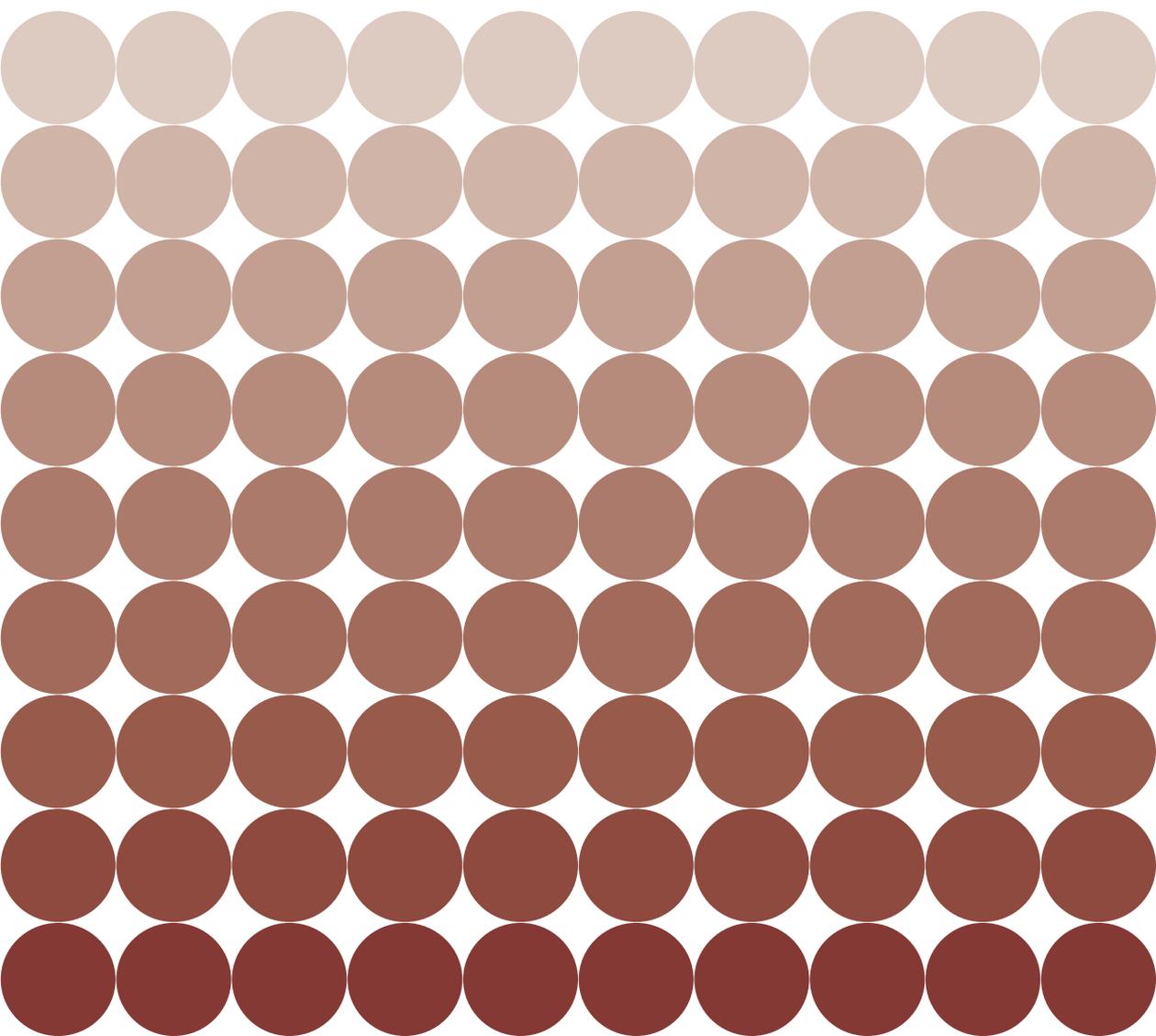


THE PROLIFERATION SECURITY INITIATIVE

Legal Considerations and
Operational Realities

AARON DUNNE



STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE

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Operational Realities

SIPRI Policy Paper No. 36

AARON DUNNE



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Preface

The international community has approached the threat posed by the proliferation of weapons of mass destruction (WMD) by agreeing a series of international treaties, by establishing multilateral strategic trade control regimes, and by adopting resolutions in the United Nations Security Council. Despite these and other actions, the threat to global peace and security persists: state and non-state actors continue to seek materials and technologies for WMD through illicit networks that circumvent international and national controls. Growing numbers of suppliers, more sophisticated procurement networks, developments in international trade, and the relative ease of concealment ensure that the opportunities and incentives to circumvent such controls are not diminishing.

The Proliferation Security Initiative (PSI) emerged as a ‘new’ response to these challenges, to specifically target the transport of consignments of proliferation concern. It was defined as a means of securing the political commitment of states and encouraging their practical cooperation. Now, in its 10th year, and despite boasting over 100 participants, the PSI continues to face challenges; a number of key states remain opposed; and questions about its legality, activities and effectiveness persist.

This SIPRI Policy Paper offers a concise exploration of the key issues associated with the PSI for states considering participation. In doing so it explores some of the key challenges, sets out the legal bases and, with its innovative use of operational scenarios, attempts to explore the realities of PSI activities. It fills a gap in the literature on the PSI, contributes to a better and wider understanding of it and, potentially, provides a platform for further research into the operational realities that both underpin and constrain the PSI. It uses an approach that could be positively applied to research on the operational implementation and effectiveness of a range of counterproliferation tools.

The author, Aaron Dunne, draws on his experience of the PSI as a former Head of Counter-Proliferation Policy with HM Revenue and Customs, the UK’s enforcement authority for strategic trade controls, to explore the realities from an operational perspective. I am grateful to him for producing this excellent study, and to the German Federal Foreign Office for its generous funding of this publication.

Professor Tilman Brück
Director, SIPRI
Stockholm, April 2013

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As with all SIPRI publications, the research was conducted independently and the views expressed here are solely those of the author. They do not necessarily reflect the official opinion of the German Government and neither German governmental institutions and bodies, nor any person acting on their behalf, may be held responsible for the use that may be made of the information contained herein.

Aaron Dunne
Stockholm, April 2013

Summary

The Proliferation Security Initiative (PSI) is a means to secure the political commitment of states, and promote their practical cooperation, to counter the transfer of weapons of mass destruction (WMD), their delivery systems and related materials to and from states and non-state actors of proliferation concern. It was conceived as a response to a growing threat from the proliferation of WMD and their means of delivery, and a perceived gap in the global non-proliferation system.

Since its inception in 2003 the PSI has evolved from a core group of 11 like-minded states to comprise 102 participating states. Of these, 21 states form the Operational Experts Group (OEG), the PSI's coordinating and decision-making body. In contrast with other non-proliferation and counterproliferation initiatives, the PSI was promoted from the start as an activity and not an institution.

The PSI Statement of Interdiction Principles (SIP) defines and directs PSI activity, articulating the rationale, principles and activities that define the initiative. The first of its two sections introduces the SIP and outlines strategic objectives, while the second contains four interdiction principles, or commitments, that support the PSI. The last of these defines six specific actions to which PSI participants commit themselves. States that wish to openly support the PSI are required to publicly endorse the SIP. Unlike the majority of counterproliferation initiatives, the PSI is open to all states based on a non-legally binding political commitment to undertake actions that SIP endorsing states are able and willing to take.

Endorsement of the SIP does not create legal powers beyond those already established in international law and the SIP endorsing state's national law. When undertaking PSI activities, SIP endorsing states must not act outside of either international or national law.

International maritime and aviation law set the boundaries for action relating to the transport of consignments of proliferation concern while United Nations Security Council resolutions create obligations on all states to undertake a range of measures to counter proliferation. In addition, proliferation-related treaties impose obligations on signatories that support PSI interdiction principles and activities. The PSI is therefore highly dependent on the incorporation of international legal obligations into national law, although this is not a prerequisite for participation.

From an operational perspective, the majority of PSI interdictions occur in port and therefore depend on customs authorities having the necessary powers and on the full range of proliferation-related offences being defined in national law thereby making effective enforcement possible.

Four operational scenarios—transit, trans-shipment, maritime and air—demonstrate the operational realities of undertaking PSI interdictions. Transit and trans-shipment are important features of international trade and present both a proliferation threat and an opportunity to intercept. Although the interdiction of

vessels in international waters is commonly portrayed as the focus of the PSI, a maritime scenario is actually one of the least likely operational scenarios and the scope of action is highly constrained. As the air scenarios relate to national, rather than international, airspace the scope of action available—to either prevent the use of national airspace or intercept aircraft believed to be transporting consignments of proliferation concern—is significantly greater, although the challenges differ.

Despite an enduring programme of diplomacy and outreach, the PSI has not achieved universal support. It continues to face a range of challenges: explicit opposition, questions and criticism, and the need to achieve objectives and maintain momentum.

Over the past 10 years the military focus of the PSI has gradually given way to a greater focus on the interdiction of consignments of proliferation concern by customs in port, based on national law. However, further movement in this direction is required that better reflects the operational realities of the PSI and the types of activity that SIP endorsing states are most likely to be required to undertake. After all, comparatively few states have the naval capability, let alone the will, to intercept vessels in international waters.

The Critical Capabilities and Practices effort could become the key vehicle for enhancing the operational effectiveness of the PSI. In order to optimize its impact, it would benefit from more support from OEG members and a move from assessing and collecting supporting material to developing and delivering a PSI-wide implementation strategy for enhancing operational effectiveness.

The OEG could be more representative and transparent, and the PSI would benefit if the OEG enhanced its own effectiveness and relevance. Not all members of the OEG satisfy the nominal membership criteria of being the ‘most active’ or ‘strongly engaged’ PSI participants, and these informal criteria may need reconsidering. Moreover, as the PSI steering group, the OEG could provide more clarity on the operational realities and national legal requirements of the activities it promotes.

National law and the ability to act are the basis for most PSI activity. The PSI’s capacity-building and exercise activities should better reflect proliferation risks and opportunities, operational realities and the capability gaps of most states. Accordingly, a true measure of the PSI’s success is how well it enhances the ability of states to undertake an interdiction when called on to do so. The CCP effort appears to recognize this.

If the PSI is to remain relevant after 10 years of operation, enhance its effectiveness and secure its future for the next 10 years, it needs to undertake an honest inward-looking self-assessment and develop a strategy for progress. The 10th anniversary in 2013 provides an ideal opportunity to do so.

Abbreviations

BTWC	Biological and Toxin Weapons Convention
CCP	Critical Capabilities and Practices
CPX	Command post exercise
CWC	Chemical Weapons Convention
EU	European Union
HLPM	High-level Political Meeting
IAEA	International Atomic Energy Agency
LIVEX	Live exercise
MTCR	Missile Technology Control Regime
NPT	Nuclear Non-Proliferation Treaty
NSG	Nuclear Suppliers Group
OEG	Operational Experts Group
PSI	Proliferation Security Initiative
ROEG	Regional Operational Experts Group
SIP	Statement of Interdiction Principles
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TTX	Tabletop exercise
UAE	United Arab Emirates
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
WMD	Weapons of mass destruction

1. Introduction

On 31 May 2003 at Wawel Castle in Krakow, Poland, US President George W. Bush announced the creation of the Proliferation Security Initiative (PSI):

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. [We] 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.¹

Three months later the PSI was effectively codified in the PSI Statement of Interdiction Principles (SIP)—an articulation of the rationale, objectives and activities that define the initiative.² The year 2013 marks the PSI's 10th anniversary and an important milestone, with the first PSI High-level Political Meeting (HLPM) in five years taking place in Warsaw, Poland, in May. The anniversary also provides an opportunity to persuade more states to participate in the PSI and there will be a series of events to promote the PSI's continued relevance and success—as perceived by the participants.

This Policy Paper summarizes and clarifies the commitments or obligations that a state enters into when it endorses the SIP by examining the legal bases and operational realities of undertaking PSI activities. In parallel, it examines some of the different views and perceptions of the PSI and, where appropriate, makes policy proposals. In doing so it is hoped that the paper will not only help inform the decision-making process of states considering endorsement of the SIP, but also contribute to a better understanding of the legal bases and operational realities of the PSI more generally.

Chapter 2 of the paper introduces the PSI, its origins, structure, development and activities. The substance of the SIP and the commitments being made by states that endorse it are explored in chapter 3, which also defines a number of central concepts. Building on this, chapter 4 focuses on a range of legal issues that are directly related to PSI activities. Chapter 5 uses a series of scenarios that reflect the nature of international trade and the modus operandi of proliferators to explore the operational realities of PSI activities. Chapter 6 highlights some of the challenges faced by the PSI, followed in chapter 7 with a review of the key points identified for states considering endorsing the SIP and a number of policy recommendations to enhance the operational effectiveness of the PSI.

¹ White House, 'President George W. Bush, Remarks by the President to the People of Poland', Wawel Royal Castle, Krakow, Poland, 31 May 2003, <<http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html>>. For information and documents on the PSI see the newly created official website, [psi.info](http://www.psi.info), <<http://www.psi-online.info/>>.

² The PSI Statement of Interdiction Principles is reproduced in appendix A in this volume.

2. Development and activities of the Proliferation Security Initiative

The Proliferation Security Initiative is a vehicle for securing the political commitment of states, and promoting their practical cooperation, to counter the transfer of weapons of mass destruction (WMD), their delivery systems and related materials to and from states and non-state actors of proliferation concern. It was conceived as a response to a gap in the global non-proliferation system and as a way to counter the ‘increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade’.³ It was characterized early as an ‘activity not an organisation . . . open to any state or international body that accepts the [Statement of Interdiction Principles] and makes an effective contribution’.⁴ Unlike the multilateral regimes that seek to control the trade in goods related to WMD, the PSI is open to all states.

The PSI Statement of Interdiction Principles defines and directs the PSI’s activity. States that wish to openly support the PSI are expected to publicly endorse the SIP: fulfilling the obligations in the SIP is synonymous with supporting the PSI.

Origins

The PSI is widely considered to have been a response to the interdiction of the *So San*—a freighter owned by the Democratic People’s Republic of Korea (DPRK, North Korea) that sailed under a Cambodian flag of convenience.⁵ Following a request from the United States, the Spanish Navy pursued and boarded the vessel on the basis of statelessness (the vessel was not flying a flag).⁶ During the subsequent search, it found 15 Scud missiles, warheads and fuel hidden under bags of cement. However, it was soon discovered that the missiles, warheads and fuel were part of a legal sale from North Korea to Yemen and that there was no legal basis for seizing the consignment or detaining the vessel. Indeed, if the legal basis for boarding was to ascertain the flag state of the vessel, then it is difficult to justify a search of the vessel’s hold to assist in verifying the flag state. The vessel was subsequently allowed to continue and deliver the consignment to Yemen.⁷

³ Statement of Interdiction Principles (appendix A).

⁴ US Department of State, ‘Proliferation Security Initiative: Chairman’s conclusions at the fourth meeting’, 10 Oct. 2003, <<http://2001-2009.state.gov/t/isn/rls/other/25373.htm>>.

⁵ Sailing under a flag of convenience refers to vessels registering in the national registry of a state different to the state where the shipowner is located. On the trafficking challenges (including proliferation) faced by vessels sailing under flags of convenience see Griffiths, H. and Jenks, M., *Maritime Transport and Destabilizing Commodity Flows*, SIPRI Policy Paper no. 32 (SIPRI: Stockholm, Jan. 2012).

⁶ This ‘broken tail light’ approach to interdicting consignments of concern is explored in chapter 6 below.

