Executive Summary and Key Conclusions

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Sailing Into Uncharted Waters?
The Proliferation Security Initiative and the Law of the Sea

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Executive Summary and Key Conclusions

Introduction: 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 trafficking of weapons of mass destruction (WMD) and related materials in the air, on land and at sea. The initiative was originally taken forward by 11 participants - Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United States - and have since been joined by Canada, Denmark, Norway, Singapore and Turkey, bringing the total number of participants to 16 (although approximately 60 states in total have indicated their support for it). Key states still outside the PSI include China and Russia.

Ultimately, the success or failure of the PSI will be judged in terms of its effectiveness on the ground: is it resulting in concrete actions to stem the flow of WMD materials and delivery systems to those states and non-state actors with ambitions to procure illicit unconventional
arsenals? Is it increasing the political and economic costs of trafficking in WMD materials and delivery systems? Although the initiative is still in its infancy, with most attention having been focused on planning and organizational matters, the participants have also undertaken a series of training exercises (at least ten to date) and a number of interdiction operations. Such interdictions are rarely announced or discussed in public, the exception being the successful interdiction in October 2003 of centrifuge parts bound for Libya.

About this report

This report reviews the PSI story to date and discusses possible avenues of progress. The PSI has the potential to be part of an effective multi-faceted approach to preventing proliferation and non-compliance: an approach that is consistent with existing arms control regimes and other cooperative international agreements. We focus on its impact on maritime shipping, with particular emphasis on the United Nations Convention on the Law of the Sea (UNCLOS). Roundtable discussions will be organised to review the main findings.

The Interdiction Principles

The terror attacks of 11 September 2001 heralded a new threat based on the nexus between terrorism and weapons of mass destruction, and the possibility of access to such weapons through failed states or 'rogue' regimes. The extent to which this new 'nexus orthodoxy' captures the reality of the new international strategic environment is open to question, although it clearly provides the strategic context within which the PSI was born. President Bush formally announced the PSI during a speech in Poland in May 2003. Frustrated efforts to seize a shipment of missiles en route to the Yemen from North Korea in December 2002 provided the final impetus for its launch.

Inter-governmental PSI plenary meetings

Five PSI plenary meetings have taken place so far: in Madrid, Spain (June 2003); Brisbane, Australia (July 2003); Paris, France (September 2003); London, UK (October 2003); and Lisbon, Portugal (March 2004), although the initiative now appears to have moved on from "set piece meetings" to "operational expert meetings", such as the one that took place in Washington, DC, United States, in December 2003.

'Membership' of the PSI

The PSI is an activity and not an organisation, consisting of an ad hoc coalition of states. It is mainly a transatlantic venture, with heavy representation from within the G-8, EU and NATO. Only three non-western countries currently participate in the initiative: Australia, Japan and Singapore. Prima facie, the PSI reflects earlier Cold War divisions, although this may change if the Russian Federation were to join the initiative.

The focal point of the PSI is a set of politically binding interdiction principles, which the parties agreed at their third meeting in Paris in September 2003. The principles outline core objectives and methods, including:

- Targeting "states and non-state actors of proliferation concern" - with no formal 'targets' or 'black lists', the initiative primarily targets the same group of countries that have concerned Western governments for over a decade.
Targeting "Weapons of Mass Destruction" - a term used interchangeably throughout the principles with "chemical, biological and nuclear weapons".

Effective measures for interdiction and adoption of streamlined intelligence procedures - tracking the many thousands of ships of all designations and sizes is a difficult task, but experience suggests that the participants may face considerable difficulties in streamlining and coordinating their intelligence procedures.

Reviewing relevant national and international law - participants are obliged to review and strengthen their relevant national legal authorities and to work to strengthen international law and frameworks to support the development of the initiative.

Guidelines on "Specific Actions" - maritime interdictions are expected to focus on key ports and sea-lanes that are crucial to current trafficking networks.

The territorial application of the PSI is potentially far-reaching and covers the following sea zones: internal waters; territorial seas; contiguous zones; exclusive economic zones (EEZ); and international waters (the high seas).

In the internal waters, territorial seas and contiguous zones, participants can stop and search suspect vessels flying the flag of any nation, but on the high seas, the participant is only authorised to board and search vessels flying its own flag. Thus, the principles commit participants to seriously consider mutual boarding arrangements. The United States has signed two such agreements recently: with Liberia (February 2004) and Panama (May 2004). A relatively small number of such agreements could potentially cover a large proportion of the world's shipping. Even so, participating states are almost certainly going to need to explore ways of expanding the territorial scope of the initiative. One of the big remaining legal uncertainties is whether or not the initiative can be applied on the high seas.

