

# THE PROLIFERATION SECURITY INITIATIVE: EVOLUTION AND FUTURE PROSPECTS

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## I. INTRODUCTION

The Proliferation Security Initiative (PSI) is an informal network of states committed to preventing 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 main goal of the PSI is to strengthen the individual and collective capacities of participating states to interdict proliferation-related components at sea, in the air or on land once they have left their state of origin. Interdiction is broadly defined as any actions that result in the denial, delay or disruption of a shipment of proliferation concern.<sup>1</sup>

The PSI focuses on direct, practical measures to enable effective interdiction of proliferation-related transfers. It assists participating states in identifying existing gaps in their relevant legal, diplomatic, intelligence, economic, military and law enforcement tools. It also helps to make improvements and to take full advantage of more developed interdiction capabilities and procedures. Exercises, workshops and other bilateral and multilateral exchanges play an instrumental role in this process.<sup>2</sup>

The PSI has been portrayed as an ‘activity, not an organization’ for a variety of reasons.<sup>3</sup>

<sup>1</sup> US Department of State, ‘Proliferation Security Initiative Frequently Asked Questions (FAQ)’, Fact Sheet, Bureau of International Security and Nonproliferation, Washington, DC, 22 May 2008, <<http://merln.ndu.edu/archivepdf/wmd/State/105213.pdf>>, p. 2; and Nikitin, M. B., *Proliferation Security Initiative (PSI)*, Congressional Research Service (CRS) Report for Congress RL34327 (US Congress, CRS: Washington, DC, 18 Jan. 2011), p. 4.

<sup>2</sup> ‘Opening remarks by Acting, Deputy Assistant Secretary of State Tony Foley’, PSI Regional Operational Experts Group Meeting, Sopot, Poland, 22 June 2009, <[http://dtirp.dtra.mil/pdfs/psi\\_remarks.pdf](http://dtirp.dtra.mil/pdfs/psi_remarks.pdf)>, pp. 4–6.

<sup>3</sup> US Department of State, ‘Proliferation Security Initiative: Chairman’s conclusions at the Fourth Meeting’, Fourth Meeting of the PSI, London, 9–10 Oct. 2003, <<http://www.state.gov/t/isn/115305.htm>>.

## SUMMARY

The Proliferation Security Initiative (PSI) is an informal network of states seeking to strengthen their national and collective capacities to interdict materials related to weapons of mass destruction (WMD). Despite the lack of means to objectively assess how effective the PSI has been in fulfilling its main objective, it can be described as a qualified success.

However, the PSI faces a number of challenges in its ever-evolving fight against WMD proliferation: (a) certain, significant global actors are not involved in the PSI, (b) there are gaps in both the national legislations of PSI participants and international legal frameworks, (c) capacity-building activities within the PSI are irregular, (d) civilian law enforcement officers are not sufficiently involved in PSI exercises, and (e) the PSI has so far failed to develop assessment measures for effectiveness.

The realization of critical interdiction capabilities and practices, and the further institutionalization of the PSI, could help to address some of these challenges. The European Union, regardless of whether it is given formal status in the initiative, could also play a role in discussions and activities to facilitate the successful realization of non-proliferation goals that it shares with the PSI.

## ABOUT THE AUTHOR

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1. It was not established through a legally binding treaty.

2. It does not have an international secretariat or headquarters with a permanent staff, its own budget, a formal multilateral decision-making mechanism, any authority approving activities or a compliance-control mechanism.

3. It has 'participating states', not members. States do not join the PSI but endorse its principles as outlined in the Statement of Interdiction Principles (SOP).

4. Support for the PSI does not legally bind states to any actions. They have the freedom to decide on a case-by-case basis whether to take part in unilateral or multilateral interdiction operations.<sup>4</sup>

5. The PSI does not create any new legal authority to conduct interdiction. Each participant remains constrained by its national legislation and international law. It acts under its own legal responsibility and not on behalf of the PSI.<sup>5</sup>

As a result, the initiative is described as a 'coalition of the willing', an informal grouping or a 'loose consortium' of states pursuing a common aim.<sup>6</sup>

The non-binding character of the PSI is very often perceived as an advantage. It guarantees the flexibility to adapt to a constantly changing international security environment. The PSI is also seen as a model for other similar activities, such as the Global Initiative to Combat Nuclear Terrorism.<sup>7</sup>

The PSI was designed to complement and support other existing non-proliferation mechanisms, including binding multilateral treaties (e.g. the Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention), voluntary export-control regimes (e.g. the Zangger Committee, the Nuclear Suppliers Group, the Australia Group

and the Missile Technology Control Regime) and United Nations Security Council resolutions. The added value of the PSI has been that, unlike other non-proliferation regimes, it has also envisioned intercepting WMD-related items in their transport phase. The PSI was intended to constitute a last line for halting transfers of WMD-related material, in case proliferators circumvented existing export controls and managed to load such material aboard a ship, plane or truck. Although interdiction of materials that have left the source state have been conducted in the past, the PSI was the first to provide a formula for enhanced cooperation and coordination between states in this area.<sup>8</sup>

The PSI was launched on 31 May 2003 in Krakow, Poland, by then United States President George W. Bush and since its inception has had a relatively strong European Union (EU) component: eight out of eleven original PSI participants were EU member states (including Poland, which was in the accession stage).<sup>9</sup> However, the PSI's development was driven primarily by the USA and was a direct result of the US emphasis on strengthening measures to combat WMD proliferation in the context of the terrorist attacks on the USA of 11 September 2001. Counterproliferation methods, including interdiction, were seen by the USA as a critical component of its December 2002 National Strategy to Combat Weapons of Mass Destruction, which highlighted a nexus between WMD proliferation and terrorist networks. Similarly, the PSI's structure reflects the US preference for less formal, multilateral partnerships. A significant event in the formation of the PSI was the US-driven interdiction of the vessel *So San*, which took place in December 2002. On one hand, the success in boarding and searching a stateless vessel indicated the potential for cooperative interdiction operations at sea. On the other hand, a failure to seize proliferation-related cargo demonstrated the constraints of international and national legal frameworks to conduct successful interdiction. The subsequent development of the PSI was also shaped by the discovery of the A.Q. Khan proliferation network and the proliferation-related activities of Iran, Libya

<sup>4</sup> Belcher, E., *A Tighter Net: Strengthening the Proliferation Security Initiative*, Lowy Institute Policy Brief (Lowy Institute for International Policy: Sydney, Aug. 2009), pp. 4–5.

<sup>5</sup> Malirsch, M. and Prill, F., 'The Proliferation Security Initiative and the 2005 Protocol to the SUA Convention', *Heidelberg Journal of International Law*, vol. 67 (2007), p. 234.

<sup>6</sup> Holmes, J. R. and Winner, A. C., 'The Proliferation Security Initiative', eds N. E. Busch and D. H. Joyner, *Combating Weapons of Mass Destruction: The Future of International Nonproliferation Policy* (University of Georgia Press: Athens, GA, 2009), p. 140.

<sup>7</sup> For more information see Etzioni, A., 'Tomorrow's institution today', *Foreign Affairs*, vol. 88, no. 3 (2009); and Belcher, E., *The Proliferation Security Initiative: Lessons for Using Nonbinding Agreements*, Working Paper, Council on Foreign Relations (CFR), International Institutions and Governance Program (CFR: New York, July 2011).

<sup>8</sup> National Institute for Public Policy, 'The Proliferation Security Initiative: a model for future international collaboration', *Comparative Strategy*, vol. 28, no. 5 (2009), pp. 397–405.

<sup>9</sup> The PSI is also known as the 'Krakow Initiative', after the city in which it was announced. The 8 EU member states that originally participated in the PSI were France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and the United Kingdom. The other original PSI participants were Australia, Japan and the USA.

and the Democratic People's Republic of Korea (DPRK or North Korea) at the time.<sup>10</sup>

The rationale that led to the establishment of the PSI has not disappeared in recent years. Iran, North Korea and Syria pose the main non-proliferation challenges. Additionally, Libya is a cause for concern since there is a risk that, given the unstable political situation, material applicable to WMD might be used for non-peaceful purposes.<sup>11</sup> The original PSI goal of supplementing other non-proliferation regimes is still valid. The effective conduct of interdiction operations still remains of crucial importance. There is also still a need to dissuade state and non-state actors from engaging in proliferation activities by making the transport of proliferation-related material more risky, more costly and less legitimate.

The question is whether, after almost ten years of operation, the PSI is ready to meet the evolving proliferation challenges. An analysis of the evolution of the initiative's institutional framework and PSI-related activities as well as further prospects for PSI development can help to answer that question.

## II. THE INSTITUTIONAL FRAMEWORK OF THE PROLIFERATION SECURITY INITIATIVE

### The Statement of Interdiction Principles: basic provisions and limitations

A blueprint of the PSI's activities and a clarification of what it means to be a PSI partner were included in the Statement of Interdiction Principles (SOP) announced at the third plenary meeting of the original PSI participants on 4 September 2003 in Paris. According to the SOP, each state taking part in the PSI is politically committed to: (a) interdict, either alone or in cooperation with other states, transfers of 'weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern'; (b) develop procedures to

facilitate the rapid exchange of information with other countries, and dedicate appropriate resources and efforts to interdiction operations; and (c) strengthen national legal authorities and relevant international laws and frameworks to facilitate interdiction.

Additionally, the SOP outlines the following specific actions that each state should take to support PSI effectiveness: (a) prevent proliferation from its own territory; (b) interdict suspected proliferation shipments that fall under its jurisdiction; (c) 'seriously consider' allowing other PSI participants to board and search vessels with its own flag but which are suspected of proliferation activities and, if necessary, to seize proliferation-related cargo; (d) interdict or deny overflight to suspected aircraft; and (e) inspect and seize suspected cargoes transferred through its territory.<sup>12</sup>

The SOP outlines the PSI's relevance to interdicting shipments transported by air, land or sea, but maritime interdiction remains the main focus of PSI actions. This reflects the fact that, according to data from 2009, around 90 per cent of the world's imports and exports by volume are at some point transported by water, while about 9 per cent are transported by land and only about 0.25 per cent by air. In terms of imports and exports by value, 73 per cent are transported by sea, 14 per cent by land and 13 per cent by air.<sup>13</sup>

The SOP is focused on 'states or non-state actors of proliferation concern', described as countries or entities that are engaged in (a) efforts to acquire chemical, biological or nuclear weapons and associated delivery systems; or (b) transfers of WMD, their delivery systems, and related materials'.<sup>14</sup> Countries that are subject to restrictive measures imposed by the UN Security Council are generally considered to be the main focus for PSI activities, but the SOP does not subject countries that are outside the multilateral non-proliferation treaties and regimes to particular scrutiny. The SOP also remains ambiguous about the items that could be subject to interdiction. Nevertheless, through decisions taken in export control regimes and specialized committees working

<sup>10</sup> For more information see Winner, A. C., 'The Proliferation Security Initiative: the new face of interdiction', *The Washington Quarterly*, vol. 28, no. 2 (2005), pp. 130–132; and Joseph, J., 'The Proliferation Security Initiative: can interdiction stop proliferation?', *Arms Control Today*, vol. 34, no. 5 (June 2004), pp. 7–8.