⁷ For contemporary accounts see Karon, T., ‘SCUD seizure raises tricky questions’, *Time*, 11 Dec. 2002; and ‘U.S. lets Scud ship sail to Yemen’, CNN, 12 Dec. 2002, <http://articles.cnn.com/2002-12-11/world/us.missile.ship_1.yemeni-officials-scud-missiles-yemeni-government>. See also Ahlström, C., ‘The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles’, *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005).

Although the *So San* case is considered the catalyst for the creation of the PSI, the PSI has not created new legal grounds for interdiction, search or seizure. If the *So San* interdiction occurred today, and assuming the vessel were flying the Cambodian flag, the grounds for boarding, searching and seizing the cargo would not derive from the PSI. In fact, prior to the adoption by the UN Security Council of Resolution 1718 in 2006 and Resolution 1874 in 2009, which imposed sanctions on North Korea, the international legal basis for such actions did not exist.⁸ Even after their adoption, the legal grounds for boarding, searching and seizing the cargo would only exist if Cambodia had effectively incorporated the resolutions into Cambodian law.

If the resolutions had been incorporated, and if the interdiction of the *So San* were attempted today, it would probably begin with the Spanish Navy seeking and receiving permission from Cambodia to board and search the vessel. The Spanish Navy could then seize the cargo if there were reasonable grounds that it contravened Cambodian law.

The *So San* case is therefore indicative of what is probably the key challenge addressed by the PSI: the limitations or ‘deficiencies in the existing legal structures’.⁹ Although the PSI does not overcome these limitations, they were recognized and the SIP contains an explicit commitment to work together to strengthen national and international law in this area.¹⁰

Development

The PSI’s structure and the nature of participation have evolved significantly since its inception in 2003. Initially, 11 ‘like-minded states’—Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the USA—formed what was called the ‘core group’, which drafted the SIP and agreed to cooperate with the USA to develop the initiative. In 2004 the core group expanded to include Canada, Norway, Russia and Singapore, reflecting the desire to enlarge the geographic scope of the group and incorporate states that would be able to make positive contributions.

In 2005 the core group disbanded, as the basic principles of interaction had been established, and formed what is now called the Operational Experts Group (OEG).¹¹ As of early 2013, the OEG is comprised of 21 members; the Republic of Korea (South Korea) became the most recent member when it endorsed the SIP in 2010.¹² As the core group or OEG expanded, so did the number of SIP endorsing states that were not members. The result is a two-tier participation structure comprising 102 states (see table 2.1).

⁸ UN Security Council Resolution 1718, 14 Oct. 2006, para. 8(a)(i); and UN Security Council Resolution 1874, 12 June 2009, para. 12.

⁹ Klein, N., *Maritime Security and the Law of the Sea* (Oxford University Press: Oxford, 2011), p. 194.

¹⁰ Statement of Interdiction Principles (appendix A), para. 3.

¹¹ Valencia, M. J., *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Paper no. 276 (Routledge: London, 2005), p. 29.

¹² ‘S. Korea joins leadership of U.S.-led campaign against spread of WMD’, Yonhap News Agency, 1 Nov. 2010, <<http://english.yonhapnews.co.kr/news/2010/11/01/0200000000AEN20101101005500315.HTML>>.

Table 2.1. States that have endorsed the Proliferation Security Initiative Statement of Interdiction Principles as of April 2013

<i>Africa</i>	Mongolia [†]	Latvia
Angola	New Zealand*	Liechtenstein
Djibouti	Papua New Guinea	Lithuania
Liberia [†]	Philippines	Luxembourg
Libya	Samoa	Macedonia, FYR
Morocco	Singapore*	Malta [†]
Tunisia	Sri Lanka	Moldova
<i>Americas</i>	Tajikistan	Montenegro
Antigua and Barbuda [†]	Thailand	Netherlands*
Argentina*	Turkmenistan	Norway*
Bahamas [†]	Uzbekistan	Poland*
Belize [†]	Vanuatu	Portugal*
Canada*	<i>Europe</i>	Romania
Chile	Albania	Russia*
Colombia	Andorra	San Marino
Dominica	Armenia	Serbia
Dominican Republic	Austria	Slovakia
El Salvador	Azerbaijan	Slovenia
Honduras	Belarus	Spain*
St Lucia	Belgium	Sweden
St Vincent and the Grenadines [†]	Bosnia and Herzegovina	Switzerland
Panama [†]	Bulgaria	Ukraine
Paraguay	Croatia [†]	United Kingdom*
United States*	Cyprus [†]	<i>Middle East</i>
<i>Asia and Oceania</i>	Czech Republic	Bahrain
Afghanistan	Denmark*	Iraq
Australia*	Estonia	Israel
Brunei Darussalam	Finland	Jordan
Cambodia	France*	Kuwait
Fiji	Georgia	Oman
Japan*	Germany*	Qatar
Kazakhstan	Greece*	Saudi Arabia
Korea, South*	Holy See	Turkey*
Kyrgyzstan	Hungary	United Arab Emirates
Marshall Islands [†]	Iceland	Yemen
	Ireland	
	Italy*	

* These 21 states are members of the Operational Experts Group.

† These 11 states have concluded ship-boarding agreements with the USA.

Sources: US Department of State, 'Proliferation Security Initiative participants', 27 Sep. 2012 <<http://www.state.gov/t/isn/c27732.htm>>; French Ministry of Foreign Affairs, 'States participating in the PSI', 1 June 2008, <<http://www.diplomatie.gouv.fr/en/global-issues/disarmament-arms-control/arms-control-and-arms-trade/france-and-non-proliferation-of-proliferation-security-initiative/article/states-participating-in-the-psi>>; 'S. Korea joins leadership of U.S.-led campaign against spread of WMD', Yonhap News Agency, 1 Nov. 2010, <<http://english.yonhapnews.co.kr/news/2010/11/01/0200000000AEN20101101005500315.HTML>>; US Department of State, 'Thailand endorses the Proliferation Security Initiative', 19 Nov. 2012, <<http://www.state.gov/r/pa/prs/ps/2012/11/200849.htm>>; and US Department of State, 'Ship boarding agreements', <<http://www.state.gov/t/isn/c27733.htm>>.

In parallel with this increased participation, the PSI evolved as the challenges, threats and practicalities of interdiction became better understood. By the first anniversary it had ‘transformed from a vision into an active network of partnership and practical cooperation. Common principles have been defined. Interdiction capabilities developed and tested.’¹³

The type and tempo of PSI activities was established quickly: meetings, workshops, exercises and outreach (see below). The focus of activity during the first few years was twofold: to explore the PSI’s scope and test its capabilities; and to increase the number of states willing to support the PSI by publicly endorsing the SIP. It soon became apparent that some form of practical guidance was required to help states implement the SIP. This led to the development and publication of a short handbook, the *Proliferation Security Initiative (PSI) Model National Response Plan*, in December 2007 to help PSI participants develop what it describes as ‘a framework for responding to PSI/proliferation situations’.¹⁴ The handbook was widely circulated in paper and electronic format.

More recently, in a 2009 cornerstone speech outlining his nuclear policy, US President Barack Obama declared:

We must also build on our efforts to break up black markets, detect and intercept materials in transit, and use financial tools to disrupt this dangerous trade. Because this threat will be lasting, we should come together to turn efforts such as the Proliferation Security Initiative . . . into durable international institutions.¹⁵

While PSI participants welcomed the goal of making the initiative more durable, the reference to ‘international institution’ initiated some debate—not least because the previous US administration had attributed the PSI’s success to the fact that it was not an institution.¹⁶

The extent to which the PSI has become a more durable international institution since 2009 is not clear. The only discernable evidence is the USA taking on the role of a PSI Focal Point ‘providing support, improving information flow, and coordinating schedules of international activities among partners’.¹⁷ It is unclear how this has changed the PSI or whether the PSI has become a more ‘durable international institution’ as a consequence.¹⁸

¹³ Polish Ministry of Foreign Affairs, Chairman’s statement, 1st anniversary PSI meeting, Krakow, 1 June 2004, <http://www.psi.msz.gov.pl/en/meetings/global_meetings_org_by_poland/cracow_2004/>.

¹⁴ New Zealand Ministry of Foreign Affairs and Trade (MFAT), International Security and Disarmament Division, *Proliferation Security Initiative (PSI): Model National Response Plan* (MFAT: Wellington, Dec. 2007), p. 4.

¹⁵ White House, ‘Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic’, 5 Apr. 2009, <http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered>.

¹⁶ US Department of State, ‘U.S.–EU nonproliferation consultations’, Cable no. 09STATE83574, 11 Aug. 2009, <<http://wikileaks.org/cable/2009/08/09STATE83574.html>>.

¹⁷ Nacht, M., Assistant Secretary of Defense for Global Strategic Affairs, Statement before the Senate Committee on Armed Services Subcommittee on Emerging Threats and Capabilities, 21 Apr. 2010, <[http://www.armed-services.senate.gov/statemnt/2010/04 April/Nacht 04-21-10.pdf](http://www.armed-services.senate.gov/statemnt/2010/04%20April/Nacht%2004-21-10.pdf)>, p. 5.

¹⁸ US official familiar with PSI, Discussion with author, Washington, DC, Aug. 2012; and Officials from OEG member states, Discussions with author, Berlin, Oct. 2012.

The most recent development is the initiation in June 2011 of a Critical Capabilities and Practices (CCP) effort to ‘leverag[e] the experience and expertise gained in eight years of PSI activities’ and ‘to offer support to all PSI-endorsing states in strengthening their critical interdiction capabilities and practices’.¹⁹ (On CCPs see below.)

Activities

The PSI undertakes a greater number, and broader range, of activities than the four multilateral strategic trade control regimes and other proliferation-related initiatives.²⁰ PSI events fall into four, often overlapping, categories: (a) meetings, including those of the OEG, Regional OEGs (ROEGs) and High-level Political Meetings; (b) workshops to explore evolving threats and ways to counter them; (c) exercises to test capabilities; and (d) outreach activities to support and build the capacity of SIP endorsing states and help secure further endorsement of the SIP by more states.²¹

Meetings

Meetings of the Operational Experts Group and the Regional OEGs are held regularly (one or two of each per year) and are invariably chaired by a senior official from the host country. The purpose of OEG meetings is to bring together ‘operational experts’ from those states that are described as the ‘most active’ and ‘strongly engaged’ in advancing PSI objectives.²² The meetings are usually held over two days, begin and end with a plenary session of OEG members, and include functionally focused breakout sessions on enforcement, intelligence, legal aspects and exercises. These breakout sessions strengthen the network of officials for each functional activity and responsibility.

The OEG is primarily a forum for the exchange of information and experience on real cases but is also used to agree and coordinate future PSI activities and explore specific PSI-related issues.²³ It also acts, to a lesser degree, as a decision-making body, reaching agreement by consensus on a range of procedural and structural issues, such as OEG membership and when and where to hold the next meeting.

¹⁹ US Department of State, ‘PSI-endorsing states undertake effort to build critical capabilities and practices (CCP) for interdicting WMD’, Fact sheet, 10 June 2011, <<http://www.state.gov/t/isn/166732.htm>>.

²⁰ The 4 multilateral strategic trade control regimes are the Nuclear Suppliers Group (NSG), the Australia Group, the Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. See also chapter 3 in this volume.

²¹ A list of most PSI events is available at US Department of State, Bureau of International Security and Nonproliferation (ISN), ‘Calendar of events’, <<http://www.state.gov/t/isn/c27700.htm>>.

²² French Ministry of Foreign Affairs, ‘Proliferation Security Initiative: presentation’, <<http://www.diplomatie.gouv.fr/en/global-issues/disarmament-arms-control/arms-control-and-arms-trade/france-and-non-proliferation-of-proliferation-security-initiative/>> and French Ministry of Foreign Affairs, ‘Proliferation Security Initiative (Sep. 25 and 26, 2008)’, <<http://www.diplomatie.gouv.fr/en/global-issues/disarmament-arms-control/arms-control-and-arms-trade/france-and-non-proliferation-of-proliferation-security-initiative/article/proliferation-security-initiative>>.

²³ French Ministry of Foreign Affairs, ‘Presentation’ (note 22).

ROEG meetings tend to focus on capacity building and the securing of wider participation. They are an attempt to maintain the operational momentum of the PSI and to promote greater cooperation and coordination at a regional level by bringing together both OEG and non-OEG members. There has been a gradual shift away from holding more than one OEG per year to a greater focus on holding a number of ROEGs in conjunction with exercises or workshops.

There are no formal rules of procedure for OEG or ROEG meetings. Publicly available records are restricted, at most, to the text of an opening speech, the chairman's concluding statement and a short media brief. These tend to highlight the threat posed by proliferation and the important role being played by the PSI in countering the threat. Vague objectives may be defined by the host state but the chairman's statements seldom include agreement on concrete issues.²⁴

In addition to OEG and ROEG meetings, three HLPs—open to all PSI participants—have been held. In 2004 Poland hosted the first HLP in the form of a 'First Anniversary Meeting', which was attended by over 60 states. The stated aims of the meeting included 'further development of international support for the aims and objectives of the PSI, and promotion of broad international cooperation and participation in PSI activities'.²⁵ In 2006 Poland again hosted an HLP, attended by 65 PSI participants, with the aim of supporting enhanced cooperation.²⁶ In 2008 the USA hosted 88 PSI participants in Washington, DC. While the first two HLPs helped build support for the PSI, the stated aim of the Washington HLP was to 'assess the PSI and discuss new ideas for strengthening international cooperation'.²⁷ There is no public record of what the assessment was or what new ideas were discussed. In May 2013 Poland is to host the fourth HLP, the first in 5 years, to mark the 10th anniversary of the establishment of the PSI.²⁸

Workshops

Workshops are held on an ad hoc basis to explore specific issues and operational challenges faced by the PSI, which have included shipping container security, proliferation finance and outreach.²⁹ They allow for the inclusion of non-OEG members and have also been a useful forum for engaging with the maritime transport industry.

Attendance by non-members of the OEG is dependent on the subject of the workshop and ultimately determined by the host state. The most recent workshop, held in July 2012 to explore further the idea of CCPs, was hosted by Poland

²⁴ For a collection of the chairman's statements from 2003 to 2006 see US Department of State, 'Chairman's statements', <<http://www.state.gov/t/isn/c27727.htm>>. Subsequent chairman's statements are usually available on the foreign ministry website of the host state.

²⁵ Polish Ministry of Foreign Affairs (note 13).

²⁶ Polish Ministry of Foreign Affairs, Chairman's statement, High-level Political Meeting, Warsaw, 23 June 2006, <http://www.psi.msz.gov.pl/en/meetings/global_meetings_org_by_poland/warsaw_2006>.

²⁷ US Department of State, 'Washington Declaration for PSI 5th Anniversary Senior-level Meeting', 28 May 2008, <<http://2001-2009.state.gov/r/pa/prs/ps/2008/may/105268.htm>>.

²⁸ Polish Ministry of Foreign Affairs, 'Krakow Initiative: Proliferation Security Initiative', <<http://www.psi.msz.gov.pl/en/>>.

²⁹ US Department of State (note 21).

and took the form of a regional event with PSI participants from Europe, the Caucasus and Central Asia.³⁰

Exercises

PSI exercises cover the full spectrum of PSI activities and include maritime, air, land and intermodal interdictions that can take the form of live exercises (LIVEX), command post exercises (CPX) or tabletop exercises (TTX). They are ordinarily hosted and organized by an OEG member and are open to all OEG members, although participation is not considered obligatory. They are also usually regionally focused and invitations are extended to both current and prospective SIP endorsing states in the region.

