The Proliferation Security Initiative and the 2005 Protocol to the SUA Convention

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A. Introduction

The present article gives an account of recent developments in the law concerning the non-proliferation of weapons of mass destruction (hereinafter: WMD) and related materials at sea: The first development to be reported on is an informal coalition of states called Proliferation Security Initiative (hereinafter: PSI), which has been in operation since 2003. The second development is the adoption of an amending protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 (hereinafter: SUA Convention) by the Diplomatic Conference on the Revision of the SUA Treaties on October 14, 2005[1]. The article provides information about the objectives of the PSI and its status under international law as well as the legal consequences which arise for PSI participants acting in pursuance of these objectives. The PSI will be analysed as a form of informal co-operation between states which has had a certain influence on the law governing the non-proliferation of WMD at sea (Part B). Furthermore, the article introduces the newly arranged regulations contained in the 2005 Protocol to the SUA Convention (Part C). Moreover, the authors would like to make a few remarks on informal co-operation in the named field of international law and informal co-operation in general, which is currently discussed under the dodgy keyword of "Coalitions of the Willing" (Part D)[2].

B. The Proliferation Security Initiative

The PSI was announced by U.S. President George W. Bush on May 31, 2003 at a speech prior to the G8 Summit in Cracow[3] as a response to the growing challenge

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1 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (LEG/CONF.15/21).

2 E.g. Proceedings of the 99th Annual Meeting of the American Society of International Law, 99 ASIL Proc. vol. 214 (2005), 243-55.

3 "The greatest threat to peace is the spread of nuclear, chemical and biological weapons. And we must work together to stop proliferation. […] 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

posed by the proliferation of WMD, their delivery systems, and related materials worldwide. The PSI is meant to be a specific response to the urgent need to seize WMD-related transfers between states of proliferation concern, or to non-state actors, that violate international non-proliferation norms or are beyond the scope of the existing multilateral export control regimes. In addition to reinforcing multilateral non-proliferation regimes, the PSI shall be an element of the implementation of United Nations Security Council Resolution 1540, which *inter alia* calls upon all states to take co-operative action to prevent illicit trafficking in WMD, their means of delivery and related materials[4]. UN Secretary General Kofi Annan has welcomed the initiative's role in that respect[5].

The PSI could also be regarded as an element of the implementation of the U.S. National Security Strategy[6], more precisely the National Strategy to Combat WMD[7].

I. Objectives and Participants of PSI

The primary objective of the PSI is to prevent WMD trafficking at sea, in the air, and on land. In order to reach this objective, initiative participants intend to carry out interdiction operations at sea, in the air, or on land with the aim of making it more costly and risky for proliferators to acquire the weapons or materials they seek. The PSI is limited solely to seizing shipments of WMD and dual-use goods which both have civilian, peaceful purposes and which could also be used for the construction of weapons by those countries and non-state actors viewed as threats by PSI participants[8]. So far, the PSI has played an important role in providing the framework for action to disrupt proliferation on several occasions[9]. For instance, in October 2003, Italy, Germany and the United States worked together to stop

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of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hands of our common enemies." President George W. Bush, Remarks at Wawel Royal Castle in Krakow, Poland, at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html> (last visited May 31, 2003).

[4] C. Ahlström, The Proliferation Security Initiative, in: SIPRI Yearbook 2005, 741-767 (763).

[5] K. Annan, United Nations Secretary General, "A Global Strategy for Fighting Terrorism", speech at International Summit on Democracy, Terrorism and Security, Madrid, Spain, 10 March 2005, <http://www.unfoundation.org/files/pdf/2005/A_Global_Strategy_for_Fighting_Terrorism.pdf> (last visited June 21, 2006).

[6] Available at <http://www.whitehouse.gov/nsc/2006/> (last visited October 10, 2006).

[7] Available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> (last visited June 15, 2006); also see Section V of the NSS 2006.

[8] Press Release, White House, Principles for the PSI (September 4, 2003), available at <www.state.gov./t/np/rls/prsrl/23809/htm> (last visited May 30, 2006).

