

The Proliferation Security Initiative: Can It Deliver?

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Abstract:

The Proliferation Security Initiative (PSI) is a multinational initiative that aims to stop the trafficking of Weapons of Mass Destruction (WMD), their delivery systems, and related materials to and from states and non-state actors of proliferation concern. The core of the PSI's activity revolves around the interdiction of WMD trafficking at sea. As a framework for interdiction, the PSI suffers from a series of shortcomings in its current form which create significant loopholes that can be exploited by a determined trafficker. There are significant legal issues that severely restrict the interdiction and seizure of WMD materials at sea. The PSI lacks the participation of key nations in Asia straddling the major shipping routes between North Korea and Iran, two states of proliferation concern. The PSI also faces structural challenges that affect its transparency. Given these challenges, it is questionable if the PSI in its current form can be effective in preventing proliferation. However, the fundamental logic of the PSI as a non-proliferation tool is sound. The PSI's best strategy is to build international momentum against illicit trafficking of WMD and related material and expand the legal freedom to act through growing its membership. PSI participants should continue to increase their effectiveness at detecting and seizing WMD and related materials in their own ports and internal waters, and the PSI can help in these endeavours. A "kinder, gentler" PSI—one that is established firmly within the bounds of international law—would be naturally attractive to nations as a way of discharging their international obligations. By backing off from an aggressive interdiction posture, the PSI could win over more adherents and build momentum towards non-proliferation.

Keywords: Maritime Security; Nuclear Proliferation; Proliferation Security Initiative; Weapons of Mass Destruction

INTRODUCTION

"The greatest threat to peace is the spread of nuclear, chemical and biological weapons ... 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."

George W. Bush, Krakow, Poland, 31 May 2003¹

The Proliferation Security Initiative (PSI) is a multinational initiative that "aims to stop the trafficking of Weapons of Mass Destruction (WMD), their delivery systems, and related materials to and from states and non-state actors of proliferation concern."² The core of the PSI's activity revolves around the interdiction of WMD trafficking at sea, although the PSI has provisions for interdiction on land and in the air as well.³ Since its inception in 2003, the level

of international interest in and commitment to the PSI has increased. Participation in PSI has expanded, from an initial membership of ten countries,⁴ to 95 nations in 2010.⁵ Multinational PSI exercises and workshops continue to be conducted on a regular basis with an average frequency of four events per year.⁶

Despite the promising level of international participation and commitment to the PSI, little evidence has been released to show that the PSI has thus far been effective at interdicting WMD traffic. The PSI continues to suffer from fundamental legal and practical issues that cripple its effectiveness and discourage broader participation.

The issue of nuclear non-proliferation is now high on the international agenda. The United Nations' (UN) resolutions against the North Korean nuclear test in 2009, Iran's refusal to cease high-level enrichment of uranium, the high participation in the 2009 Nuclear

Security Summit,⁷ and the international attention focused on the 2010 Non-Proliferation Treaty Review Conference,⁸ are all indications of a growing global search for effective mechanisms to strengthen non-proliferation efforts. In a cornerstone speech outlining his nuclear policy in Prague, Czech Republic, in 2009, President Barack Obama has declared that he would work towards making the PSI an enduring institution.⁹ The 2010 Nuclear Posture Review Report reiterated that the United States (US) Department of Defense would act to impede trade in sensitive nuclear materials in light of President Obama's pledge towards the PSI.¹⁰ It is timely to consider whether the PSI in its current form can deliver on its promise, and if not, how its effectiveness can be enhanced.