Although the main motive for undertaking PSI exercises is to test capabilities, they have other objectives and benefits, including improving the participant's and the public's understanding of the PSI, deterring proliferators and encouraging wider participation. Media coverage of exercises has therefore become increasingly important and a recent Japanese-hosted exercise even included press participation.³¹

A common criticism of PSI exercises is that they are too military orientated.³² During the PSI's formative years the PSI was largely military driven: OEG delegations were often led by representatives from defence ministries and exercises focused on the 'model interdiction scenario' of using military assets to forcibly intercept suspect vessels in international waters, as in the *So San* case. However, the constraints of maritime law, the nature of maritime trade, and the practicalities of detecting and securing proliferation-sensitive items on the high seas have necessitated a refocus on the more realistic scenario of the voluntary diversion of a vessel to a friendly port and the use of customs' powers to search and seize suspect consignments of proliferation concern in port. The case of the *BBC China* is an example of the latter approach. In October 2003 the vessel was believed to be carrying centrifuge equipment supplied by the A. Q. Khan network for the Libyan nuclear programme. In a joint US–British–German–Italian operation, the German owners of the vessel were approached and agreed to divert it to an Italian port, where the suspect consignment was unloaded.³³

Despite this evolving focus, PSI exercises still retain a significant and often high-profile military dimension. For example, the Pacific Protector 2010 PSI exercise was hosted by the Australian Department of Defence, although the exercise was led by the Australian Customs and Border Protection Service and

³⁰ Polish Ministry of Foreign Affairs, 'Regional PSI critical capabilities and practices workshop Warsaw, July 11th–12th, 2012', <http://www.psi.msz.gov.pl/en/meetings/regional-meetings_org_by_poland/warsaw_2012/regional_psi_critical_capabilities_and_practices_workshop_warsaw_july_11th_12th_2012>.

³¹ Japanese Ministry of Foreign Affairs, 'PSI air interdiction exercise "Pacific Shield 12" hosted by Japan (overview)', 17 July 2012, <http://www.mofa.go.jp/policy/un/disarmament/arms/psi/pacific_shield_12.html>.

³² See e.g. Bauer, S., Dunne, A. and Mičić, I., 'Strategic trade controls: countering the proliferation of weapons of mass destruction', *SIPRI Yearbook 2011: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2011), pp. 434–36.

³³ Boese, W., 'Key U.S. interdiction initiative claim misrepresented', *Arms Control Today*, vol. 35, no. 6 (July/Aug. 2005); and Reynolds, P., 'On the trail of the black market bombs', *BBC News*, 12 Feb. 2004, <<http://news.bbc.co.uk/2/hi/3481499.stm>>.

involved ‘No Defence assets’.³⁴ The US-led Leading Edge 2010 PSI exercise, held in Abu Dhabi, United Arab Emirates (UAE), in partnership with the UAE armed forces, began with military assets undertaking an interdiction, although it ended with a ‘tabletop’ component exploring customs and legal issues.³⁵ The Eastern Endeavour 2010 PSI exercise involved military assets in a maritime interdiction that included a ‘tabletop’ component involving inter-agency teams of officials who explored the ‘legal, diplomatic, customs, law enforcement, intelligence and financial aspects of [interdiction]’.³⁶ Unusually, no PSI exercises were held in 2011.³⁷

Four PSI LIVEXs were held in 2012: two US Navy-led ‘maritime interoperability exercise[s] with PSI maritime interdiction scenario injects’: Phoenix Express 2012 (in the Mediterranean) and Saharan Express 2012 (in West Africa); an air interdiction exercise hosted by Japan: Pacific Shield 12; and Panamax 2012, a PSI-related scenario that was incorporated into another US Navy-led annual exercise focusing on the safety and security of the Panama Canal.³⁸ The Japanese air interdiction exercise was led jointly by the Japanese ministries of Foreign Affairs, Finance (Japan Customs), and Defense, and the National Police Agency.³⁹ The US Navy leading three of the four LIVEX’s in 2012 reinforces the perception (or misperception) that the PSI is a US military initiative with a focus on maritime interdictions. Some OEG members believe this continued military focus diverts attention and resources away from more realistic scenarios that would better serve the PSI’s objectives.⁴⁰

However, in 2012 there was also a Gulf Cooperation Council PSI TTX held in Dubai that has not been included in the various public PSI calendars of events. It had no military component, focused on the interdiction of a container in port, and comprehensively explored the associated legal and practical opportunities and constraints.⁴¹ In doing so, it reflects the operational realities of the most likely PSI interdictions that SIP endorsing states will encounter and is a good example of the focus that PSI exercises should take. (See also chapter 5.)

³⁴ Australian Department of Foreign Affairs and Trade, ‘Regional Operational Experts Group Meeting and Exercise Pacific Protector ’10’, Media release, 13 Sep. 2010, <<http://www.dfat.gov.au/media/releases/departement/2010/100913.html>>.

³⁵ US Embassy, Abu Dhabi, ‘Remarks of Ambassador Richard Olson at US–UAE Proliferation Security Initiative training’, 25 Jan. 2010, <http://abudhabi.usembassy.gov/pr_01252010.html>; and US Navy, ‘Exercise Leading Edge 2010 begins’, 29 Jan. 2010, <http://www.navy.mil/search/display.asp?story_id=50900>.

³⁶ Rudd, K., Australian Minister for Foreign Affairs, and Smith, S., Australian Minister for Defence, ‘Australia participates in the Republic of Korea’s Proliferation Security Initiative (PSI)’, Media release, 13 Oct. 2010, <http://www.foreignminister.gov.au/releases/2010/kr_mr_101013.html>.

³⁷ US Department of State (note 21).

³⁸ US Department of State (note 21); and US Navy, ‘Annual Panamax military exercise concludes’, 16 Aug. 2012, <http://www.navy.mil/submit/display.asp?story_id=69048>.

³⁹ Japanese Ministry of Foreign Affairs (note 31).

⁴⁰ Officials from OEG member states familiar with PSI and its activities, Correspondence and discussions with author, Jan. 2012.

⁴¹ US Department of State, *GCC Proliferation Security Initiative Table Top Exercise, Dubai, United Arab Emirates, March 13, 2012* (Department of State: Washington, DC, 2012).

Outreach

Outreach is undertaken by OEG members, either bilaterally or multilaterally, and at the initiative of any OEG member. The costs of outreach are usually borne by the OEG member undertaking the outreach. Outreach can take the form of capacity building for new SIP endorsing states, although it is usually directed at non-endorsing states. Some of these are considering endorsement of the SIP and requesting help, while others are identified by OEG members individually or collectively and are approached accordingly. There is a case for more targeted outreach to SIP endorsing and non-endorsing states that are considered to represent the greatest proliferation risks, such as those with open registries, those with transit and trans-shipment hubs, those along high-risk proliferation supply chains, those adjacent to states under sanction by the UN Security Council, and major producers of dual-use goods.⁴²

ROEGs, workshops and exercises are also used for outreach purposes. For instance, states that have not endorsed the SIP regularly attend PSI exercises, while ROEGs often include non-endorsing states from the region as well as SIP endorsing states that are not members of the OEG. Targeted outreach to specific states is also undertaken bilaterally or multilaterally on an ad hoc basis when the opportunity arises.

Attribution

There is no official or semi-official mechanism for determining what constitutes a PSI interdiction. During the early years of the PSI there was a series of (mainly US) statements about the nature and number of PSI interdictions.⁴³ More recently, there has been reluctance to quantify the PSI in any way other than by the number of SIP endorsing states.

The question of exactly what constitutes a PSI interdiction is not clear but can be viewed in two ways: what types of activity fall within the PSI and, when these activities do occur, to what extent can they be attributed to the PSI? Getting it wrong can be embarrassing: in the case of the *BBC China*, initial claims by US officials that this was a PSI success were later contradicted.⁴⁴

The few statements by OEG members that make direct reference to PSI interdictions suggest that the range of PSI activities is broad and can occur throughout nearly the full length of the supply chain: from notifying source companies about procurement entities of concern to the interception and shadowing of

⁴² An 'open registry' is a shipping registry that does not set strict criteria concerning the nationality of vessel owners, officers and crew, and includes a large majority of foreign-owned vessels. See Griffiths and Jenks (note 5).

⁴³ Boese, W., 'Interdiction initiative successes assessed', *Arms Control Today*, vol. 38, no. 6 (July/Aug. 2008).

⁴⁴ Boese (note 33).

vessels suspected of transporting consignments of proliferation concern.⁴⁵ The challenge is compounded by the fact that many of these activities took place prior to the establishment of the PSI and continue to be undertaken without reference to the PSI.

There is also a general unwillingness to publicize interdictions. They are often based on intelligence, and the need to safeguard sources, capabilities and relationships will override any desire to publicize activities, despite the potential deterrent effect that publicity may have. Overcoming such hurdles and compiling annual statistics on PSI interdictions is therefore unfeasible. Cases may exist where the nature of the interdiction or the benefits of publicity lead to a PSI interdiction becoming public knowledge, but in most instances this will not be the case.

Critical Capabilities and Practices

In his surprisingly open and self-critical keynote address to the November 2010 meeting of the OEG, Hisashi Tokunaga, Japanese Parliamentary Vice-Minister for Foreign Affairs, noted that the PSI was ‘at a crossroads, faced with ever growing complex proliferation methods’ and that it needs to ‘produce innovative ideas and constructive dialogue’.⁴⁶ The comments reflected a wider concern within the OEG that the PSI was losing momentum and needed reinvigorating.⁴⁷

Partly in response to these concerns, the USA hosted a ‘planning conference’ in June 2011 for OEG members to build what were termed ‘Critical Capabilities and Practices’ for undertaking interdictions by ‘leveraging the experience and expertise gained in eight years of PSI activities’.⁴⁸ OEG members were invited to participate on a voluntary basis by ‘sharing tools and resources that support interdiction related activities and by conducting events in a coordinated manner to develop, implement, and exercise CCPs’.⁴⁹ In parallel, OEG members were invited to share ideas about how to develop the CCP effort.

The following year Poland hosted a regional PSI CCP workshop with the objective of ‘identifying specific resources (including documents, programs, training opportunities, and methodologies) necessary to conduct interdiction activities’ and making them available to other PSI participants.⁵⁰ The workshop brought together 39 states, half of which were not OEG members, and included European Union (EU) and North Atlantic Treaty Organization (NATO) representation.

⁴⁵ Graham, E., ‘Maritime counter-proliferation: the case of the MV Light’, S. Rajaratnam School of International Studies (RSIS) Commentaries no. 96/2011, 29 June 2011, <<http://www.rsis.edu.sg/publications/commentaries.html>>.

⁴⁶ Japanese Ministry of Foreign Affairs, ‘The Proliferation Security Initiative (PSI) Operational Experts Group (OEG) Tokyo meeting’, 2 Nov. 2010, <http://www.mofa.go.jp/announce/announce/2010/11/1102_01.html>.

⁴⁷ Officials familiar with the PSI from a number of OEG member states, Discussions with author, Mar. and Oct. 2012.

⁴⁸ US Department of Department (note 19).

⁴⁹ US Department of Department (note 19).

⁵⁰ Polish Ministry of Foreign Affairs (note 30).

The CCP effort has yet to make a discernable contribution to PSI activities. Apart from the introductory conference and subsequent workshop, limited progress appears to have been made. Most OEG members attended or contributed to the conference and workshop but few have contributed ideas or identified and shared resources or tools, and there does not appear to be any coherent implementation strategy.⁵¹

⁵¹ Officials familiar with PSI from OEG member states, Correspondence and discussions with author, Sep.–Dec. 2012.

3. The Statement of Interdiction Principles

The PSI Statement of Interdiction Principles was agreed on 4 September 2003 at a meeting of the core group of 11 states in Paris.⁵² It is a relatively short statement comprised of two sections. The first introduces the SIP while the second contains the four PSI interdiction principles and lists a number of associated activities.

The first section of the SIP reiterates what could be described as the PSI doctrine: it notes that the PSI is a response to the growing challenge of proliferation and that it complements existing treaties and agreements. To support this statement it makes explicit reference to the UN Security Council Presidential Statement of January 1992, which states

we should today commit ourselves anew to upholding international peace and security through reinforced measures of arms control. Activity to restrain the accumulation and transfer of arms, to prevent the proliferation of weapons of mass destruction, affects all Members of the United Nations. Arms-control policy has become genuinely global.⁵³

It also refers to Group of Eight (G8) and EU statements that conclude more ‘coherent and concerted efforts are needed’.⁵⁴ The PSI was therefore clearly conceived as a new effort to fill a gap and enhance existing efforts to prevent the proliferation of WMD. The first section also clarifies the strategic objectives of the PSI and articulates the fundamental commitment being made: essentially, to secure ‘cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes’ to stop the flow of consignments of proliferation concern.

The second section of the SIP documents four interdiction principles, or commitments, in support of the PSI. Interdiction principle 1 defines the scope of the PSI by asking SIP endorsing states to ‘Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of [consignments of proliferation concern] to and from state and non-state actors of proliferation concern’. Interdiction principle 2 highlights the importance of information exchange, confidentiality and resources in undertaking such measures. Interdiction principle 3 refers to strengthening national law and ‘relevant international law and frameworks’ (see chapter 4).

Interdiction principle 4 identifies six ‘specific actions’—hence the common description of PSI as a ‘set of activities’—to which PSI participants commit them-

⁵² See appendix A for the full text; and Proliferation Security Initiative, 3rd Meeting, ‘Press statement released under the responsibility of the chair’, 3–4 Sep. 2003, <<http://www.mofa.go.jp/policy/un/disarmament/arms/psi/psi.html>>.

⁵³ United Nations, Security Council, 3046th meeting, S/PV.3046, 31 Jan. 1992.

⁵⁴ Group of 8, ‘Non-proliferation of weapons of mass destruction: a G8 declaration’, Evian, 2 June 2003, <http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents.html>; European Council, ‘A secure Europe in a better world: European Security Strategy’, Brussels, 12 Dec. 2003, <<http://www.consilium.europa.eu/eeas/security-defence/european-security-strategy>>; and European Council, ‘Fight against the proliferation of weapons of mass destruction: EU strategy against proliferation of weapons of mass destruction’, 10 Dec. 2003, <http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/133234_en.htm>.

selves.⁵⁵ The actions refer to stopping the transport of consignments of proliferation concern; the stopping, boarding and searching of vessels flying the flag of an SIP endorsing state that are ‘reasonably suspected’ of carry consignments of proliferation concern; the denial of aircraft entry to national airspace and requiring aircraft to land for inspection if ‘reasonably suspected’ of carry consignments of proliferation concern; and controlling trans-shipment. (On these ‘actions’ see chapter 5).

Definitions and interpretation

Interdiction

An interdiction in the context of the PSI refers to a broad range of actions, as set out in the SIP, intended to ‘to help impede and stop the flow of WMD, their delivery systems, and related materials to and from states and non State actors of proliferation concern’, in a way that is ‘consistent with international law’.⁵⁶ A successful interdiction will therefore begin with either the provision of information on, or the detection of, a consignment of proliferation concern and, assuming the information is correct, end with the consignment’s seizure and disposal or its return to the state from which it was exported.

An interdiction does not necessarily require the interception of a ship or aircraft followed by a forced diversion to a friendly port or airport. In fact, the vast majority of PSI interdictions involve containers containing dual-use goods that are either about to be exported or, in the case of trans-shipment, unloaded from a vessel before being reloaded on to another vessel. Hence, enforcement action would not be possible without effective national law.