[9] See remarks by Condoleezza Rice, U.S. Secretary of State, on the second anniversary of the PSI, <http://www.state.gov/secretary/rm/2005/c14856.htm> (last visited June 15, 2006).

the German-owned vessel BBC China from delivering a cargo of centrifuge parts for uranium enrichment destined for Libya's nuclear weapons program. Soon after, the Libyan Government renounced its WMD programs and opened its borders for international verifications.

To co-ordinate their efforts in this respect, the eleven core participants developed a set of principles on September 4, 2003[10]. This "Statement of Interdiction Principles" calls upon all PSI participants, as well as other countries, not to engage in WMD-related trade with countries of proliferation concern and to permit their own vessels and aircraft to be searched if suspected of transporting such goods. The principles further contain the quick exchange of information on suspicious activities to enable possible interdictions and demand that all vessels and aircraft reasonably suspected of carrying dangerous cargo are inspected when passing through national airports, ports, and other trans-shipment points. According to the U.S. administration, the rapid development of these principles was merely possible because of the fact that just a small group of like-minded states was involved[11]. At the same time, the initiative is open for other states' suggestions:

> "While the Principles have been agreed, the PSI is a dynamic initiative. If countries have ideas that are not reflected in the Statements on Principles that would contribute to a more robust, effective initiative, we want to hear from them. In that way, the PSI is an initiative open to contributions from all states that want to support interdiction efforts."[12]

Initially, ten states joined the initiative. Up to today, more than 60 countries have expressed their support for the PSI[13]. However, the factual and legal quality of that possible support remains unclear in detail.

In addition to these measures, participating states are called upon to negotiate and conclude ship-boarding agreements with other states (especially with states which are known as flag-of-convenience states). So far, the United States has signed ship-boarding agreements with some of the world's largest ship registry states, *inter alia* Liberia, Cyprus, and Panama[14]. For example, the agreement with Liberia allows U.S. personnel to enter a suspicious ship flying the Liberian flag unless the Liberian authorities deny access within two hours after the boarding request[15]. Similar agreements with other states are currently under negotiation. This practice is perfectly in accordance with international law and common among

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[10] The Statement of Interdiction Principles can be found on the Web Site of the State Department: <http://www.state.gov/t/np/rls/fs/23764.htm> (last visited April 25, 2005).

[11] U.S. Department of State, Fact Sheet (May 26, 2005), see <http://www.state.gov/t/isn/rls/fs/46839.htm> (last visited July 10, 2006).

[12] U.S. Department of State, Fact Sheet (May 26, 2005), see ibid.

[13] The core participants include Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, the UK, and the USA.

[14] J.R. Crook, Contemporary Practice of the United States Relating to International Law, 99 AJIL (2005), 889-925 (919).

[15] Agreement partly reprinted by S.D. Murphy, Contemporary Practice of the United States Relating to International Law, 98 AJIL (2004), 349-70 (355).

states with respect to other dimensions of the law of the sea (e.g. prevention of drug smuggling, fisheries management)[16].

II. Status and Structures of PSI Under International Law

1. Status

The PSI is often described as an informal agreement or as a coalition of like-minded states without any legal foundations. The participants themselves regard the PSI as an activity rather than an organization[17]. According to their perception, the PSI was not constituted by an international treaty. It has neither a co-ordinating body nor a compliance control mechanism nor any other characteristic of an international organization. Therefore, a twofold question arises with regard to the initiative's normative status under international law: Firstly, how does legal doctrine treat such intergovernmental institutions or multilateral activities not intended to possess the legal status of an international organisation or to create legal rights and obligations for the participating states? Secondly, which implications result from such undertakings with respect to the international legal order? Are they a threat, a supplement, or even an *avant-garde* to existing international law?

The formation of coalitions between states without the intention to create legal rights and obligations between the respective participating states is well known to international legal doctrine. The existence of so-called informal instruments, understandings or non-legal agreements has been recognized by the overwhelming majority of scholars[18]. State practice and the jurisdiction of international courts also indicate the possibility that on several occasions throughout history, states concluded agreements lacking the quality of an international treaty. As informal instruments have been employed in almost every field of international relations, e.g. diplomatic, defence, commercial, and transport, every lawyer working for a defence or foreign ministry will be familiar with them[19].