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BACKGROUND

In December 2002, President George W. Bush released his "National Strategy to Combat Weapons of Mass Destruction," National Security Presidential Directive 17 (NSPD-17). NSPD-17 outlined a three-pronged strategy to safeguard the United States from WMDs, namely counter-proliferation, strengthened non-proliferation, and consequence management.¹¹ Interdiction of WMD materials was a key component of the counter-proliferation strategy and aimed to "prevent the movement of WMD materials, technology and expertise to hostile states and terrorist organizations."¹² In May 2003, President Bush introduced the PSI as a new approach to prevent the spread of illicit WMD materials. Ten countries joined the United States as founding members of the PSI.¹³

The concept of multi-national cooperation on interdiction met with early validation in October 2003, five months after the announcement of the PSI. The *BBC China*, a German-flagged ship, was en-route



Port of Singapore

from Malaysia to Libya when the German government, acting on intelligence from the United States, ordered it to divert to Italy where it was detained. Its cargo of centrifuge parts, which could have been used for uranium enrichment, was seized.¹⁴ Although the seizure of the *BBC China* was not a PSI operation, the success of the maritime interdiction operation appeared to validate the principles on which the PSI was founded. The large cast of nations involved in the operation reinforced the need for multi-national participation in such interdictions. Then US Secretary of State Condoleezza Rice credited the interdiction for its role in persuading Libya to abandon its WMD program.¹⁵ The evidence uncovered by the seizure of the *BBC China's* illicit cargo was also instrumental in exposing and unraveling the A. Q. Khan nuclear proliferation network, which had previously supplied interested countries with the high-tech equipment and expertise required for their nuclear programs.¹⁶ It seemed then that the PSI's strategy was sound. But is it really?

CURRENT SHORTCOMINGS OF THE PSI

In order to be effective, an interdiction program must be able to target a large enough proportion of illicit shipments in order to deter prospective traffickers. There also has to be some latitude on time, place and conditions to make allowances for limited intelligence. Additionally, safe haven must be denied to suspect ships, as the existence of "bolt-holes" and safe zones would render interdiction ineffective.

As a framework for interdiction, the PSI suffers from a series of shortcomings in its current form which create significant loopholes that can be exploited by a determined trafficker. Almost immediately after the PSI's inception, it was recognized that there were significant legal issues that severely restrict the circumstances under which interdiction and seizure of WMD materials at sea is permitted.¹⁷ The PSI still lacks the participation of key nations in Asia straddling the major shipping routes between North Korea and Iran, two states ostensibly "of proliferation concern."¹⁸ The PSI also faces structural challenges that affect its transparency and dissuade participation. These issues are elaborated below.

LEGAL CHALLENGES OF THE PSI

The PSI Interdiction Principles explicitly state that PSI activities are to be undertaken "consistent with national legal authorities and relevant international law and frameworks."¹⁹ However, under international law the legal basis for interdiction on the high seas and in the air is extremely narrow. The current set of United Nations Security Council Resolutions do not give sufficient latitude to PSI participants or states to contravene international law by stopping and searching vessels suspected of carrying WMD and related material. Effectively, without the consent of the flag state, vessels of concern can only be stopped and searched in the internal waters of a PSI participant. This limits the conditions under which interdiction can legally take place, and severely hampers the integrity of the PSI in staunching the flow of WMD materials.

Limitations of Current UN Security Council Resolutions

The current UNSCRs do not give sufficient latitude to states to deviate from international law to interdict vessels of concern. There are three sets of UNSCR currently relevant to stopping the illegal transport of WMDs. UNSCR 1540 (2004) calls on all states "to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."²⁰ However, UNSCR 1540 limits any action taken to those "consistent with international law." Another set of UNSCR refers to Iran's nuclear enrichment program. Of these, UNSCR 1803 (2008) is aimed at tightening restrictions on Iran's nuclear activities, and calls on states to "inspect cargoes to and from Iran" if there are "reasonable grounds to believe that the aircraft or vessel is transporting goods prohibited."²¹ However, such action is again limited within the bounds of international law. The third set of UNSCR focuses on North Korea's nuclear program. Of these, UNSCR 1874 (2009), enacted in response to North Korea's 2009 nuclear test, calls for the inspection of "all cargo to and from the Democratic People's Republic of Korea (DPRK)" but also limits the inspections to that "consistent with international law."²² Given that UNSCR 1874 still maintains this restriction despite clear evidence of nuclear capability

by North Korea, it seems the UN Security Council is unwilling to shut the proverbial barn door even after the horse has bolted. It is unlikely that any future UNSCR would allow PSI interdiction operations to contravene international laws to the extent needed to effectively halt nuclear proliferation.