WMD, their delivery systems and related materials

‘Weapons of mass destruction’ refers to chemical, biological or nuclear weapons and their delivery systems, which includes theatre ballistic missiles, inter-continental ballistic missiles, cruise missiles, combat fixed-wing aircraft and artillery.⁵⁷ UN Security Council Resolution 1540—the international legal foundation for mandatory strategic trade controls—uses the term ‘means of delivery’, which it defines as ‘missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use’.⁵⁸

‘Related materials’ refers to dual-use goods destined for use in programmes for ‘WMD and their means of delivery’. Dual-use goods are goods that have both a

⁵⁵ US Department of State, *The Proliferation Security Initiative* (Department of State: Washington, DC, [n.d.]), <<http://guangzhou.usembassy-china.org.cn/uploads/images/JuUmF4g8jIchC4umHED4-A/proliferation.pdf>>.

⁵⁶ Press statement released under the responsibility of the chair, [n.d.], <<http://www.mofa.go.jp/policy/un/disarmament/arms/psi/press.pdf>>.

⁵⁷ The standard reference work on the technology of WMD and their means of delivery is US Department of Defence (DOD), Office of the Under Secretary of Defense for Acquisition and Technology, *The Militarily Critical Technologies List, Part II, Weapons of Mass Destruction Technologies* (DOD: Washington, DC, Feb. 1998).

⁵⁸ UN Security Council Resolution 1540, 28 Apr. 2004.

civil and military use and fall into two categories: listed and non-listed. Listed dual-use goods are goods that appear in the control lists of the four multilateral strategic trade control regimes: the Australia Group (which controls technology related to chemical and biological weapons), the Nuclear Suppliers Group (NSG), the Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.⁵⁹ Non-listed dual-use goods destined for WMD programmes are also controlled by what are referred to as either ‘catch-all’ or ‘end-use’ controls. For example, in the EU the catch-all clause requires authorization for any export of an item that is or may be intended for use in connection with WMD.⁶⁰

The control lists of the four strategic trade control regimes are referred to in Security Council Resolution 1540, which defines related materials as ‘materials, equipment and technology covered by *relevant multilateral treaties and arrangements*, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery’.⁶¹ This is reflected in the UN 1540 Matrix, which is ‘the primary method used by the 1540 Committee to organize information about implementation of UN Security Council resolution 1540 by Member States’.⁶²

State and non-state actors of proliferation concern

A ‘non-state actor’ is defined in Resolution 1540 as an ‘individual or entity, not acting under the lawful authority of any State’.⁶³ Among the many definitions of ‘state’, the *Concise Oxford English Dictionary* definition is ‘a nation or territory considered as an organized political community under one government’.

The SIP defines the target of the PSI as ‘those countries or entities . . . engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials’.⁶⁴ Establishing which state and non-state entities are engaged in proliferation is left to ‘PSI participants involved’. This certainly include those states and non-state actors that are subject to proliferation-related UN Security Council resolutions, but other states may also have suspected or declared WMD programmes and other non-state actors may deliberately or inadvertently supply dual-use goods to these programmes.

⁵⁹ On the four multilateral export control regimes and their control lists see their respective websites: Australia Group, <<http://www.australiagroup.net/>>; Nuclear Suppliers Group, <<http://www.nuclearsuppliersgroup.org/>>; Missile Technology Control Regime, <<http://www.mtc.info/>>; and Wassenaar Arrangement, <<http://www.wassenaar.org/>>.

⁶⁰ Council Regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009, Article 4. See also Wetter, A., *Enforcing European Union Law on Exports of Dual-use Goods*, SIPRI Research Report no. 24 (Oxford University Press: Oxford, 2009).

⁶¹ UN Security Council Resolution 1540 (note 58) (emphasis added).

⁶² United Nations, Security Council, 1540 Committee, ‘The 1540 Matrix’, <<http://www.un.org/en/sc/1540/national-implementation/matrix.shtml>>.

⁶³ UN Security Council Resolution 1540 (note 58).

⁶⁴ Statement of Interdiction Principles (appendix A), para. 1.

There is no formal or informal PSI list; the range of active proliferating entities is continually evolving and any determination will be done on a case-by-case basis. PSI interdiction requests therefore usually include information about state or non-state entities that are associated with the consignment of proliferation concern, which allows the state receiving the request to conclude whether or not the threshold for ‘reasonable suspicion’ is met.

However, the object of a PSI interdiction is not a specific state or non-state actor, although the state or non-state actor, and the suspected end-use of the consignment, are factors that will contribute to determining whether the consignment may contravene national or international law. The object of a PSI interdiction is actually a *consignment* of proliferation concern, and only indirectly the vessel or aircraft carrying it.

The term ‘consignment of proliferation concern’ is used here to refer to ‘WMD, their delivery systems and related materials flowing to and from states and non-state actors of proliferation concern’.

Reasonably suspected

There is no clear or formal PSI definition of ‘reasonably suspected’, although in an enforcement context it will usually be based on specific information that justifies the detention of the consignment and further enquiries. The threshold for action, and the nature of any subsequent activity, will differ from state to state and be influenced by a range of factors, including legally defined thresholds, official guidance, political considerations, nationally held information or intelligence that may support the suspicion, and liability.

Liability for the costs associated with an interdiction is an important challenge for the PSI. The enforcement authorities in a number of PSI participating states are liable for the costs associated with the interdiction of a consignment of proliferation concern if the consignment is subsequently determined not to have breached national controls. In many states the threshold for action is therefore relatively high and a systemic reluctance to proactively target consignments of proliferation concern has developed. In some states the enforcement authority will only act if presented with evidence of an offence—a significantly higher legal threshold than reasonable suspicion.

The question of reasonable suspicion and its relationship to liability is rarely considered by states when endorsing the SIP. It is also an important, but seldom considered, issue in the enforcement of Security Council resolutions related to counterproliferation and sanctions. A number of resolutions make reference to ‘reasonable suspicion’ or ‘reasonable grounds’ as the trigger for action without due consideration of the liability constraints faced by many enforcement authorities.

Endorsement and commitment

Endorsement of the SIP is a political commitment that requires only the actions that SIP endorsing states ‘are able and willing to take’. It is thus distinct from

states' legally binding obligations, such as those contained in treaties. The PSI explicitly acknowledges that the capabilities and capacities of SIP endorsing states differ and that not all are either able or willing to respond. SIP endorsing states also commit themselves to take measures 'in support of the PSI, as outlined in the [SIP]'. Activities not included in the SIP are therefore beyond the scope of the PSI.

The process of endorsement usually starts with informal engagement with one or more OEG members in order to clarify the commitment being made, answer questions, and possibly provide some form of capacity building or support. The SIP endorsing state will then make a public announcement that explicitly endorses the SIP or confirms the state's support for the PSI more generally.

Non-endorsement is not a barrier to undertaking activities envisaged by the PSI. Non-endorsing states regularly cooperate with PSI participating states on proliferation issues that fall within the scope of the PSI. US engagement with China over North Korean flights to Iran that pass through Chinese airspace is just one of many examples.⁶⁵

Some states have expressed a reluctance to endorse the SIP because of a perceived capability gap—between what the state perceives endorsement of the SIP to require and an objective assessment of its ability to fulfil the commitment.⁶⁶ However the PSI does not set conditions on a prospective SIP endorsing state's ability to act, and for some states PSI participation creates opportunities to enhance capabilities through bilateral capacity building and exercise participation.

While endorsement of the SIP requires a political commitment, membership of the OEG implies an additional political and material commitment.

Cooperation and coordination

Cooperation and coordination are prerequisites for PSI activities at both the national and international levels. They are referred to explicitly in the SIP, which requires SIP endorsing states to adopt 'streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, . . . and maximize coordination among participants in interdiction efforts'.

To this end, PSI participants are asked to designate an appropriate PSI point of contact to facilitate the effective exchange of information relating to specific interdiction requests.⁶⁷ Most PSI participants will make use of existing channels: intelligence, diplomatic or law enforcement. More important than the channel

⁶⁵ US Embassy in Beijing, 'China informed of possible weapons-related transfer from DPRK to Iran', Cable to State Department no. 09BEIJING2080, 21 June 2009, <<http://wikileaks.org/cable/2009/07/09BEIJING2080.html>>.

⁶⁶ These concerns were expressed to the author by a non-endorsing state in a question during a PSI outreach seminar and subsequently in the margins by another non-endorsing state, Mar. 2012.

⁶⁷ US Department of State, 'Proliferation Security Initiative frequently asked questions (FAQ)', 22 May 2008, <<http://2001-2009.state.gov/t/isn/rls/fs/105213.htm>>.

chosen is the ability to respond to a request in a timely and effective manner: the information must be assessed, decisions made on what action to take and resources deployed to undertake the action, in what may be a relatively short period of time. PSI participants are therefore encouraged to develop standard procedures and structures to ensure that action can take place before the consignment of proliferation concern is beyond reach; a Model National Response Plan has been developed to help PSI participants implement an effective 'framework for responding to PSI/proliferation situations.'⁶⁸

⁶⁸ New Zealand Ministry of Foreign Affairs and Trade (note 14), p. 4.

4. Legal considerations

Despite the explicit commitment in the Statement of Interdiction Principles that Proliferation Security Initiative activities are ‘consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council’, there is still concern that PSI interdictions may contravene international law. This concern stems in part from differing interpretations of international law relating to both the initiative and its activities. Nonetheless, the PSI implicitly recognizes that there are different interpretations of international law and does not attempt to impose a common interpretation that PSI participants are required to endorse.

This chapter recounts the main international and national legal frameworks and considerations associated with the interdiction of consignments of proliferation concern at sea, in the air and on land.

Maritime law

The interdiction of a vessel at sea can take two basic forms: the boarding and searching of a vessel or the diversion of a vessel to a friendly port. If the vessel is subsequently found to be carrying a consignment of proliferation concern, its detention and seizure will occur in port and therefore under national customs or associated laws.

The starting point when determining the scope of action available for an interdiction is the maritime zone in which the vessel lies (see figure 4.1). In the PSI context there are essentially two relevant maritime zones, as defined by the 1982 United Nations Convention on the Law of the Sea (UNCLOS): national and international waters.

The United Nations Convention on the Law of the Sea

UNCLOS is the international agreement that defines the rights and responsibilities of states’ use of the world’s oceans and is therefore instrumental in determining jurisdiction and the scope of action associated with PSI maritime interdictions.⁶⁹ UNCLOS states that ‘Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles’ and that ‘The sovereignty of a coastal State extends [to] the territorial sea’.⁷⁰

Beyond the territorial waters, jurisdiction depends on the flag state of the vessel. UNCLOS codifies this long-standing feature of customary law, stating that ‘Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas’, and that ‘Ships shall sail under the flag of one State only

⁶⁹ United Nations Convention on the Law of the Sea, opened for signature 10 Dec. 1982, entered into force 16 Nov. 1994, *United Nations Treaty Series*, vol. 1833 (1994). As of Jan. 2013, 165 states had ratified UNCLOS. A small minority of PSI participants have not ratified UNCLOS—most notably the USA.

⁷⁰ UNCLOS (note 69), articles 2, 3, 5.

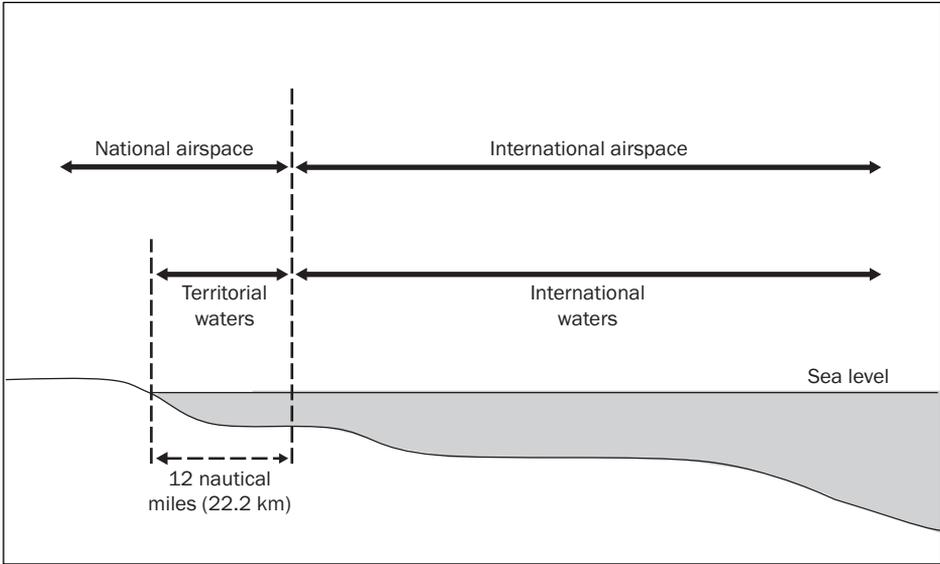


Figure 4.1. Maritime and air zones

and . . . shall be subject to its exclusive jurisdiction on the high seas'.⁷¹ For flagged vessels the jurisdiction of the flag state will prevail except where there is reasonable grounds to believe the vessel is engaged in the transport of slaves, piracy, unauthorized broadcasting or 'without nationality', as in the case of the *So San*.⁷²

UNCLOS also created the international legal framework for the registration of vessels to what is usually referred to as the 'flag state', covering the nationality and status of vessels and setting out the duties of the flag state.⁷³

Innocent passage

Jurisdiction in national waters is limited by Section 3 of Part I of UNCLOS, which establishes the right of innocent passage in territorial waters and states that vessels 'of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'.⁷⁴ The convention defines passage as 'navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility' and innocent as 'not prejudicial to the peace, good order or security of the coastal State'.⁷⁵ It goes on to list 12 activities considered

⁷¹ UNCLOS (note 69), articles 87, 90, 92.

⁷² UNCLOS (note 69), articles 99, 100, 110.

⁷³ UNCLOS (note 69), articles 91, 92, 94.

⁷⁴ UNCLOS (note 69), Article 17.

⁷⁵ UNCLOS (note 69), articles 18–19.

prejudicial to the ‘peace, good order or security of the coastal State’ but does not include the transport of WMD, their delivery systems and related materials.

There are different interpretations of innocent passage. Most states hold the view that vessels engaged in innocent passage while transporting consignments of proliferation concern cannot be boarded and searched by the state adjacent to the territorial sea. Some states hold the view that the state adjacent to the territorial sea can enact laws that make it possible to interdict vessels taking advantage of the right of innocent passage to transport consignments of proliferation concern.⁷⁶

Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention) was amended by a 2005 protocol (2005 SUA Protocol) to introduce a number of new offences relating to terrorism and the transport of fugitives.⁷⁷ The 2005 amendments also addresses the situation where a vessel in international waters is carrying WMD, their means of delivery and related materials, and obliges states that have ratified it to ‘cooperate to bring the responsible person to justice’.⁷⁸ These new proliferation-related offences include transporting (a) ‘explosive or radioactive materials, for the purpose of the intimidation or compulsion of a government or population’, (b) ‘biological, chemical and nuclear weapons (for any purpose)’, (c) ‘special fissionable materials as defined by the Statute of the International Atomic Energy Agency [IAEA] with the knowledge that those materials are going to be used for any purpose not safeguarded by the IAEA’, and (d) ‘equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a [biological, chemical or nuclear] weapon, with the intention that it will be used for such purpose’.⁷⁹

In addition, the amended SUA Convention includes new rules on consensual boarding in international waters and requires states parties to ‘co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this article as expeditiously as possible’.⁸⁰

The rules reflected bilateral ship-boarding agreements already concluded by the US in support of the PSI. The first was signed with Liberia in February 2004,

⁷⁶ Wolf, C., Chow, B. G. and Jones, G. S., *U.S. Combat Commands’ Participation in the Proliferation Security Initiative: A Training Manual* (RAND: Santa Monica, CA, 2009). pp. 45–46.