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[16] M. Byers, Policing the High Seas: The Proliferation Security Initiative, 98 AJIL (2004), 526-41 (529).

[17] Chairman's Conclusions, PSI Meeting London, October 9-10, 2003.

[18] E.g., J. Fawcett, The Legal Character of International Agreements, 30 British Yearbook of International Law (1953), 381-400; K. Widdows, What Is an Agreement in International Law, 50 British Yearbook of International Law (1979), 117-149; H. W. Baade, The Legal Effects of Codes of Conduct for Multinational Enterprises, German Yearbook of International Law (1979), 11-52; R. R. Baxter, International Law in Her Infinite Variety, 29 International and Comparative Law Quarterly (1980), 549-566; T. Gruchalla-Wesierski, A Framework for Understanding 'Soft-Law', 30 McGill Law Journal (1984), 37-88; M. Nash, International Acts not Constituting Agreements, 88 American Journal of International Law (1994), 515-519; F. Münch, Comments of the 1968 Draft Convention on the Law of Treaties – Non-Binding Agreements, 29 HJIL (1969), 1-11; M. Bothe, Legal and Non-legal Norms – A Meaningful Distinction in International Relations, 11 Netherlands Yearbook of International Law (1980), 65-95.

[19] A. Aust, The Theory and Practice of Informal International Instruments, 35 International and Comparative Law Quarterly (1986), 787-812 (788).

Especially in the field of international economic law and closely related to that in the area of arms control and non-proliferation, several informal export control arrangements involving the participation of the major supplier states of WMD-related equipment and materials exist (commonly referred to as supplier groups)[20]. Those supplier groups pursue the aim of curbing the proliferation of WMD, material for their production and means of delivery through the multilateral coordination of their domestic export control regulations[21]. According to almost every commentator, the supplier groups rely on non-legally binding arrangements and do not create any legal rights and obligations between the participating states. The same might be true for the PSI, but such a categorization depends on the criterion applicable for terminating the legal or non-legal status of an agreement. Therefore the question that arises is: what is deemed to be that criterion? With other words, what is the decisive criterion for distinguishing between legal and non-legal agreements? The answer to this question might be found in the treaty concept expressed in the Vienna Convention on the Law of Treaties (hereinafter: VCLT).

With regard to the Vienna Convention, a treaty consists of one or more written instruments concluded between states, regardless of their designation, only requiring that these agreements are "governed by international law"[22]. At first glance, this definition seems to be tautological: An international treaty is an agreement […] governed by international law. However, with regard to the evolution and the *travaux préparatoires* of this definition, this formulation is the result of negotiations over several decades. During this time, two alternative definitions were under discussion. The first one referred to the intention of the parties to create legal rights and obligations, while the second one preferred the inducement of an intention to create a legal relationship between states. Both elements were ultimately sacrificed at the Vienna Conference for the actual definition. Therefore, according to the prevailing view in legal doctrine, the decisive criterion for differentiating between legal and non-legal agreements should be the intention of the parties to enter into an international treaty[23]. In light of this criterion, the PSI's normative status depends on the intention of the participating states. As mentioned above, the participating states regard the PSI as an initiative not based upon an international treaty and without any legally binding force. Thus, the participants neither in-

[20] The following groups are considered to be an integral part of the non-proliferation regime: The Nuclear Suppliers Group (NSG), the Australia Group (AG) for the field of biological and chemical weapons non-proliferation, and the Missile Technology Control Regime (MTCR).

[21] Other recent examples entail coalitions of states that pursue collective goals, such as combating money laundering and terrorist financing (the Financial Action Task Force), fighting AIDS and other pandemics in developing countries (the Global Fund to Fight AIDS, Tuberculosis and Malaria) and facilitating transnational trade.