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Limited Grounds for Interdiction on the High Seas

Apart from the UN Security Council Resolutions, the legal basis for PSI maritime interdictions under international law is very limited. On the High Seas, neither the 1958 Convention on the High Seas nor the United Nations Convention on the Law of the Sea (UNCLOS) allows for ships to be stopped and boarded solely on the suspicion of carrying WMD or related materials.²³ Under the UNCLOS, a warship can justify boarding a foreign merchant vessel on the high seas only when the ship in question is engaged in piracy, the slave trade, unauthorized broadcasting, is assessed to be without nationality, or suspected to be of the same nationality of the warship.²⁴ These limitations on interdiction apply in a similar manner to international straits and within archipelagic sea lanes, to which the regime of transit passage and archipelagic sea lanes passage apply respectively.²⁵ The carriage of illegal WMD and related materials does not in itself provide the legal basis for a vessel to be stopped and searched. Absent these conditions, a foreign merchant ship can be stopped and boarded if the flag-state of the merchant vessel agrees, or if the ship's master agrees to do so. Currently, the United States has boarding agreements with key flag states that facilitate such interdictions, including Panama, Liberia and the Marshall Islands, among others.²⁶ However, this approach depends completely on the willingness of the flag state to enter into such agreements.

Needless to say, states of proliferation concern are unlikely to authorize any interdictions on their flagged merchant vessels, and can be presumed to have instructed their ships' masters likewise.

Limited Grounds for Interdiction in Territorial Waters

There are also very limited legal grounds for the maritime interdiction of illicit WMD traffic in territorial waters. A coastal State has very limited legal basis to interdict a ship that is exercising innocent passage through its territorial sea. The UNCLOS favors the freedom of navigation, stating that coastal States "shall not hamper the innocent passage of foreign ships through the territorial sea."²⁷ Nor can coastal states enact any laws and regulations that impose on foreign ships constraints such that they "have the practical effect of denying or impairing the right of innocent passage," or "discriminate in form or in fact against the ships of any State."²⁸ Hence, the coastal state is limited in its ability to enact domestic legislation to prohibit the transport of illicit WMDs through its waters. In addition, the fact that the ship is carrying WMD or related material has no impact on the innocent nature of its passage.²⁹ Therefore, while the exercise of a State's sovereignty over their territorial sea is extensive, its rights are not extensive enough for the effective interdiction of illicit WMD traffic.



The Straits of Malacca

Possible Exceptions in Territorial Seas

There may, however, be some scope for coastal states to contest the innocent passage of ships of concern. There have been instances where coastal states have unilaterally attempted to deny or restrict passage to ships transporting hazardous radioactive waste through their Exclusive Economic Zone (EEZ) or territorial seas based on the precautionary principle, due to the risk posed to the environment by these hazardous materials. For instance, in 1992 the Heads of Government of the Caribbean Community objected to the planned passage of the Pacific Pintail, carrying a shipment of radioactive waste through Caribbean waters.³⁰ Such cargoes were argued to be prejudicial to the peace, good order and security of the coastal state. In addition, the UNCLOS requires that “ships carrying nuclear or other inherently dangerous substances” when exercising innocent passage through the territorial sea, “carry documents and observe special precautionary measures established for such ships by international agreements.”³¹ Presumably, there may be scope for the coastal state to deny innocent passage if this requirement has not been met.³² However, the legal merit of such an argument is unclear.

Greatest Latitude for Interdiction in Internal Waters

A PSI member has the greatest latitude to enforce its laws in its ports and internal waters where the right of innocent passage does not apply. A PSI member state would be permitted to “take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters ... is subject.”³³ This would include the right to visit, board and search ships of concern, and seize illicit cargo if domestic legislation allows. This form of interdiction is encouraged in the PSI, which recommends that states take appropriate action to stop and search suspect vessels in their internal waters.³⁴ Indeed, major transshipment hubs

