

## PROLIFERATION SECURITY INITIATIVE

### I. The Issue

#### The Initiative

The Proliferation Security Initiative (PSI) is an international alliance aimed at interdicting “the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern.”<sup>1</sup> PSI participants will identify the countries or other entities “of proliferation concern” based on their “(1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers ... of WMD, their delivery systems, or related materials.”<sup>2</sup>

In addition to interdiction and related efforts, the PSI participants agreed to “[a]dopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity.”<sup>3</sup>

First announced by President Bush on May 31, 2003, in Poland,<sup>4</sup> the PSI has eleven members: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. Some have viewed the PSI as a response to U.S. frustration over its having urged Spain to interdict a ship carrying 15 Scud missiles from North Korea to Yemen and then, after determining that it lacked the legal authority to detain the ship, allowing it to proceed.<sup>5</sup> It also plays a role in the U.S. effort to put economic pressure on North Korea.

At the PSI meeting in Paris, September 3-4, 2003, the members agreed to conduct a series of ten sea, air, and land interdiction training exercises.<sup>6</sup> Four countries participated in the first exercise, in the Coral Sea, September 12-14.

#### Legal Issues

The PSI countries are concerned as to the circumstances in which they might legally be justified in interdicting a WMD or missile shipment and interested in clarifying the relevant legal bases for action. Indeed, their first order of business was to assess their own authorities and export control regimes in the context of intercepting suspect cargoes within their own territorial waters and land and air space.<sup>7</sup> This is consistent with paragraph 3 of the PSI Interdiction Principles, in which the parties committed to “[r]eview and work to strengthen their relevant national legal authorities ... and work to strengthen when necessary relevant international laws and frameworks ....” However, the United States seems inclined to a more aggressive approach. Under Secretary of State

John Bolton was quoted as asserting in July 2003 that the United States is “prepared to undertake interdictions right now” and that “[t]here is broad agreement within the group that we have that authority.”<sup>8</sup> British diplomats were said to disagree.<sup>9</sup>

According to Under Secretary Bolton, at a December 2003 “operational meeting,” PSI participants’ “legal experts will analyze their authorities against real world scenarios and examine any gaps in authorities that can be filled either through national legislation or policy or international action.”<sup>10</sup>

In this connection, it is worth noting that in both places in which the Statement of Interdiction Principles commits the parties to taking some action to interdict a shipment, that commitment is qualified by the phrase “consistent with ... international law and frameworks.”<sup>11</sup>

Indeed, significant legal issues do exist for the PSI under international law and the Law of the Sea Convention (LSC)<sup>12</sup> with respect to the interception of shipping either on the high seas or in territorial waters straits. On the high seas (generally 12 nautical miles or more off shore), ships under a nation’s flag are subject to the jurisdiction of only their flag state and generally may not be boarded by ships not under the flag of that state. In territorial waters or straits, ships have the right of “innocent passage” or “transit passage”; and carrying WMD or missiles as cargo currently does not, in and of itself, render a ship or plane beyond the protections of the doctrines of innocent or transit passage.

On the other hand, Article 88 of the LSC reserves the high seas for “for peaceful purposes.” This raises the question of whether a shipment of WMD or missiles might legitimately be deemed not peaceful and thus subject to being seized. Also, Article 51 of the UN Charter allows nations “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.” Under Secretary of State Bolton has been quoted as asserting a “general right of self defense” to interdict a vessel believed to be carrying WMD material.<sup>13</sup>

On September 5, 2003, in a statement released at the conclusion of a PSI meeting in Paris, the PSI participants asserted “that the PSI is consistent with and a step in the implementation of the UN Security Council Presidential statement of January 31, 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need to prevent proliferation.”<sup>14</sup> At this point, it is not clear whether the PSI intends to use that Security Council statement as the basis either for an expansive interpretation of international law or for any particular action. Indeed, it is not clear whether or under what circumstances the PSI will actually interdict a WMD or missile shipment.