<sup>11</sup> Hoyer, W., 'The international non-proliferation landscape and Proliferation Security Initiative', Speech by the Minister of State at the Foreign Office at the opening of the Proliferation Security Initiative Operational Experts Group meeting, Berlin, 8 Nov. 2011, <<http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Reden/2011/111108-Hoyer-Proliferation-Meeting-Berlin.html>>.

<sup>12</sup> US Department of State, 'Proliferation Security Initiative: Statement of Interdiction Principles', Fact Sheet, Office of the Press Secretary, Washington, DC, 4 Sep. 2003, <<http://www.state.gov/t/isn/c27726.htm>>.

<sup>13</sup> IHS Global Insight, 'An evaluation of maritime policy in meeting the commercial and security needs of the United States', 7 Jan. 2009, <<http://www.ihsglobalinsight.com/gcpath/MARADPolicyStudy.pdf>>, p. 4.

<sup>14</sup> US Department of State (note 1), p. 1.

under the UN Security Council, lists of items with technical characteristics that could be of assistance to a WMD programme have been elaborated. It is generally accepted that these lists, including a catch-all control clause, provide guidelines for PSI participants.

On the one hand, the general language of the SOP gives PSI participants the flexibility to adjust their activities as particular cases and proliferation challenges change over time. On the other hand, the lack of clearly formulated criteria defining 'actors of proliferation concern' or 'related materials' makes PSI participants vulnerable to criticism that they might employ double standards in their choice of targets and expand the scope beyond what is needed to combat WMD-related proliferation. Further, it raises concerns that the PSI might be used by, for example, the USA in order to pressure other states to enforce US export controls.

The general nature of the SOP is also a reason for the lack of specific information about procedures to conduct interdiction operations, including intelligence sharing between PSI partners. Generally, after obtaining relevant intelligence information, a PSI participating state may stop, inspect and, if possible, seize a suspect shipment. It can also request action by another PSI participant. To facilitate the flow of intelligence information, each PSI participant 'is asked to identify an appropriate point of contact for sharing information'. Each PSI partner makes its own judgment as to whether the obtained information is reliable and sufficient for interdiction. To protect the classified nature of information on specific interdiction cases, it is shared only with states directly involved in the specific interdiction effort; it is not made available to other PSI states.<sup>15</sup>

The SOP specifies that any actions undertaken by PSI participants will be taken 'to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks'. It makes clear that national and international laws and frameworks set boundaries beyond which air, sea or land interdiction operations cannot be executed. At the same time, the SOP indicates the intention of PSI participating states to extend these boundaries by strengthening national legal authorities and enhancing relevant international laws and frameworks.

The preferred timing for a PSI participant to interdict a shipment of proliferation concern is

when it has appropriate national legislation in place and interdiction is the least problematic in terms of international law. Such a situation is relatively easy to achieve in the case of interdiction on land in the territory of a state. There are few legal limits to a state's power to enact and enforce laws and regulation on the interdiction and seizure of WMD-related dual-use goods, so interdiction is technically limited only by the national legislations and capacities of states to conduct interdiction operations.<sup>16</sup> The situation is much more complicated for interdiction at sea, and even more so in the air.

Maritime interdiction can include boarding and inspecting suspected vessels and seizing illegal cargo. For practical reasons, because the cargo on-board cannot be fully inspected or off-loaded while at sea, the vessels are usually diverted to friendly ports. PSI participants are constrained in their rights to conduct such interdiction by the rules of international maritime law embodied in the international customary law and the 1982 UN Convention on the Law of the Sea (UNCLOS). According to these rules, states have jurisdiction over vessels flying their flag. They also have the authority to permit, if requested, other states to stop and search such ships, or even to seize cargo on-board. The extent to which states' jurisdiction and enforcement powers apply depends, however, on the enactment of these powers in national legislation. For example, the authority of a state to demand a flag vessel redirect is contingent on the appropriate laws being in place.

PSI participating states' authority over vessels flying the flags of other countries varies and is generally dependent on their type, location and cargo. The interdiction of a foreign ship that is 'reasonably suspected' of carrying cargo of proliferation concern may be carried out without international legal constraints when the ship is in the port or the internal waters of a PSI partner. Since ports and internal waters are assimilated within a country's land territory, the authority to interdict and seize proliferation-related cargo depends on there being appropriate national legislation in place in that country which prohibits specific items on-board. The only exception to this rule is that a port state does not have the right to inspect

<sup>15</sup> US Department of State (note 1), p. 2.

<sup>16</sup> Ahlström, C., 'The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles', *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005), p. 749.



foreign warships and government vessels used only for non-commercial purposes.

Interpretations diverge as to whether PSI partners have the right to interdict foreign ships that travel through their territorial sea, which is an area that extends up to 12 nautical miles from the baseline of a coastal state. Although a coastal state has sovereignty over its territorial sea, interdiction operations remain problematic because of the right of innocent passage stipulated by UNCLOS. On the one hand, some experts underline that the right of innocent passage is not unqualified: it is protected as long as it is not 'prejudicial to the peace, good order or security of the coastal state'. The illegitimate transfer of WMD-related items could be interpreted as making a non-innocent passage. Additionally, national legislation that criminalizes the illicit passage of WMD and related material can even be seen as justifying the boarding of a foreign vessel trespassing a territorial sea. On the other hand, states such as China, India and Pakistan express concerns that PSI participants, in the course of their interdiction efforts, would compromise the right of innocent passage of those countries and could infringe on their sovereignty.<sup>17</sup>

The legal authority to conduct interdiction operations is further constrained in the contiguous zone, a maritime zone adjacent to the territorial sea that may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. In such a zone, a coastal state may exercise only the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. As a result, interdiction is possible if a transfer of WMD-related components violates existing national law and a vessel stops in its port or enters its territorial sea. If a vessel does not do that and is only transiting the contiguous zone, justification for the interdiction of the vessel is highly problematic.<sup>18</sup>

<sup>17</sup> For further arguments concerning the relation between the right of innocent passage and the legality of PSI interdiction operations in territorial waters see Klein, N., *Maritime Security and the Law of the Sea* (Oxford University Press: Oxford, 2011), pp. 198–203; Kwast, P. J., 'Maritime interdiction of weapons of mass destruction in an international legal perspective', *Netherlands Yearbook of International Law*, vol. 38 (2007), pp. 177–184; and Thomas, T. V., 'The Proliferation Security Initiative: towards relegation of navigational freedoms in UNCLOS? An Indian perspective', *Chinese Journal of International Law*, vol. 8, no. 3 (2009), pp. 669–671.

<sup>18</sup> Klein (note 17), p. 202.

On the high seas, international maritime law clearly allows a PSI partner to stop and search a vessel suspected of carrying proliferation items only if it is (a) flying the PSI state's own national flag, (b) flying no flag at all, or (c) flying the flag of a state that consents to a search by treaty or on an ad hoc basis. Therefore, the strict adherence to exclusive flag state control makes the possibility of boarding a vessel flying the flag of a state of proliferation concern highly unlikely. It has been proposed that a 'broken tail light' approach could be used by PSI participants to lawfully stop a vessel from a state of proliferation concern just to find out whether it is involved in proliferation-related activity.<sup>19</sup> However, in such a case, in the absence of a UN Security Council resolution with a relevant provision in force, there would be no clear legal authority to seize WMD materials if they were found on board.<sup>20</sup>

PSI air interdiction includes a denial of the right of transit if a foreign aircraft is suspected of having prohibited cargo on board. It may also involve forced landings and seizure of prohibited cargo. However, due to the limited time in which interception of foreign aircraft in the air can be attempted, and for practical reasons, air interdiction is difficult and uncommon.<sup>21</sup>

All states enjoy the freedom of overflight in international airspace. They also enjoy exclusive jurisdiction over their own aircraft. Therefore, as with maritime interdiction, any action undertaken by PSI partners against foreign aircraft flying in international airspace without the consent of the appropriate state would be illegal as well as impractical.

Under the 1944 Convention on International Civil Aviation (the Chicago Convention) a state possesses complete and exclusive sovereignty over the airspace above its land territory (including above its territorial sea). There is no right of innocent passage for overflight of a territorial sea. The authority of a PSI participant to interdict a foreign aircraft differs depending on whether the aircraft is civil or state-operated. A state has the right to deny a state-operated aircraft's overflight over its territory if it suspects that the

<sup>19</sup> Klein (note 17), p. 203.

<sup>20</sup> Elsea, J. K., *Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft*, Congressional Research Service (CRS) Report for Congress RL32097 (US Congress, CRS: Washington, DC, 1 Oct. 2003), p. 22.

<sup>21</sup> See also Moore, J. W., 'Aerial interdictions of WMD shipments', *JFQ*, no. 44 (2007), pp. 34–38; and Struckman, D. E., US Air Force, *The Proliferation Security Initiative: Cooperative Process or Command and Control Nightmare?* (Joint Military Operations Department: Newport, RI, 16 May 2006).

aircraft will be carrying prohibited goods. However, once it permits, the aircraft enjoys immunity. Interdiction possibilities are greater for civil aircraft. On landing, civil aircraft are subject to the laws of the state in the territory they enter. They may be intercepted and boarded for inspection by local officials to ensure compliance with local law.<sup>22</sup>

Scheduled civil flights that overfly the territory of another state are required to obtain prior permission or other authorization from that state. Such permission may include special terms, including a requirement that the aircraft does not transport proliferation-related cargo. The territorial state may also require civil aircraft to land at designated airports. While non-scheduled flights have a right to fly into and transit a state without prior permission, they also have to land if requested to do so by the territorial state.<sup>23</sup>

The Chicago Convention implicitly recognizes that states may lawfully intercept civil aircraft, provided that they refrain from using weapons and that the lives of persons on board and the safety of the aircraft are not endangered during interception. Further, Annex 2 to the Chicago Convention contains standards relating to the interception of civil aircraft, with detailed procedures for interception, including approach, visual signals and manoeuvring, and sample voice transmissions.<sup>24</sup>

It is noteworthy that although the PSI has become a useful platform for promoting enhanced common standards, not all PSI participating states have in place the national legislation that would allow land, sea and air interdiction to the extent permitted by international norms. So far the PSI's work has not led to the establishment of a zone in which all states have similar legislation allowing interdiction operations to be carried out. Vulnerabilities in the legal codes of some PSI participants still exist and may be exploited by state and non-state actors engaged in the transfer of WMD or related materials.

Furthermore, despite almost a decade of operation, the PSI and its participants have yet to publish a common interpretation of international legal norms clarifying whether or not interdiction would be carried out in a specific scenario. While analysing the question of a legal basis for PSI actions, there is the

need to continuously refer to various interpretations of international law. The lack of a common interpretation allows each PSI participant to make its own decision about whether to engage in a specific interdiction action. An agreement on a common interpretation could be viewed as a political commitment to act in specific scenarios. The lack of a common interpretation leaves the door open to endorsements of the PSI by states that may have different legal interpretations of controversial issues. It also leaves potential proliferators with ambiguity about whether PSI partners will act, which in some situations may dissuade them from proliferation. However, such opacity may add to criticism of the PSI's efforts as not transparent enough and may raise concerns that some PSI participants may not act in accordance with international law during interdiction.