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such as Singapore and Hong Kong have enacted legislation to this effect, thereby denying safe haven and replenishment points along the trafficking route.³⁵ This form of “port denial” may be instrumental in denying passage to the *Kang Nam I*, a North Korean freighter suspected of carrying weapons in contravention of UNSCR 1874. The *Kang Nam I* was unable to complete its journey from North Korea to Myanmar in June 2009, and turned back in the South China Sea.³⁶ Although the exact reason that *Kang Nam I* turned back is unknown, Vice President Joe Biden credited the reversal to the fact that “[t]here was no place [*Kang Nam I*] could go with certitude that they would not be, in fact, at that point boarded and searched.”³⁷

POLITICAL CHALLENGES OF THE PSI

While participation in the PSI seems high at 95 member states in 2010,³⁸ the PSI lacks the support of key Asian nations straddling the major shipping routes connecting North Korea and Iran, the two states ostensibly of greatest proliferation concern. These include China, Malaysia, Indonesia, India and Pakistan. Their non-participation creates holes in the WMD interdiction dragnet that can be exploited by a determined trafficker. The participation of these nations is held back by concerns over the concept of interdiction, freedom of navigation, and sovereignty issues, among others.

Gaps in Political Participation of Key Asian States

The lack of participation of key Asian states in the PSI—China, Malaysia, Indonesia, India and Pakistan, significantly limits the effectiveness of the PSI's interdiction efforts. Malaysia and Indonesia straddle the waters of the Malacca Strait—an important choke point linking the Pacific to the Indian Ocean.³⁹ China, India and Pakistan are nuclear powers and have significant industrial capabilities related to WMD and missile production, as well as ports lining the route between North Korea and Iran. Their participation in the PSI

or endorsement of its principles would add significant clout and momentum to the Initiative. Unfortunately, these states have serious reservations over the fundamental concept of the PSI—the legality of multinational interdictions.

Concerns Over Interdiction and International Laws

Despite the PSI's close adherence to the regimes of international law clearly spelled out in the PSI Interdiction Principles, there remains concern that the PSI is an attempt to generate momentum for a parallel set of international norms that would dilute the current guarantees on freedom of navigation. For instance, China's Ministry of Foreign Affairs "remains concerned about the possibility that the interdiction activities taken by PSI participants might go beyond the international law [sic]."⁴⁰ This concern is not helped by transparent American attempts to push the envelope on the legal basis to stop and search shipping. For instance, the US has attempted to insert provisions into the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) that would allow the interdiction of vessels suspected of carrying WMD related materials.⁴¹ Such a provision would dilute the protection of shipping on the high seas, as the UNCLOS allows ships to be boarded on the high seas if "interference derives from powers conferred by treaty."⁴² This concern is exacerbated by the fact that there is no clear definition under the PSI on who is on the list of "states or non state actors of proliferation concern," nor is there any definition regarding what type of "related materials" come under the purview of PSI interdictions. The broadness of the PSI's potential list of interdiction targets does not provide much reassurance to states that are concerned about the PSI's potential impact on the freedom of navigation and trade. Partly due to these concerns, China does not subscribe to the idea that interdiction should be a primary method for non-proliferation. According to China's Ministry of Foreign Affairs, China believes that non-proliferation issues "must be settled through dialog and international cooperation,"⁴³ and prefers the "attainment of the non-proliferation goal through political and diplomatic means."⁴⁴

Concerns Over Sovereignty

Another major source of concern over the PSI derives from the fear that a PSI participant's sovereignty would be undermined by the implicit obligation to allow a multinational PSI force to operate within their territorial seas for the purposes of interdiction. While there is no explicit statement within the Interdiction Principles that compels this, Indonesia and Malaysia are particularly sensitive to this possibility. For instance, during a visit by Secretary of State Condoleezza Rice to Jakarta in 2006, the Indonesian Foreign Ministry underlined its concern that the PSI's activities could infringe on its sovereignty, and sought clarification from the US "for the location of the initiative [activities]," and whether they would take place in the EEZ or archipelagic waters.⁴⁵ Malaysia is similarly leery. Its abhorrence of foreign warships operating within the Malacca Strait was evidenced by its vehement rejection of the US-proposed Regional Maritime Security Initiative in 2004, which proposed a framework for a partnership of regional states to counter transnational threats in the Malacca Strait. Then Malaysian Deputy Prime Minister Najib Tun Razak stated that "control of the [Malacca] Strait is the sovereign prerogative of Malaysia and Indonesia, and the US military involvement is not welcome."⁴⁶ *Dato' Sri* Najib is now the Prime Minister of Malaysia. A multinational force operating in the Malacca Strait to interdict shipping would not be appreciated by him, nor by Indonesia.