It has been suggested that a UN Security Council resolution would be the surest way to clarify or provide the authority to interdict WMD and materials and missile shipments in specific circumstances or to and from specific countries. Two Brookings Institution nonproliferation experts, Michael Levi and Michael O’Hanlon, made this argument in a July 11, 2003, issue of the *Financial Times*. They noted that, for example, the United States could call on the UN Security Council to declare North Korean plutonium illegal on the basis that it was acquired under false pretenses; and the ensuing resolution could help establish a low threshold for interdiction and searches aimed at intercepting such illegal material.<sup>15</sup> Levi and O’Hanlon stated that the United States could also argue that

countries with highly oppressive internal polices or sponsorship of terrorism merited special concern. The Security Council could then pass a resolution establishing that by behaving illegally in either way, a state had lost its sovereign right to protection, thus providing automatic authority for cargo searches.

However, the difficulty of obtaining any such resolutions should not be underestimated. China and Russia—two Security Council members who have veto power and are not PSI members—might or might not support a resolution authorizing interdiction.<sup>16</sup> Their positions might depend on whether they view the resolution as helping or hindering the resolution of the North Korean nuclear crisis or as threatening to themselves if internal oppression were the basis.

Nevertheless, the effort to seek a more broadly based and legally sustainable basis for interdictions of WMD shipments could improve the way in which countries of the world other than the 11 PSI members view this initiative.

### Practical Considerations

In addition to the legal questions facing the PSI in its efforts to intercept WMD and missile shipments, there is also an array of practical considerations that could impair its success.

Until the PSI membership increases or the Security Council adopts a resolution authorizing the interdiction of certain WMD and missile shipments, the ability to prevent North Korean trade in such items seems like a very long shot. First, the PSI lacks the membership of many countries whose ports, territorial waters, and straits would be involved in the shipping routes likely to be involved—China, South Korea, and all south and southeast Asian and Middle East countries.<sup>17</sup> Thus, if the PSI wished to interdict a shipment in the waters of one of these countries it would have to seek its cooperation and perhaps be required to show a legal basis for the interdiction.

Also, any efforts to prevent shipments of bomb-grade nuclear materials would find enormous technical challenges in detecting grapefruit- or softball-sized quantities, shielded and buried in the hulls of freighters or in intercepting materials on board a jet liner. However, North Korean imports of the machinery for the production of nuclear materials and weapons and exports of missiles would be much easier to detect in a visual search of cargo.<sup>18</sup>

Moreover, the possible reaction of North Korea to interdiction of a suspected shipment of questionable cargo to or from it must also be weighed in the balance. On June 17, 2003, its state-run media warned that a United States-led blockade could start an “all-out” war and accused the United States of “laying an international siege to the North and putting a blockade against it as a premeditated scheme to start a new war on the Korean peninsula.”<sup>19</sup> Statements like this are very hard to take at face value and are often dismissed as bluster. Nevertheless, interdiction could lead to an escalation of tensions and create an atmosphere in which the risk of conflict resulting from accident or miscalculation increases.

On the other hand, assume the United States has reliable intelligence that a ship has left North Korea with a nuclear weapon or bomb-grade nuclear materials on board. Few would argue that an American president should allow the ship to proceed to a destination

where the weapon or materials might be delivered to a terrorist organization or rogue state.

## **APPENDIX A**

### **STATEMENT OF INTERDICTION PRINCIPLES<sup>20</sup>**

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through:
  - (a) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or
  - (b) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
  - (a) Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
  - (b) At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

- (c) To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- (d) To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
- (e) At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
- (f) If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

## **II. Recent Legislation**

- N/A

## **III. Obstacles**

- Although more nations may soon be invited to the join,<sup>21</sup> the PSI currently has only 11 members, with only Japan and Australia in the Asia-Western Pacific region and no members in south Asia or the Middle East.
- Missile and WMD shipments do not, in and of themselves, subject a ship to interdiction.
- Small-size quantities of weapons-grade nuclear materials, shielded and hidden in the hull of an ocean-going freighter, would be extremely difficult to detect.
- A UN Security Council resolution or resolutions could provide new grounds for intercepting North Korean exports or imports of WMD or the machinery for producing WMD, or missile exports, but obtaining such resolutions may be difficult.
- The North Korean reaction to the seizure of an inbound or outbound shipment is difficult to calculate.
- Air shipments of nuclear materials from North Korea to the Middle East may be very difficult to obtain intelligence on and, unless China were actively cooperating, to intercept.