The PSI and the Law of the Sea

All PSI participants except Denmark, Turkey and the United States have signed and ratified UNCLOS, which allows each state criminal and civil jurisdiction over ships flying its own national flag. In most cases, therefore, interdiction would be legal only when carried out by, or with the permission of, the target ship's own flag state. Since many anticipated PSI operations on the high seas are likely to be undertaken by states other than the flag state, this may necessitate a change in international law.

Criminal jurisdiction over ships carrying WMD materials

The legal jurisdiction for interdiction of shipping suspected of carrying WMD materials is different for each of the maritime zones, and in general the situation becomes more complex and less certain the further a ship is away from the coast. Participating states have full jurisdiction to interdict suspect ships in their own internal waters, and such seizures under civil lawsuits are not uncommon. An illustration of such a seizure in relation to illicit weapons trafficking is the 'Ku Wol San' incident in India in 1999 (discussed in Box 1 in the full report).

In territorial waters the grounds for instigating criminal proceedings are more limited, especially by the right of innocent passage. But if national laws have been enacted to criminalise WMD proliferation, then naval interdiction of foreign ships in the participating state's own
territorial waters is usually permissible. An example of such an interdiction is the Baltic Sky incident in Greek territorial waters in June 2003 (discussed in Box 2 in the full report).

In order to intercept a ship carrying WMD components in the contiguous zone the state must have enacted laws making an unauthorised cargo an infringement of its customs laws, and the cargo needs to be heading towards the mainland or must have originated on the mainland heading towards international waters.

The exclusive economic zone (EEZ) is designed to protect the economic benefits that a country can gain from its adjoining oceans. When it comes to interdiction of WMD and related materials, the EEZ can be regarded as international waters. The rights of a coastal state to stop and board vessels in these two maritime zones are limited to specific circumstances prescribed by UNCLOS. In these waters, a ship is normally under the "exclusive jurisdiction" of the state whose flag it flies. Stateless merchant ships and those not flying colours or showing proper identification can be boarded. A recent example of an involved a Cambodian registered ship, the Sosan, which was boarded by Spanish commandos (discussed in Box 3 on page ). However, it was not permissible to confiscate the cargo, and there is a danger that the naval power of PSI states might be used to harass 'legitimate' shipping. If so, this would challenge two of the key tenets of the Law of the Sea: innocent passage and freedom of navigation.

Is transporting nuclear materials 'innocent passage'?

The right of innocent passage has been questioned by several states when it involves nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances. In fact, some coastal states have argued that passage of hazardous radioactive cargo is in fact prejudicial to the security of the coastal state, thus rendering the passage non-innocent.

One reason why UNCLOS lacks clarity on this issue is that, at the time it was drafted, the US and former Soviet Union wanted to safeguard the movement of their own nuclear-armed submarines, nuclear powered vessels and vessels carrying WMD and related materials primarily through international straits and other chokepoints. While the PSI aims to restrict that right for others, the nuclear weapon states-especially those within the PSI, will undoubtedly try to simultaneously maintain their existing rights to nuclear-free passage.

Limiting freedom of navigation

Bilateral or multilateral agreements can place limits on freedom of navigation without jeopardising the legal regimes governing the use of territorial waters. Securing such agreements between interdicting states and flag states has a relatively long history, from Britain's attempt to curb the international slave trade in the 19th century to current US counter-narcotic interdictions in the Caribbean. The successful interception of centrifuge equipment en route to Libya in October 2003 is another recent ad hoc example of the interdicting state seeking the permission of the shipper prior to the interdiction (as discussed in Box 4 in the full report).

The case for the seizure of illicit materials, including "absolute contraband", is weak in peacetime, and a more solid legal ground to facilitate the seizure of WMD and related materials may need to be established.
The Future of the PSI

There are various options for strengthening the initiative. The most obvious is by increasing the 'membership' and securing the participation of key flag states and states that control geographically important areas, such as international straits. However, given that many 'flags of convenience' are located in developing countries, many of which rely on the registration of ships to boost foreign currency earnings, convincing them to cooperate with the PSI will not be easy and will probably require offers of economic or other security incentives. Deepening links between members, especially in relation to law enforcement and intelligence cooperation, is also needed.


