.

In addition to the fifteen confirmed PSI-member states, two other countries—Denmark and Turkey—sent representatives to the December 2003 operational experts meeting. Some sixty other countries, although not yet joining PSI, have reportedly agreed to cooperate on an ad hoc basis if a “rogue” ship or aircraft enters their territorial waters or airspace.

Most importantly, PSI has already produced results. In late September 2003, U.S. and British intelligence services learned that a German-owned freighter, the *BBC China*, was on its way to Libya carrying thousands of parts for gas centrifuges of a kind that can be used to enrich uranium. They notified the German government, which asked the ship’s owner to divert the freighter to an Italian port where the suspect containers were then seized. This successful operation--which was not legally contentious because the vessel voluntarily came into port and the centrifuges were not on the manifest—has subsequently been credited with encouraging Libyan leader Muammar el-Qaddafi to

abandon his WMD programs.

## II. EXISTING INTERNATIONAL LAW

All the PSI measures agreed upon so far are consistent with existing international law. There is nothing that prevents a state from granting permission to board and search vessels flying its flag or to require aircraft of its registry to land for inspection. For example, on December 11, 2001, a multilateral treaty entered into effect under which fifty-one countries accorded each other the right to board and inspect fishing vessels flagged by other states parties in “any high seas area covered by a sub-regional or regional fisheries management organization or arrangement . . . for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.” Similarly, a number of bilateral treaties accord stop and search powers with respect to vessels on the high seas believed to be smuggling drugs. States could and should, by way of bilateral treaties or one or more multilateral treaties, agree to do the same with respect to vessels suspected of WMD proliferation activities.

On February 11, 2004, the United States and Liberia, the world’s second largest shipping registry after Panama, signed the first treaty of this kind. In it, the two countries accord each other the right, on the high seas, to board, search, detain, and seize the cargo of any vessel that is reasonably suspected of trafficking in missiles or WMD. The agreed right to interdict is provided without prejudice to other rights under international law that might also allow for boarding, and it can normally be exercised only if a request for authorization is first made to the flag state. But the treaty also stipulates that authorization may be presumed, if such a request is made and two hours pass without a response. Moreover, the treaty explicitly foresees that its terms could provide a template for similar agreements between Liberia and other states, opening the door to a series of identical bilateral agreements between that country and all the PSI members. As it happens, Liberia does not have a navy. Yet despite the apparent absence of actual reciprocity, this technically reciprocal treaty is entirely legal--and it will help to close a potentially

important path for the high seas traffic in missiles and WMD. Similar bilateral treaties have been concluded with Panama and the Marshall Islands, extending the reach of U.S. anti-proliferation efforts yet further. The conclusion of multiple new bilateral treaties could be augmented through the amendment of existing multilateral instruments: the Missile Technology Control Regime could be transformed into a legally binding treaty, or the Suppression of Unlawful Acts Convention—the scope of which already is under review—could be extended to criminalize the transport of WMD, their delivery systems, and related materials on merchant vessels. The United States has proposed amendments to this effect that would permit the search and seizure of suspect vessels. One amendment would require that an effort be made to contact the flag state before interdicting, with consent being presumed if four hours passed without a response.

A more traditional but less expedient approach might involve the negotiation of a new multilateral treaty. As with the 1995 Straddling Stocks Agreement, this could conceivably take the form of a protocol to the Law of the Sea Convention, which is currently being considered by the U.S. Senate for its advice and consent to accession. However, PSI member states have given no indication of moving in this particular direction.

The problem with all the treaty-based approaches is that the states most likely to traffic in WMD and associated technologies are unlikely to accord stop-and-search powers to other states. Ships flagged by non-consenting states may be searched when in foreign harbours if reasonably suspected to be carrying armaments that have not been declared. But modern vessels are able to circumnavigate the globe without stopping for fuel and provisions. Once port states begin asserting their right to search for and seize undeclared missiles and weapons components—as is envisaged under PSI—suspect vessels could simply avoid entering a port en route.

The most effective way to address the problem of non-consenting states would be through the UN Security Council. Any country whose shipments of weapons were deemed by the Council to pose a threat to international peace and security could be made

the subject of a Chapter VII resolution granting the necessary powers to other states. On several previous occasions, the Council has categorized the proliferation of missiles and WMD as a threat to international peace and security. For example, in Resolution 687 of 1991, it stated that WMD posed a threat to “peace and security” in the Middle East and imposed a stringent disarmament regime on Iraq. In Resolution 1172 of 1998, it condemned nuclear tests conducted by India and Pakistan and affirmed “that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security.” And in Resolution 1373 of 2001, in the aftermath of the terrorist attacks on New York and Washington, the Council noted “with concern” the close connection between international terrorism and, inter alia, the “illegal movement of nuclear, chemical, biological and other potentially deadly materials”; it also categorized this connection as a “threat to international security.”