⁷⁷ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), opened for signature 10 Mar. 1988, entered into force on 1 Mar. 1992, *United Nations Treaty Series*, vol. 1678 (1999); and Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Protocol), adopted 14 Oct. 2005, entered into force 28 July 2010, IMO document LEG/CONF.15/21, 1 Nov. 2005.

⁷⁸ Britannia Steam Ship Insurance Association Ltd, ‘SUA Conventions’, *Britannia News: Conventions*, no. 2 (July 2010), p. 9.

⁷⁹ Britannia Steam Ship Insurance Association Ltd (note 78), p. 10; and amended SUA Convention (note 77), Article 3bis.

⁸⁰ Amended SUA Convention (note 77), Article 8bis.

less than a year after the establishment of the PSI and more than year before the adoption of the 2005 SUA Protocol. The USA has now concluded 11 ship-boarding agreements (see table 2.1 above).⁸¹ No other OEG member has entered into ship-boarding agreements with the USA or concluded its own ship-boarding agreements with other states. There is no information in the public domain about the number of boardings that have occurred under these 11 agreements or any assessment of how effective they are. Moreover, despite the potential utility of the 2005 SUA Protocol in pursuing PSI objectives, not all OEG members have signed the protocol and even fewer have ratified it.

Aviation law

The PSI is not restricted to the maritime domain and the interdiction of vessels. Aircraft may also transport consignments of proliferation concern, and while there are similarities with the maritime case, there are also significant differences. As in the maritime domain, the boundary between national and international airspace is the basis for determining the PSI-related activity that can be undertaken. National airspace is defined as the atmosphere above a state's territory and territorial sea with an upper limit of 150 km (93 miles) above sea level, which marks the boundary between national airspace and outer space (see figure 4.1).⁸²

Parties to the 1944 Convention on International Civil Aviation (Chicago Convention) agree to 'certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner'.⁸³ On the questions of territory and sovereignty, the Chicago Convention is clear: 'every State has complete and exclusive sovereignty over the airspace above its territory', where 'the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto'.⁸⁴

There is no legal basis for the PSI interdiction of aircraft in international airspace. PSI interdictions in the air are therefore directly related to a state's control of national airspace and can take three forms: the refusal of overflight permission; making overflight permission conditional on landing for inspection; and in extreme cases forcing an aircraft in national airspace to land.

Certain 'Freedoms of the Air' are codified in the International Air Services Transit Agreement: 'Each contracting State grants to the other contracting States . . . in respect of scheduled international air services . . . The privilege to fly across its territory without landing'.⁸⁵ However, contracting states also reserve 'the right

⁸¹ US Department of State, 'Ship boarding agreements', <<http://www.state.gov/t/isn/c27733.htm>>.

⁸² US Army, Army Training and Doctrine Command, Space Division, 'Army space reference text', [n.d.] <http://www.fas.org/spp/military/docops/army/ref_text/>, section 5-1.

⁸³ Convention on International Civil Aviation (Chicago Convention), opened for signature 7 Dec. 1944, entered into force 4 Apr. 1947, as amended, <<http://www.icao.int/publications/Pages/doc7300.aspx>>, preamble.

⁸⁴ Chicago Convention (note 83), articles 1, 2.

⁸⁵ International Air Services Transit Agreement (IASTA), opened for signature 7 Dec. 1944, entered into force 30 Jan. 1945, *United Nations Treaty Series*, vol. 84 (1955), Section 1.

to withhold or revoke a certificate or permit to an air transport enterprise of another State . . . in case of failure of such air transport enterprise to comply with the laws of the State over which it operates'.⁸⁶

The mechanisms for requesting and denying overflight permission will differ from state to state and depend on whether the flight is military, diplomatic, scheduled commercial, and so on; and whether it is declaring the transport of dangerous goods or munitions of war. The overflight by an aircraft suspected of transporting consignments of proliferation concern would ordinarily contravene 'the laws of the State' and can therefore be denied. Instead of denying overflight, a state may choose to grant overflight permission on condition that the aircraft lands for inspection. Agreement on such overflight terms is concluded bilaterally.

The situation is more problematic for scheduled international air services. The Chicago Convention states that 'scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission' but also grants 'the right of the State flown over to require landing'.⁸⁷

The forced interdiction of aircraft suspected of transporting consignments of proliferation concern that either do not have overflight permission, refuse to abide by conditions to land, or are 'scheduled international air services' that refuse to land is a significant challenge. A 1984 amendment to the Chicago Convention states that 'in case of interception, the lives of persons on board and the safety of aircraft must not be endangered' and that every state 'is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention' and that for this purpose 'States may resort to any appropriate means consistent with relevant rules of international law'.⁸⁸

United Nations Security Council resolutions

The SIP makes direct reference to the UN Security Council when it states that PSI activities are 'consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council'. Although the SIP precedes most of the proliferation-related UN Security Council resolutions still in force, it places itself within the legal boundaries set by future resolutions. A number of resolutions that followed the establishment of the PSI have proven instrumental in its operation, most importantly Resolution 1540 in 2004 and a series of proliferation-related resolutions that target sanctions at specific states.

⁸⁶ International Air Services Transit Agreement (note 85), Section 5.

⁸⁷ Chicago Convention (note 83), Article 5.

⁸⁸ Chicago Convention (note 83), Article 3bis(a), (b).

Resolution 1540 obliges all states ‘to establish domestic controls to prevent the proliferation of [WMD] and their means of delivery, including by establishing appropriate controls over related materials’.⁸⁹ It specifies that states should

Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls.⁹⁰

Additionally, since 2006, the UN Security Council has adopted four resolutions, calling on Iran to ‘suspend its enrichment activities and peacefully resolve outstanding concerns over the nature of its nuclear programme’.⁹¹ Resolution 1737, adopted in December 2006, imposed sanctions on Iran in response to the proliferation risks presented by the Iranian nuclear programme and Iran’s continuing failure to meet the requirements of the IAEA Board of Governors and to comply with the provisions of Resolution 1696.⁹² The sanctions were extended by Resolution 1747 in 2007, Resolution 1803 in 2008 and Resolution 1929 in 2010.⁹³

Resolution 1737 required, for the first time, all states

to prevent the supply, sale or transfer directly or indirectly from their territories, or by their nationals or using their flag vessels or aircraft to, or for the use in or benefit of, Iran, and whether or not originating in their territories, of all items, materials, equipment, goods and technology which could contribute to Iran’s enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems.⁹⁴

The controlled ‘items, materials, equipment, goods and technology’ initially referred to in Resolution 1737 are detailed in two lists that were originally annexed to Resolution 1718, which imposed similar sanctions on North Korea. The lists correspond to the 2006 versions of the NSG and MTCR lists.⁹⁵ These lists have been superseded by updated NSG and MTCR lists, which are referred to in Resolution 1929 of 2010.⁹⁶ Resolutions 1718 and 1737 and subsequent reso-

⁸⁹ UN Security Council Resolution 1540 (note 58), para. 3.

⁹⁰ UN Security Council Resolution 1540 (note 58), para. 3(d).

⁹¹ UN New Centre, ‘Citing Iran’s failure to clarify nuclear ambitions, UN imposes additional sanctions’, 9 June 2010, <<http://www.un.org/apps/news/story.asp?NewsID=34970>>.

⁹² UN Security Council Resolution 1696, 31 July 2006; and UN Security Council Resolution 1737, 23 Dec. 2006.

⁹³ UN Security Council resolutions 1747, 24 Mar. 2007; 1803, 3 Mar. 2008; and 1929, 9 June 2010.

⁹⁴ UN Security Council Resolution 1737 (note 92), para. 3.

⁹⁵ United Nations, Security Council, Letter dated 13 Oct. 2006 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, S/2006/814; and United Nations, Security Council, Letter dated 13 Oct. 2006 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, S/2006/815.

⁹⁶ International Atomic Energy Agency (IAEA), Communications received from certain member states regarding guidelines for transfers of nuclear-related dual-use equipment, materials, software and related technology, INFCIRC/254/Rev.7/Part 2a, 20 Mar. 2006; IAEA, Communication received from the permanent mission of Brazil regarding certain member states’ guidelines for the export of nuclear material, equipment and technology, INFCIRC/254/Rev.9/Part 1a, 7 Nov. 2007; United Nations, Security Council, Letter dated 27 May 2010 from the Permanent Representative of the United Kingdom of Great Britain and

lutions effectively obligate all states to control the transfer of NSG and MTCR listed items to Iran and North Korea.

Resolution 1737 was followed relatively quickly, in 2007, by Resolution 1747, which tightened existing sanctions and introduced a ban on the export of 'arms or related materials' from Iran.⁹⁷ Resolutions 1803 and 1929 tightened sanctions even further and introduced a number of new measures. Of particular relevance to the PSI are the provisions of Resolution 1929 that require all states

to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from Iran, in their territory, including seaports and airports, if the state concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited.⁹⁸

It goes on to note that 'States, consistent with international law, in particular the law of the sea, may request inspections of vessels on the high seas with the consent of the flag State, and calls upon all States to cooperate'.⁹⁹ Since 2003, Security Council resolutions 1695, 1718 and 1874 on North Korea have included similar measures.¹⁰⁰

The ultimate objective of most Security Council sanction resolutions is 'to apply pressure on a State or entity to comply with the objectives set by the Security Council without resorting to the use of force'.¹⁰¹ The UN Charter makes it clear that member states of the UN 'agree to accept and carry out the decisions of the Security Council'.¹⁰² However, it is important to note that Security Council resolutions are only binding on the state; in order for them to be binding on individuals or other legal entities, they require national implementation. Consequently, 'states are faced with difficult problems of domestic implementation of what are effectively treaty obligations entailing, in most cases, adaptation of internal law. Only a handful of states at present have the necessary enabling legislation to automatically comply with UN Security Council decisions'.¹⁰³ The implementation of the measures contained in Security Council resolutions, and the establishment of offences and their subsequent enforcement, is therefore dependent on adopting effective national laws.

Northern Ireland to the United Nations addressed to the President of the Security Council, S/2010/263, 28 May 2010; and UN Security Council Resolution 1929 (note 93), para. 13.

⁹⁷ UN Security Council Resolution 1747 (note 93), para. 5.

⁹⁸ UN Security Council Resolution 1929 (note 93), para. 14.

⁹⁹ UN Security Council Resolution 1929 (note 93), para. 15.

¹⁰⁰ UN Security Council resolutions 1695, 15 July 2003; 1718 (note 8) and 1874 (note 8).

¹⁰¹ United Nations, Security Council, 'Security Council Sanctions Committees: an overview', <<http://www.un.org/sc/committees/>>.

¹⁰² Charter of the United Nations, opened for signature 26 June 1945, entered into force 24 Oct. 1945, <<http://www.un.org/en/documents/charter/>>, Article 25.

¹⁰³ Graduate School of International Studies, 'Domestic implementation of Security Council decisions on sanctions: a comparative approach', Feb. 1999, <<http://archive.unu.edu/p&g/sc-sanctions.html>>.

Arms control treaties

The implementation in national legislation of the 1968 Non-Proliferation Treaty (NPT), the 1972 Biological and Toxin Weapons Convention (BTWC), and the 1993 Chemical Weapons Convention (CWC) provide much of the national legal basis required for undertaking the actions contained within the SIP, in addition to fulfilling Resolution 1540 obligations and providing a basis for implementing proliferation-related UN sanction resolutions. They ban or control the possession (with some exceptions) and trade in WMD, their means of delivery and dual-use goods.

The BTWC bans the ‘development, production, stockpiling, acquisition and retention’ of ‘Microbial or other biological agents, or toxins’ unless for peaceful purposes and the ‘Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict’.¹⁰⁴ Each state party ‘undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I’.¹⁰⁵ As of April 2013, 171 states are party to the BTWC and a further 10 have signed but not ratified it, leaving only 16 states that are not part of the regime.¹⁰⁶

The CWC requires its states parties to monitor and report the import and export of chemicals listed in three schedules and prohibits the transfer of Schedule-1 and Schedule-2 chemicals to states that are not party to the convention.¹⁰⁷ More specifically the CWC prohibits the ‘transfer, directly or indirectly’ of prohibited ‘toxic chemicals and their precursors’, ‘Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals’ and ‘any equipment specifically designed for use directly in connection with the employment of [those] munitions and devices’.¹⁰⁸ As of April 2013, 188 states are party to the CWC and a further 2 have signed but not ratified it. Only 6 states have neither signed nor ratified the CWC.¹⁰⁹

The NPT has three key objectives: to prevent the spread of nuclear weapons and weapon technology; to promote cooperation in the peaceful uses of nuclear

¹⁰⁴ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological and Toxin Weapons Convention, BTWC), opened for signature 10 Apr. 1972, entered into force 26 Mar. 1975, *United Nations Treaty Series*, vol. 1015 (1976), articles I, III.

¹⁰⁵ Biological and Toxin Weapons Convention (note 104), Article III.

¹⁰⁶ The 16 states that have neither signed nor ratified the BTWC are Andorra, Angola, Chad, Comoros, Djibouti, Eritrea, Guinea, Israel, Kiribati, Mauritania, Micronesia, Namibia, Niue, Samoa, South Sudan and Tuvalu.

¹⁰⁷ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, CWC), opened for signature 13 Jan. 1993, entered into force 29 Apr. 1997, <<http://treaties.un.org/Pages/CTCTreaties.aspx?id=26>>. The 3 schedules appear in the Annex on Chemicals.

¹⁰⁸ Chemical Weapons Convention (note 107), articles I, II.

¹⁰⁹ The 6 states that have neither signed nor ratified the CWC are Angola, Egypt, North Korea, Somalia, South Sudan and Syria.

energy; and to further the goal of achieving nuclear disarmament.¹¹⁰ It differentiates between nuclear weapon states and non-nuclear weapon states. The nuclear weapon states are defined as the five states in possession of nuclear weapons when the treaty was opened for signature in 1968: China, France, the Soviet Union (now Russia), the United Kingdom and the United States. The non-nuclear weapon states are defined to be all other states, whether party to the NPT or not.

The nuclear weapon states undertake ‘not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices . . . directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to . . . acquire nuclear weapons or other nuclear explosive devices’.¹¹¹ Non-nuclear weapon states party to the NPT undertake ‘not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices . . . directly, or indirectly; not to . . . acquire nuclear weapons or other nuclear explosive devices’.¹¹² In addition, all NPT parties undertake ‘not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article’.¹¹³

With 190 parties, the NPT has the widest membership of the three proliferation-related treaties. Only three states have never been party to the NPT—India, Israel and Pakistan—and one state has withdrawn—North Korea.

National laws

There are three references to ‘national legal authorities’ in the SIP. The first is in the introductory paragraph to the interdiction principles: ‘PSI participants are committed to the following interdiction principles . . . consistent with national legal authorities’.¹¹⁴ In this way, the SIP makes it clear that any actions undertaken in support of the PSI must be consistent with, and not exceed, powers granted by national law. In turn, interdiction principle 4 requires that national laws do not contravene international law by requiring SIP endorsing states to commit to only taking ‘specific actions . . . to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks’. Recognizing that national laws are fundamental to realizing the PSI’s objectives and are at the same time a potential weakness, interdiction principle 3 asks that SIP endorsing states ‘review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives’.

¹¹⁰ Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT), opened for signature 1 July 1968, entered into force 5 Mar. 1970, <<http://www.iaea.org/Publications/Documents/Treaties/npt.html>>.