The IMO agreed a new, comprehensive security regime for international shipping in December 2002. The regime will enter into force in July 2004 and includes a number of mandatory security measures, including several amendments to the 1974 Safety at Sea Convention (SOLAS) which are expected to enhance maritime security. These measures also have the potential for further development as a global tracking and monitoring system to aid WMD interdictions on the high seas. Given all these important developments in maritime security, the IMO would seem to be the natural place to further develop the PSI.

One option would be to amend the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). The SUA Convention was introduced to ensure that appropriate action is taken against persons committing unlawful acts against ships. Ninety-five states have become parties, 37 of them since 11 September 2001. Proposed amendments to the SUA Convention have been under consideration for several years and would significantly broaden the range of offences to include acts of terrorism against shipping. Three of the proposed amendments are directly related to illicit WMD trafficking, and at least one PSI participating state (the UK) has publicly acknowledged that it is working in 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."

Gaining legitimacy through the UN Security Council

Any country that refused to accept an amended SUA Convention could, if its shipments posed a threat to international peace and security, be made the subject of a UNSC resolution that provides the necessary stop-and-search powers to other states. The UNSC has already taken the view that the proliferation of weapons of mass destruction constitutes a threat to international peace and security - most recently in adopting Resolution 1540 (2004). It may consider building on this resolution in the future by agreeing measures, including the use of armed force, to maintain that security by curbing or interdicting the trade in WMD materials.

What needs to be introduced in order to give the PSI a legal framework is a UNSC resolution expanding the criminal jurisdiction of states beyond the territorial sea. This would allow WMD proliferation to be combated in the same way as states now combat piracy or international drugs trafficking. UNSC Resolution 1540 by no means achieves the comprehensive approach that the US seeks, but is reflective of the need for compromise. It is likely to be difficult to find
common ground with both China and Russia in formulating any follow-up enforcement resolution of the type that would authorise PSI activities. It is of utmost importance that any future resolution carefully balances the rights of the flag states against the interests of the international community to curb the trade in WMD and related materials.

**PSI and the doctrine of ‘necessity’**

Another option is to review the principle of ‘state of necessity’ and to admit that some PSI interdictions may be illegal. However, the illegality would be excused by the grave threat that weapons of mass destruction constitute. The doctrine of ‘necessity’ is an international version of national criminal laws that excuse criminal behaviour caused by distress. If the PSI participants were to acquire solid intelligence proving that WMD materials were being shipped on international waters, could they claim that an interception at that time would be ‘the only means’ of safeguarding their interests against a ‘grave and imminent peril’? The case for interdiction in the case of illicit nuclear materials seems strongest, since a nuclear device in the hands of an international terrorist network would indeed constitute a ‘grave and imminent peril’ to the security of the PSI participants.

But post-Iraq, there would also be questions as to the validity of the intelligence and the significance of the suspected materials in advancing any NBC programme. Major uncertainties regarding the lethality and quality of a proliferating state's NBC activities, especially around key issues such as nuclear weapons design, quality of biological or chemical agent development, and missile reliability, suggest that it will be extremely difficult to make a case for interdiction against a single shipment on grounds of imminent threat. In any case, the doctrine of necessity is a ‘last resort’ option, only valid when all other options have been exhausted. To systematically lean on this doctrine to justify high seas interdiction would not be in accordance with international law.

**PSI and the doctrine of ‘pre-emptive self defence’**

A third way forward is to expand the concept of ‘pre-emptive self defence’. This would be a risky and highly contentious approach, since there is widespread distrust of this agenda following the way that the US-led coalition handled the run up to war in Iraq and the current post-combat complications in achieving stability.

Not even the emerging concept of ‘humanitarian intervention’ is completely accepted in international law, since it is seen as an infringement of the right to territorial integrity and political independence of the attacked state. The argument that tyrants hide behind the protection of the UN Charter may be true in practice, but it does not change the law. The essence of international law since 1945 is that the use of force should be authorised as a last resort, as a means for self-protection against an ongoing or imminent attack. The key lesson from Iraq is that intelligence is not yet reliable or adequate to support military operations against proliferating powers or to make accurate assessments of the need to pre-empt. To utilise force on the basis of sketchy intelligence or mere accusations of wrongdoing or bad intent weakens the foundation of the law and presents, in the long run, a grave threat to international stability.