### The Operational Experts Group

Since the PSI's inception, the direction of its activities has been driven by a limited group of like-minded states, led by the USA. The 11 original PSI participants—Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the USA—constituted an informal 'core group' which was expanded in 2004 to include Canada, Norway, Russia and Singapore. The core group held five plenary meetings between June 2003 and March 2004, which provided basic guidance for the PSI's work, including the SOP. With a further extension of the list of PSI participants, the concept of a core group was contested. Objections were raised that it created a different class of participation. At the same time, its extension was seen as hindering effective decision making. As a result, political-level meetings open to all PSI supporters replaced the concept of the core group. So far there have been three such meetings, in June 2004, June 2006 and May 2008.<sup>25</sup> The next meeting will probably take place in May 2013, marking the tenth anniversary of the announcement of the PSI in Krakow.

On the one hand, the lack of political-level meetings since 2008 may reflect the PSI's original emphasis on practical rather than political cooperation. On the other hand, it could be perceived as a signal of lessening interest in the initiative on the part of participating states and a lack of progress in the PSI.

<sup>22</sup> Williams, A. S., 'The interception of civil aircraft over the high seas in the global war on terror', *Air Force Law Review*, vol. 59 (2007), pp. 95–99.

<sup>23</sup> Ahlström (note 16), pp. 749–750.

<sup>24</sup> Williams (note 22), pp. 133–139.

<sup>25</sup> National Institute for Public Policy (note 8), p. 414.

Since March 2004, the regular meetings of the PSI's most actively engaged and influential participants have been conducted under the framework of the Operational Experts Group (OEG).<sup>26</sup> The OEG is currently made up of 21 PSI participating states. In addition to the core group of 15 states, it includes Argentina, Denmark, Greece, New Zealand, Turkey and the Republic of Korea (ROK or South Korea). The states are chosen according to their political significance; the strength of their commitment to the PSI; their importance to international shipping; and their regional distribution.<sup>27</sup> OEG members perceive the issuing of invitations to the group as a way of attracting key states to join the PSI.

The OEG acts as a steering committee and is a forum for regular policy discussions. However, it is primarily focused on operational and pragmatic issues, such as the presentation of previous, and the planning of future, exercises; identifying capabilities and procedures required and available for interdiction operations; exploring operational issues in the legal, law enforcement, customs and intelligence arenas; sharing information and good practice; and analysing lessons learned from PSI activities. This is reflected in the OEG's three breakout groups focused on the enforcement, legal and intelligence areas.

The composition of delegations to the OEG varies by state and includes officials from a variety of ministries and departments, including defence, foreign affairs, export control, economy, customs, coast guard, justice, internal affairs and police officials. Initially, representatives of defence ministries led most national delegations, reflecting the largely military nature of the PSI during its formative years. Over time, however, as the OEG became the only regular policy forum, foreign ministry officials took leadership roles in about half of the delegations. When the PSI's remit was expanded to include law enforcement against WMD proliferation facilitators, intelligence and law-enforcement experts then began joining national delegations.<sup>28</sup> The broadening of national delegations to the OEG also stemmed from the fact that the nature

of maritime trade, the constraints of international maritime law, and activities related to detecting and securing proliferation-sensitive items on the high seas have necessitated the greater involvement of civilian authorities.<sup>29</sup> Further, this reflects the fact that civilian authorities have the main responsibility for conducting interdiction operations in most PSI participating states. For example, in the EU a lot of work has been done to persuade accessing states to transfer the responsibility for border management and the interdiction of civilian goods in legal trade from military to civilian authorities.<sup>30</sup>

Originally, the OEG met three to five times a year, but since 2009 there has been only one meeting annually. At the PSI Senior Level Meeting held in May 2008 PSI participants adopted the Washington Declaration, which set priorities for the future, called for a stronger focus on regional PSI activities and outreach workshops and highlighted the importance of maintaining communication among OEG members.<sup>31</sup>

The decreasing number of OEG meetings may also be due to the reluctance of OEG members to host them. The OEG has no formal chairmanship or rules for chairing its meetings. The country hosting the meeting usually fulfils the role of chairman. Occasionally states have voluntarily offered to host a meeting of the group, but usually a state that has not hosted an OEG meeting, or has not done so for a long time, is identified and approached informally by the USA or other OEG members.<sup>32</sup>

The reduction in the number of OEG meetings, as well as the ad hoc and voluntary mechanism of hosting and chairing them, led to ideas that the highly informal and decentralized structure of the PSI could be strengthened by a mechanism to help coordinate the activities of PSI partners. Speaking in Prague in April 2009, US President Barack Obama highlighted the idea of changing the PSI into a 'durable international institution'.<sup>33</sup>

<sup>26</sup> The Operational Experts Group evolved from the Operational Experts Working Group (OEWG). The OEWG was convened for the first time on the margins of the Core Group plenary session in Brisbane in July 2003 and was initially one of the working groups of the PSI's Core Group. In December 2003 it met for the first time separately from the Core Group and began using the name Operational Experts Group. National Institute for Public Policy (note 8), p. 415.

<sup>27</sup> National Institute for Public Policy (note 8), p. 415.

<sup>28</sup> National Institute for Public Policy (note 8), pp. 415–416.

<sup>29</sup> Bauer, S., Dunne, A. and Mičić, I., 'Strategic trade controls: countering the proliferation of weapons of mass destruction', *SIPRI Yearbook 2011: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2011), p. 435.

<sup>30</sup> I am thankful to Ian Anthony for pointing this out to me.

<sup>31</sup> US Secretary of State, 'PSI: summary of September 2008 Paris Operational Experts Group (OEG) meeting', Cable no. 08STATE115935, 30 Oct. 2008, <<http://wikileaks.org/cable/2008/10/08STATE115935.html>>.

<sup>32</sup> Former OEG member state official, Communication with author, Apr. 2012.

<sup>33</sup> The White House, Office of the Press Secretary, 'Remarks by President Barack Obama', Hradcany Square, Prague, Czech Republic,

According to US officials, President Obama's reference to institutionalizing the PSI did not mean that the USA proposed establishing a secretariat or another similar bureaucratic structure, but rather wanted to 'secure multilateral buy-in'.<sup>34</sup> For this purpose, in May 2009 the USA successfully proposed and took on the role of PSI Focal Point, designed to provide support, improve information flow and coordinate international activities among all PSI partners (not only members of the OEG).<sup>35</sup> The USA hopes that other OEG member will eventually take over this role; however, it is unclear whether any other state would like to bear that responsibility.<sup>36</sup>

Other proposals related to institutionalizing the PSI include the establishment of a troika of the current, preceding, and succeeding chairs or a regular mechanism for a rotating annual chairmanship of the OEG, which would increase the effectiveness of the chairmanship.<sup>37</sup> More structured OEG meetings could be also facilitated by establishment of permanent working groups dealing with issues of particular importance for PSI functioning. It is possible that the structure of OEG meetings and the future of a PSI Focal Point will be discussed further at the next session in 2012, which is to be organized by South Korea.

### III. ACTIVITIES WITHIN THE PROLIFERATION SECURITY INITIATIVE FRAMEWORK

#### Increasing the number of supporters of the Proliferation Security Initiative

Since the initial phase of PSI development, the goal has been to expand support for it as broadly as possible.<sup>38</sup>

5 Apr. 2009, <[http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/)>.

<sup>34</sup> US Secretary of State, 'U.S.-EU Nonproliferation Consultations', Cable no. 09STATE83574, 11 Aug. 2009, <<http://wikileaks.org/cable/2009/08/09STATE83574.html>>.

<sup>35</sup> Nacht, M., Assistant Secretary of Defense for Global Strategic Affairs, Statement before the Senate Committee on Armed Services Subcommittee on Emerging Threats and Capabilities, 21 Apr. 2010, p. 5, <<http://armed-services.senate.gov/statemnt/2010/04%20April/Nacht%2004-21-10.pdf>>.

<sup>36</sup> Katz, L. M., 'Counterproliferation program gains traction, but results remain a mystery', Global Security Newswire, 10 Dec. 2010, <<http://www.nti.org/gsn/article/counterproliferation-program-gains-traction-but-results-remain-a-mystery/>>.

<sup>37</sup> National Institute for Public Policy (note 8), p. 427.

<sup>38</sup> The White House, 'Remarks by the President to the people of Poland', Wawel Royal Castle, Krakow, Poland, 31 May 2003, <<http://georgewebush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html>>.

The PSI was initially portrayed as a 'fast-track' and 'global' initiative with an 'inclusive mission', and the original participants have stressed that the PSI is 'an activity that is open to all, and not an exclusive club reserved only for certain states'.<sup>39</sup> To secure the widest possible involvement, PSI participants have therefore engaged in regional diplomatic outreach activities. Their efforts have focused on states that pose the greatest proliferation threat or that could positively contribute to interdiction efforts (i.e. flag, trans-shipment, overflight, transit and coastal states). Other states willing to participate are expected to contribute according to their particular capabilities.<sup>40</sup>

Extending PSI participation is seen as important for several reasons. With a larger number of states involved in PSI activities, the possibility of conducting interdiction operations increases and participating states can fill more of the gaps that potential proliferators might otherwise exploit, such as certain transportation routes.<sup>41</sup> Broad participation can also reinforce the normative power of PSI principles by facilitating the creation of an international norm against proliferation. Including countries with questionable proliferation records within the PSI could even potentially improve their behaviour.<sup>42</sup>

The fifth plenary meeting of the PSI's core partners took place in Lisbon in March 2004 and outlined practical steps constituting the basis for partnership in the PSI, namely: (a) formally committing to and publicly endorsing the PSI and its SOP as well as indicating a willingness to take all steps available to support PSI efforts; (b) undertaking a review and providing information about current national legal authorities to undertake interdiction operations as well as indicating a willingness to strengthen authorities where appropriate; (c) providing points of contact for PSI interdiction requests and other operational activities as well as establishing internal government processes to coordinate PSI efforts; (d) being willing

<sup>39</sup> US Department of State (note 3); and French Ministry of Foreign Affairs, 'Proliferation Security Initiative', <<http://www.diplomatie.gouv.fr/en/global-issues/disarmament-arms-control/arms-control-and-arms-trade/france-and-non-proliferation-of-proliferation-security-initiative/#nb1>>.

<sup>40</sup> See US Department of State (note 3); and US Department of State, 'Proliferation Security Initiative: Chairman's statement at the Fifth Meeting', Fifth Meeting of the PSI, Lisbon, 4-5 Mar. 2004, <<http://2001-2009.state.gov/t/isn/rls/other/30960.htm>>.

<sup>41</sup> Wolf, C., Jr., Chow, B. G. and Jones, G. S., *Enhancement by Enlargement: The Proliferation Security Initiative* (RAND Corporation: Santa Monica, 2008).

<sup>42</sup> National Institute for Public Policy (note 8), p. 427.



to actively participate in PSI interdiction exercises and actual operations as opportunities arise; and (e) being willing to consider signing relevant agreements (e.g. boarding agreements) or to establish other concrete bases for cooperation under the PSI umbrella.<sup>43</sup>

Outreach efforts undertaken within the framework of the PSI have been relatively successful and the PSI has been steadily endorsed by an increasing number of states: 50 states supported it in October 2003, around 60 in March 2004, over 75 in June 2006, 91 in May 2008 and 98 in September 2010.<sup>44</sup>

With a total of 48 states (including all 27 EU members), Europe is the numerically dominant region in terms of PSI membership. Monaco is the only European state outside of the PSI. Of particular importance is the participation of Russia, which initially was sceptical of the PSI. The level of participation from other regions is as follows.