[22] According to Art. 2.1 *lit*. a, a VCLT treaty means "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[23] O. Schachter, The Twilight Existence of Non-Binding International Agreements, 71 AJIL (1977), 296-304 (296); H. Kraus, Système et Fonctions des Traités Internationaux, Recueil des Cours, 1934 IV, 311-400 (327).

tended to create legal rights and obligations between them nor to establish a legal relationship. Ergo, the PSI is based upon a non-binding agreement and the commitments of the participants in that respect are merely morally or politically binding.

2. Structures

High-level meetings of representatives of participant states are the only recognizable structure within the PSI. The initiative is explicitly meant to be a loose connection of states pursuing a common aim instead of being an international organization with firm structures. This lack of formal mechanisms is considered as an advantage in respect of reacting to new developments promptly.

The decision-making process within the framework of the PSI primarily relies on high-level meetings of representatives of the participating governments, but it also builds national capabilities of the participating states within the framework of the PSI Operational Experts Group (hereinafter: OEG) to improve their national interdiction capabilities. The OEG is an expanding network of military, law enforcement, intelligence, legal, and diplomatic experts. Their task is the development of operational concepts for interdiction, the organization of interdicting exercises, the exchange of information about national legal authorities, and the co-operation with relevant industry sectors with regard to interdiction operations. Through these efforts, the OEG participants enhance the quality of collective and national interdiction capabilities.

III. Legal Consequences for States Acting in Pursuance of the Initiative's Objectives

The PSI does not empower states to do anything that they previously were not allowed to do under international law. Every participating state acts under its own legal responsibility and not as a body of or on behalf of the PSI. Most importantly, the PSI does not grant governments any new legal authority to conduct interdiction operations in international waters or airspace. Such interdictions may take place, but they must be confined to what is currently permissible under international law (e.g. consenting boarding). According to the UN Convention on the Law of the Sea (hereinafter: UNCLOS) and customary international law, the freedom of navigation on the High Seas and the right of innocent passage through territorial waters have to be respected[24]. UNCLOS and customary international law

[24] For comprehensive studies on this point see W. Heintschel von Heinegg, The Proliferation Security Initiative: Security vs. Freedom of Navigation?, 35 Israel Yearbook on Human Rights (2005), 181-203; D.H. Joyner, The Proliferation Security Initiative: Non-Proliferation, Counter-Proliferation, and International Law, 30 Yale Journal of International Law (2005), 507-548; C. Schaller, Die Unterbindung des Seetransports von Massenvernichtungswaffen: Völkerrechtliche

do not contain any entitlement to stop and search a foreign ship simply because it is suspected to engage in proliferation activities: Art. 110 UNCLOS merely stipulates that a ship may be forcibly boarded on the High Seas if it is reasonably suspected of engaging in piracy or slave trade, lacks a flag or is broadcasting in an unauthorized manner towards, or is registered in, the state that wishes to board[25]. The only available means of legally exempting interdiction activities on the High Seas from the confines of Art. 110 UNCLOS for state parties of the same would be to take advantage of the article's first clause, which stipulates: "except where acts of interference derive from powers conferred by treaty." This provision reflects the intention of the drafters of the UNCLOS to leave open the possibility for state parties to amend the interdiction principles of Art. 110 through the establishment of conflicting principles in other treaty instruments.

As mentioned above, the PSI itself offers no additional legal basis for justifying operations prohibited by Art. 110 UNCLOS. The initiative is primarily intended to encourage participating states to use all permitted means to intercept proliferation-related trade. However, PSI participants, especially the U.S., seek new ways to act in accordance with the law, e.g. through the conclusion of boarding agreements or by advancing the adoption of an amending protocol to the SUA Convention. Both constitute treaties within the meaning of the first clause of Art. 110 UNCLOS.