The adoption of a Chapter VII resolution that authorized high seas interdictions would not be legally contentious, but it would depend on securing the support of nine of the fifteen Security Council members, including the votes, or at least the abstentions, of all five permanent members. At the moment, it is unclear whether the support or acquiescence of France, Russia, and China can be assured. Although France and Russia are participating in PSI, their relations with the Bush administration were strained by the decision to go to war in Iraq without express Security Council authorization. And though Chinese relations with North Korea have recently cooled, China has traditionally supported Pyongyang; it currently favours using economic and diplomatic pressure rather than steps that could provoke a military confrontation. But even if it were possible to obtain a Security Council resolution specifically authorizing the interdiction of North Korean weapons shipments, the Bush administration might prefer to avoid depending on a situation-specific Council resolution, since such a resolution would probably not authorize similar future actions against other states. A parallel may be seen in the decision not to seek express authorization for the 2001 intervention in Afghanistan. The right of self-defence was invoked instead, a move that helped to secure widespread agreement that the right of self-defence includes responsive action against state sponsors of terrorism, not just in Afghanistan.

In his speech to the UN General Assembly on September 23, 2003, President Bush requested that the Security Council adopt a new anti-proliferation resolution that would “call on all members of the U.N. to criminalize the proliferation of weapons . . . of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders.” A draft resolution to this effect, introduced on March 24, 2004, by the United States on behalf of all the permanent members, was adopted as Resolution 1540 on April 28, 2004. It invokes Chapter VII and requires all states to “develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law.” But it merely “calls upon all States,” again in accordance with national and international law, “to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.” The recommendatory nature of the latter provision indicates, together with the references to international law, an absence of any authorization to exceed the existing rules.

### III. CUSTOMARY INTERNATIONAL LAW

In certain circumstances, customary international law might already allow for the high seas interdiction of suspected WMD or missile-laden vessels flagged by non-consenting states. These circumstances could arise when the vessel posed an imminent threat, either to the interdicting state or to a third state that requested the interdiction. It is widely considered that the customary international law right of individual or collective self-defence, as referred to in Article 51 of the UN Charter, extends to pre-emptive action if there is a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.” Indeed, the *Caroline* incident that gave rise to these criteria involved action taken to prevent weapons shipments, albeit across the Niagara River and not on the high seas. If a North Korean flag merchant vessel were thirteen nautical miles from Los Angeles with what intelligence indicated was a nuclear weapon

on board, few would contest the right of the United States to stop, search, and, if necessary, seize the vessel.

The law is less clear with respect to the high seas interdiction of weapons in less immediately threatening circumstances. Apart from the absence of any such right among the interdiction rights codified in Article 110 of the Law of the Sea Convention, the state practice on this specific issue is hardly conclusive. For example, in 1873, the *Virginus*, a U.S.-flag vessel, was seized on the high seas by the Spanish navy while carrying weapons, along with British and U.S. nationals, to Cuba in support of an insurrection against Spain. Spain claimed self-defence: the claim was accepted by Britain but rejected by the United States.

During the late 1950s and early 1960s, France stopped and searched thousands of ships suspected of carrying weapons to Algeria during the uprising against French rule. Its actions were strongly opposed by many of the states whose ships were affected. Robin Churchill and Vaughan Lowe suggest that a contributing factor to the opposition was “the emergence . . . of rules limiting the use of force generally, and notably article 51 of the UN Charter, which arguably limits the right of self-defence to cases of armed attack.” Although the colonial context may also have affected the international reaction, the evidence of state practice and *opinio juris* generated by opposition to the French policy would still seem to militate against the existence of any extended right of self-defence against weapons shipments on the high seas.

This conclusion is supported by British practice during the 1982 Falklands war, when London expressed the view that the right of self-defence did *not* extend to the interception of a French vessel carrying weapons to Argentina. However, since Britain and Argentina were in a state of armed conflict, the widely accepted right of belligerent visit and search was probably available instead.

During the 1962 Cuban missile crisis, the United States asserted a right to stop and search vessels bound for that island nation to determine if they were carrying “offensive military

equipment.” But it justified this action on the basis of Chapter VIII of the UN Charter, as regional peacekeeping, though this fact has not prevented at least two academics from subsequently regarding the action as a precedent for pre-emptive self-defence.