STRUCTURAL CHALLENGES

In trying to fast-track interdiction operations and avoid creating a cumbersome institution, the PSI has thus far neglected its organizational development. PSI participants have described the PSI as "an activity [and] not an organization,"⁴⁷ and indeed the PSI has few institutional structures. The PSI "has no international secretariat, no offices in [US] federal agencies established to support it, no database or reports of successes or failure."⁴⁸ To some extent, this loose structure facilitates speed of action, control of sensitive intelligence, and allows members to pick and choose their participation levels. However, the lack of organizational mechanisms

ultimately hinders the wider adoption of the PSI due to a lack of transparency, unclear definitions, a lack of operational and intelligence sharing, and an uneven web of bilateral agreements that threaten to complicate multilateral operations.

Lack of Transparency

A lack of transparency appears to be an institutional characteristic of the PSI, and this is detrimental to international perception of the PSI's impartiality. Intelligence is not shared equally among participants, nor is there any intent to make actionable intelligence available to all PSI states.⁴⁹ There are also no mechanisms to verify the reliability of intelligence used for interdictions.⁵⁰ States can take interdiction action at their own initiative, or at the request of another state with good cause.⁵¹ The veracity of the "good cause" is completely up to the states involved to decide.⁵² The results of interdiction are kept in classified channels and are not shared with all participants.⁵³ Nor is there any requirement for PSI activities to come under the scrutiny of international bodies such as the International Maritime Organization (IMO), International Atomic Energy Agency (IAEA) or the UN. Indeed, a state could conceivably be a member of the PSI but not be fully aware of the PSI's activities unless other participants saw fit to share information. While these measures are understandable given the sensitive nature of intelligence and the need to safeguard sources, they do not give states any confidence to endorse the Interdiction Principles or be willing to come under obligation to "take all steps available to support PSI efforts."⁵⁴

Unclear Definition of the Targets of Interdiction Efforts

There is no internationally recognized and accepted basis for the definition of targets of PSI interdictions.⁵⁵ The PSI Interdiction Principles target "WMD, their delivery systems, and related materials" that are shipped to and from "states and non-state actors of proliferation concern."⁵⁶ The definitions of these terms and the targets of interdiction are not endorsed by the UN or any other international bodies. Legal shipments of WMD materials between those who are not Non-Proliferation Treaty (NPT) signatories are fair game for



Chemical, Biological, Radiological and Explosive (CBRE) Defence Group

PSI interdiction under this definition, as the fact that the state is not a member of the NPT has no bearing on whether the state is considered "of proliferation concern."⁵⁷ This is despite the fact that states that are not members of the NPT are technically not legally constrained in stockpiling or trading such weapons.⁵⁸ The definition of these terms is not even consistent within the PSI. Instead, countries of proliferation concern are defined as "those countries or entities that the PSI participants involved establish should be subject to interdiction."⁵⁹ The term "involved" suggests that there need not be consensus within the PSI when determining states of concern. These unclear definitions can create a situation for potential abuse, especially where dual-use materials are targeted for interdiction.

Uneven Distribution of Bilateral Agreements

A lopsided web of bilateral ship boarding agreements have been established between PSI participants in order to facilitate interdiction. The US has established ship-boarding agreements with nine PSI members: Liberia, Panama, the Bahamas, Belize, Croatia, Cyprus, Malta, the Marshall Islands, and Mongolia.⁶⁰ Together, these flag states cover a significant proportion of global shipping by tonnage. While the PSI encourages participating states to enter into ship-boarding agreements, no other state has as comprehensive a set of agreements as the United States. This unbalanced set of bilateral agreements can potentially complicate multinational PSI operations, as each state participating in a joint operation would vary in their ability to board

shipping of different flag states. Potentially, the US with its broader set of agreements would take on a disproportionate share of interdictions, creating or reinforcing the perception that the PSI is a US-dominated activity.