¹¹¹ Non-Proliferation Treaty (note 110), Article I.

¹¹² Non-Proliferation Treaty (note 110), Article II.

¹¹³ Non-Proliferation Treaty (note 110), Article III(2).

¹¹⁴ Statement of Interdiction Principles (appendix A), para. 3.

The national laws that apply to the PSI fall into two main categories: the SIP endorsing state's control of its flagged vessels; and the laws that are associated with the SIP endorsing state's strategic trade control system.

Control of flagged vessels

In the PSI context there are no mandatory requirements or normative standards for the control of flagged vessels and significant differences exist among OEG members. Ideally, national law will include controls on flagged vessels in international waters that include the right to board, search cargo and divert a vessel when flag states have reason to believe that it is carrying a consignment of proliferation concern. These are rights that may be transferred to other PSI participants through a bilateral boarding agreement or in response to an ad hoc request. Currently only a small number of flag states have all of the above controls.

It is common for flag states to have the right to board and search in international waters for a range of specified reasons. In some cases these reasons include a general reference to illicit activities; in others the reasons for boarding and searching are listed. The legal authority to demand the diversion of a vessel by the flag state is less common. Few flag states have such a power and even fewer have the ability to meaningfully enforce such a power. In reality, the diversion of a vessel will either follow a boarding and search or be undertaken voluntarily with the consent of the vessel owner.

Despite some debate about its PSI credentials, the 2003 case of the German-owned, and Antigua and Barbuda-flagged, *BBC China* is a good example of a successful voluntary diversion.¹¹⁵ The case highlights the fact that, in the absence of a flag state power to divert, it is still possible to secure a vessel's diversion. As a general rule, flag state consent will be sought for permission to board a vessel and owner consent to divert.

Strategic trade control system

In the context of PSI, an SIP endorsing state's strategic trade control system requires three fundamental components: (a) a comprehensive legal and regulatory framework, reflecting Resolution 1540 and including the implementation of Security Council resolutions; (b) licence procedures and practices for the export, transit and trans-shipment of military and dual-use goods and technology based on the multilateral strategic trade control regime lists, as well as a catch-all clause and brokering controls; and (c) robust enforcement to maintain the integrity of the licensing system, encompassing effective risk management, detection, investigation and prosecution capabilities.¹¹⁶

In operational terms, an adequate number of offences—both customs- and licensing-related—need to be defined in law, and enforcement authorities require sufficient powers to demand information and then detain, seize and dispose of consignments of proliferation concern without liability if there is reasonable

¹¹⁵ Boese (note 33).

¹¹⁶ On the 3 basic components see US Department of State, Export Control and Related Border Security Assistance (EXBS) Program, <<http://www.state.gov/strategictrade/>>.

suspicion of an offence. The offences are therefore largely dependent on the existence of mandatory declaration and licence requirements that differ for export, transit and trans-shipment and from state to state. There should certainly be mandatory licence requirements for export, although there is often a licence exemption for transit and trans-shipment except where the consignment contravenes Security Council resolutions or nationally defined controls, or where the goods are destined for a WMD programme.¹¹⁷

Many states—both PSI participants and non-participants—have nascent or rudimentary strategic trade control systems with significant gaps in national laws. This results in either the inability to act or an unlawful act. While the lack of appropriate effective national laws is not a barrier to PSI participation, it is probably the most significant hurdle that the PSI needs to overcome if it is to become a more effective global initiative. The CCP effort—if supported by a strategy for implementation, the commitment of OEG members and adequate resources—may provide a means for overcoming this hurdle.

¹¹⁷ This is the case in the UK. For further details see British Department for Business, Innovation and Skills, 'Transit and transshipment', 12 Dec. 2012, <<https://www.gov.uk/transit-and-transshipment>>.

5. Operational realities

The lack of publicly available information on PSI interdictions, and a reluctance to attribute interdictions to the PSI, makes meaningful analysis of real cases difficult.¹¹⁸ This challenge is overcome here by constructing a series of ‘operational scenarios’ to further understanding of the PSI, the legal constraints and operational realities. To illustrate and explore the operational realities of undertaking PSI activities, four such scenarios are described below. They minimize the number of actors and assume that effective systems for coordination and cooperation are in place at the national and international levels. They also assume that, where appropriate, the nature of the information provided is sufficient to identify the consignment and that it crosses reasonable suspicion thresholds.

The first two scenarios focus on two elements of the supply chain that commonly occur between the origin and destination of a consignment: transit and trans-shipment.¹¹⁹ The volume of international trade that either transits or trans-ships through a third state at some point along the supply chain is increasing each year. Large transit and trans-shipment hubs have developed that are recognized as arenas for the diversion of consignments of proliferation concern but also provide opportunities for their interdiction by enforcement authorities.¹²⁰ Both scenarios focus on the maritime domain, as the majority of international trade is seaborne, although similar principles apply to the air and land domains.¹²¹

The final two scenarios explore the operational realities of interdiction in international waters and undertaking air interdictions.¹²² Although the vast majority of maritime-related PSI interdictions occur in port, and other forms of interdiction are comparatively rare, the PSI is often associated with interdictions in international waters. The third scenario therefore explores the limited circumstances under which an interdiction in international waters can occur. The fourth scenario explores the operational challenges associated with air interdiction.

¹¹⁸ On attribution see chapter 2 in this volume.

¹¹⁹ Export has not been included because the interdiction of a consignment at export is well established and comparatively simple. Import has not been included because at import the consignment is beyond the reach of the PSI—there can be no interdiction because the consignment has entered the sovereign territory of the importing state.

¹²⁰ See e.g. US House of Representatives, Committee on Foreign Affairs, *Transshipment and Diversion: Are U.S. Trading Partners Doing Enough to Prevent the Spread of Dangerous Technologies?*, Hearing before the Subcommittee on Terrorism, Nonproliferation and Trade, 22 July 2010, Serial no. 111–122 (US Government Printing Office: Washington, DC, 2010).

¹²¹ According to one source, in 2008 maritime trade accounted for 90% of world trade by volume and 73% by value, air for less than 1% by volume and 13% by value, and land 10% by volume and 14% by value. IHS Global Insight, ‘An evaluation of maritime policy in meeting the commercial and security needs of the United States’, 7 Jan. 2009, <<http://www.ihsglobalinsight.com/gcpath/MARADPolicyStudy.pdf>>, pp. 4–5.

¹²² Land interdictions have not been included because they are comparatively straightforward and national customs legislation will invariably allow for the inspection of consignments entering or leaving the state by land.

Operational scenario 1. Interdiction during transit

Operationally, interdiction during transit is probably the most challenging of the PSI activities commonly undertaken. In the present context, a transit occurs when a consignment passes through a customs territory without being unloaded from the means of transport. Transit and trans-shipment hubs, or nodes, are an increasing feature of international supply routes and a significant proportion of international containerized trade transits or trans-ships at some point along the supply chain. These transit and trans-shipment hubs offer opportunities for interdiction without the need to resort to an interdiction in international waters.

The transit scenario begins with the sharing of information by PSI Participant A with PSI Participant B about a consignment of proliferation concern that is soon to transit through a port of PSI Participant B. PSI Participant B will endeavour to identify and unload the consignment while minimizing the impact on the shipper. The window of opportunity is likely to be relatively short and the customs authority's ability to detain the consignment will depend on whether the information provided is sufficient to identify the consignment from the ship's manifest. Ideally, the customs authority in PSI Participant B will have received the manifest in advance of the vessel arriving in port—either automatically as part of a pre-arrival declaration system or from an ad hoc request—and be ready to unload the consignment of proliferation concern as part of any scheduled loading or unloading.

For many states the national legal authority to intercept a consignment of proliferation concern in transit is limited and usually restricted only to cases where there is reasonable grounds to believe that the consignment is in breach of sanctions-related UN Security Council resolutions. It is therefore essential that, at the very least, sanctions-related resolutions are properly incorporated into domestic legislation; that adequate national legal authorities exist; and the state possesses the ability to undertake the interdiction of a consignment in transit.

The reasonable suspicion threshold for the interdiction of consignments of proliferation concern in transit is also relatively high and, if the intercepted consignment does not breach national controls, then the liability, costs and political repercussions may be relatively significant.

Operational scenario 2. Interdiction during trans-shipment

Trans-shipment is formally defined as the transfer of consignments from the 'importing means of transport to the exporting means of transport within the area of one Customs office which is the office of both importation and exportation'.¹²³ This is similar to the transit scenario except that the consignment is unloaded with the intention of being reloaded for onward shipment. There will

¹²³ International Convention on the Simplification and Harmonization of Customs Procedures, as amended (Revised Kyoto Convention), signed 18 May 1973, entered into force 25 Sep. 1974, revised by a protocol signed 26 June 1999, which entered into force 3 Feb. 2006, <<http://www3.wcoomd.org/Kyoto-New/Content/content.html>>, Annex E, Chapter 2.

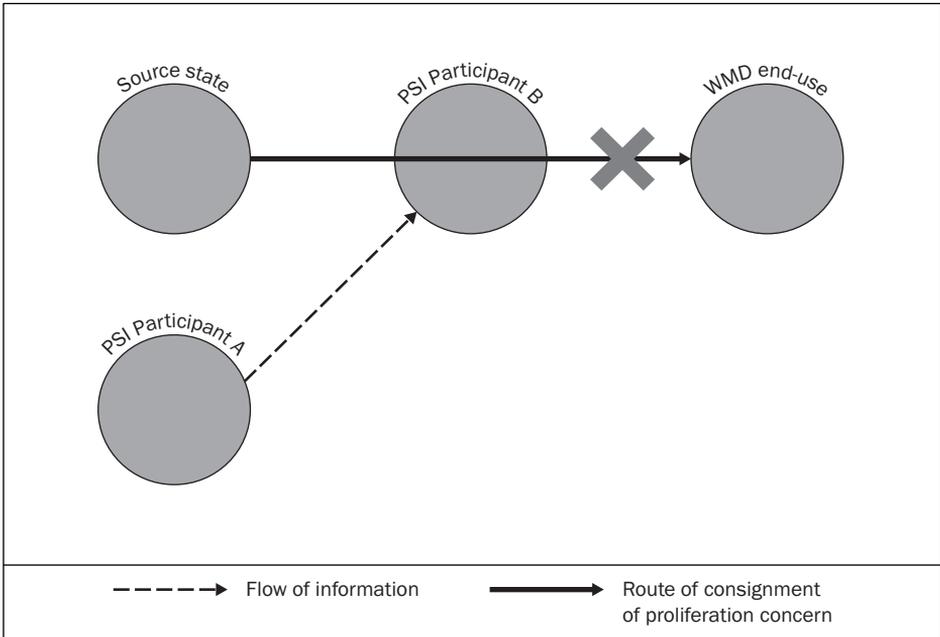


Figure 5.1. Interdiction during transit

be a requirement on the shipper to submit information to the port operator on the consignments or containers for trans-shipment and there may also be a customs declaration requirement.

In contrast with transit, the consignment is likely to be present at the port for a significantly longer period of time—on the quayside or in a warehouse waiting to be reloaded—thereby providing a greater window of opportunity to identify and intercept consignments of proliferation concern without disrupting the schedule of the vessels. The powers available to customs authorities to intercept trans-shipments are also usually greater.

The trans-shipment scenario begins with the sharing of information by PSI Participant A with PSI Participant B about a consignment of proliferation concern soon to be trans-shipped through a port of PSI Participant B. PSI Participant B will endeavour to identify the consignment prior to it being unloaded. Once unloaded the customs authority will detain the consignment and seek to ascertain whether the consignment is destined for a WMD end-use or breaches sanctions-related Security Council resolutions.

Similar to transit, the ability to intercept a trans-shipping consignment of proliferation concern depends on the incorporation of sanctions-related resolutions into national law and adequate legal authority to act. Capability is less of a factor as the consignment will not need to be identified while on the vessel and unloaded, and the window of opportunity is significantly greater. The reasonable suspicion threshold will be relatively low and an initial inspection of the documentation or physical inspection of the goods will allow for a quick initial deter-

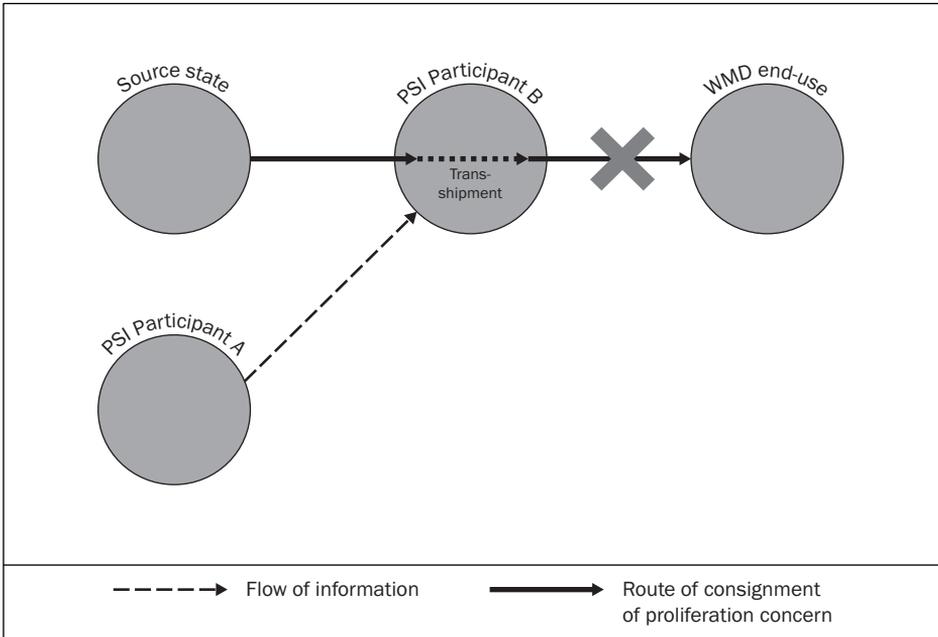


Figure 5.2. Interdiction during trans-shipment

mination of whether or not the consignment can be loaded for export or whether further enquiries are necessary.

If the intercepted consignment does not breach national controls, then the greater window of opportunity and limited disruption to trade will reduce the potential liability, costs and political repercussions.

Operational scenario 3. Interdiction in international waters

The maritime scenario explores the interdiction of a vessel in international waters suspected of carrying a consignment of proliferation concern. In such cases the vessel carrying the suspect consignment will either voluntarily divert to a friendly port or be boarded and inspected with the consent of the flag state—the only scenarios consistent with international law.

The scenario begins with the departure of a vessel from PSI Participant A to a state of concern. PSI Participant C is in possession of information that indicates the vessel is carrying a consignment destined for a WMD end-use. The vessel is currently in international waters and the next port of call is in the country of concern. The objective is therefore to prevent the consignment from being delivered. This can be achieved in two ways: either the vessel voluntarily agrees to divert to a friendly port (PSI Participant B) or permission is secured from the vessel's flag state to board and inspect the cargo.