Another possibility of taking advantage of the said clause of Art. 110 UNCLOS advanced by the U.S. is to regard an authorization by the UN Security Council as an obligation for the state parties arising under a different treaty framework. Then U.S. Under-Secretary of State John Bolton indicated that a Security Council Resolution under Chapter VII of the UN Charter could provide authority for interdiction operations by PSI participants in cases in which sufficient authority could not be found in Art. 110 UNCLOS or other treaties like the SUA Convention, the protocols thereto or bilateral boarding agreements[26]. The practical disadvantages of this approach are obvious: Apart from the difficulty of persuading enough members of the Security Council to vote in favour of a resolution providing an authority to interdict a particular vessel, the necessity of revealing intelligence information could contradict national security interests. Moreover – as time is a decisive factor after the detection of a suspicious vessel – the Security Council is no adequate body for making quick decisions[27].

In this respect, Security Council Resolution 1540 of April 28, 2004, and especially its operative paragraph 10, has been regarded by some commentators as an additional legal authority for PSI participants to interdict vessels at the High Seas.

Aspekte der – Proliferation Security Initiative – , SWP-Studie 19, Berlin 2004 (German Institute for International and Security Affairs Research Papers, Vol. 19, Berlin 2004).

[25] On the customary status of that provision, see Byers, *supra* note 16, 532.

[26] The Proliferation Security Initiative: An Interview with John Bolton, Arms Control Today, December 2003; <http://www.armscontrol.org/act/2003_12/PSI.asp> (last visited April 23, 2005).

[27] Joyner, *supra* note 24.

Despite the opinion of those authors, neither UN Security Council Resolution 1540 nor the inherent right of self defence provide a legal basis for maritime interception operations unless substantive additional information are available which give reason to counteract an imminent attack reaching the threshold of an armed attack. A full analysis of this question would go well beyond the scope of the present article. Therefore, readers are referred to other publications[28].

C. The 2005 Protocol to the SUA Convention

To maximise their capacity to participate in PSI operations, participants have also agreed to strengthen relevant laws. Accordingly, PSI countries have participated in negotiations in the International Maritime Organization (hereinafter: IMO) to amend the SUA Convention[29]. The amendments will create new offences in relation to the transport of WMD and related materials by sea and establish a boarding regime in relation to suspect vessels. As mentioned above, the U.S. suggested amending the SUA Convention with the aim of combating terrorist activities on the High Seas and has finally achieved this goal *inter alia* through the participation of PSI countries in IMO negotiations. The SUA Convention prohibits certain activities at sea by declaring them unlawful and provides enforcement mechanisms (such as the entitlement to stop and search ships under certain conditions): Among the unlawful acts covered by Art. 3 SUA Convention are the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it[30]. The trafficking of WMD and related goods is not yet among the unlawful acts. This reflects the lack of "hard" or formal international law within the non-proliferation framework.

The 2005 Protocol to the SUA-Convention negotiated in the IMO's legal committee is closely linked to the PSI[31] and designed to change this legal situation. The protocol sets up provisions that criminalize terrorist acts and the transport of WMD and related goods on the High Seas by defining such acts as offences under the Convention in a new Art. 3 *bis*. Thereby certain proliferation activities are made substantively illegal.

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[28] Ibid.

[29] According to the Australian Department of Foreign Affairs and Trade, see <http://www.dfat.gov.au/publications/wmd/chapter_5.html> (last visited August 8, 2006).

[30] In this context, it should be noted that an Annex to the SUA Convention lists nine treaties under which offences can be considered as offences for the purpose of the SUA, e.g. the Convention for the Suppression of Seizure of Aircraft (done at The Hague 1970), the International Convention for the Suppression of Terrorist Bombings (adopted by the General Assembly of the United Nations on December 15, 1997), the International Convention for the Suppression of the Financing of Terrorism (adopted by the General Assembly of the United Nations on December 9, 1999).

[31] IMO Legal Director Rosalie Balkin underlines the impact some States have had on the inclusion of a reference to the Nuclear Non-Proliferation Treaty within the Protocol, 4 IMO-News (2006), 6.