ASSESSMENT AND RECOMMENDATIONS

The PSI Effectiveness Paradox

It is difficult to gauge the effectiveness of the PSI based on the number of interdictions. The paradox is that a lack of high-profile interdictions could either mean that the PSI is completely ineffective in intercepting these shipments, or so effective a deterrent that offenders have abandoned their efforts at trafficking. Secretary Condoleezza Rice revealed broadly that over the course of nine months from 2004 to 2005, PSI partners had cooperated on eleven “successful efforts” that prevented Iran from procuring goods to support its nuclear program.⁶¹ However, there has been little evidence released regarding the number and nature of interdictions conducted under the Initiative, nor is it possible to judge Secretary Rice’s statements without a context of what percentage these numbers entail of the total volume of WMD trafficking. Secrecy aside, the very nature of the PSI’s paradox makes judging success difficult. The effectiveness of the PSI will therefore have to be judged on the basis of the legal and political impediments to its activities, and by its ultimate results.

The PSI – Has it Delivered?

The PSI’s current legal and political shortcomings raises many questions about its ability to fulfill its mission to stop trafficking of WMD and related materials to state and non-state actors of proliferation concern. Despite the indications from Secretary Rice that the PSI interdictions have hindered proliferation, ultimately the PSI has not prevented North Korea from conducting two nuclear tests, nor has it halted Iran’s progress at producing uranium at ever higher levels of enrichment.

With respect to state actors such as Iran and North Korea, the current UNSCRs do not grant the PSI latitude to deviate from international laws, and so the

PSI’s dragnet is restricted in large part to the flagged ships, ports and internal waters of PSI participants. Regarding membership, the support of key Asian states of strategic importance are conspicuously absent, as discussed previously.

With respect to non-state actors, the PSI’s ability to stem the flow of WMD related material to terrorists and other criminal organizations is questionable. President Obama has said that the smallest amount of plutonium—the size of an apple—is all that is necessary for terrorists to fashion a device of catastrophic power.⁶² Much less material would be required to make a “dirty bomb”—one that uses conventional explosives to disperse radiological material. The PSI’s ability to staunch this threat is dwarfed by the scale of the problem. The IAEA reports that from 1993 to 2008, there were 336 confirmed incidents of unauthorized possession and related criminal activities involving nuclear material or radioactive sources, and an additional 421 incidents involving the theft or loss of radiological materials.⁶³ Of these, 15 incidents involved possession of kilogram-scale quantities of highly enriched uranium and plutonium, and the IAEA has indications that the seized material was merely a sample of larger quantities available for illegal purchase.⁶⁴ This trafficking is also conducted over land and air routes,⁶⁵ both of which are within the PSI’s scope but are not the main focus of its maritime interdiction efforts. It is questionable if the PSI can put a halt to these shipments of small amounts of radiological material, given its current shortcomings

The PSI – Could it Deliver?

Despite the realities of the current situation, as an ideal the PSI is a highly attractive initiative towards non-proliferation. The fundamental logic of the PSI is sound. By building coordinated international action to counter the illicit trafficking of WMD and related material, the PSI can drive up the cost and risk involved in developing WMDs and thereby delay, disrupt and dissuade potential proliferation. The net effect of an effective interdiction campaign is to concentrate illicit traffic into fewer channels, which in turn can be monitored and dealt with through other aspects of the non-proliferation effort.

If interdiction is successful, seized material can be used as evidence to bolster an international case against an offending nation, or to justify further action. The successes at derailing the Libyan WMD program and the unraveling of the A. Q. Khan nuclear proliferation network are testimony that interdiction can be the tipping point in a future non-proliferation effort.

