By Robert Chesney

In late 2002, United States officials learned that an unflagged merchant vessel – the So San – had left the North Korean port of Nampo bearing suspicious cargo, heading west toward an unknown destination. The So San eventually was intercepted on the high seas some 600 miles off the coast of Yemen by the Spanish frigate Navarra, part of the international coalition patrolling the Arabian Sea in search of fleeing members of Al Qaeda and the Taliban. Spanish troops boarded the So San by helicopter after it attempted to flee, and with the assistance of U.S. personnel eventually discovered 15 Scud missiles and 24 tanks of rocket fuel additive hidden beneath the So San’s declared cargo of cement. The interdiction appeared at first blush to be a rousing counterproliferation success, but there was a catch – the missiles had been legally purchased from North Korea by the government of Yemen. Press Secretary Ari Fleischer accordingly explained that “[w]hile 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.”

The timing was remarkable. That very day, the White House released the National Strategy to Combat Weapons of Mass Destruction (NS-CWMD), a policy paper identifying proliferation as a grave threat to U.S. national security. According to the NS-CWMD, interdiction is a “critical part of the U.S. strategy to combat WMD and their delivery means.” But the So San incident dramatically illustrates an important limitation on interdiction as a tool of counterproliferation policy: decision makers may be reluctant to use the interdiction option if they lack plausible authority under international law to stop and search the target and to seize dangerous cargo discovered as a result.

Response: The Proliferation Security Initiative

This dilemma has not gone unnoticed. Speaking in Krakow in May 2003, President Bush surprised many observers by declaring a new counterproliferation initiative:

“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 proliferation called the Proliferation Security Initiative. The United States and a number of our close allies . . . 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.”

Over the following weeks, representatives of eleven states – including the United States, the United Kingdom, Spain, France, Germany, Italy, the Netherlands, Portugal, Poland, Japan, and Australia – have twice gathered to negotiate the specifics of the Proliferation Security Initiative (“PSI”), and a third meeting has been scheduled for Paris in September following PSI exercises that month in the Coral Sea. And while the details of these negotiations remain undisclosed, it is clear that PSI is a multilateral policy initiative designed to (1) create among cooperating states the coordinated intelligence and military
infrastructure needed for global interdiction of WMD and missile transfers both in the air and on the sea and (2) to clarify or perhaps even generate the legal authority to carry out such operations.

Bearing in mind the So San incident, this essay addresses only two of the many issues raised by PSI. First, to what extent does current international law authorize interdiction of WMD and missile shipments on the high seas (in contrast to aerial interdiction, maritime interdiction in territorial waters, or port searches such as that which led to the discovery of dual use chemicals on board a North Korean vessel in Taiwan’s Kaohsiung Harbor in August 2003). Second, what are the options for expanding that authority?

The Status Quo: Current International Law on High Seas Interdiction

Notwithstanding the release of the So San, Under Secretary of State John Bolton recently stated that “[w]e are prepared to undertake interdictions right now and . . . there is broad agreement within the group of 11 that we have that authority.” What, then, is the status quo with respect to international law and high seas interdiction?

Any assertion of a right to stop and search a vessel on the high seas – let alone seize its cargo – is in tension with freedom of navigation, which John Negroponte once described as “perhaps our oldest customary international law doctrine,” one without which “[m]aritime commerce as we know it would not exist.” In practical terms, free navigation means that a ship on the high seas is subject to the jurisdiction only of the state to which the ship is registered (the “flag state”), and may not be interfered with by the ships of other states. If taken as an absolute principle, then, high seas interdiction would be legal only when carried out by the target’s own flag state. PSI operations on the high seas – which inevitably will target ships registered to foreign states – would rarely meet this test.

Fortunately, freedom of navigation is subject to a few exceptions which permit boarding by the ships of other states even on the high seas. These are identified most clearly in the United Nations Convention on the Law of the Sea (the United States has not yet ratified the Convention but nonetheless accepts that its navigation provisions reflect customary international law). As discussed below, these exceptions provide authorization for PSI interdiction operations in limited circumstances.