## **IV. Q & A**

**Q: Who are the members of the PSI and what is PSI's objective? Is it an organ of the UN?**

**A:** The eleven members are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.

According to the White House, their objective is to interdict shipments of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern.”<sup>22</sup> PSI participants will identify the countries or other entities “of proliferation concern” based on their “(1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers ... of WMD, their delivery systems, or related materials.”<sup>23</sup>

The PSI is not a part of or connected to the UN.

**Q: Isn't the PSI aimed at stopping North Korea's trade in drugs, counterfeit money, and other illicit items?**

**A:** No. Although Australia and Japan have taken actions against the illegal North Korean drug trade,<sup>24</sup> the PSI is aimed solely at WMD and related items.

**Q: How will the PSI determine that a state or other entity is “of proliferation concern” and what effect will that determination have under international law?**

**A:** The PSI has not specified how it will make that determination nor has it specified whether or how it would have any significance under international law. Presumably, any such determinations will simply serve to focus the efforts of the PSI members, and they will then take any actions based on principles of international law independent of that determination.

**Q: Will more nations be joining the PSI?**

**A:** On September 4, 2003, Under Secretary of State John Bolton said, “Many countries around the world have indicated an interest in participating in PSI efforts. The United States welcomes this support and looks forward to explaining the PSI more fully and working with such countries to build a better and more robust interdiction initiative.”<sup>25</sup> As of October 20, 2003, no members in addition to the original 11 had joined.

**Q: What are the grounds for interdicting a shipment of WMD or materials, or missiles?**

**A:** As noted in the foregoing paper under the heading “Legal Issues,” the legality depends on a variety of factors. For a discussion specifically of the PSI and these issues, see Benjamin Friedman, “The Proliferation Initiative: The Legal Challenge,” on the Bipartisan Security website, at:

[http://www.gsinsitute.org/docs/09\\_03\\_PSI\\_brief.pdf](http://www.gsinsitute.org/docs/09_03_PSI_brief.pdf). A brief commentary on them also appears in “The Proliferation Security Initiative: An interdiction strategy,” *IISS Strategic Comments*, vol. 9, issue 6, August 2003, accessed at: <http://www.iiss.org/showfreepdfs.php?scID=282&type=iiss.pdf>.

**V. Talking Points**

- N/A

**VI. Factoids**

- N/A

## VII. Applicable Treaties, Legislation, and Other International Agreements

- United Nations Convention on the Law of the Sea, accessed at: [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf).
- Proliferation Security Initiative, Statement of Interdiction Principles (reprinted in the appendix, above).

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<sup>1</sup> The White House, Office of the Press Secretary, “Fact Sheet: Proliferation Security Initiative: Statement of Interdiction Principles,” September 4, 2003, accessed at: <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>.

<sup>2</sup> Interdiction Principles for the Proliferation Security Initiative, reprinted in the appendix to the paper and accessed at: <http://www.france.diplomatie.fr/actu/article.gb.asp?ART=36866>.

<sup>3</sup> *Ibid.*

<sup>4</sup> Remarks by the President to the Polish people, accessed at: <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

The President, in his remarks, referred to the Proliferation Security Initiative as a “partnership.” However, in December 2, 2003, remarks, Under Secretary of State for Arms Control and International Security John R. Bolton made a point of referring to the Proliferation Security Initiative as an “‘activity’ rather than an ‘organization.’” It is not clear to the author of this paper what the nature of this distinction might be. Under Secretary Bolton’s remarks can be accessed at: <http://www.state.gov/t/us/rm/26786.htm>.

<sup>5</sup> Rebecca Weiner, “Proliferation Security to Stem Flow of WMD Material,” Research Story of the Week, Center for Nonproliferation Studies (July 16, 2003), accessed at: <http://cns.miis.edu/pubs/week/030716.htm>.

<sup>6</sup> Under Secretary for Arms Control and International Security Affairs John R. Bolton, remarks at Proliferation Security Initiative Meeting, Paris, September 4, 2003, accessed at: <http://www.state.gov/t/us/rm/23801.htm>.