Finally, there is some Israeli practice concerning high seas interdiction of weapon-laden vessels, most notably the January 2002 seizure of the *Karin-A*, an Iraqi-flagged ship in the Red Sea. Some fifty tons of mostly Iranian-made weaponry were found on board, including Katyusha rockets, antitank, and anti-aircraft missiles. Israel claimed that the weapons were destined for the Palestinian Authority and that it was acting in self-defence against an imminent threat; Prime Minister Ariel Sharon described the vessel as a “ticking bomb.” The Authority, however, denied any involvement. Most importantly, there was little in the way of international comment. When asked whether the seizure was a breach of international law, U.S. Department of State spokesman Richard Boucher replied: “It was an Israeli operation. You can ask them questions about how it was conducted and what its basis was.”

The advent of PSI will soon introduce more state practice with respect to the issue of high seas interdiction via the various bilateral and multilateral treaty initiatives now under way. The widespread conclusion of treaties allowing for the search and seizure of suspected weapons-trafficking vessels could conceivably generate a new rule of customary international law in parallel to the treaty obligations.

The development of a new customary rule by way of treaty practice, however, may be made more difficult if the treaties in question are designed as exceptions to an established customary rule. Consider, for example, the decades-long debate over the effect of bilateral investment treaties on the customary international law concerning compensation for expropriation, or the refusal of the International Court of Justice in the North Sea Continental Shelf cases to discern *opinio juris* in a network of bilateral maritime delimitation agreements. And if the established rule is particularly well rooted in state practice and *opinio juris*, this might also impede, or at least retard, any legal change. The principle of exclusive flag state jurisdiction is one such rule, one that most states have

traditionally sought to defend. As a result, those seeking new high seas interdiction powers—whether with regard to the slave trade, straddling fish stocks, or drug smuggling—have generally pursued the treaty avenue instead. The requirement of flag state consent is deeply valued by most states and, therefore, is highly resistant to change. A new customary international law right of interdiction is unlikely to develop simply as a result of the conclusion of numerous bilateral and multilateral treaties relating to the trafficking of missiles and WMD by sea. But this is not to say that a new customary right to interdict could not arise as the result of developments more broadly, including those outside the law of the sea.

#### IV. AN EXTENDED RIGHT OF PREEMPTIVE SELF-DEFENSE?

In most circumstances, foreign-flag vessels suspected of transporting missiles and WMD on the high seas will not constitute a threat that is “instant, overwhelming, leaving no choice of means, and no moment of deliberation.” However, the United States has recently sought, particularly through its September 2002 National Security Strategy, to extend the general right of pre-emptive self-defence to more distant and uncertain challenges. Although this effort is not specific to the law of the sea, it is framed in the context of the combined threat from global terrorism and WMD. And to the degree that it proves successful, it will directly affect the extent to which states may engage in high seas interdictions of suspect vessels flagged by non-consenting states.

John Bolton, the architect of PSI, asserted on several occasions during the early stages of the initiative that an extended right of pre-emptive self-defence was part and parcel of it. For example, during the PSI meeting in Brisbane in July 2003, he told *The Australian* that the United States had “a general right of self-defence if there was a serious belief that the North Korean vessels were carrying material for use in WMDs.” Similarly, in a speech to the Federalist Society in November 2003, he said, with specific reference to high seas interdictions of vessels flagged by non-consenting states:

Where there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstances dictate. What we do not believe, however, is that only the Security Council can grant the authority we need, and that may be the real source of the criticism we face.

The Bush doctrine of pre-emptive self-defence is controversial, not least because its principal proposal—the adaptation of “the concept of imminent threat to the capabilities and objectives of today’s adversaries”—would introduce more ambiguity into the law, thus allowing power and influence to play a greater role in determining whether self-defence is available in particular situations. And the doctrine has, generally speaking, not received the widespread support needed to change customary international law. A few regional powers, such as India, Israel, and Russia, responded favourably, as did Australian Prime Minister John Howard, who went on to suggest that the UN Charter be amended to allow for a right of unilateral pre-emptive action. However, Howard’s comments sparked angry protests from other Southeast Asian states, protests that could themselves constitute state practice and provide evidence of *opinio juris*. And Japan, while expressing support for a right of pre-emptive self-defence, was careful to confine its claim to the *Caroline* criteria.

As the Iraq crisis escalated, this at-best mixed reaction may have contributed to bringing the United States to the Security Council where, on November 8, 2002, it obtained Resolution 1441. Although the resolution did not expressly authorize the use of force against Iraq, its terms provide some support for an argument that a previous authorization, accorded in Resolution 678 of 1990, was revived as a result of Iraq’s “material breaches” of Resolution 687, the 1991 cease-fire resolution. The Bush administration subsequently relied on both this argument and the pre-emptive self-defence claim to justify the war, while its two principal allies, Britain and Australia, relied solely on the Security Council resolutions. The advancement of two distinct arguments, with the latter receiving broader support, may have reduced any effect the pre-emption claim might otherwise have had on customary law.