Interdiction by Permission

The Convention confirms that states may waive freedom of navigation by agreement with one another. Accordingly, an effective way to ensure that PSI operations comport with international law is to obtain from other states express permission to interdict their ships upon reasonable suspicion that they carry illicit WMD or missiles. Such permission can take the form of a treaty or exchange of diplomatic notes specifying the circumstances in which interdiction would be permitted and the consequences in the event WMD materials or missiles are discovered. The British employed this approach during the 19th Century in the course of their effort to suppress the international slave trade, and the U.S. has relied on it more recently in connection with counternarcotics.

But what if a formal agreement cannot be obtained prior to interdiction of a ship registered to a particular state? This situation arises routinely in the narcotics context, and U.S. practice is to seek permission on an ad hoc, contemporaneous basis – first from the master of the target vessel itself, and then if necessary the request is relayed via the State Department to the government of the flag state. These ad hoc requests are granted routinely, but for a number of reasons the formal agreement approach is preferable for PSI purposes. Under the ad hoc approach, there always is a risk that
permission will be denied (especially if the flag state is Iran or North Korea). Even when granted, ad hoc requests entail a degree of delay which may enable the crew of the target to dispose of some or all of the suspect cargo. Finally, there is some question as to the propriety of the ad hoc approach given that the Convention refers to the use of a “treaty” to establish a waiver of freedom of navigation.

**Interdiction of Stateless Vessels**

A vessel which is not properly registered to any state (either because it is unregistered or because its registry is fraudulent or defective) is a ripe target for maritime interdiction. Such ships lack nationality, and the Convention clearly establishes a right to visit such ships to inquire into their status. But can such ships be subjected to the jurisdiction of other states for purposes of searching for and seizing illicit WMD and missile technology? Some dispute the claim that stateless ships are subject to the jurisdiction of all states, but the U.S. has consistently asserted this position in other contexts (e.g., narcotics trafficking and driftnet fishing). Unfortunately, one cannot expect WMD and missile shipments will often be carried by stateless vessels.

**Interdiction Where the Vessel in Reality Is of the Same Nationality**

Freedom of navigation of course is no shield against assertions of jurisdiction by the flag state itself, which is free to interdict ships of its own registry. In addition, where there is reasonable suspicion to believe that the flag flown by an apparently foreign ship is false and that the ship in truth is registered to the interdicting state, a warship is permitted to stop it and confirm its nationality. Again, however, one cannot expect this scenario to arise often in the context of WMD and missile shipments.

**Interdiction to Suppress Prohibited Activities**

The Convention specifies three types of undesirable activities justifying interference with freedom of navigation: piracy, slave trading, and unauthorized broadcasting. Proliferation concerns, in contrast, are not mentioned at all in the Convention. Does customary international law nonetheless recognize proliferation as an undesirable activity for which there is an exception to free navigation?

The answer appears to be no, although PSI itself might mark an important development in the evolution of such an exception. One could point to the statement by the U.N. Security Council in January 1992 that “[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security.” One might also point to the complex system of treaties (in particular, the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention), supplier groups, nuclear weapon-free zones, and export control regimes which collectively establish a global network operating to suppress WMD proliferation. But none of the WMD treaties expressly authorize ad hoc enforcement through interdiction, and there is little or no support for a proliferation exception to freedom of navigation in past state practice (the legal significance of the 1962 Cuban Missile Crisis is the subject of considerable dispute among scholars). The absence of any such exception in the Convention itself, of course, also cuts against a WMD proliferation exception.

The argument is weaker still with respect to missile technology proliferation, for in that context the only relevant international agreement – the Missile Technology Control Regime – is merely a set of voluntary guidelines for export controls subscribed to by thirty-three member states. The *So San* incident, moreover, is a fresh example of state practice indicating that there is not a proliferation exception to freedom of navigation with respect to missiles. Accordingly, the suspected presence of WMD or missiles
aboard a foreign vessel on the high seas does not – standing alone – authorize search or seizure at this time.