According to the IMO publication of the new Art. 3 *bis*, a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

"uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;

discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substances, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;

uses a ship in a manner that causes death or serious injury or damage;

transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;

transports on board a ship any BCN weapon, knowing it to be a BCN weapon;

any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and

transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose." [32]

The transportation of nuclear material does not constitute an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a state party to the Treaty on the Non-Proliferation of Nuclear Weapons. Under the 2005 Protocol, a person does commit an offence within the meaning of the SUA Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act which is regarded as an offence under the SUA Convention. The 2005 Protocol also outlaws the unlawful and intentional injury or killing of any person in connection with the commission of any of the offences in the SUA Convention. Additionally, the attempt to commit such an offence, the participation as an accomplice, the organization or direction of others to commit an offence, or the contribution to the commissioning of an offence is equally prohibited.

The wording of the new Art. 3 *bis* resembles definitions of terrorist acts contained in United Nations conventions directed against specific aspects of terrorist activity.

The list of offences under the Convention is further broadened by amendments to the 1988 SUA Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. These amendments reflect the spirit of the proposed 2005 Protocol to the SUA Convention.

[32] Available at <http://www.imo.org/About/mainframe.asp?topic_id=1018&doc_id=5334> (last visited May 30, 2006).

In order to allow effective enforcement of the new prohibitions, the 2005 Protocol will also establish procedures to board ships suspected of transporting WMD and related goods under certain circumstances. A new Art. 8 *bis* in the SUA Convention covers several related procedures and principles of co-operation and procedures to be followed if a state party to the Convention desires to board a ship flying the flag of another state party when the requesting party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in the commission of an offence under the Convention. The authorization of the flag state is still required before the boarding measure. However, a state party may notify the IMO Secretary General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response from the flag state within four hours. A state party can also notify that it authorizes a requesting party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed. The use of force during boarding operations is to be avoided, except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed to the execution of authorized actions.

Art. 8 *bis* contains necessary safeguards for when a state party takes measures against a ship, including boarding. The safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed.

In addition, the proposed protocol also covers extradition procedures and contains provisions relating to international co-operation in criminal procedures against offenders governed by the principle of *aut dedere aut judicare*.

The 2005 Protocol was adopted by the Diplomatic Conference on the Revision of the SUA Treaties on October 14, 2005. As its entry into force is linked to the entry into force of the revised 2005 SUA Convention, which will enter into force ninety days after the date on which twelve states have either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession with the IMO Secretary General, the Protocol has not yet entered into force. The Protocol additionally requires ratification from three state parties to the SUA Convention. The instruments have been open for signature since February 14, 2006.

The adoption of the 2005 Protocol to the SUA Convention may possibly solve some of the legal deficits of the PSI's interdiction operations with regard to boarding measures on the High Seas. When entered into force, it will empower states to conduct interdiction operations including the boarding of ships subject to conditions that have been adjusted to fit the needs of states in their efforts to counter terrorism and enforce non-proliferation regimes.

D. Some Remarks on Informal Co-Operation

The starting point for the current discussion about the advantages and disadvantages of informal co-operation between states was the 2003 war against Iraq, which was led by a group of states calling themselves a "Coalition of the Willing". The whole discussion revolves around the idea that there is a common phenomenon in public international law: Individual states form alliances outside the established structures of multilateral institutions, i.e. international organizations, in order to realize common objectives which they could otherwise not achieve.

In contrast to an international organization, such a coalition is not based on a legally binding treaty between states but on a non-binding instrument, e.g. an informal understanding.

The term "Coalition of the Willing" has acquired a negative connotation during the last decade, as it was used to denote the collective efforts of a group of states led by the U.S. to disarm Iraq of WMD. In this context, analysts have identified a nexus between the forming of informal coalitions designed to overcome or avoid institutional blockades and the "multilateralism-*à-la-carte*" tendency in U.S. foreign policy[33]. At a more general level, the question has been raised whether "Coalitions of the Willing" represent a threat to the existing international legal order or form an *avant-garde* within the process of international law-making[34].

Critics of those informal instruments argue that states increasingly seek to avoid international law altogether and instead explore other modalities. According to those voices, governments that initiate co-ordination efforts across national boundaries consciously avoid making any claims about international law and do not use treaties as the means for co-ordinating their activities. Thus, they shape international law, but only indirectly, through informal processes. They sign no formal treaties, set up no international organizations, and sometimes mask public functions as private initiatives subject only to private law. They consciously try to disengage from traditional international law.

