

## CHAPTER 6

### Conclusions and recommendations – Building on a positive start

The rationale of the PSI is indeed appealing. If implemented correctly it could be a credible enforcement mechanism and a logical and solid expansion of the current non-proliferation and disarmament regimes. If implemented incorrectly, however, it may prove counterproductive by not only hampering free trade and the right of humankind to use the resources of the ocean freely, but by reinforcing discriminatory practices in non-proliferation.

Whenever a new initiative is launched, the founders, and those considering joining it, have to balance the advantages of the measure against its disadvantages. When it comes to the PSI, the advantages are certainly great. Almost the whole of the international community has rejected the idea of acquiring nuclear weapons and other WMD as a means of enhancing national security. With the exception of the five declared nuclear states, the three undeclared nuclear states and a handful of ‘states of concern’, most states have reached the conclusion that nuclear weapons threaten security at all levels: national, regional and global. In short, they consider that the effects of their use are too terrible to fathom.

On the other hand, the tactical benefits of having a weapon capable of such destruction must be tempting for certain international terrorist organisations and a few ‘states of concern’. Therefore, the problem of trade, technology transfer and proliferation in WMD materials is real and should not be underestimated.

Neither should the problem of WMD proliferation be overestimated. An intrusive regime hampering global trade needs to be proportional to the potential gains from applying it. Other avenues for curbing WMD proliferation must also be explored or expanded. Several examples:

- Remodelling and strengthening the enforcement capabilities of the IAEA and the OPCW;
- Greater international harmonisation and strengthening of criminal laws and export control regulations; and

- Accelerated implementation of the cooperative threat reduction agenda.

Finally, in order to cure a disease, the disease itself has to be targeted not just the symptoms. The nuclear weapon states need to renounce their weapons and work harder towards the goal of a nuclear free world, as stressed by both the Chilean and Brazilian statements accompanying UNSC Resolution 1540 (2004). At a minimum, the nuclear weapon states need to assure the non nuclear weapon states that nuclear arms will never be used against them in a first-strike. Under international humanitarian law, the use of a nuclear weapon is generally illegal. The ICJ has pronounced that use of them may be acceptable only in situations in which the very survival of the state may be at stake. It is difficult to imagine such a scenario.

This report does not aspire to be an authoritative statement of the law. On the face of it, there is currently no clear-cut basis to use force in order to interdict ships transporting WMD and related materials on the high seas. Thus, the participants need to use a variety of tools in order to establish a favourable legal environment for the initiative. It is naïve to wait for the emergence of a new custom, since it is apparent that some major seafaring nations object to the initiative, including China and India. Therefore, other measures need to be taken.

Here are twelve specific recommendations to strengthen the PSI and expand the global norm of combating and preventing WMD trafficking:

#### Recommendation 1: Continue to expand PSI ‘membership’ through regional outreach activities

PSI participants are committed to seeking the support of other states for the initiative, and over 60 countries have already done so.<sup>238</sup> The London plenary meeting also reiterated that further co-ordinated outreach work would be needed to broaden international understanding of and co-operation with the Initiative, and stated that further regionally based meetings and activities would be valuable. The information meeting organised by Poland in January 2004 for the countries of Central and Eastern Europe, and similar efforts in the Asian region being undertaken by Japan and Australia, are welcome developments and ought to be replicated in other regions where PSI participation is under-represented.

**Recommendation 2:****Focus on specific nuclear, biological or chemical technologies**

The review in section 2.5 of how states and non-state groups use the term WMD leads to the conclusion that a more authoritative definition of targeted contraband is required. Most likely, WMD will be interpreted narrowly, but in the interest of clarity participants should consider using the term ‘nuclear, biological and chemical weapons’ throughout future PSI agreements instead of the term WMD. A clear and precise phraseology is essential for several reasons. Of course, it is good to know what the participants are talking about when they use the word, but better phraseology would also:

- Make the initiative more predictable. States as well as shipping companies will be more confident in knowing that certain goods will not be subject to interdiction. They will also be certain that shipping some cargoes increases the likelihood of interdiction.
- Minimize the risk that the PSI will be wrongfully used. With the current definition, nothing stops the participants from interdicting a ship of materials within the grey-area, such as high explosives or industrial parts, and calling it ‘WMD related materials’. This particularly applies to technologies required for the development and production of chemical and biological weapons, which are by their very nature often ‘dual-use’.<sup>239</sup>
- Increase potential support for the initiative. When states and other concerned parties know what the participants intend to interdict, they may be more willing to join. Presently, use of the term WMD may deter countries that feel that they may be targeted (such as China and Russia) from joining.