More recently, widespread opposition to the Bush doctrine was evident in speeches at the opening of the fifty-eighth session of the UN General Assembly in September 2003. For instance, Hidipo Hamutenya, the Foreign Minister of Namibia, observed that “the central theme, that runs through nearly all the speeches at this Session, is the call for a return to multilateral dialogue, persuasion and collective action, as the only appropriate approach to resolving many conflicts facing the international community.” The claim that an extended right of pre-emptive self-defence has the widespread support needed to develop customary international law is difficult to make in light of this and other negative reactions. And yet the claim continues to be made, most recently in a television interview given by President Bush on February 7, 2004, where he went so far as to say: “I believe it is essential--that when we see a threat, we deal with those threats before they become imminent. It’s too late if they become imminent. It’s too late in this new kind of war.”

Given its continued commitment to the doctrine, it might be considered surprising if the Bush administration did *not* seek to include an extended form of pre-emptive self-defence within PSI, as one of a series of legal mechanisms for curtailing the international traffic in missiles and WMD. Moreover, an extended right of pre-emption could provide an additional advantage not achievable by way of treaty, parallel customary international law, or even the existing authorities of port states: it would apply not only to merchant but also to military vessels, such as those North Korea might choose to employ to avoid the other mechanisms being put in place under PSI.

## V. EXCEPTIONAL ILLEGALITY

It should not be assumed, however, that the United States is seeking to change customary international law in this area, even if it envisages a possible need to engage in high seas interdictions of vessels flagged by non-consenting states. The various non-controversial mechanisms involved in PSI, if rigorously advanced and applied, will render such situations highly exceptional. Moreover, the United States itself ascribes considerable importance to the requirement of flag state consent. The combination of these two considerations raises the possibility that the United States, if and when it needs to act,

may simply choose to violate the law rather than seek to modify it.

This, indeed, is one possible interpretation of the approach taken during the 1999 Kosovo intervention, where most of the intervening states were careful *not* to advance a legal justification for their action. In the truly exceptional situation where there is a strongly felt compulsion to act, consent from the relevant sovereign state cannot be obtained, and the Security Council is not prepared to authorize action, states may choose to breach the rules without advancing strained and potentially destabilizing legal justifications. By doing so, they allow their action to be assessed subsequently, not in terms of the law, but in terms of its political and moral legitimacy, with a view to mitigating their responsibility rather than exculpating themselves.

If the United States interdicted a North Korean flag vessel on the high seas and seized its cargo *without* claiming the legal right to do so, it would be opening itself up to a requirement of reparation. However, as the International Law Commission made clear in its 2001 Articles on State Responsibility, any determination of reparations must take into account any contributory “wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.” In this era of global terrorism, there is an argument to be made that trafficking in missiles and WMD, even if not illegal, involves a degree of negligence on the part of the trafficking state. In any event, any compensation that might be due as a result of the interdiction would likely not deter the United States, provided that its concerns were well founded and its motives sincere.

In the absence of a legal claim by the United States, most states would likely remain silent, there being no need to protest an action for which no *opinio juris* exists. More cautious states might wish to express the view that the interdiction, while supportable on moral or political grounds, was inconsistent with international law and should remain so. This would help to ensure that the requirement of flag-state consent remained secure and that the exceptional violation did not, over time, somehow become regarded as the rule.

## VI. CONCLUSION

The Proliferation Security Initiative is reflective of a shift in U.S. foreign policy toward a more flexible approach to collective action that eschews both ad hoc unilateralism and institutionalized multilateralism. What Department of State Director of Policy Planning Richard Haass has characterized as a “*a la carte* multilateralism” involves coalitions that will vary in size and composition depending on the issue at hand, with the only constant being that the coalitions are formed and led by the United States. From Washington’s perspective, this approach would seem to offer several advantages: it largely avoids problems of institutional blockage, such as those that can occur within the UN Security Council; it allows for the limitation of new initiatives to small groups of like-minded states, with the group then being expanded once momentum has been achieved; and it enables the United States to focus its persuasive efforts on those most able and willing to assist with respect to any given matter.