PSI Participant C will usually begin by contacting the flag state to identify the operator of the vessel, if not already known, and to seek permission to board and

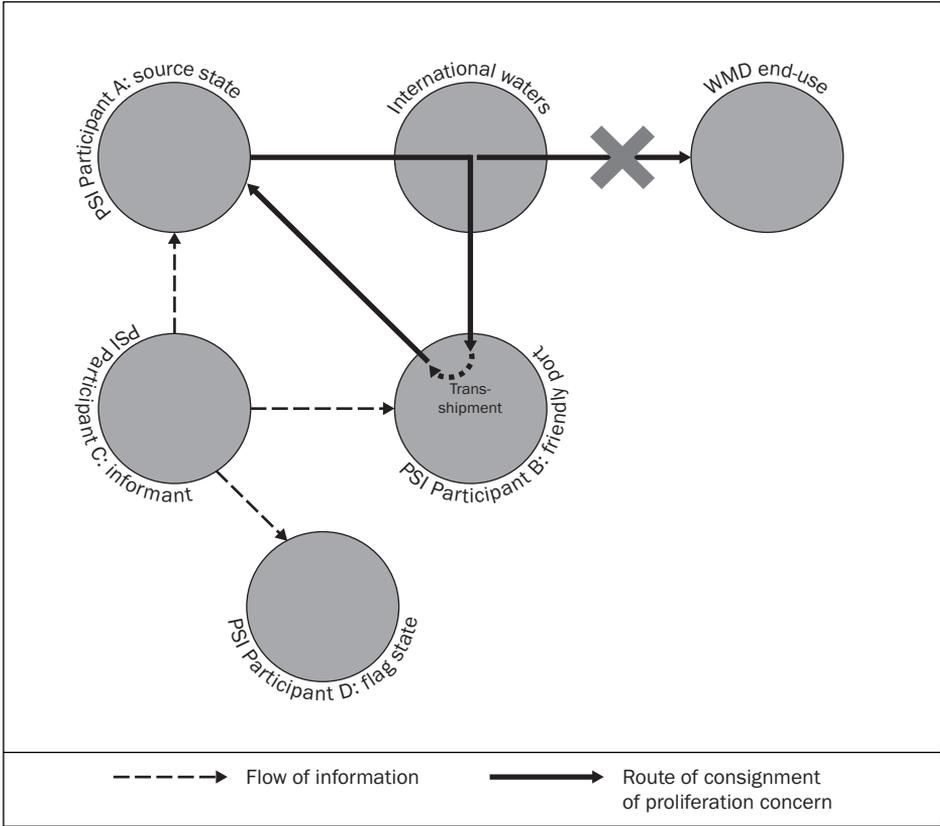


Figure 5.3. Interdiction in international waters

search—either in the context of a bilateral ship-boarding agreement or on an ad hoc basis. In parallel, attempts will be made to identify and contact the vessel operator to seek a voluntary diversion of the vessel. If a positive response is not forthcoming from the operator, and the vessel is still in international waters, then permission may be given by the flag state to board and search. In the case of a voluntary diversion, PSI Participant C will inform PSI Participant B about the consignment of concern and will seek permission from PSI Participant B for the vessel to enter port and for the consignment to be investigated.

In preparation for a possible boarding, PSI Participant C will seek to ensure that naval or similar assets are in a position to intercept the vessel in international waters should permission to board and inspect be secured. PSI Participant C will also share information with PSI Participant B on the consignment, inform it about the imminent diversion of the vessel and seek permission for the vessel to enter one of its ports.

PSI Participant B and C will also inform PSI Participant A of the interdiction and ask for information on the suspect consignment. Whether the vessel voluntarily diverts or is diverted following a boarding, the consignment of proliferation

concern will be unloaded in a PSI Participant B port. If there is no suspicion of shipper complicity, then the vessel and crew will usually be allowed to continue.

PSI Participant B is then likely to seek the return of the consignment to PSI Participant A. The best opportunity for enforcement action will lie with PSI Participant A, as any offences associated with the consignment are most likely to be linked to national strategic trade controls or sanction-related resolutions.

Despite the prominent focus on the interdiction of vessels in international waters by the PSI, such cases are extremely rare and the operational challenges immense. While it may be possible to board a vessel, if the cargo is containerized, it is unclear how the suspect container can be accessed, opened and searched at sea. Nor is it likely that the ship's manifest will contain sufficient information to confirm that the consignment is of proliferation concern. The voluntary diversion of a vessel suspected of carrying a consignment of proliferation concern will nearly always be the preferred course of action. When interdictions do occur in international waters—either voluntary diversion or boarding and search—success depends on the effectiveness of the cooperation and coordination between the PSI participants involved in the case. The reasonable suspicion threshold is also high as the potential disruption to trade, liabilities, costs and political damage can be significant.

Operational scenario 4. Interdiction in the air

The air domain is more constrained and aerial PSI interdictions are less common than maritime interdictions. They also represent different challenges: significantly smaller windows of opportunity, and the unfeasibility of boarding and searching aircraft in the air. Unlike the previous scenarios, this section looks at three short scenarios that enable the exploration of different operational tactics for air interdictions consistent with the PSI: (a) denial of overflight permission; (b) making overflight permission conditional on landing for inspection; and (c) forcing an aircraft in national airspace to land. All three are supported by international law. Each scenario starts with the provision of information on a suspect consignment of proliferation concern.

1. *Denial of overflight permission.* In this case, PSI Participant A must have provided information to PSI Participant B about a specific flight it suspects will be carrying a consignment of proliferation concern before permission is sought for overflight. PSI Participant B will then assess the information and review the options available to it. A decision to deny overflight can then be made in response to the request.

2. *Making overflight permission conditional on landing for inspection.* PSI Participant B may choose to grant overflight permission on the condition that the aircraft lands at a pre-designated airfield and submits to a cargo search. The aircraft is then free to either not overfly or submit to the landing and inspection conditions. A recent non-PSI example of this tactic (the goods seized were conventional, rather than WMD-related) was Turkey's interdiction in March 2012 of

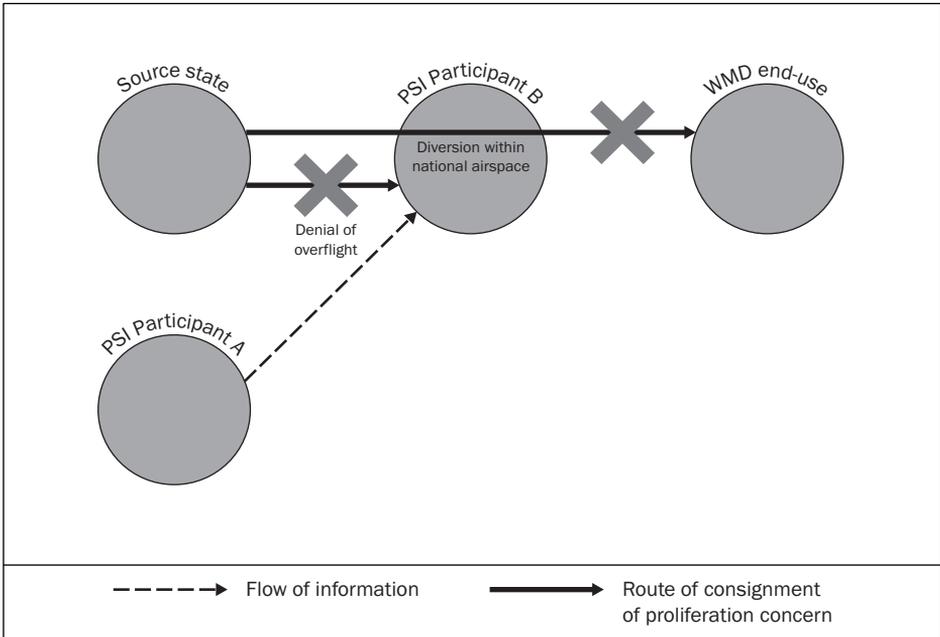


Figure 5.4. Interdiction in the air

an Iranian aircraft carrying small arms, ammunition and mortar shells in contravention of Security Council Resolution 1929.¹²⁴ According to one media report, the Syrian-bound aircraft ‘was given permission to pass through Turkish airspace provided it made a “technical stop” at Diyarbakir airport’.¹²⁵ The policy appears to stretch back to at least September 2007: ‘a political decision had been taken to request any cargo flight originating in Iran and bound for Syria to land in Turkey for inspection. Refusal of inspection would result in denial of overflight clearance’.¹²⁶

3. *Forcing an aircraft in national airspace to land.* This operational tactic applies to cases where the aircraft that is the subject of the information provided by PSI Participant A has already entered PSI Participant B’s airspace or enters despite the denial of overflight permission. PSI Participant B may then choose to scramble interceptor aircraft to force the aircraft to land for inspection, assuming the aircraft is still in its national airspace. Interceptor aircraft may also be scrambled to escort aircraft that have agreed to land for inspection. Despite being relatively unlikely, this tactic has been the subject of a number of PSI exercises and formed the basis for the Pacific Shield 12 exercise in 2012.¹²⁷

¹²⁴ United Nations, Security Council, Final Report of the Panel of Experts submitted in accordance with Resolution 1984 (2011), 4 June 2012, annex to S/2012/395, 12 June 2012, paras 33–34.

¹²⁵ Charbonneau, L., ‘Exclusive: Turkey says seizes illegal Iran arms shipment’, Reuters, 31 Mar. 2011, <<http://www.reuters.com/article/2011/03/31/us-iran-sanctions-un-idUSTRE72U6GJ20110331>>.

¹²⁶ US Embassy in Ankara, ‘Turkey to inspect shipment between Iran and Syria’, Cable to US Department of State no. 07ANKARA2394, 22 Sep. 2007, <<http://wikileaks.org/cable/2007/09/07ANKARA2394.html>>.

¹²⁷ Japanese Ministry of Foreign Affairs (note 31).

The interdiction of a consignment of proliferation concern in the air domain will require a relatively high threshold for reasonable suspicion. Denying overflight permission or making overflight permission conditional on landing is unusual and are likely to have political repercussions or lead to similar retaliatory action. The scrambling of an interceptor aircraft escort to force an aircraft to land will have even greater political consequences and result in significant media attention.

If the aircraft is found to be carrying a consignment of proliferation concern, then the ability of PSI Participant B to take any enforcement action will depend on having appropriate effective national laws in place.

6. Challenges for the Proliferation Security Initiative

Since its inception the PSI has faced numerous challenges to which it has responded with varying degrees of success. This chapter explores three inter-related challenges: the explicit opposition of some states to the PSI; external, and increasingly internal, questions and criticism; and the overarching need for the PSI to achieve objectives and maintain momentum.

Opposition to and criticism of the PSI are closely linked. Their depth and nature varies considerably: at one end of the spectrum are internal questions about effectiveness or external concerns about the legality of specific activities. At the other end of the spectrum is North Korea's description of South Korea's participation in the PSI as a declaration of war.¹²⁸

While North Korea's is the most extreme expression of opposition, the PSI does not enjoy unreserved or universal support—nearly half of all UN member states have not openly expressed support for the PSI by endorsing the SIP, despite an enduring programme of targeted diplomacy and outreach. The following sections explore some of the key aspects of the PSI that incite opposition, raise questions or stimulate criticism: affiliation and leadership, clarity and ambiguity, and image and perception.¹²⁹

Affiliation and leadership

The PSI has been criticized for being a two-tier initiative with an 'elite' steering committee dominated by close US allies. This is true of its inception and initial activity, but the intention was always to broaden participation. Today the OEG includes such diverse states as Argentina, South Korea, Russia and Singapore, and PSI activities have become increasingly inclusive, with invitations extended to both states that have endorsed the SIP and prospective endorsing states. There has also been a marked reduction in the number of meetings of the OEG, which has a restricted membership, and a corresponding increase in the number of ROEG meetings, which include SIP endorsing states from the region that are not members of the OEG.

However, as long as the two-tier structure of OEG member and PSI participant exists, criticism is likely to continue. The challenge for the PSI is therefore to retain what is perceived to be the flexibility and efficiency of its non-institutional structure, while becoming more inclusive and transparent. The OEG has an important role and its members are expected to be the 'most active' and 'strongly

¹²⁸ Glionna, J. M., 'North Korea threatens war, berates South Korea, U.S.', *Los Angeles Times*, 28 May 2009; and Korean Central News Agency, 'KPA Panmunjom mission clarifies revolutionary armed forces' principled stand', 27 May 2009, <<http://www.kcna.co.jp/item/2009/200905/news27/20090527-16ee.html>>.

¹²⁹ For a comprehensive articulation of states' opposition to the PSI see Valencia, M. J., 'The Proliferation Security Initiative: a glass half-full', *Arms Control Today*, vol. 37, no. 5 (June 2007).

engaged' in advancing PSI objectives.¹³⁰ The fact remains that the capacity and engagement of most PSI states is relatively limited.

While there are no formal OEG membership procedures, it is likely that an SIP endorsing or prospective endorsing state would engage bilaterally with OEG members and secure membership if it were willing and able to contribute positively. This is likely to have been the case with South Korea's endorsement of the SIP and membership of the OEG in 2010.

The OEG is unrepresentative of certain regions—there are no member states from Africa or the Middle East, and only one member each from South America and South East Asia (see table 2.1 above). It could also include more high-risk states—states along proliferation supply chains with significant transit and transshipment traffic or proximity to states of proliferation concern. Inclusion of these states would bring the added benefit of the participation of states facing proliferation challenges that differ significantly from those faced by the majority of OEG members, Singapore and South Korea excepted.

It has also been suggested that a UN Security Council resolution is required for the PSI to gain legitimacy (and legality). One commentator has even suggested that the PSI is 'undermining the UN system'.¹³¹ However, the PSI's relationship with the UN is more complex. Although there is no direct reference to the PSI in UN Security Council Resolution 1540, some parallels are evident in the text:

to counter [the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery], [the Security Council] calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.¹³²

Moreover, there is direct reference to the UN Security Council in the SIP: 'PSI participants are committed to [acts] consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council'.¹³³

Additionally, in December 2004, a year after the PSI's inception, the UN Secretary-General's High-level Panel on Threats, Challenges and Change noted in that 'Recent experience . . . has demonstrated the need for and the value of measures taken to interdict the illicit and clandestine trade in components for nuclear programmes. This problem is currently being addressed on a voluntary basis by the Proliferation Security Initiative. We believe that all States should be encouraged to join this voluntary initiative.'¹³⁴ Kofi Annan, the UN Secretary-General, stated in his keynote address to the 2005 Madrid Summit 'I applaud the

¹³⁰ French Ministry of Foreign Affairs (note 22).

¹³¹ Valencia, M. and Huisken, R., 'Discussion of "The Proliferation Security Initiative: coming in from the cold"', Nautilus Institute, 3 July 2006, <<http://nautilus.org/apsnet/0613d-huisken-valencia-html/>>.

¹³² UN Security Council Resolution 1540 (note 58), para. 10.

¹³³ Statement of Interdiction Principles (appendix A), para. 3.

¹³⁴ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations: New York, 2004), para. 132.

efforts of the Proliferation Security Initiative to fill a gap in our defences'.¹³⁵ In 2005 he wrote

While the Treaty on the Non-Proliferation of Nuclear Weapons remains the foundation of the non-proliferation regime, we should welcome recent efforts to supplement it. These include Security Council resolution 1540 . . . and the voluntary Proliferation Security Initiative, under which more and more States are cooperating to prevent illicit trafficking in nuclear, biological and chemical weapons.¹³⁶

The UN Secretary-General has never suggested that the PSI lacks legitimacy or is illegal in the absence of a UN Security Council resolution. Nor is there any suggestion that the PSI undermines the UN system. In fact, the above quotes suggest that the UN Secretary-General is highly supportive.

Clarity and ambiguity

The SIP defines the PSI's scope and activities.¹³⁷ Consisting of a two-paragraph preamble and four 'interdiction principles', it is relatively devoid of detail, and uses undefined terms and vague language that add to its ambiguity (see chapter 3). Consequently, SIP endorsing and prospective endorsing states have questioned its content, meaning and intention.