1. *North America*: the USA and Canada (2 states).
2. *Central America*, South America and the Caribbean: Antigua and Barbuda, Argentina, the Bahamas, Belize, Chile, Colombia, El Salvador, Honduras, Panama, Paraguay, and Saint Vincent and the Grenadines (11 states).
3. *The Middle East*: Bahrain, Iraq, Israel, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, the United Arab Emirates (UAE) and Yemen (10 states).
4. *Africa*: Angola, Djibouti, Liberia, Libya, Morocco and Tunisia (6 states).
5. *Central Asia*: Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan (6 states).
6. *East Asia*: Japan, South Korea and Mongolia (3 states).
7. *South and South East Asia*: Brunei Darussalam, Cambodia, the Philippines, Singapore and Sri Lanka (5 states).
8. *Australia and Oceania*: Australia, Fiji, the Marshall Islands, New Zealand, Papua New Guinea, Samoa and Vanuatu (7 states).<sup>45</sup>

Of significant importance to the PSI's operation is that it includes 26 of the 35 most registered flags;

<sup>43</sup> US Department of State, Fifth Meeting (note 40).

<sup>44</sup> National Institute for Public Policy (note 8), p. 413.

<sup>45</sup> US Department of State, 'Proliferation Security Initiative participants', Bureau of International Security and Nonproliferation, Washington, DC, 10 Sep. 2010, <<http://www.state.gov/t/isn/c27732.htm>>.

together they account for about 80 per cent of the world's fleet in deadweight tonnage. Five of the largest account for almost 50 per cent of the world's fleet in deadweight tonnage: Panama (22.6%), Liberia (11.1%), the Marshall Islands (6.1%), Greece (5.3%) and the Bahamas (5.02%). Furthermore, some key trans-shipment ports are located within the territories of PSI partners (Singapore, Dubai in the UAE and Busan Metropolitan City in South Korea).<sup>46</sup> The regulation of commercial activities in trans-shipment hubs is clearly important as demonstrated by the A.Q. Khan network's use of such hubs in order to facilitate the proliferation of nuclear technology.<sup>47</sup>

Despite the relatively large number of PSI participants, the gaps in participation remain a concern. Non-participants in the PSI include several states that play leading roles in international trade, possess industries related to WMD and missiles, are important because of their geography since they control important shipping and transit routes, or have significant political or economic influence. These include Brazil, China, Egypt, India, Indonesia, Malaysia, Pakistan and South Africa. Because of their importance, it is often argued that if any one of these states endorses the PSI it should become a member of the OEG.<sup>48</sup>

One critical gap remains in Asia: 7 of the 35 most registered flags are from Asian states that do not participate in the PSI (China, Hong Kong, Indonesia, Malaysia, Taiwan and Vietnam).<sup>49</sup> Together they account for about 14 per cent of the world's deadweight tonnage. Furthermore, 6 of the 10 busiest ports in the world are located in China, which does not participate in the PSI.<sup>50</sup> The most recent success in extending the number of participants in Asia came with the official endorsement of PSI principles by South Korea in May 2009, just one day after a North Korean nuclear test. The lack of participation by countries in Africa

<sup>46</sup> United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2010* (UNCTAD: Geneva, 21 June 2011), pp. 43, 150.

<sup>47</sup> US Committee on Foreign Affairs, *Transshipment and Diversion: Are U.S. Trading Partners Doing Enough to Prevent the Spread of Dangerous Technologies?*, Hearing Before the Subcommittee on Terrorism, Nonproliferation and Trade of the Committee on Foreign Affairs House of Representatives (Government Printing Office: Washington, DC, 22 July 2010), pp. 18–22.

<sup>48</sup> Wolf, Chow and Jones (note 41).

<sup>49</sup> United Nations Conference on Trade and Development (note 46), p. 43.

<sup>50</sup> United Nations Conference on Trade and Development (note 46), table 7.4, p. 150.

may become another critical gap in the future as the share of international trade accounted for by African countries grows.

There are several reasons for some states' reluctance to become PSI partners. Most importantly, non-participating states continue to have concerns about the legality of interdiction operations. They worry that, in the course of interdiction, PSI participants could infringe on their sovereignty, especially the right of innocent passage. The PSI is also still perceived as a US-dominated effort, which negatively impacts on some countries' willingness to join. The reluctance of Indonesia and Malaysia stems from their sovereignty concerns over the Malacca Strait. Last but not least, the resistance of some states may be driven by a concern that membership could negatively impact their trade, based on the belief that their PSI commitments might impede quick passage through their ports.<sup>51</sup>

It is, however, important to note that a country's participation or non-participation in the PSI does not necessarily reflect its actual engagement in interdiction operations. There are significant differences between PSI participants in terms of the extent of their involvement, based on political interest, counterproliferation capability or any number of situations in which they have the opportunity to engage in actual operations. Non-participation in the PSI also does not foreclose cooperation with PSI participants in specific actions against WMD and missile proliferation.<sup>52</sup> In 2004 a US official revealed that the USA had worked in 'cooperation with China in some interdiction efforts' for several years.<sup>53</sup> Further, in August 2008 India reportedly denied a North Korean plane passage through Indian airspace en route to Iran at the request of the USA.<sup>54</sup> China, India, Malaysia and Pakistan have already participated in PSI exercises as observers, which could potentially have a

positive impact on their capacities to cooperate in real interdiction cases in the future.

### **The status of the European Union within the Proliferation Security Initiative**

Since the PSI's inception, a potential means of EU involvement (i.e. that of EU institutions) has been explored.<sup>55</sup> The Council of the EU formally endorsed the PSI's principles and objectives in June 2004, stating that they complement the objectives of the 2003 EU Strategy against Proliferation of Weapons of Mass Destruction.<sup>56</sup>

In May 2008 the EU Personal Representative on Non-proliferation provided the USA with a 'non-paper' requesting the participation of EU institutions in the PSI. The EU requested formal observer status, similar to its role in the Global Initiative to Combat Nuclear Terrorism (GICNT). This would involve EU participation in its own right at the PSI plenary meetings, in the European regional PSI meetings and in the OEG meetings, 'to the extent to which it can contribute to the discussions in accordance with its tasks and competencies'.<sup>57</sup> Without such a formal status, the EU can only be informally represented at OEG meetings by the OEG state holding the EU presidency or other EU member state. EU delegations have only ever participated in their own right at Regional Operational Expert Group (ROEG) meetings, such as that held in Sopot, Poland, in June 2009.

The formal status of EU institutions in the PSI has been reportedly supported by all EU member states, especially France, Germany and Italy. Some EU members such as the UK, however, have expressed reservations in deference to the USA's concerns.<sup>58</sup> According to leaked documents, the USA expressed strong scepticism of the EU request, although some US officials perceived it as advantageous.<sup>59</sup> The most

<sup>51</sup> For more information see e.g. Dela Pena J., 'Maritime crime in the Strait of Malacca: balancing regional and extra-regional concerns', *Stanford Journal of International Relations*, vol. 10, no. 2 (spring 2009), pp. 5–7; MFA of the People's Republic of China, 'The Proliferation Security Initiative', <<http://www.fmprc.gov.cn/eng/wjzb/zzjg/jks/kjlc/fkswt/t410725.htm>>; Belcher (note 4), pp. 8–9; and Valencia, M. J., *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Paper no. 376 (Routledge: London, Oct. 2005), pp. 12–14.

<sup>52</sup> National Institute for Public Policy (note 8), pp. 414, 425.

<sup>53</sup> Kan, S. A., *China and Proliferation of Weapons of Mass Destruction and Missiles: Policy Issues*, Congressional Research Service (CRS) Report for Congress RL31555 (US Congress, CRS: Washington, DC, 26 May 2011), p. 59.

<sup>54</sup> Crail, P., 'GAO report calls for revamped PSI', *Arms Control Today* (Dec. 2008).

<sup>55</sup> US Embassy in Brussels, 'RFG: should the EU be involved with PSI?', Cable no. 03BRUSSELS4518, 23 Sep. 2003, <<http://wikileaks.org/cable/2003/09/03BRUSSELS4518.html>>.

<sup>56</sup> Council of the European Union, 'Non-proliferation: support of the Proliferation Security Initiative (PSI)', Press release, 10052/04, Brussels, 1 June 2004, <<http://consilium.europa.eu/uedocs/cmsUpload/st10052.en04.pdf>>.

<sup>57</sup> US Mission to the European Union, 'EU non-paper requesting participation in PSI', Cable no. 08USEUBRUSSELS716, 14 May 2008, <<http://wikileaks.org/cable/2008/05/08USEUBRUSSELS716.html>>.

<sup>58</sup> US Mission to the European Union (note 57).

<sup>59</sup> US Mission to the European Union, 'Iran, PSI, and the EU: is it time to let the EU in?', Cable no. 09BRUSSELS1058, 31 July 2009, <<http://wikileaks.org/cable/2009/07/09BRUSSELS1058.html>>.

controversial issue has been whether the EU could officially participate in the OEG meetings.

The significant overlap between EU membership and participation in the PSI has resulted in the PSI having a high profile role within the EU. Therefore, EU officials have argued in favour of EU participation in the PSI for several reasons.

First, member states have transferred the regulatory authority and competencies in several areas relevant to the PSI (such as customs, transport, internal market, proliferation finance and dual-use export controls) to the EU. In this context, EU officials have stressed that the EU's supranational character is unique and incomparable to any other international organization. For example, the EU Dual-Use Regulation revised in 2009 applies directly to all 27 member states.<sup>60</sup> Also, the common EU customs legislation rules and common minimum EU rules on civil aviation security are directly applicable in all EU member states. Further, the EU plays an essential role in transposing UN sanctions against WMD proliferators and can adopt autonomous sanctions. Finally, it provides a legal basis for the interdiction, inspection and seizure of WMD related cargoes of some companies and states. According to EU officials, the EU's participation in the OEG would allow both the provision and receipt of early information on elements related to the work of EU institutions in order to provide EU member states with an appropriate legal basis to perform effective interdiction operations.

Second, EU officials have highlighted that the EU offers capacity building in implementing the PSI's SOP. The EU Joint Situation Centre (SITCEN), with input from EU members, allows the production of joint intelligence assessments related to WMD proliferation. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) assists, for example, in the training of national border guards and sets out training standards. The Joint Research Centre (JRC) develops a number of operational tools to improve the surveillance of maritime traffic, the monitoring of container movement and the screening of containers.