Despite its general importance, academic writers have recently concentrated on the UN System of Collective Security when discussing "Coalitions of the Willing"[35], whereas other authors examine the general tendency towards informal co-

[33] Compare Byers, *supra* note 16, 542.

[34] This was the case throughout a symposium held by the Institute of International Law and European Law at the University of Goettingen in July 2005.

[35] E.g. N. Blokker, Powers and Practice of the UNSC to Authorize the Use of Force by – Coalitions of the Able and Willing –, 11 EJIL (2000), 541-568; P. Stewart, Beyond Coalitions of the Willing: Assessing U.S. Multilateralism, 17 Ethics and International Affairs (2003), 37-54; G. Wilson, UN Authorized Enforcement: Regional Organisations vs. – Coalitions of the Willing –, 10 International Peacekeeping (2003), 89-106; D.T. Stuart, NATO and the Wider World: From Regional Collective Defence to Global Coalitions of the Willing, 58 Australian Journal of International Affairs (2004), 33-46; R. Ponzio, The Solomon Islands: The UN and Intervention by Coalitions of the Willing, 12 International Peacekeeping (2005), 173-188.

operation rather than concrete initiatives especially under aspects of International Relations theories[36].

In light of the adoption of the 2005 Protocol to the SUA Convention, one can assume that one of the PSI's effects was to give the impetus for the amending protocol to the SUA Convention. Therefore, it is possible to conclude that the PSI may be regarded as an *avant-garde* for the development of international law in the context of the WMD non-proliferation regime. It is certainly not justified to transfer the more general thesis that the tendency towards informal co-operation poses a threat to the existing international legal order to the example of the PSI. Several aspects of that thesis may be valid with regard to the prohibition of the use of force in international relations, but the thesis in general is not assignable to the PSI. The PSI is reflective of a shift in U.S. foreign policy towards a more flexible approach to collective action[37]. It was designed as a tool to realize a more proactive and dynamic approach towards the proliferation problem[38]. Certainly, the PSI may be seen as a pathfinder for a more stringent and effective non-proliferation policy and contains some elements which could be characterized as a starting point of a changed policy leaving traditional non-proliferation approaches behind and carefully opening new ways towards an era of counter-proliferation activities in accordance with international law. International law – as illustrated by the 2005 Protocol to the SUA Convention – has benefited from this new approach. As has been pointed out by other writers, the PSI in its present form is primarily about states strengthening and enforcing existing national and international norms while taking advantage of the requirement of flag state consent[39]. Some commentators have stressed that counter-proliferation strategies, because of their inherent character, design and purpose, are hard to square in international law and are therefore rather pursued through informal coalitions[40]. As the example of the PSI shows, informal co-operation can help a state to realize certain political aims without recourse to established structures of the international legal order, i.e. international organizations. The positive impact the PSI had on the development of the SUA Convention also illustrates that the formation of an informal coalition with a view to solving certain problems does not necessarily pose a threat to the existing international legal framework in that respect.

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[36] A.-M. Slaughter, A New World Order, Princeton and Oxford 2004; H.H. Koh, Why Do Nations Obey International Law, 107 Yale Law Journal (1997), 2599-2659; S. Haggard/B.A. Simmons, Theories of International Regimes, 41 International Organization (1987), 491-517.

[37] Byers, *supra* note 16, 543.

[38] "The initiative reflects the need for a more dynamic, proactive approach to the global proliferation problem. It envisions partnerships of states working in concert, employing their national capabilities to develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD and missile-related equipment and technologies." U.S. Efforts To Stop the Spread of Weapons of Mass Destruction: Testimony Before the House Comm. on Int'l Relations, 108th Cong. (2003) (statement of John R. Bolton, Under Secretary of State for Arms Control and International Security).

[39] Byers, *supra* note 16, at 545.

[40] Joyner, *supra* note 24.