**PSI and the need for comprehensive nuclear disarmament**

The linkage between movement on nuclear disarmament commitments under the NPT and broadening support for the PSI
needs to be explored. It is unreasonable to expect other nations not to acquire a weapon that the nuclear weapon states find essential for their own security. On the contrary, emerging and worrying concepts of 'pre-emptive wars' and 'first strikes' may prompt countries to acquire a nuclear deterrence. The development of new US strategies and new technologies to use low-yield nuclear weapons against hard and buried targets will in effect blur the distinction between conventional and unconventional weapons.

The non-proliferation aspects of the NPT has always been given undue weight in the review process, while the nuclear weapon states have dodged their responsibility to take forceful action to rid this world of a true weapon of mass destruction. At the same time, the international community has been successful in concluding legal regimes outlawing chemical and biological weapons, which are cheaper and easier to manufacture than nuclear arms.

The number of states suspected of being nuclear cheaters is a handful at most. This may change, however. The PSI should not be seen as a separate activity in a losing war against weapons proliferation, but as a tool in the wider context of non-proliferation.

Conclusions and recommendations - building on a positive start

If implemented correctly, the PSI could be a credible enforcement mechanism and a logical and solid expansion of the current non-proliferation and disarmament regimes. If implemented incorrectly, it may prove counterproductive by hampering free trade and the rights of all humankind to use the resources of the ocean freely, and by reinforcing discriminatory non-proliferation practices.

The problem of trade, technology transfer and proliferation in WMD materials is real and should not be underestimated. Neither should the problem 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: remodelling and strengthening the enforcement capabilities of the IAEA and the OPCW; greater international harmonization and strengthening of criminal laws and export control regulations; and accelerated implementation of the cooperative threat reduction agenda. And the nuclear weapon states need to renounce their weapons and work harder towards the goal of a nuclear free world.

There is currently no clear-cut basis to use force in order to interdict ships transporting WMD and related materials on the high seas. The participants need to use a variety of tools in order to establish a favourable legal environment for the initiative, since it is apparent that some major seafaring nations object to the initiative. Twelve specific recommendations are made here for strengthening the PSI and expanding the global norm of combating and preventing WMD trafficking.

Recommendation 1: Continue to expand PSI 'membership' through regional outreach activities

The London plenary meeting reiterated that further co-ordinated outreach 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. Outreach activities in Central and Eastern Europe and Asia 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**

A more authoritative definition of targeted contraband is required than the vague term WMD. Greater clarity on the 'nuclear, biological and chemical' components and materials being targeted would make the initiative more predictable, minimise wrongful application (especially regarding dual-use technologies) and increase potential support.

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

Participants should consider incorporating other forms of illicit activity under the PSI interdiction framework, such as slavery, illegal immigration, small arms and drugs trafficking. It is worth thinking about ways of expanding the PSI at this stage, rather then 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. But as currently configured the PSI may have difficulty in preventing a recurrence of incidents like the temporary seizure of the Sosan en route to Yemen, which the Spanish navy was obliged to release because there was no mandate for the interdiction. Achieving a higher degree of multilateral support will tend to enhance international political goodwill and support for the PSI. One possibility is to use the UNSC as a global legislature and negotiate a resolution on WMD trafficking in general, another would be to conclude a multilateral agreement relating to the use of the seas, preferably through the IMO (see recommendation 5).

**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 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.

**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 clean 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.

**Recommendation 7: Undertake a feasibility study for the development of an international maritime tracking system with global coverage**

The many technological innovations suggest that a global tracking and tracing system to monitor suspect shipping and provide data to law enforcement agencies in all nations may become technically
feasible in the near future. The real hurdles are likely to be political. But new civilian maritime security systems being pioneered by the IMO 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, 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.

**Recommendation 9: Consider establishing a UN interdiction committee**

Resolution 1540 (2004) establishes an ad-hoc committee to implement its non-proliferation provisions, while resolution 1373 (2001) established a Counter-Terrorism Committee. 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.

**Recommendation 10: Negotiate towards a common position on 'states of concern'**

More needs to be done to try and reach a consensus definition of 'states of concern'. Sensitive destination lists within export control regimes may provide some way forward. An agreed target list of countries would enhance the predictability of the initiative, although 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**

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. Should participation in the initiative continue to grow, the 'members' may find it necessary to set up a coordinating body.

**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 expeditiously 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. For the flag state, a boarding agreement should give political goodwill as well as economic benefits.