CHAPTER FIFTEEN

THE PROLIFERATION SECURITY INITIATIVE: AMENDING THE CONVENTION ON THE LAW OF THE SEA BY STEALTH?

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I. Introduction

President Bush launched the Proliferation Security Initiative (PSI) in May 2003 in response to security concerns arising from the spread of weapons of mass destruction (WMD) and the potential for terrorists to gain access to such weapons. Described as an “activity” and not an “organization,” considerable effort has been expended since 2003 to develop frameworks and mechanisms for its implementation, including numerous multilateral training exercises. Whilst the PSI has a multiple dimension and extends to land, sea and air, its principal focus has been on maritime operations, which have generated the most comment regarding its legality.¹ This is principally because of the inherent clash between the law of the sea and the principle of high seas freedom of navigation and the asserted right under the PSI of high seas interdiction of certain vessels. Whilst from time to time acknowledging this legal tension raised by the PSI, its proponents have mostly skirted around the edges of this legal debate. When they have been forced to articulate their position, reference is often made to Security Council Resolution 1540 (2004) and the strong endorsement of E.U. and G-8 members of the need to cooperate to stop proliferation. In addition, the recent amendments to the 1988 Rome SUA Convention via the new 2005 SUA

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Protocol are also pointed to as an additional international law basis for potential PSI high seas interdictions. However, since no flag state has to date sought to question the legality of a purported PSI-interdiction before a body such as the International Tribunal for the Law of the Sea (ITLOS), its legality remains largely untested.

II. Reconciling Freedom of Navigation with the PSI

One of the founding principles of the law of the sea is the freedom of navigation. This essentially Grotian concept for the oceans is one which remained constant throughout the major codifications and developments in the law during the Twentieth Century. Such is the significance of the freedom of navigation that, subject to limited constraints, the high seas freedom of navigation extends under the 1982 Convention on the Law of the Sea (UNCLOS) from the outer edge of the territorial sea over the water surface of the exclusive economic zone (EEZ) beyond to the high seas. Even within essentially coastal waters, navigational freedoms such as the right of innocent and transit passage are recognized. This is not to suggest that within the UNCLOS there is absolutely no capacity to conduct a lawful naval interdiction. Within a coastal state’s territorial sea, ships engaged in illegal fishing, criminal activities or posing a threat to national security can be stopped, searched and even arrested. However, these rights of the coastal state to undertake maritime interdictions within their own waters are to be clearly contrasted from the right to undertake interdiction of foreign flagged vessels on the high seas. This was a point Australia was reminded of in late 2004 when the Howard government announced a new initiative to potentially conduct interdictions of vessels up to one thousand nautical miles from the Australian coast for national security purposes. Following protests from a number of neighboring States, Australia subsequently modified its proposal so as to be consistent with international practices.

Whilst the navigational freedoms recognized within coastal waters are to be conducted for peaceful purposes without threat to the security of the coastal state, it must be recalled that the United States was one of

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4 Klein, supra note 2, at pp. 339–340.