**Recommendation 3:****Consider enlarging the scope to include other illicit trafficking activities**

In addition to greater specificity in relation to WMD technologies, the participants may also want to incorporate other forms of illicit activity under the PSI interdiction framework. For example, they may want to use the initiative as a starting point to facilitate interdictions of ships carrying slaves and illegal immigrants, small arms, or even narcotics. It is worth thinking about ways of expanding the PSI at this stage, rather than later, when the initiative may already be formalised.

**Recommendation 4:****Seek a wider mandate for interdiction through new multilateral negotiations and agreements**

The PSI and other ‘coalitions of the willing’ are trying to combine the flexibility of unilateral action with multilateral credibility. It is not necessarily a bad or unlawful approach. However, while the path of unilateralism or limited plurilateral actions may allow greater flexibility and fast-track decision making than multilateral agreements in the short term, in the longer term it can be self-defeating or even exacerbate existing tensions. Thus, as currently configured the PSI may have difficulty in preventing a recurrence of incidents like the temporary seizure of the *Soson* en route to Yemen, which the Spanish navy was obliged to release because there was no mandate for the interdiction.

Obviously, reaching universal agreement on any new initiative is very difficult, but achieving a higher degree of multilateral support will tend to enhance international political goodwill and support for it. One possibility is to use the UNSC as a global legislature and negotiate a resolution on WMD trafficking in general (targeting states as well as non-state actors). Currently, the authority of the UNSC in this regard seems a little unclear, and it may be that the Council finds that it lacks authorisation to pass a resolution of that kind.

Another option would be to conclude a multilateral agreement relating to the use of the seas, preferably through the IMO (see recommendation 5). This has been done before, most notably in order to suppress terrorism at sea, and has proved successful.

A third way forward would be to engage on a trail of reinterpretations and restatements: tweaking the law to the participant’s advantage much as a lawyer argues his or her case in a national court. This may be an easier route but is unlikely to gain the support of a broad grouping of countries.

**Recommendation 5:****Work with the IMO in further developing the PSI**

The IMO ought to be at the heart of the PSI. It is encouraging that at least one participating state, the United Kingdom, is working through the IMO to secure amendment to the SUA Convention to make it an internationally recognised offence to transport WMD, their delivery systems and related materials on commercial vessels. However, the IMO also has the potential to work on other aspects of the PSI agenda,

such as enhancing tracing and identification of suspect shipping. It should not be dissuaded from doing so on misplaced ideological grounds.<sup>240</sup>

#### Recommendation 6:

### **Place the burden of proof on flag states, shippers and masters to ensure WMD-free cargoes**

The IMO would also be a suitable forum to negotiate rules that place a legal responsibility on flag states, shippers and masters to ensure that their cargo is clear of WMD. Rules of this kind could be negotiated within the framework of the safety at seas convention and could be supplemented with suitable and credible liability rules. The work could also focus on enacting or strengthening national criminal legislation relating to the act of transporting WMD on the high seas and beyond.

#### Recommendation 7:

### **Undertake a feasibility study for the development of an international maritime tracking system with global coverage**

In an ideal world, a global tracking and tracing system would be able to monitor suspect shipping and provide data to law enforcement agencies in all nations. Indeed, the many technological innovations and changes in communications technology suggest that this may become technically feasible in the near future, and that the real hurdles are likely to be political. The IMO, for example, has introduced major improvements to the maritime distress system,<sup>241</sup> and other automatic information systems are being introduced as part of a new comprehensive maritime security regime (as discussed in section 5.1). These new civilian systems, in addition to the NOSS, provide a starting point for the development of an international maritime tracking system with global coverage.

#### Recommendation 8:

### **Promote technical cooperation and assistance**

Assistance programmes to developing countries for training and the improvement of their maritime and port security infrastructure should be introduced as a carrot to attract new PSI participants. In particular, shipping and port industries in the United States, EU and other wealthy participating states could be encouraged to provide financial, human or in-kind resources to such programmes, possibly as part of the

IMO's existing Integrated Technical Co-operation Programme. This would not only advance goodwill for the PSI, but also help to enhance effective implementation of, and compliance, with international non-proliferation and maritime security norms. Similar technical cooperation and assistance programmes for increasing the effectiveness of national non-proliferation export control regimes in newly independent countries in Central and Eastern Europe, and in other regions vulnerable to illicit trafficking, have proved successful in the past. Finally, UNSC Resolution 1540 (2004) also calls for international assistance to those states unable to implement the provisions of that resolution.

#### Recommendation 9:

### **Consider establishing a UN interdiction committee**

Resolution 1540 (2004) establishes an ad-hoc committee to implement the non-proliferation provisions contained therein. Previously, in September 2001, the UNSC also adopted resolution 1373 which established the Counter-Terrorism Committee. Both committees, comprised of the members of the UNSC, monitor the implementation of the respective resolutions and will seek to increase the capability of states to combat proliferation and fight terrorism. It would undeniably give the PSI more legitimacy if the participants were to push for the establishment of an 'interdiction committee' under a UNSC resolution. This might even be a future role for the new committee established under resolution 1540.

