

CHAPTER 1

Introduction

1.1 What is the Proliferation Security Initiative (PSI)?

The Proliferation Security Initiative (PSI) is a US-led proposal to establish a comprehensive enforcement mechanism which aims to restrict weapons of mass destruction (WMD) trafficking in the air, on land and at sea, and thereby increase the political and economic costs of such trafficking. The 11 original members - Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United States - have been joined by Canada, Denmark, Norway, Singapore and Turkey, bringing the total number of participants to 16.¹ At a two-day meeting in Krakow, Poland, on 31 May- 1 June 2004, the participants will mark the initiative's first anniversary.

According to Guy Roberts, director of negotiations policy at the Pentagon, instead of operating with a central administrative or office or organisational control centre, the PSI is being driven by several international working groups, An operational experts group and an intelligence group are developing PSI procedures, while a legal group is determining what actions PSI members may legally take outside their own territorial boundaries.²

In September 2003 the initiative participants agreed to a set of 'interdiction principles',³ which "... builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes".⁴ This sentence suggests that the PSI is not a separate and new approach to non-proliferation, but rather an enforcement mechanism for the existing web of treaties and international agreements to limit the spread of nuclear, biological and chemical weapons.

The assumption, especially among the current US administration and some of its allies (including the British government) is that the multilateral global non-proliferation regime⁵ is unable to deter hostile states or terrorists from acquiring these weapons.

This alleged failure of the arms control system is said to be partly due to the unwillingness of the international community to take action against treaty violations and non-compliance, something which Don A. Mahley, the US State Department's special negotiator for chemical and biological arms control, describes as the "greatest threat to the arms control regime and the rule of law",⁶ and partly due to the changed nature of the threat, post 9/11. Critics also argue that developments in technology and globalisation trends exacerbate these defects and threaten to render current treaties unenforceable.

But for all the faults, most experts agree that the existing arms control treaties, are vital to stopping the most dangerous states and groups from getting the most dangerous weapons. Moreover, the critics often downplay the many non-proliferation successes,⁷ and avoid the Bush Administration's role in undermining international attempts to strengthen some of these treaties.⁸ Nonetheless, there is general acceptance that the international arms control treaty-based system has its shortcomings, and the PSI is one of a range of innovative measures in the non-proliferation toolbox designed to address the new challenges.

In that respect, the PSI participants also claim that the principles are "... a step in the implementation of the UN Security Council Presidential Statement of January 1992"⁹ and that, more important, the initiative is "... consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council".¹⁰ The initiative has been described as a "collective political commitment",¹¹ rather than a legally binding document. It has also been said that the initiative "is an activity not an organisation" which "should be open to any state or international body that accepts the Paris Statement of Principles and makes an effective contribution".¹²

However, the wording of the principles suggests that the PSI is intended to be more than a political framework. Indeed, the principles give the impression that it is the embryo of a new legal regime. Notwithstanding the political character of the principles, the participants must still observe international law and regulations when they are conducting their 'activity'. There are a multitude of legal frameworks regulating the use of the air and the sea. Initially, however, participants have chosen to focus on interdiction and shipping and the most relevant international legal framework is the United Nations Convention on the Law of the Sea (the UNCLOS).¹³ Most PSI participants have signed and ratified the convention¹⁴ and those who stand outside have admitted that the convention in many respects mirrors international custom.

The PSI has already gained momentum. In December 2003, BASIC rhetorically asked if the initiative were "dead in the water or steaming ahead?".¹⁵ A few weeks later, the

White House announced the accession of new initiative partners and proclaimed that the initiative was “ongoing and accelerating”.

However, there is still lot of work to be done. For instance, China is one potentially important and absent partner to the initiative. The Chinese view on the PSI is mixed; The Chinese foreign ministry spokesman has said that China “... can understand the worries by some countries over the proliferation of weapons of mass destruction ... [but it is also China’s view that] ... some countries of the world have doubts over the legality and effectiveness of the measure”.¹⁶ He went on to argue that the best way to curb WMD proliferation is to “... safeguard and promote international security through consultations and dialogue”.¹⁷ It seems inconceivable that the US Administration and other PSI participants will continue without consulting China on this issue at some stage in the near future.¹⁸

Another potentially important absent partner is Russia. As the only G-8 member currently standing outside the initiative, the Russian Federation seems to be sceptical regarding its legality: “We have questions about this initiative’s compliance with international legal norms ... [but in] general, the idea of intercepting vehicles shipping dangerous substances meets Russia’s interests. We share the direction of this initiative”.¹⁹ What the Federation means when it states that they “share the direction” of this initiative remains unclear. It implies that the Federation not only shares the initiative’s aim and purpose but also approves of its practicality.

However, a senior US State Department official has said that the Russians “are not ready to join the process” because they are “raising a lot of questions”.²⁰ The official added that it is “no secret that [the US] have imposed sanctions on Russian companies and individuals”, but the Federation is also both “part of the problem and part of the solution”.²¹ Without doubt, the PSI partners consider Russia’s military resources, geopolitical location and permanent membership in the UN Security Council as assets that would greatly contribute to the success of the initiative. Thus, according to another senior US official, “The Russians are interested in knowing more about it and perhaps even participating”.²² Indeed, at the time of writing, there is some speculation that Russia may be invited to join the PSI at the anniversary meeting in Poland at the end of May.²³

1.2 About this report

Objectives

The main purpose of this report is to review the PSI story to date, including its legal and strategic implications, and to discuss possible avenues of progress. It is our

view that the PSI has the potential to be part of an effective multi-faceted approach to preventing proliferation and non-compliance. This is an approach that is consistent with existing arms control regimes and other cooperative international agreements.