Third, the EU is engaged in assistance and outreach efforts to third countries. At the political level, this

<sup>60</sup> Council Regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

includes inserting a WMD clause in cooperation agreements. It also provides legal and technical assistance, training and necessary equipment.<sup>61</sup>

However, sceptics of granting the EU formal observer status have highlighted that the PSI is an operational activity and decisions to participate in specific interdiction operations are conducted on a national basis. While operating within the framework provided by the EU, EU member states act on national, bilateral or multilateral bases in particular cases. Therefore, formal PSI participation should be reserved only for states. These sceptics also argue that the current role of EU capabilities and bodies in supporting interdiction operations is minimal: the added value of SITCEN in its current form is marginal; Frontex has not undertaken and does not appear to have any experience of strategic trade control-related training; and the JRC's tools are not widely deployed or integrated into national capabilities.<sup>62</sup>

Further, the formal role of the EU in the PSI, especially in the OEG, has been seen as posing a risk in terms of the unnecessary bureaucratization of the PSI. It has also been argued that since 10 of the 20 OEG members are EU states, EU interests are already sufficiently represented in the PSI. Additionally, granting observer status to the EU might raise the question of granting the same status to other organizations, which in turn raises concerns about changing the PSI into a deliberative body.<sup>63</sup>

In terms of the PSI's operation, EU institutional involvement seems to be less important than the endorsement of the PSI by additional states. As all EU member states already participate in the PSI, the political signal to other states provided by the

<sup>61</sup> For further information on the EU position see 'EU contribution to PSI', Presentation by Dr Andreas Strub, Proliferation Security Initiative (PSI) Operational Experts Group (OEG) meeting, Paris, 25 Sep. 2008, <[http://www.consilium.europa.eu/uedocs/cmsUpload/Paris\\_PSI\\_25\\_September.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/Paris_PSI_25_September.pdf)>; US Secretary of State (note 31); US Mission to the European Union, 'U.S.-EU troika consultations on disarmament and nonproliferation (CODUN/CONOP)', Cable no. 09BRUSSELS1301, 25 Sept. 2009, <<http://wikileaks.org/cable/2009/09/09BRUSSELS1301.html>>; and Gianella, A., 'Proliferation Security Initiative (PSI)', Keynote speech on behalf of the EU, Sopot, Poland, 22 June 2009, <[http://www.consilium.europa.eu/uedocs/cmsUpload/09-06-22\\_speech\\_Sopot\\_AG.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/09-06-22_speech_Sopot_AG.pdf)>.

<sup>62</sup> Former OEG member state official, Correspondence with author, April 2012.

<sup>63</sup> See also US Secretary of State, 'PSI: Operational Experts Group meeting in Paris, France (25-26 Sep., 2008), part 1 of 2', Cable no. 08STATE115948, 30 Oct. 2008, <<http://wikileaks.org/cable/2008/10/08STATE115948.html>>; and US Secretary of State (note 34).

EU's involvement would be of limited value. Also, because almost half of the OEG members are EU members, the EU's involvement in OEG meetings could raise further concerns about the unbalanced geographical distribution of the OEG membership. One possible compromise between the position of the EU institutions and that of the most reluctant OEG members might involve limiting observer status to the EU official presence in ROEG meetings, PSI plenary meetings, and PSI workshops and exercises.

#### IV. STRENGTHENING INTERNATIONAL LAW AND FRAMEWORKS

PSI participants have stressed that they seek to interdict shipments at the moment of maximum legal authority. At the same time, they have undertaken efforts to broaden international consensus and strengthen international legal frameworks in order to extend the basis for interdiction operations. For this purpose, participants have first tried to secure support for the PSI's activities from various international organizations and actors, such as the EU, the Group of Eight (G8) and the UN Secretary-General.<sup>64</sup> Crucial to strengthening the support and the legal basis for interdiction operations has been bilateral ship-boarding agreements, UN Security Council resolutions and amendments to international conventions that criminalize the transport of WMD material to and from state and non-state actors of proliferation concern.

##### The role of bilateral agreements

Expanding the legal authority of PSI partners to interdict shipments can be achieved by signing bilateral boarding agreements with selected countries. This method has been employed by the USA, which has entered into such agreements with so-called 'flag-of-convenience' states—states that hold the largest shipping registries and have the greatest number of flagged vessels under their control and exclusive jurisdiction.<sup>65</sup> Between 2004 and 2010 the USA signed

boarding agreements with eleven flag-of-convenience states: Antigua and Barbuda, the Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, Mongolia, Panama, and Saint Vincent and the Grenadines.<sup>66</sup>

The agreements established procedures under which the USA, on a mutual basis, can receive permission to board, search and possibly detain suspected vessels flying the flag of these states while in international waters. Under the agreements, if a ship flies the flag of a party to the agreement and is suspected of carrying illicit cargo, another party can ask for permission to stop and inspect the vessel. To minimize the risk that a reply to a request will not be obtained in a timely manner, all of the agreements established an implied consent rule. Depending on the specific agreement, authorization may be implied if a certain amount of time has elapsed (for example, two hours for ships with flags from Panama and Antigua and Barbuda, or four hours for ships with a flag from the Marshall Islands) since the receipt of a request to search and board was confirmed.

According to the agreements, the jurisdiction over the detained vessel, cargo and persons on board rests with the flag state, unless it waives this right. Each of the agreements contains specific boarding procedures. In terms of the PSI's operation, it is important to note that although the agreements have been concluded on a bilateral basis with the USA, in some circumstances they may also be extended to other PSI participating states.<sup>67</sup>

The signing of bilateral ship-boarding agreements enabled the USA to establish an authority that it would not otherwise have and provides the USA with the opportunity to board and search a substantial part of the world's merchant fleet (e.g. ships under the flags of the Bahamas, Liberia, the Marshall Islands and Panama together account for 45 per cent of the world's commercial fleet deadweight tonnage).<sup>68</sup>

Ship-boarding agreements with flag-of-convenience states are of significant importance to non-proliferation efforts since such an open registry of vessels could be used to hide the identity of the real owners. For example, according to a report from the UN Panel of

<sup>64</sup> United Nations, General Assembly, 'In larger freedom: towards development, security and human rights for all', Report of the Secretary-General, A/59/2005, 21 Mar. 2005, p. 28; and United Nations, General Assembly, Note by the Secretary-General, A/59/565, 2 Dec. 2004, para. 132.

<sup>65</sup> The main characteristic of 'flag-of-convenience states' or states with an 'open registry' is that they provide advantageous conditions for the registration of foreign-owned ships under their flags. They offer, for

example, cheap registration fees, low or no taxes, and relaxed labour regulations in comparison to many countries of ownership.

<sup>66</sup> US Department of State, 'Ship boarding agreements', <<http://www.state.gov/t/isn/c27733.htm>>.

<sup>67</sup> Ahlström (note 16), p. 756; and Klein (note 17), pp. 184–190.

<sup>68</sup> United Nations (note 46), p. 43.



Experts in May 2011, the imposition of sanctions since 2007 has prompted Iran to move registration of its vessels abroad. As a result, as of 1 January 2010 almost 94 per cent of Iranian-controlled vessels (measured by tonnage) were registered abroad, including more than 70 per cent in Malta.<sup>69</sup>

### The role of United Nations Security Council resolutions

UN Security Council resolutions have played an important role in improving the basis for interdiction in national and international law. Of particular importance has been Resolution 1540 adopted in April 2004 under Chapter VII of the UN Charter, the mandate of which was extended in 2011 until April 2021. The resolution called on all states to take cooperative action to prevent trafficking in WMD as it ‘affirmed that proliferation of nuclear, chemical and biological weapons as well as their means of delivery, constitutes a threat to international peace and security’.<sup>70</sup> For the first time, the resolution also required all states to take and enforce effective measures to establish domestic controls to prevent the proliferation of WMD and their means of delivery. The resolution contributed to enacting legislation in many states aimed at controlling and outlawing some proliferation activities. It is noteworthy, however, that despite its importance the resolution did not provide the PSI with any enforcement authority or explicitly call for the interdiction of WMD-related shipments. The USA sought to include such explicit language but, on China’s insistence, the resolution only referred to using international cooperative action when necessary to prevent illicit trafficking.<sup>71</sup>

In terms of extending a legal basis for the PSI’s actions, it was important that the role of interdiction in preventing proliferation of WMD and their means of delivery gained increasing importance in subsequent UN Security Council resolutions and related measures imposed against Iran and North Korea.<sup>72</sup>

<sup>69</sup> United Nations, Security Council, Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010), May 2011, paras 191–192.

<sup>70</sup> UN Security Council Resolution 1540, 28 Apr. 2004.

<sup>71</sup> This provision is often referred to as the ‘PSI clause’ in UN Security Council Resolution 1540. Winner, A. C., ‘The Proliferation Security Initiative: the new face of interdiction’, *The Washington Quarterly*, vol. 28, no. 2 (spring 2005), p. 136.

<sup>72</sup> Iran: Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1929 (2010); and North Korea: Resolutions 1718 (2006) and 1874 (2009).

Resolution 1929 on Iran and Resolution 1874 on North Korea, in particular, call on all states to inspect all cargo to and from Iran and North Korea that is in their territory, including seaports and airports, if there are ‘reasonable grounds’ to believe the cargo contains items of which the supply, sale, transfer or export is prohibited. Both resolutions also call on states to cooperate in inspections and, more significantly, they authorize all UN members to seize and dispose of prohibited cargo. If enacted in national legislations, the resolutions resolve the problem of the lack of a sufficient legal basis for the seizure of WMD-related materials, in the case of these two states.

However, the resolutions do not provide PSI partners with a legal basis to conduct interdiction operations on the high seas. They both stress that such inspections can take place only with the consent of the flag state. In contrast to Resolution 1929, Resolution 1874 says that if the flag state does not consent to an inspection on the high seas it should direct the vessel to proceed to an appropriate port for the required inspection. However, the flag state does not have to agree to do so, and the resolution does not envision any direct negative consequences, apart from reporting such a situation.<sup>73</sup>

### The 2005 Suppression of Unlawful Acts Protocol and the Beijing Convention

PSI participants played an instrumental role in the adoption of the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Protocol) that came into force on 28 July 2010.<sup>74</sup> Although counterterrorism was the main driver behind the protocol, it contains language that strengthens non-proliferation efforts in general. The protocol sets up provisions that criminalize the intentional transportation of:

[A]ny source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement;

<sup>73</sup> UN Security Council Resolution 1874, 12 June 2009, paras 11–16; and UN Security Council Resolution 1929, 9 June 2010, paras 14–16.

<sup>74</sup> Belcher (note 7), pp. 12–13.

or . . . any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN [biological, chemical, nuclear] weapon, with the intention that it will be used for such purpose.<sup>75</sup>

The 2005 SUA Protocol is the first international agreement that formally recognizes the trafficking of WMD and related goods as illegal.<sup>76</sup> Similar to UN Security Council Resolutions 1874 and 1929, it does not change existing international law by adding any new legal basis to interdict vessels suspected of transporting WMD on the high seas. The authorization of the flag state is still required before boarding.<sup>77</sup> The protocol applies only to states that ratified it and does not apply to the activities of armed forces during an armed conflict or when exercising official duties in peacetime (Art. 2.2). However, if the majority of states accede to it and adjust their domestic legislation accordingly, its provisions criminalizing the transport of illegal WMD shipments become more significant. As of 30 April 2012, the 2005 SUA Protocol had 22 contracting parties (including 11 PSI endorsing states but only 3 members of the OEG). Their combined merchant fleet constituted only approximately 30 per cent of the gross tonnage of the world's merchant fleet.<sup>78</sup> In contrast, the 1988 SUA Convention has 160 parties that together account for 95 per cent of the world's merchant fleet.<sup>79</sup>

The 2005 SUA Protocol served as a basis for discussion about introducing similar provisions related to transport by civil aircraft. The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention), adopted at a diplomatic conference held in Beijing from 30 August to 10 September 2010, repeats the text of relevant provisions of the 2005 SUA Protocol. As with the 2005

SUA Protocol, the Beijing Convention was primarily motivated by a need to strengthen counterterrorism measures, but it also strengthens non-proliferation efforts and PSI participants played an important role in the work on it. The Beijing Convention requires states to criminalize 'unlawful and intentional' transport via civil aircraft of biological, chemical and nuclear weapons and related materials and to prosecute those responsible for such acts.<sup>80</sup> It has not come into force yet. Similar to the 2005 SUA Protocol, the Beijing Convention will have the greatest value if it is ratified and enacted in national legislation by a significant number of states.