This committee could be ready, on short notice, to decide interdiction cases. Preferably, the members of the committee would have an equal vote without the possibility of a veto. However, it seems unlikely that the permanent members would agree to such an arrangement. Therefore, the obvious drawback with the establishment of a committee is the overriding threat of a state vetoing an interdiction. This might decrease the effectiveness of the initiative as a whole. On the other hand, the establishment of such a committee might bolster international and public support for the initiative, silence some of its critics and encourage new states to join it.

#### Recommendation 10:

### **Negotiate towards a common position on 'states of concern'**

More work also needs to be done on trying to reach a consensus definition of 'states of concern'. Utilising sensitive destination lists within export control regimes may provide some way forward. The EU, for example, has achieved partial convergence of the national lists of sensitive destinations, although the utility (and even exist-

ence) of such listings continues to be controversial. In the UK, for example, the sensitive destination list was withdrawn in 1998 on the grounds that it might cause diplomatic difficulties with some of the countries listed, and some other EU member states do not officially have such a list (although clearly officials in all member states have to make a judgement about the country of destination when considering an export licence application, and thus de facto sensitive destination lists do exist throughout the community).

Moreover, the reasons why a country is designated sensitive are rarely stated explicitly. A 1995 analysis of the sensitive country lists of four major exporters of arms (Germany, Japan, the UK and US) sought to identify and explain the concerns that led to the inclusion of countries on those lists.<sup>242</sup> The findings in relation to Germany and the UK were that a total of 57 countries were listed (50 by the UK and 48 by Germany) with 41 common to both lists. The nine countries on the UK list but not on the German lists were Angola, Argentina, Brazil, Croatia, Egypt, Slovenia, South Africa, South Korea and Taiwan. The seven countries on the German lists but not the UK list were Chile, Comoros, Djibouti, Jordan, Oman, UAE and Vanuatu. These differences were largely a reflection of the different foreign policy concerns of Germany and the UK and confirm the difficulties that the PSI participating states will have in reaching a common perspective in such matters.

However, if the participants were able to agree a target list of countries, and made this list publicly available, it would enhance the predictability of the initiative. It would reassure shipping companies and exporting states that they could conduct business as usual without having to factor in the risk of a wrongful interdiction in their estimates. On the other hand, naming and shaming target states may have unforeseen consequences and further alienate and isolate countries of concern.

**Recommendation 11:  
Increase the visibility of national contributions to PSI activities and enhance parliamentary oversight**

For the time being, there is no real need to establish a new organisation (a PSI-authority) to oversee the initiative. The participants have reiterated over and over again that this is an activity, not a club. What the initiative mostly requires states to do is to enforce their own laws and update them where needed. A large part of the initiative pertains to customs and border controls. A small but high profile part relates to the use of armed force on the high seas. But there are no plans for participating states to dedicate specific personnel or funding to support this role. In the United States, for example, the Pentagon has said that the Defense Department could handle its PSI responsibilities with existing capabilities, and there is no separate line item for PSI in the fiscal 2005 budget request.<sup>243</sup>

However, in order to ensure proper parliamentary oversight and to help evaluate the effectiveness of the PSI, participating states should include a line item for the PSI in their defence budgets, as well as a description of PSI activities carried out in any annual reporting mechanisms.

In addition, should participation in the initiative continue to grow, the ‘members’ may find it necessary to set up a coordinating body of some description. Also, if they choose to set up a counter-proliferation committee in the UN, there would probably be a need for military liaison between the committee and the interdicting state.

**Recommendation 12:  
Expand bilateral and multilateral boarding agreements**

One immediate way forward is to conclude bilateral or multilateral boarding agreements with the major commercial flag states, including the so-called flags of conveniences. This would facilitate lawful boarding of vessels on the high seas and could be concluded expediently with a minimum of negotiations. This appears to have been the case with the two boarding agreements that the United States has recently concluded with Liberia and Panama.

It may, however, prove costly. International organisations have for a long time tried to combat the poor wages and dangerous working conditions onboard these ships, and boarding agreement trade-offs may hamper their efforts. For the flag state, a boarding agreement should give political goodwill as well as economic benefits.

Finally, there is a danger that the PSI could establish a dangerous precedent regarding boarding on the high seas. International custom can be applied by all states, not only PSI participants. And if a new custom emerges, it could be used to conceal illegitimate boardings carried out with other intentions than the fight against the proliferation of WMD and related materials. This would naturally be a most undesirable development.