Limiting the early stages of a law-making initiative to a core group of like-minded states is hardly a new strategy. For example, it was readily apparent in the mid-1990s attempt to develop a multilateral agreement on investment. Those negotiations were confined to the twenty-nine developed states of the Organization on Economic Cooperation and Development (OECD), with the express intent of creating a “free-standing” treaty to which non-OECD members could later accede on a negotiated case-by-case basis. Developed states, which already had high standards of investment protection, were thus excluding developing states from negotiations on a treaty that was intended ultimately to apply to them. And developing states would have had little option but eventually to sign on; had the negotiations been successful, accession to the agreement would likely have become a factor in the granting of foreign aid, the provision of emergency assistance by the International Monetary Fund, and the World Bank’s public assessment of the creditworthiness of individual developing states. PSI seems likewise designed to develop momentum among a core group of like-minded developed states, with additional states being invited--first to cooperate, then to participate--but only after agreement on principles has been achieved.

However, keeping the early stages of an initiative within a core group of states might not overcome all hurdles. Bolton's early statements on pre-emptive self-defense are noteworthy in this context, in that they were not supported by other PSI states; indeed, *The Australian* claimed that its report of his comments in Brisbane led to a "rift" between the United States and the other countries, which believed that "a UN Security Council resolution or an international convention would be required to allow interception on the high seas." A contributing factor here may be the fact that both China and Russia have expressed concerns about, and questioned the legality of, this aspect of the initiative. Although Russia has recently joined PSI, China has made considerable efforts to manage the North Korean situation by diplomatic and economic means. Hostility toward PSI from that large and powerful country could limit its effectiveness and provide a source of unnecessary friction in international affairs, the potential consequences of which will not have been lost on member states such as Britain, France, and Germany.

There are no references to pre-emptive self-defence in the principles agreed upon at the September 2003 Paris meeting. Instead, there is considerable ambiguity. Bolton continues to insist that "actions taken under the PSI will be fully consistent with national legal authorities and relevant international law and frameworks," without indicating whether, and to what degree, the relevant law allows or precludes pre-emptive action.

It is possible that Bolton has abandoned any attempt to include a pre-emptive self-defence element; as Rebecca Weiner has reported, "the deeper the initiative delves into issues of international law, the harder the coalition is likely to press for U.N. approval and support--an eventuality the United States is not entirely sanguine to face." Moreover, it is possible that U.S. shipping interests, and perhaps even the U.S. Navy, have weighed in in defence of the requirement of flag state consent. Yet another possibility, however, is that the absence of clarity is itself designed to work to the eventual advantage of Bolton's early position: one has only to imagine what could happen once the initiative was firmly established and a vessel registered in a non-consenting state were suspected of transporting WMD or missile technology on the high seas. As Bolton himself indicated in

July 2003, the United States would likely interdict: “We are prepared to undertake interdictions right now and, if that opportunity arises, if we had actionable intelligence and it was appropriate, we would do it now.” If the United States did interdict, it might not only claim pre-emptive self-defence but also assert that its claim is consistent with and supported by PSI. And this would in turn leave other PSI states with a choice: acquiesce in a legal claim that was backed up by a decisive, physical act of state practice or publicly protest, thus risking the considerable benefits offered by the rest of PSI as well as continued good relations with the United States.

PSI states are undoubtedly aware of this potential trap. Yet they are in the difficult position of having two potentially incompatible goals: restricting the proliferation of WMD, missiles, and associated technology, on the one hand, and on the other, reducing the risk that the United States will take forceful steps on its own. One of the ironies of contemporary international politics is that the Bush administration’s evident willingness to use force unilaterally and pre-emptively provides it with heightened influence in multilateral negotiations. From this perspective, the continued ambiguity on any pre-emptive self-defence element within PSI may have the effect of pushing other states into accepting the broadest and most effective consensual interdiction regime possible, since such a regime would greatly reduce the frequency with which the United States would be tempted to act alone.

In any event, PSI in its present form is primarily about states strengthening and enforcing existing national and international rules while taking advantage of the requirement of flag state consent to accord stop-and-search powers to each other. Contrary to some perceptions, the Bush administration devotes considerable attention to international law, and not just when it seeks to disentangle itself from existing obligations, or to shield itself from treaties and tribunals to which it chooses not to consent. From a global perspective, PSI as currently structured is not ideal. But given the very real problem that it seeks to address, and the alternative paths that the United States might take, this particular instance of a la carte multilateralism is worthy of support.

For more on the PSI, see:

Michael Byers, "Policing the High Seas: The Proliferation Security Initiative," (2004) 98 American Journal of International Law 526-45.

Sean Murphy, "Contemporary Practice Of The United States Relating To International Law: International Criminal Law," (2004) 98 American Journal of International Law 355.

US State Department website on the Proliferation Security Initiative: <  
<http://www.state.gov/t/np/c10390.htm> >.