### **The role of exercises, workshops and Regional Operational Expert Group meetings**

PSI partners have engaged in exercises and workshops to enhance both their national interdiction capabilities and cooperation in various interdiction scenarios. Together with ROEG meetings, these have played an instrumental role in the PSI's outreach activities.

The PSI's multinational exercises encompass maritime, air or ground scenarios, or a combination of all three. They can be live exercises (LIVEX), games, tabletop exercises, command post exercises (CPXs) or simulations, and can be sponsored by OEG members or other PSI participants. Full participation in such exercises is limited to states that have formally endorsed the SOP. Other countries may be invited as observers. Apart from multinational exercises, national exercises can also be conducted by one state to improve its capabilities and internal coordination.<sup>81</sup>

As of March 2012, 49 PSI multinational exercises have taken place and the majority of them have been live exercises. More than half of all the exercises involved maritime interdiction or had a maritime component. They were mostly organized by original PSI participants, in particular by the USA. Of 49 exercises so far, 17 were led by the USA (4 co-hosted with Panama and 2 with the UAE), 4 each by Australia and France (1 co-hosted with Djibouti), 3 by Poland (1 co-hosted with Denmark, Russia and Sweden, and

<sup>75</sup> International Maritime Organization (IMO), Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 Oct. 2005, Art. 3bis (iii) and (iv).

<sup>76</sup> The protocol does not affect any rights, obligations or responsibilities under the Non-Proliferation Treaty (NPT), the Biological and Toxin Weapons Convention or the Chemical Weapons Convention, including the right to transport nuclear weapons if doing so is consistent with the NPT. Klein (note 17), p. 172.

<sup>77</sup> International Maritime Organization (note 75), Art. 8.

<sup>78</sup> International Maritime Organization (IMO), Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions as at 30 April 2012, <<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>>, pp. 416–417.

<sup>79</sup> International Maritime Organization (note 78), p. 406.

<sup>80</sup> The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation done at Beijing on 10 Sept. 2010, <[http://legacy.icao.int/DCAS2010/restr/docs/beijing\\_convention\\_multi.pdf](http://legacy.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf)>, Arts 1(i), (2).

<sup>81</sup> Chairman of the Joint Chiefs of Staff Instruction, 'Proliferation Security Initiative (PSI) activity program', 1 Mar. 2007, <[http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/3520\\_02.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/3520_02.pdf)>, pp. A-1, A-2.

1 with the Czech Republic), 2 each by Italy, Japan, Singapore, Spain and the United Kingdom and 1 by Croatia, Germany, Lithuania, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, Slovenia, Turkey and Ukraine. Only 12 exercises have been hosted or co-hosted by non-OEG members: Croatia, the Czech Republic (co-hosted), Djibouti (co-hosted), Lithuania, Panama (co-hosted), Slovenia, Sweden (co-hosted), Ukraine and the UAE (co-hosted). More than half of all the exercises, 26 out of 49, took place in Europe or in its neighbourhood (including 4 US European Command-led Phoenix Express exercises in the Mediterranean Sea, which have been hosted since 2008).<sup>82</sup>

The exercises have served several important functions seen in terms of the PSI's operation. Primarily, the exercises have been designed to enhance PSI participants' readiness to conduct real-life interdiction operations. They have provided a tool to demonstrate and test available interdiction capabilities, technologies and procedures as well as recognize and address key problems in cooperation between different national institutions and among different PSI partners. They have also aimed at exploring post-interdiction issues in the customs, law enforcement and legal areas and identifying gaps in legal authorities.<sup>83</sup> Further, the exercises have included lessons learnt and scenarios covering situations in which PSI countries choose not to release information to some or all partners.

Participants often find that the greatest value of PSI exercises lies in the fact that they enable different agencies that protect national borders—armed forces, foreign ministry, customs, police, intelligence and others—to meet and establish strong links with each other. Similarly, they facilitate a stronger relationship between parallel bodies in different PSI participant countries. For example, one official from a PSI participating state has claimed that, thanks to PSI exercises, if a ship heads towards a PSI state carrying WMD components, that state is much more likely to find

out about it today than would have been the case before the PSI.<sup>84</sup>

Apart from their practical role, these exercises have been also perceived as a platform for PSI outreach activities since states that have not endorsed the PSI might observe them and gain insightful knowledge about how the PSI operates. The exercises have been also seen as a mechanism that contributes to raising regional awareness of WMD non-proliferation efforts. Further, they have been used as an expression of strong will and determination to counter proliferation and as a tool to send warning messages to potential proliferators.<sup>85</sup>

The number of multinational exercises conducted every year has ranged from 3 to 9 since the PSI's inception: 4 in 2003, 9 in 2004, 6 each year in 2005 and 2007, 7 in 2006, 5 in 2008, 3 in 2009, 4 in 2010 and 5 in 2011.<sup>86</sup> However, the last PSI exercise led by a European state took place in Croatia in May 2008, and the last exercise led by a European OEG member took place in Poland in September 2006. The most common practice in recent years has been for PSI exercises to be included in multinational military-to-military regional exercises such as Phoenix Express (US European Command-led exercises), Panamax (US Southern Command-led exercises), Pacific Protector (Australia-led exercises) or Deep Sabre (Singapore-led exercises). This suggests that PSI multinational exercises are dependent on scheduled multinational regional military exercises to which PSI scenarios are injected rather than on the deliberate planning of PSI participants.

Such an approach to the PSI's exercises may be attributed to a loss of momentum by the PSI, budgetary constraints or the fact that is seen as sufficient in order to maintain the level of cooperation between PSI participants.<sup>87</sup>

Initially, PSI exercises were military-oriented and resembled the military nature of the PSI during the first years of its operation. Over time, they have become more integrated with other responses to the legal, law

<sup>82</sup> US Department of State, 'Calendar of events', Proliferation Security Initiative, <<http://www.state.gov/t/isn/c27700.htm>>; and US Government Accountability Office (GAO), *Proliferation Security Initiative: Agencies Have Adopted Policies and Procedures but Steps Needed to Meet Reporting Requirement and to Measure Results*, GAO-12-441 (GAO: Washington, DC, Mar. 2012), p. 29.

<sup>83</sup> US Secretary of State, 'PSI: update to invitation to attend PSI exercise Leading Edge 2010', Cable no. 09STATE119211, 18 Nov. 2009, <<http://wikileaks.org/cable/2009/11/09STATE119211.html>>.

<sup>84</sup> Goff, P., 'Cooperating for non-proliferation', Opening address of the Proliferation Security Initiative Operational Experts Group meeting, Auckland, 26 Mar. 2007, <<http://www.beehive.govt.nz/speech/cooperating-non-proliferation>>.

<sup>85</sup> 'PSI exercise begins in waters off Busan', *The Korea Herald*, 13 Oct. 2010.

<sup>86</sup> US Department of State (note 82); and US Government Accountability Office (note 82), p. 29.

<sup>87</sup> See National Institute for Public Policy (note 8), pp. 416–417; and Kulesa, L., 'Poland and the Proliferation Security Initiative', *Korean Journal of Defense Analysis*, vol. 22, no. 1 (Mar. 2010), pp. 23–24.

enforcement, intelligence and policy challenges faced by states, and have involved the presence of appropriate civilian authorities.<sup>88</sup> The evolution of the exercises has been a consequence of an increasing focus of PSI efforts on law enforcement related to commercial trade in dual-use goods, which more accurately reflects real-world interdiction cases. Although there may be scenarios involving the movement of nuclear, biological or chemical weapons in which a military response would be justified, such cases are extremely rare.

Nevertheless, despite the greater involvement of civilian law enforcement authorities, the majority of PSI exercises have retained a significant and very often high profile military dimension. The continued military focus of exercises could be perceived as the PSI having become distracted from reality in its capacity-building efforts and may even run counter to the accepted standards of some of PSI participants. Some OEG members have recognized this overly extensive military involvement and have stressed that the exercises should include stronger law enforcement aspects.<sup>89</sup>

Apart from training and exercises, PSI partners have been engaged in hosting workshops designed to facilitate cooperation between key industry and PSI participants. These have been devoted to shipping container security, maritime industry and financial aspects of countering proliferation. The goal of the workshops was to enable a state's authorities to meet with representatives of private companies to raise industry awareness about illicit WMD trafficking and discuss how to minimize the impact of WMD interdiction on legitimate trade.<sup>7</sup>

In order to increase the level of engagement on the part of non-members of the OEG and discuss region-specific issues, OEG members decided in May 2008 to focus on regional PSI activities and outreach workshops, and to emphasize the role of ROEG meetings. Initially, OEG participants planned to hold such meetings at least once every two years.<sup>90</sup> So far, five ROEG meetings have taken place. The first European ROEG meeting took place in Germany in November 2005 and the second in Poland in June

2009. The ROEG meeting for the western hemisphere was held in Miami in May 2009. There have also been two ROEG meetings for the Asia-Pacific region: the first in Australia in September 2010 and the second in Honolulu in June 2011. In addition to these ROEG meetings, in October 2010 South Korea hosted a workshop for Asia-Pacific participants of the PSI.<sup>91</sup>

The ROEG exercises, workshops and meetings were designed to play an instrumental role in PSI outreach. Despite their achievements, however, outreach activities undertaken by PSI participants have also had considerable deficiencies. Such efforts have been rather ad hoc, infrequent and with an uneven geographical distribution. There have been no long-term programmes aimed at increasing the interdiction capabilities of PSI participants that are not also members of the OEG. The scant official information available to the public about the PSI also highlights an insufficient focus on outreach.

#### **The development of critical interdiction capabilities and practices**

After the PSI Critical Capabilities and Practices Planning Conference in Honolulu in June 2011, OEG members acknowledged the benefits of undertaking critical capabilities and practices (CCP) for interdicting WMD.<sup>92</sup> The basic role of CCP is to address the deficiencies in PSI outreach and capacity-building efforts by establishing a structured and regular mechanism for sharing the practical lessons learnt by OEG members with the 77 non-OEG PSI participants.<sup>93</sup> The goal of CCP is to help these states further develop or improve their interdiction capabilities so that they can more effectively engage in interdiction operations. According to the USA, CCP is also 'a critical step toward ensuring that PSI achieves President Obama's vision of being a durable institution'.<sup>94</sup>

<sup>91</sup> US Department of State (note 82).

<sup>92</sup> US Department of State, 'PSI-endorsing states undertake effort to build critical capabilities and practices (CCP) for interdicting WMD', Fact Sheet, Bureau of International Security and Nonproliferation, 10 June 2011, <<http://www.state.gov/t/isn/166732.htm>>.