But clarification may not be in the interest of the PSI. The SIP's relative ambiguity enables states to endorse it based on their own interpretation. There are certainly differences of interpretation within the OEG of both the SIP and associated international law with which the PSI vows to comply. Agreement on an 'official interpretation' is therefore unlikely to be achieved. More than 100 states have endorsed the SIP, including its inherent ambiguities, and clarification may not be welcome if the official interpretation differs from their original or current interpretation.

One of the more common criticisms of the PSI is that it is 'stretching if not breaking the limits of existing international law' despite one of the least ambiguous and most clear commitments in the SIP being that all PSI activities must be 'consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council'.¹³⁸ This criticism, usually refers to interdiction in international waters and interference with the right of innocent passage as a violation of UNCLOS.¹³⁹ However, this criticism ignores the SIP's caveat 'consistent with . . . international law' and is based on a selective interpretation of the PSI's more general objectives.

¹³⁵ United Nations, 'Secretary-General offers global strategy for fighting terrorism, in address to Madrid Summit', Press release, 10 Mar. 2005, <<http://www.un.org/News/Press/docs/2005/sgsm9757.doc.htm>>.

¹³⁶ United Nations General Assembly, 'In larger freedom: towards development, security and human rights for all', Report of the Secretary-General, A/59/2005, 21 Mar. 2005, p. 28.

¹³⁷ See chapter 3 and appendix A in this volume.

¹³⁸ Valencia and Huisken (note 131). See also chapter 5 in this volume.

¹³⁹ Hawkins, W., 'Chinese realpolitik and the Proliferation Security Initiative', Association for Asian Research, 18 Feb. 2005, <<http://www.asianresearch.org/articles/2505.html>>.

Image and perception

The PSI was conceived by the USA, which is one of the most active and high profile participants.¹⁴⁰ There is therefore some truth in the assertion that the PSI ‘remains a US-initiated and driven ad-hoc activity’.¹⁴¹ The USA’s association with the PSI was further reinforced by the decision of the OEG in May 2009 to accept a proposal from the USA that it act as the PSI Focal Point to ‘keep track of actions and other procedural matters’.¹⁴² Although the PSI Focal Point appears to have had limited impact, continued US engagement and leadership in the PSI is the determining factor behind the initiative’s expansion, activity and perceived success. This factor is also perhaps the PSI’s main weakness. With no formal structure and relatively vague semi-commitments, the PSI depends on the proactive engagement of a small number of OEG members.

One of the main criticisms of the PSI, from within and outside, is the lack of transparency.¹⁴³ The issue of transparency relates to two different PSI arenas of activity: organizational—the workings and activities associated with the OEG, ROEGs, exercises and workshops; and operational—the activities associated with a specific interdiction.

At the organizational level there is actually a significant amount of information in the public domain. For OEG and ROEG meetings, the keynote speech and chairman’s statement are usually released by the host state.¹⁴⁴ For exercises, press statements are usually issued that include the exercise scenarios and details of participants. Similarly, press statements and other information are released about workshops and capacity building.

The basis for the criticism may therefore relate to accessibility, rather than the quantity or quality, of information available. The US Department of State’s PSI-related web pages are the most comprehensive but do not contain, or link users to, material published after 2006—other than US-released press statements and fact sheets from 2009.¹⁴⁵ OEG member states with PSI-related web pages, mostly on foreign ministry websites, focus predominately on their own PSI-related activities and do not link to the US Department of State website or other OEG members’ websites.¹⁴⁶ A recent development that seeks to overcome this problem is the establishment in early 2013 of a public PSI website by the German Federal

¹⁴⁰ Other particularly active OEG members include Australia, Canada, France, Germany, New Zealand and the UK.

¹⁴¹ Valencia and Huisken (note 131).

¹⁴² National Institute for Public Policy, *The Proliferation Security Initiative: A Model for Future International Collaboration* (National Institute Press: Fairfax, VA, Aug. 2009), p. xiv.

¹⁴³ EU member state officials familiar with the PSI, Discussions with author, Berlin, Sep. 2012.

¹⁴⁴ US Department of State (note 24).

¹⁴⁵ US Department of State, Bureau of International Security and Nonproliferation, ‘Proliferation Security Initiative’, <<http://www.state.gov/t/isn/c10390.htm>>.

¹⁴⁶ OEG members with notable PSI websites include Canada and France. Foreign Affairs and International Trade Canada, ‘The Proliferation Security Initiative’, <<http://www.international.gc.ca/arms-armes/nuclear-nucleaire/psi-isp.aspx>>; and French Ministry of Foreign Affairs (note 22).

Foreign Office.¹⁴⁷ The objective of the website is to inform the public about the PSI and it contains a wide range of information, publications, videos and links.

At the operational level, transparency is closely linked to the problem of attribution (as discussed above). Additionally, it is not the PSI that undertakes interdictions, but the states that have chosen to participate in it. Equally, the extent to which these states consider the interdictions to be 'PSI interdictions' is unclear and inconsistent. In the majority of cases, knowledge of an interdiction is restricted to the states that are directly involved and is not shared among OEG members. Other than high-profile cases where publicizing an interdiction is intended to prevent a proliferation attempt or deter proliferation more generally, it is unlikely that PSI interdictions will be publicized more widely.

Even if the PSI is unable or unwilling to publicize interdictions, it could be more open about its internal workings, offer more clarity on the operational realities of the activities it promotes and make the information more accessible. The recent establishment of an official PSI website is a positive development, although the extent to which the OEG and its members are willing to be more open and actively contribute to the website is not yet clear.¹⁴⁸

¹⁴⁷ Psi.info (note 1).

¹⁴⁸ Psi.info (note 1).

7. Conclusions and recommendations

The Proliferation Security Initiative is an activity, not an institution. Participation implies willingness to cooperate and undertake activities to intercept consignments of proliferation concern. It is a non-binding political agreement and action under the initiative is limited to what the participants are both ‘able and willing’ to do. Unlike the multilateral strategic trade control regimes, all states are free to ‘join’ the PSI by simply publicly endorsing the Statement of Interdiction Principles. The SIP directs PSI activity by articulating the principles and activities that define the initiative. However, participation is not restricted to SIP endorsing states—non-PSI participants can, and do, act independently or in partnership with PSI participants to intercept consignments of proliferation concern outside the PSI umbrella.

In operational terms, PSI participants are most likely to be called on to intercept a consignment in port. If a vessel is flying the flag of a PSI participant, that state may be asked to allow the boarding and search of the vessel by another PSI participant or to require the vessel to divert—both of which are relatively unlikely. In the air domain, PSI participants may be asked to deny overflight permission, to require an aircraft to land for inspection or, in an extreme case, to intercept an aircraft and force it to land. These requests are also relatively unlikely.

In addition, PSI participants are expected to act independently to intercept consignments of proliferation concern in any of the above circumstances and share information with, or seek action by, PSI partners in relation to consignments of proliferation concern that lie beyond their reach.

A number of important interrelated considerations relate to both the endorsement of the SIP and any subsequent operational activity associated with the PSI. They can be grouped into three themes: international and national law, ‘able and willing’, and cooperation and coordination.

The PSI does not create any new legal authority, although it requires that PSI activity is compliant with both international and national law. International law frames PSI activities: it sets the boundaries and defines the scope of the activities. Most PSI objectives and commitments are already mandated by United Nations Security Council Resolution 1540, a series of sanctions-related resolutions and various arms control treaty obligations. The extent to which these international legal requirements are incorporated into national law is therefore key to the success of the PSI, as is the extent to which associated enabling law, such as customs and criminal law, support their effective implementation and enforcement. National laws are therefore crucial to all PSI operational activity. However, the absence or inadequacy of national law is not a barrier to participation. Since relatively few states have incorporated the full range of proliferation-related international law into national law, the PSI provides a useful framework for assessing what may be required and is a valuable source of advice on incorporation.

The SIP endorsing states commit only to undertake interdiction activities that they are both willing and able to do. There will be occasions when the information provided on a suspect consignment does not satisfy ‘reasonable suspicion’ thresholds, when the operational challenge is beyond the state’s capabilities, when there is no legal basis for action or when the political risk is considered too great. The importance of these considerations will vary from one PSI participant to another.

Cooperation and coordination are prerequisites for PSI activities at both the international and national levels and are explicitly mentioned in the SIP. The PSI participants are therefore asked to designate an appropriate PSI point of contact and to develop standard procedures for facilitating the effective exchange of information and any subsequent action. Most PSI participants will use existing intelligence, diplomatic or law enforcement channels for the exchange of information and existing national security-related decision-making structures and processes to authorize action under the PSI.

The following sections briefly outline again the key challenges that the PSI faces and proposes relevant recommendations.

Enhance the non-military focus

Over the past 10 years the military focus of the PSI has gradually given way to a greater focus on the interdiction of consignments of proliferation concern by customs in port, based on national law. However, further movement in this direction is required that better reflects the operational realities of the PSI and the types of activity that SIP endorsing states are most likely to be required to undertake. After all, comparatively few states have the naval capability, let alone the will, to intercept vessels in international waters.

1. Military participation in the PSI needs to become the exception rather than the norm—from the make-up of OEG delegations to the focus of exercises—while the involvement of customs authorities needs to be enhanced. Customs authorities must also be adequately incorporated into national counterproliferation decision-making structures.

Enhance operational effectiveness

The Critical Capabilities and Practices effort could become the key vehicle for enhancing the operational effectiveness of the PSI. In order to optimize its impact, it would benefit from more support from OEG members and a move from assessing and collecting supporting material to developing and delivering a PSI-wide implementation strategy for enhancing operational effectiveness.

2. The OEG should undertake an objective assessment of the operational realities of the PSI. The findings will contribute to many of the recommendations that follow and should form the basis of the ongoing CCP effort.

3. PSI activities (e.g. outreach, workshops, exercises, capacity building etc.) need to reflect the operational realities that PSI participants are most likely to face if called on to undertake or contribute to a PSI interdiction.

4. The majority of PSI exercises should be port-based and focus on the operational capabilities of customs agencies; national decision-making processes; national law relating to customs powers, disposition and liability, transit and trans-shipment; and cooperation and coordination.

5. To enhance capability, the PSI should implement a voluntary peer review process to assess national capabilities and share challenges, experiences and good practice. This should be incorporated into the CCP effort.

6. The PSI should develop a capacity-building strategy and implement a programme of targeted capacity building that reflects the threats and requirements of all PSI participants. This could form part of the existing CCP effort.

Reform the Operational Exports Group

The OEG could be more representative and transparent, and the PSI would benefit if the OEG enhanced its own effectiveness and relevance. Not all members of the OEG satisfy the nominal membership criteria of being the ‘most active’ or ‘strongly engaged’ PSI participants, and these informal criteria may need reconsidering. Moreover, as the PSI steering group, the OEG could provide more clarity on the operational realities and national legal requirements of the activities it promotes.

7. The OEG’s role and relevance within the PSI, and relationship with non-OEG PSI participants, should be clarified.

8. The OEG should be more geographically representative and include more states that lie along proliferation supply chains. It should not be assumed that expanding membership would reduce effectiveness.

9. All OEG members should make meaningful contributions to capacity building by providing experts, material or funding.

10. The OEG should engage with other customs and strategic trade control capacity-building programmes to promote the inclusion of PSI-relevant capabilities, explore partnerships, identify gaps, and assess where and how the PSI’s own capacity-building activities can add value.¹⁴⁹

11. The criteria for OEG membership need to be clarified and consideration should only be given to candidates that are already active and engaged in the PSI.

12. The OEG meetings should be more transparent. Agendas and objectives, together with reports on the breakout and plenary sessions, could be published on the official PSI website. More information should also be made available about

¹⁴⁹ These include programmes implemented by a range of international actors including the UN, the WCO, the Organization for Security and Co-operation in Europe (OSCE), the EU, the USA and the multi-lateral strategic trade control regimes.

exercises, ROEGs and workshops, and the OEG should publish a regular PSI newsletter and an annual report.

13. OEG members should host OEG meetings on a rotating basis, beginning with those OEG members that have yet to act as host. New OEG members should host an OEG and an exercise within two years of becoming members.

14. The OEG should start developing guidelines on how PSI participants can fulfil SIP obligations. The guidelines should be published and distributed in a range of languages and used to support PSI capacity-building activities. This could be incorporated into the CCP effort.

15. The OEG should resolve the issue of PSI effectiveness in terms of both structure and activity. The question of structure is not new and little tangible progress has been made in making the PSI a more 'durable international institution'. A first step would be the implementation of many of the recommendations made here. In terms of activity, the ability of PSI participants to undertake an interdiction when called on will be central to any measure of effectiveness.

Develop national law

National law and the legal authority to act are the basis for most PSI activity. The PSI's capacity-building and exercise activities should better reflect proliferation risks and opportunities, operational realities, and the capability gaps of most states. Accordingly, a true measure of the PSI's success is how well it enhances the ability of states to undertake an interdiction when called on to do so. The CCP effort appears to recognize this.

16. SIP endorsing states have committed themselves to strengthening 'national legal authorities'. OEG members must therefore have ratified and incorporated into national law UNCLOS, the SUA Convention and the 2005 SUA Protocol. OEG members must do so within two years or relinquish OEG membership. Ratification and implementation should also be a condition of future membership of the OEG. In parallel, the PSI should require the implementation of all proliferation-related treaties and UN Security Council resolutions.

17. The OEG should commission a panel of independent experts to report on how 'relevant international law and frameworks' can be strengthened in support of PSI objectives. The OEG should then agree and implement a strategy to do so.

18. Minimum national laws and good practice should be defined and developed that include offences and the powers to address them (e.g. making it a crime to trans-ship a consignment of proliferation concern and establishing the power to detain such consignments pending verification). This should probably be incorporated into the existing CCP effort.

19. Government officials (usually customs officials) should not be liable when acting legally and on the basis of reasonable suspicion in support of the PSI or counterproliferation more generally. This could also be incorporated into the existing CCP effort.

20. The OEG should engage with the World Customs Organization (WCO) to help ensure that PSI-relevant customs capabilities are incorporated into WCO capacity building, guidance and operation activities.

If the PSI is to remain relevant after 10 years of operation, enhance its effectiveness and secure its future for the next 10 years, it needs to undertake an honest inward-looking self-assessment and develop a strategy for progress. The 10th anniversary in 2013 provides an ideal opportunity to do so.

Appendix A. Statement of Interdiction Principles

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern.

The PSI seeks to involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take

in support of the PSI, as outlined in the following set of 'Interdiction Principles.'

Interdiction Principles for the Proliferation Security Initiative

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. 'States or non-state actors of proliferation concern' generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.

3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.

4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

- a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
- b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.
- c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes,

such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

- e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
- f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

Source: US Department of State, 'Proliferation Security Initiative: statement of interdiction principles', 4 Sep. 2003, <<http://www.state.gov/t/isn/c27726.htm>>.

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The Proliferation Security Initiative: Legal Considerations and Operational Realities

The Proliferation Security Initiative (PSI) was conceived in 2003 as a response to a growing threat of the proliferation of weapons of mass destruction. As it marks its 10th anniversary, the initiative faces a continually evolving set of challenges in its efforts to target the transport of consignments of proliferation concern: despite the participation of over 100 states, a number of key states remain opposed, and questions about its legality, activities and effectiveness persist.

This Policy Paper summarizes and clarifies the commitments that a state enters into when it endorses the PSI Statement of Interdiction Principles, examines the legal bases that underpin the initiative, identifies some of the key challenges that it faces, and explores the operational realities of undertaking PSI activities. By doing so, it will help inform the decision making of states considering participation in the PSI, but it will also be of interest to a wider audience and contribute to a better understanding of the PSI more generally.

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