In order to keep this specific study within manageable proportions, it focuses exclusively on the initiative’s impact on maritime shipping, with particular emphasis on the United Nations Convention on the Law of the Sea (UNCLOS). The naval interdiction of merchant vessels on the waters of involved parties and beyond for the sole purpose of curtailing the proliferation of WMD arms, materials and delivery systems may be a viable enforcement supplement to the various existing international arms control treaties, provided that it is carefully implemented and based on multilateral consensus. On the other hand, if the initiative is not carefully implemented it may have profound implications for freedom of navigation on the high seas and the right to innocent passage through all territorial waters. In that regard, the initiative may have adverse effects on global trade, which is heavily dependent on open sea lines of communication.

In focusing on maritime interdiction, this report does not cover other aspects of the PSI, which are also of high importance, such as the question of WMD interdiction at land and in the air. The reasons for this are twofold. First, the role of interdiction on land is essentially a question of national sovereignty, since all states have exclusive jurisdiction over their own land. While there is an ongoing debate about the limits to such sovereignty and the legitimacy of ‘preventive’, ‘pre-emptive’ or ‘humanitarian’ interventions, there is no indication that PSI participants are considering unauthorised land interdictions in third states.²⁴

Second, transport of WMD materials in the air is already outlawed through the 1944 Chicago Convention and subsequent national legislation.²⁵ Transportation of WMD and related materials on the seas, however, is largely unregulated.

However, additional research is planned as part of this BASIC project on the PSI in order to address other key aspects of the problem of illicit trafficking in WMD materials. For example, a follow-on report will address the role of ‘flags of convenience’ (FOC) in illicit trafficking of WMD, and what can be done to tighten their regulation.

The specific questions that this first report seeks to address are as follows:

- Is the PSI a significant new contribution to the WMD non- and counter-proliferation toolbox or simply ‘smoke and mirrors’ with little practical value on the ground?
- What is the legal basis for the use of force to interdict ships on the high seas?

- Should suitable cases for interdiction be brought before the United Nations Security Council (UNSC) or another international forum before an actual interdiction?
- How are 'states of concern' to be defined? Is it possible to reach a consensus or should participating states be allowed to interpret the phrase on an ad-hoc basis?
- What mechanisms will be adopted in support of interdiction? For example:
 - Since the initiative calls for multinational naval coordination, is there an existing organisation, for instance, NATO, that can handle this role, or do participants need to found a new organisation?
 - Is loose cooperation between states sufficient for an effective PSI or is a more formal framework necessary?
 - As the initiative needs accurate intelligence to be effective, what capacity do participants have to survey the world's oceans, which occupy nearly 71 percent of our planet's surface?
- What precedents are likely (in terms of other nations adopting the same criteria and boarding any ship that it declares to be 'of concern')?
- Since more than 90 percent of the trade between countries is carried by ships and about half the communications between nations use underwater cables, is the establishment of new maritime custom of value or is it a dangerous development?

The US Undersecretary for Arms Control, Mr. John Bolton, has outlined the US State Department's perception of the initiative in recent remarks to American organisations.²⁶ Initially, the initiative was presented as a new multilateral approach to a common problem. Since the introduction of a draft boarding agreement at the coalition's London meeting, however, along with emerging doubts on the initiative's legality, the position of the United States has begun to sound more unilateralist.

It is important that the initiative is implemented multilaterally, since such an approach is more likely to enhance its impact and effectiveness. It is hoped that this research will help to bridge the divide between unilateralist and multilateralist approaches, and help to raise awareness of both the benefits and pitfalls among a wider group of governments, as well as non-governmental organisations. It is particularly important to raise awareness about the initiative with concerned media, parliamentarians and the general public within participating states, in order that decisions are taken with the informed consent of citizens.

Methodology

This report is based on open-source materials and some initial discussions with government officials. Further interviews with officials and other interested parties are planned, and it is our intention to organise two roundtable discussions to review the main findings. The discussions will be held under Chatham House rules and will focus on the opportunities this initiative provides to reduce the danger of WMD proliferation, and in particular, how to bridge different interpretations of the Law of the Sea. Details of these consultations and updates to this report will be published on BASIC's website (<http://www.basicint.org>).

Other planned activities under this BASIC PSI research project include:

- A survey of European government and public attitudes to the PSI;
- Updates on the project's progress and the dissemination of interim findings, through BASIC's established publications, e-mail updates, and web site; and
- International advocacy and media work around the main research findings and recommendations.

Structure

The report starts with a critical analysis of the interdiction principles (chapter 2), and then discusses the implications of PSI on the Law of the Sea (chapter 3). This section also discusses the various interpretations of the Law of the Sea and examines how the PSI might be able to navigate some of its more choppy legal waters: in particular through individual waiver of freedom of navigation. The extent of the practical implementation of the initiative, in terms of exercises and interdictions carried out so far, are outlined next (chapter 4). In the last chapters, the future options for developing the initiative are discussed (chapter 5), including the relationship it has, or could develop, with the International Maritime Organisation, the UN Security Council, the doctrines of 'necessity' and 'preventive or pre-emptive self-defence', and the issue of nuclear disarmament. The report finally lists a number of conclusions and recommendations (chapter 6).