<sup>93</sup> Hoyer, W., 'The international non-proliferation landscape and Proliferation Security Initiative', Speech by the Minister of State at the Foreign Office at the opening of the Proliferation Security Initiative Operational Experts Group meeting in Berlin, 8 Nov. 2011.

<sup>94</sup> Handelman, K., Statement by the Acting US Assistant Secretary of Defense for Global Strategic Affairs before the House Committee on Armed Services Subcommittee on Emerging Threats and Capabilities, 11 Mar. 2011, pp. 8–9, <<http://www.dod.gov/dodgc/olc/docs/testHandelman03112011.pdf>>.

<sup>88</sup> Benkert, J. A., Principal Deputy Assistant Secretary of Defense for Global Security Affairs, Statement for the Record, Senate Committee on Armed Services, Subcommittee on Emerging Threats and Capabilities, 2 Apr. 2008, <<http://armed-services.senate.gov/statemnt/2008/April/Benkert%2004-02-08.pdf>>, p. 8.

<sup>89</sup> Bauer, Dunne and Mičić, (note 29), p. 436.

<sup>90</sup> National Institute for Public Policy (note 8), p. 427.



In order to implement CCP, OEG states have been identifying and listing specific elements that support the effective conduct of interdiction activities. They also have been designing tools that can be used to help non-OEG PSI participants develop these elements. There is no public information regarding specific examples, but such tools could take the form of documents, programmes, training opportunities or methodologies.<sup>95</sup> They could also encompass, for example, model lists of export control regulations, interdiction response plans, inspection methodologies or legal handbooks.

Participation in the CCP effort is voluntary for both OEG and non-OEG members. Nevertheless, CCP is seen as an instrument that could invigorate PSI by providing it with a new, long-term mission of practical work to strengthen the interdiction capacities of all PSI-endorsing states.

The CCP effort could contribute to building functional and result-oriented networks between OEG states and other PSI participants. The CCP tools, along with accompanying regular exercises demonstrating their benefits and testing their implementation in practice could supplement what is already being done to strengthen non-OEG members national capacities to enforce international agreements (e.g. UN Security Council Resolution 1540) or national export control laws. Although Resolution 1540 identifies the necessary elements for effective national export controls such as a legal basis, enforcement capacity and industry–government relations, it does not provide states with the requisite resources to incorporate them into domestic laws.<sup>96</sup> The UN 1540 Committee itself does not provide assistance but plays the role of a clearinghouse to facilitate assistance by others. The CCP effort could be an additional way for OEG members to provide such assistance.

Apart from its benefits to non-OEG PSI participants, the implementation of CCP could give new impulses to

<sup>95</sup> German Ministry of Foreign Affairs, Press release, Meeting of the PSI Operational Experts Group, Berlin 8–9 Nov. 2011, <[http://www.auswaertiges-amt.de/cae/servlet/contentblob/604064/publicationFile/162767/111108-PSI\\_Press\\_Release.pdf](http://www.auswaertiges-amt.de/cae/servlet/contentblob/604064/publicationFile/162767/111108-PSI_Press_Release.pdf)>; and Polish Ministry of Foreign Affairs, Regional PSI Critical Capabilities and Practices Workshop, Warsaw, 11–12 July 2012, <<http://www.psi.msz.gov.pl/?document=31&PHPSESSID=75c9e138207e99e40b00f520a41274e9>>.

<sup>96</sup> Jones, S. A., Beck, M. D. and Gahlaut, S., 'Trade controls and international security', eds N. E. Busch and D. H. Joyner, *Combating Weapons of Mass Destruction: The Future of International Nonproliferation Policy* (University of Georgia Press: Athens, GA, 2009), pp. 127–128.

OEG members to improve capabilities and procedures that are still being developed. For example, so far not all OEG members have developed their PSI national response plans, which identify steps and decision-making bodies involved in interdiction actions. The development of tools could also potentially lead to the unification of different approaches to controversial issues, such as different interpretations of international law. Further, the CCP effort could be used by PSI states to extend cooperation to states that for various reasons are not ready to officially endorse the PSI and become participants.

The CCP concept, however, is still being developed and some challenges to its realization remain. Most importantly, the success of the CCP effort is not only dependent on the engagement of OEG members but also on the willingness of non-OEG members to take advantage of CCP. The first practical test of whether non-OEG PSI participants are interested in CCP will be the regional workshop hosted by Poland in July 2012.<sup>97</sup>

### **The Proliferation Security Initiative's interdiction operations**

PSI interdiction can encompass a broad range of activities: denying export licences; recalling goods shipped by a domestic company that are in violation of that state's export control laws; denying overflight permission; using political pressure to divert ships to ports of origin; or naval boarding on the high seas that leads to the seizure of proliferation-related equipment. Despite the fact that boarding and searching a merchant vessel at sea is the most recognized image of PSI interdiction, such cases are very rare. For practical reasons, interdiction usually occurs when the consignment is in port, on the ground or at a customs post. An interdiction operation usually involves the engagement of civilian law enforcement authorities, such as customs officials, port authorities or air traffic officials. The number of interdiction scenarios that necessitate the engagement of the military is very limited.<sup>98</sup>

There is scant public information on successful interdiction operations undertaken within the PSI framework. Even PSI participating states do not have the full data on successful cases, as the PSI's

<sup>97</sup> Polish Ministry of Foreign Affairs (note 95).

<sup>98</sup> Boese, W., 'Interdiction initiative successes assessed', *Arms Control Today* (July/August 2008).

informal character does not require the sharing of such information. It is also unlikely that this will change, primarily because of the need to protect sensitive intelligence information and operational capabilities and procedures.<sup>99</sup>

Since information is scarce, and its general nature and sources cannot be independently verified, it is impossible to fully and accurately assess the number of successful PSI interdiction operations. In May 2005 a US official presented eleven successful interdiction cases.<sup>100</sup> By July 2006, the number had increased to 'more than 30 shipments' and, in April 2009, to about fifty successful PSI interdiction operations.<sup>101</sup> The cited examples include, for example, halting transfers to Iran of missile- and heavy water-related equipment.<sup>102</sup>

Recent cases of successful interdiction that could result from PSI cooperation are included in the Final Report of the UN Panel of Experts Established Pursuant to Resolution 1929 (2010). For example, the report describes the interdiction and seizure by South Korean authorities in December 2010 of air cargo containing rolls of phosphor bronze wire mesh that could contribute to Iran's nuclear programme, and the seizure at the port of Singapore in September 2010 of a shipment of aluminium powder that could be used for solid propellant in a missile. The UN report does not mention the role of the PSI in seizing any of this cargo. However, the fact that the states conducting the interdiction operations were PSI participants acting on unspecified intelligence information might suggest that their involvement in the PSI contributed to their success.<sup>103</sup>

The term 'PSI interdiction' is itself very problematic. On the one hand, according to the recent statements of officials from the US State Department, although PSI activities are focused on building capacity to

perform interdiction, the actual interdiction acts are not performed as part of the initiative and are 'beyond the scope of PSI'.<sup>104</sup> This mostly results from the fact that it is difficult to attribute successful interdiction operations to the PSI or distinguish whether a specific interdiction operation would have occurred in the absence of the PSI, because of other existing non-proliferation efforts and channels of intelligence sharing, diplomatic communication and active military cooperation between PSI participants. On the other hand, PSI interdiction could be broadly defined as every interdiction operation that involved a PSI participating state or 'one in which the participants made a conscious connection between the operation and the initiative to which they belonged'.<sup>105</sup>

Intrinsic problems related to defining PSI interdiction are exemplified by the interdiction of the German-owned vessel *BBC China* in early October 2003, which resulted in the seizure of nuclear centrifuge components supplied by the A.Q. Khan network and destined for Libya.<sup>106</sup> Officials from the administration of US President George W. Bush portrayed it as an example of PSI effectiveness. However, according to critics, the operation stemmed from other endeavours to disrupt the A.Q. Khan network that pre-dated the establishment of the PSI.

Nonetheless, whether a particular interdiction operation is a PSI operation or not may not be the most relevant issue. The role of the PSI is to enhance awareness, secure a commitment to counter proliferation and ensure interdiction operations are performed quickly, smoothly and as effectively as possible.

Even if it were possible to define what PSI interdiction means, numerical data on PSI interdiction operations would not constitute a sufficient basis on which to measure the PSI's effectiveness. On one hand, the increasing number of interdiction operations may simply result from an increase in proliferation activities. On the other hand, a decrease in the number could be a consequence of the PSI's success in deterring potential proliferators from sending shipments because of the prospect of interdiction or as a result of the denial of transport. It could also result from a decline in demand for proliferation-related equipment.<sup>107</sup>

<sup>99</sup> National Institute for Public Policy (note 8), p. 417.

<sup>100</sup> Rice, C., Secretary, Remarks on the Second Anniversary of the Proliferation Security Initiative, Washington, DC, 31 May 2005, <<http://merln.ndu.edu/archivepdf/wmd/State/46951.pdf>>.

<sup>101</sup> Joseph, R., Under Secretary for Arms Control and International Security, 'The global initiative to combat nuclear terrorism: a comprehensive approach to today's most serious national security threat', Washington, DC, 18 July 2006, <[http://www.usembassy.it/viewer/article.asp?article=/file2006\\_07/alia/a6071808.htm&plaintext=1](http://www.usembassy.it/viewer/article.asp?article=/file2006_07/alia/a6071808.htm&plaintext=1)>; and National Institute for Public Policy (note 8), p. 418.

<sup>102</sup> Joseph, R. G., Under Secretary for Arms Control and International Security, 'Broadening and deepening our Proliferation Security Initiative cooperation', Warsaw, Poland, 23 June 2006, <<http://2001-2009.state.gov/t/us/rm/68269.htm>>.

<sup>103</sup> United Nations (note 69), paras 65–76.

<sup>104</sup> US Government Accountability Office (note 82), p. 16.

<sup>105</sup> National Institute for Public Policy (note 8), p. 418.

<sup>106</sup> National Institute for Public Policy (note 8), p. 420.

<sup>107</sup> Lewis, J. and Maxon, P., 'The Proliferation Security Initiative', *Disarmament Forum*, no. 2 (2010), p. 38.

Because of the intrinsic difficulties of measuring the PSI's success in terms of the number of interdiction operations, the US government did not include that in its list of criteria for identifying the effectiveness of the PSI. The three criteria are: (a) the number of states that endorse the PSI, (b) the number and complexity of PSI exercises, and (c) the number of bilateral ship-boarding agreements.<sup>108</sup> However, these measures for evaluating the performance of the PSI are also problematic. For example, the number of states endorsing the PSI and the number of boarding agreements ignore the fact that it is not the number of PSI participants but the importance of particular states in fulfilling the PSI's objectives that matters the most. Also, the number and complexity of PSI exercises do not indicate to what extent these activities have enhanced and expanded the capacities of PSI participants to conduct interdiction operations.<sup>109</sup>

## V. CONCLUSIONS

The PSI was announced in May 2003 as a new tool aimed at supplementing other existing non-proliferation regimes. Its participants set themselves a demanding, practical goal of strengthening their national and collaborative capacities to interdict illicit WMD proliferation-related material in transit by sea, air or land. This ambitious goal not only posed operational difficulties, but its realization had to be tailored in a way that was consistent with national and international laws and frameworks. Some states expressed concerns that PSI operations may violate international law, particularly the right of innocent passage through their territorial sea as interpreted by those states. Another challenge for the PSI was that its institutional framework was new. It was first created as an 'activity', not an organization. Despite the lack of means by which to objectively assess how effective the PSI has been in fulfilling its main objective—interdicting illegal WMD proliferation-related material—the PSI endeavour can be described as a qualified success.