**Interdiction as a Form of Anticipatory Self-Defense**

There is a final possibility. One might argue that high seas interdiction of WMD or missile shipments would be justified by “anticipatory self-defense” in at least some circumstances. Traditionally, the propriety of a claim of anticipatory self-defense has been measured by the test stated by Secretary of State Daniel Webster in connection with the famous case of the *Caroline*. The *Caroline* was an American ship destroyed in 1837 by the British on the theory that it was going to be used in aid of a Canadian insurrection. In an exchange of diplomatic notes with his British counterpart debating the propriety of this purported exercise in anticipatory self-defense, Webster famously contended that the doctrine applied only where “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

The imminence element traditionally associated with anticipatory self-defense would seem to preclude reliance on that theory to justify the PSI interdiction program, absent extreme circumstances such as a shipment bound for a state literally on the verge of engaging in hostilities with the interdicting state. But it is no longer clear whether anticipatory self-defense remains limited by Webster’s strict imminence requirement in cases involving WMD. When the Bush Administration produced its National Security Strategy of the United States in September 2002, it proclaimed what many observers took to be a sharp departure from the traditional approach:

> “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. . . . Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. . . . The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”

This interpretation triggered a fierce debate – driven largely by the war in Iraq – with some taking the view that the scope of anticipatory self-defense is now in flux and many others (especially outside the United States) adamant in their adherence to the traditional approach. Accordingly, there will be those inclined to reject the argument that PSI interdiction could ever be justified on the ground of anticipatory self-defense. Indeed, some states not strongly motivated to voice resistance to the broad reading of anticipatory self-defense in the Iraq context may react differently now if they perceive a threat to their oceangoing commerce.

For those willing to accept the argument that the WMD threat requires a more flexible interpretation, however, PSI interdictions may be justified by sufficiently exigent circumstances. Key factors in this analysis would include the identity of the intended recipient, the nature of the illicit materials, and the nexus between the shipment and the perceived danger.

**Options for Generating Additional Legal Authority**

In light of the foregoing, there is some existing legal authority for PSI interdictions on the high seas, but the scope of that authority is limited. To increase it, the U.S. and its allies should consider pursuing some combination of the following strategies:
• **Expand the Permission Network** – The quickest route to enhance legal authority for PSI is to obtain the greatest possible number of formal agreements from other states waiving freedom of navigation where their ships are reasonably suspected of carrying illicit WMD or missile technology. The effort should, of course, prioritize those states whose registered ships are most likely to be involved in North Korean proliferation. The net effect would be to steadily reduce the range of relatively safe options for oceanic shipping available to would-be proliferators. And although ad hoc requests are a poor substitute for formal agreements, steps nonetheless should be taken to prepare the ground and streamline procedures for ad hoc PSI requests where no formal agreement applies.

• **Amend the Convention** – As noted, the Convention permits interference with freedom of navigation to suppress certain undesirable activities such as illicit broadcasting. An effort should be made to add illicit WMD and missile transactions to this list.

• **Amend the Proliferation Treaties** – There is a pressing need to strengthen the compliance regimes of all the WMD treaties, and to create a corresponding treaty regime dealing with ballistic missile technology. Among other things, the new and enhanced compliance regimes could provide authority for PSI interdictions in the event of an illegal WMD or missile transfer.

• **Playing the Security Council Card** – Security Council approval would eliminate all questions of authorization for PSI interdictions. But the prospects for success in that forum are highly uncertain in the face of a potential Chinese or Russian veto (the Chinese have sent mixed signals regarding PSI, with their initial negative assessment giving way to more neutral language in August).

• **Seek the Endorsement of Regional Organizations** – As part of the larger effort to establish a consensus supporting the legality of WMD and missile interdictions, PSI members could seek the approval of regional organizations such as NATO and OAS (it would be desirable to obtain ASEAN’s endorsement, of course, but the prospects for doing so are weak).

**A Few Words of Caution**

PSI has the potential for widespread application, but for the moment it is relevant primarily as an element in the ongoing dispute with North Korea. Accordingly, any effort to enhance the legal authority for PSI raises the question whether the effort will be so provocative as to be counterproductive in the larger scheme of things. Seeking Security Council approval may be especially problematic in this regard. In contrast, it may be possible to expand the network of permission for PSI interdictions without causing undue provocation. We must also bear in mind our own long term interest in preserving freedom of navigation around the globe, an interest we pursue today in areas such as the South China Sea. In the coming years, growing regional powers may challenge freedom of navigation to our detriment, and we should consider the extent to which PSI (and especially the doctrine of anticipatory self-defense) may become a precedent to be used against us and our allies in the future.

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