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In the current absence of any customary law against WMD trafficking, and short of the unlikely adoption of an explicit UNSCR authorizing maritime interdiction, PSI participants should continue to increase their effectiveness at detecting and seizing WMD and related materials in their own ports and internal waters. Indeed, states have an obligation to do so under UNSCR 1540. The PSI can be the framework to facilitate sharing legal guidance among those nations that are seeking to strengthen their domestic legislation against proliferation. The PSI can also facilitate the dissemination of operational lessons learned in port searches. Technology sharing is another avenue where the PSI can engage in a win-win exchange with member states. The sharing of detection technology such as hand held radiation detectors, cargo scanners and stand-off sensors can increase the effectiveness of PSI participants in screening port traffic, and thereby strengthen the effectiveness of the PSI's interdiction efforts. These advantages should be advertised to states that are still holding out against participation.

The PSI needs to encourage broader participation, especially among the key Asian hold-outs. By backing off from an aggressive interdiction posture, the PSI could win over more adherents and build momentum towards a new norm for non-proliferation. The PSI

should allay fears over sovereignty and freedom of navigation by persistently clarifying that any actions taken would fall firmly within the scope of international laws, as stated in the PSI's Interdiction Principles. A transparent panel could be set up to advise the PSI on the exact definition of dual-use materials that are of concern, and to ensure that interdiction operations undertaken by PSI members are consistent with international law. While imposing more restrictions on the PSI's interdictions might seem to be a step backward, the fact is that at this point, the PSI probably has more to gain from a broadened membership and international support than it does from executing interdictions that violate international norms guaranteeing the freedom of navigation.

A "kinder, gentler" PSI—one that is established firmly within the bounds of international law, would be naturally attractive to nations as a means of discharging their international obligations. PSI member states could consider their participation in the PSI as a fulfillment of their obligations to the United Nations under UNSCR 1540, 1803 and 1874, all of which call on states to inspect cargoes, and prevent the illicit transport of WMD and related materials to and from non-state actors, Iran and North Korea respectively. For instance, UNSCR 1540 requires states to present a report on steps they have taken or intend to take to implement the resolution,⁶⁶ thus states could use their participation in the PSI as evidence of their implementation.

Eventually, once the PSI has established a certain level of trust and international support, the PSI can then gently push the envelope on the legal basis for putting a halt to WMD trafficking. As the PSI grows in membership, proliferating nations will find that their freedom of action shrinks accordingly and they will become increasingly isolated. The PSI, together with legislative and treaty efforts against the trafficking of WMD and related material, could generate momentum towards an international norm or customary law aimed at halting WMD trafficking. The issuance of UNSCR 1540, the review of the Nuclear Non-Proliferation Treaty in 2010, and the UN actions to restrict Iran and North Korea's access to WMDs, are events that

have set the ball rolling in the right direction. The PSI has to keep this momentum going. With time and sufficient international consensus, illicit trafficking in WMD and related materials could take on an international image similar to that of narcotics trafficking, or the slave trade. If states are compelled to stop and search shipping for illegal WMDs from a sense of duty or law, the interdiction of WMDs could become an internationally recognized justification for visiting ships on the high seas. This is a long-term and uncertain prospect, but the PSI can be the vehicle in which to take the first steps towards this goal.

CONCLUSION

The PSI was formulated with noble ideals—to enhance global security by reducing the threat of WMD proliferation. In the implementation of this ideal, the effectiveness of the PSI is hobbled by the current regime of international laws. Ironically, in order to expand the international support that it requires, the PSI will have to adhere ever so closely to the same laws that inhibit it. Despite the loopholes in the current framework, the PSI can deliver—by doing what it can in ports and internal waters. Doing this much might not stop the flow of illicit material, but it can slow it, as the curtailment of the *Kang Nam I* in 2009 attests. The PSI should continue to build international cooperation and interoperability to enforce non-proliferation—for the time could come when international laws change, or the UN Security Council authorizes action, and nations will be called upon to collectively safeguard the world from the catastrophic threat of WMDs. The PSI will help the international community remain prepared for that day. 🌐

ENDNOTES

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9. Remarks by President Barack Obama at Hradcany Square, Prague, Czech Republic, 5 April 2009, http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/.
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25. UNCLOS, art. 38 and 53.
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