<sup>108</sup> US Government Accountability Office (GAO), *U.S. Agencies have taken some steps, but more effort is needed to strengthen and expand the Proliferation Security Initiative*, GAO-09-43 (GAO: Washington, DC, 10 Nov. 2008), p. 18 and p. 4 in Appendix VI; and US Department of State, *PSI Early Assessment*, Hearing before the Subcommittee on International Terrorism and Nonproliferation of the Committee on International Relations, US House of Representatives (Government Printing Office: Washington, DC, 9 June 2005), p. 5.

<sup>109</sup> See US Government Accountability Office (note 82), pp. 16–17.

During its almost nine years of operation, the PSI has gained the support of 98 states, as well as international organizations and institutions. The PSI's work has also resulted in meetings, exercises and workshops that have provided opportunities for establishing strong links between participating states and improving the interdiction capabilities of PSI participants. PSI exercises have evolved over time and have incorporated more complicated scenarios, often based on real cases involving maritime, air or land interdiction operations. Because of the PSI, participating states have become more confident about the operational relationships between their own agencies and those of foreign governments, their legal powers, their decision making and their operational capability to try to stop suspected WMD-related cargoes. Overall, these states have gained better knowledge about what to do if they suspect or find out about illegal WMD material being transported by ship, plane or land.

Although some states raised concerns that the PSI may lead to actions that violate international law, so far there have not been any reports corroborating such concerns. The PSI has not actually provided any new legal authority, but it has contributed to strengthening international law and frameworks related to prohibiting illicit trade in WMD-related components. PSI partners have played an instrumental role in the adoption of international conventions criminalizing the transfer of WMD-related material to and from state and non-state actors of proliferation concern, in particular the 2005 SUA Protocol and the Beijing Convention. PSI partners can also claim that their participation in the PSI has contributed to the adoption of UN Security Council resolutions, in particular Resolution 1540. Further, the PSI has required all participating states to analyse and improve their national laws in order to make illicit WMD-related trade more difficult.

The rationale for the PSI's existence has not faded: the PSI remains a necessary tool for practical cooperation on the interdiction of illicit WMD-related transfers. It can also still play a useful role in supplementing other existing instruments to strengthen national capacities to enforce international law, such as UN Security Council Resolution 1540.

Nevertheless, despite these achievements, there have also been some failures during the PSI's almost decade-long operation. PSI participants still have many challenges to tackle and many questions to answer that have not been dealt with in previous years.

PSI participants, especially OEG members, have not set themselves clear strategic objectives related to PSI-defined criteria against which the initiative's effectiveness can be measured. Additional effort is needed in this area.

The number of states participating in the PSI has not reached its upper limit. There is still a need to increase the number of countries formally endorsing the PSI, especially states with roles crucial to international commerce, political influence or geographical location, such as Brazil, China, Egypt, India, Indonesia, Malaysia, Pakistan and South Africa. To realize this expansion, PSI participants should strengthen their outreach activities. Additionally, they should find means to improve the interdiction capacities of states that for various reasons will not formally endorse PSI principles.

The international legal frameworks related to non-proliferation could be further improved. The 2005 SUA Protocol and the Beijing Convention need wide ratification in order to achieve universal criminalization of the transport of illicit proliferation-related cargo by sea or air. Not only the OEG states but also other PSI participants should serve as examples in this process and ratify these conventions. So far, most of them have failed to do so.

A number of activities within the PSI framework appear to have steadily declined. Although OEG meetings take place regularly, since 2008 there has not been a political-level meeting of all PSI participants that could provide a strong signal of the states' continuous commitment to the PSI. The restoration of regular political-level meetings among all PSI participants could strengthen and maintain political support for the initiative.

Almost a decade since the announcement of the PSI, OEG members have not created a regular mechanism for conducting exercises, workshops and outreach activities. The events organized so far have been rather ad hoc and their weakness has been that participants seem to have been more focused on gaining the endorsement of a growing number of states than on practical results. The greatest beneficiaries of the PSI's capacity-building activities seem to have been OEG members; there have been no long-term programmes for other PSI participants to enhance their interdiction capabilities and procedures. Outreach efforts aimed at public opinion has also been very limited and there remains little information about the success of the PSI and its operation.

A further failure of the PSI has been the insufficient engagement of civilian law enforcement officers in its exercises. Although their involvement increased as the programme of exercises evolved, it did not change the fact that the majority of PSI exercises have retained a significant military involvement. This creates the perception that PSI does not provide states with the tools that they need the most. Focusing exercises on scenarios for interdicting dual-use goods in civilian trade by civilian law enforcement authorities would better serve the PSI's objectives. In this context, organizing regular exercises with a strong law enforcement aspect could provide the PSI with significant added value. It would also enable the PSI to transform itself into a tighter network of law enforcement officers that would be more appropriate to proliferation challenges. Addressing the deficiencies of the PSI would enable participants to avoid a scenario in which the initiative gradually fades away because it is not providing sufficient tools to meet these challenges.

The realization of the CCP effort provides OEG members with an opportunity to reinvigorate the PSI and ensure its enduring role in the global non-proliferation architecture. The implementation of CCPs could address the problem of a lack of long-term, results-oriented capacity-building programmes. The development of CCP tools could assist non-OEG PSI partners in interdiction operations and exercises and could strengthen the PSI's focus on cooperation among civilian law enforcement officers. These tools could also be used to strengthen the capacities of states that do not participate in the PSI.

Adopting a more structured mechanism for coordination activities among PSI partners could also be beneficial to the sustainability of PSI activities. Such a mechanism could be created by retaining the PSI's activity-oriented character and avoiding the transformation of the PSI into an organization. The establishment of rotating chairmanship of the OEG could serve such a purpose.

There is also a need to extend the ownership of the PSI to other participating states. Despite years of operation, the PSI is still perceived as a USA-driven regime consisting of like-minded states. One of the EU member states taking on the role of PSI Focal Point could contribute to changing such perception.

It is still uncertain whether, after many years of fruitless deliberations, the question of the EU's status in the PSI can be resolved. However, the formal status of the EU within the PSI should be treated as an issue



of secondary importance. Rather than concentrating on obtaining formal status, the EU should first engage in discussion with OEG members, particularly those that are EU members, about practical activities that could facilitate the successful realization of common EU and PSI goals. Through concrete activities and enhancing its engagement with the PSI, the EU could contribute to the strengthening and long-term sustainability of the initiative, which corresponds to the EU's interest in maintaining an efficient non-proliferation architecture. This could be done in various ways.

First, it is clear that enhancing common standards is an area in which the EU could most substantially contribute to the realization of the PSI's objectives. Consequently, the EU together with the EU member states that are members of the OEG should explore whether new EU regulations could be introduced or existing regulations could be modified to better support PSI objectives. EU institutions together with all EU members could also work to establish common EU interpretations of international legal norms related to interdiction operations. In this context, the EU could contribute to existing efforts towards the realization of the CCP effort.

Second, EU institutions could support EU member states that participate in the PSI in organizing a regular interdiction exercise to demonstrate and test in practice how EU capacities and legal frameworks could facilitate rapid and effective interdiction operations. Such an exercise could fill the gap in regular PSI-related live exercises in Europe and provide direct evidence that the EU could add real value to the initiative beyond its regulatory powers. That could potentially persuade all OEG members that the EU deserves official participation in OEG meetings. More importantly, such an exercise could indicate whether, and how, the EU could enhance existing capabilities and whether additional capacities need to be established to further strengthen cooperation between EU members in conducting interdiction operations.

Third, the EU in cooperation with EU PSI states could explore the possibilities of long-term capacity-building programmes for non-EU PSI states within the CCP framework. It could explore ways of engaging and supporting non-EU PSI participants in further developing their own interdiction capabilities and practices. The EU could add significant value in the case of export control regulations in particular.

Fourth, and last, the EU together with EU OEG members could contribute to efforts to design criteria

against which the effectiveness of the PSI can be judged. These criteria would then provide guidelines for forthcoming years that would indicate whether the PSI is evolving in a direction desirable by EU member states and would help to shape the PSI's further development.

## ABBREVIATIONS

CCP	Critical capabilities and practices
OEG	Operational Experts Group
PSI	Proliferation Security Initiative
ROEG	Regional Operational Experts Group
SOP	Statement of Interdiction Principles
SUA	Suppression of Unlawful Acts
UNCLOS	United Nations Convention on the Law of the Sea
WMD	Weapon(s) of mass destruction

## A EUROPEAN NETWORK

In July 2010 the Council of the European Union decided to create a network bringing together foreign policy institutions and research centres from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems.

## STRUCTURE

The EU Non-Proliferation Consortium is managed jointly by four institutes entrusted with the project, in close cooperation with the representative of the High Representative of the Union for Foreign Affairs and Security Policy. The four institutes are the Fondation pour la recherche stratégique (FRS) in Paris, the Peace Research Institute in Frankfurt (PRIF), the International Institute for Strategic Studies (IISS) in London, and Stockholm International Peace Research Institute (SIPRI). The Consortium began its work in January 2011 and forms the core of a wider network of European non-proliferation think tanks and research centres which will be closely associated with the activities of the Consortium.

## MISSION

The main aim of the network of independent non-proliferation think tanks is to encourage discussion of measures to combat the proliferation of weapons of mass destruction and their delivery systems within civil society, particularly among experts, researchers and academics. The scope of activities shall also cover issues related to conventional weapons. The fruits of the network discussions can be submitted in the form of reports and recommendations to the responsible officials within the European Union.

It is expected that this network will support EU action to counter proliferation. To that end, the network can also establish cooperation with specialized institutions and research centres in third countries, in particular in those with which the EU is conducting specific non-proliferation dialogues.

<http://www.nonproliferation.eu>



## FOUNDATION FOR STRATEGIC RESEARCH

FRS is an independent research centre and the leading French think tank on defence and security issues. Its team of experts in a variety of fields contributes to the strategic debate in France and abroad, and provides unique expertise across the board of defence and security studies.

<http://www.frstrategie.org>



## PEACE RESEARCH INSTITUTE IN FRANKFURT

PRIF is the largest as well as the oldest peace research institute in Germany. PRIF's work is directed towards carrying out research on peace and conflict, with a special emphasis on issues of arms control, non-proliferation and disarmament.

<http://www.hsfk.de>



## INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES

IISS is an independent centre for research, information and debate on the problems of conflict, however caused, that have, or potentially have, an important military content. It aims to provide the best possible analysis on strategic trends and to facilitate contacts.

<http://www.iiss.org/>



## STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE

SIPRI is an independent international institute dedicated to research into conflict, armaments, arms control and disarmament. Established in 1966, SIPRI provides data, analysis and recommendations, based on open sources, to policymakers, researchers, media and the interested public.

<http://www.sipri.org/>