<sup>7</sup> *Ibid.* As the Australian Foreign Minister Alexander Downer, stated July 10, 2003, at a PSI meeting in Brisbane, “We will need to consider how best we can use existing domestic and international laws to confront this threat. But we should also look at how domestic and international laws could be strengthened to support our efforts to safeguard international security.” The statement was accessed at: <http://www.acronym.org.uk/docs/0307/doc04.htm>.

<sup>8</sup> “International Response: British Diplomats Dispute U.S. Authority to Intercept Suspect Shipments,” Global Security Newswire, July 11, 2003, accessed at: [http://www.nti.org/d\\_newswire/issues/2003/7/11/2s.html](http://www.nti.org/d_newswire/issues/2003/7/11/2s.html). However, another publication reported that U.S. officials characterized PSI as “merely an attempt to harmonise and coordinate export control enforcements.” “The Proliferation Security Initiative: An interdiction strategy,” *IJSS Strategic Comments*, vol. 9, issue 6, August 2003, accessed at:

<http://www.iiss.org/showfreepdfs.php?scID=282&type=iiss.pdf>. That same article noted that U.S. officials said that the “group is focusing on the ‘creative’ use of existing national laws.”

<sup>9</sup> *Ibid.*

<sup>10</sup> The Under Secretary’s remarks can be accessed at: <http://www.state.gov/t/us/rm/26786.htm>.

<sup>11</sup> See the first sentence and paragraph 4 of the Interdiction Principles, note 2.

<sup>12</sup> United Nations Convention on the Law of the Sea, accessed at <http://www.un.org/Depts/los/index.htm>. The United States has not yet ratified the treaty. However, much of it is viewed as codifying international law on the subject. For a detailed analysis of the issues surrounding the treaty and the U.S. position on it, see Marjorie Ann Browne, “The Law of the Sea Convention and U.S. Policy,” Congressional Research Service Issue Brief for Congress (IB 95010), February 14, 2001, accessed at: [http://www.ncseonline.org/NLE/CRSreports/Marine/mar-16.cfm?&CFID=10603768&CFTOKEN=20206145#\\_1\\_25](http://www.ncseonline.org/NLE/CRSreports/Marine/mar-16.cfm?&CFID=10603768&CFTOKEN=20206145#_1_25).

<sup>13</sup> Rebecca Weiner, *op. cit.*, note 5.

<sup>14</sup> Proliferation Security Initiative, Press statement released under the responsibility of the chair (France), September 5, 2003, accessed at: <http://www.france.diplomatie.fr/actu/articletxt.gb.asp?ART=36865>. “Presidential Statements” are issued when the Security Council members are represented at the head-of-state level.

<sup>15</sup> Michael Levi and Michael O’Hanlon, “A Global Solution Is Needed for Illicit Weapons,” *Financial Times*, July 11, 2003, accessed at: <http://www.brook.edu/views/op-ed/ohanlon/20030711.htm>.

<sup>16</sup> China reportedly objects to the PSI itself. See Josh Maiyo and Theo Tamis, “War and terror on the high seas,” Radio Netherlands: World Hotspots, September 5, 2003, accessed at: <http://www.rnw.nl/hotspots/html/psi030905.html>. Russia and China sometimes see and act on different nuances with respect to North Korea than do the United States and Japan. At the recent Asia-Pacific Economic Conference in Bangkok, the United States and Japan wanted the conference to adopt a statement critical of North Korea’s nuclear program; China and Russia opposed doing so because they believed it might be counterproductive. Vasily Golovnin and Vladimir Solntsev, “Russia Against Separate Document on DPRK Nuclear Programme,” *Itar-Tass*,

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October 17, 2003, accessed at:

<http://www.ransac.org/Projects%20and%20Publications/News/Nuclear%20News/1020200314117PM.html>.

<sup>17</sup> Efforts to enroll such countries may be underway. See “The Proliferation Security Initiative: An interdiction strategy,” note 8.

<sup>18</sup> *Ibid.*

<sup>19</sup> “N. Korea: Blockade means war,” CNN.com, June 17, 2003, accessed at:

<http://www.cnn.com/2003/WORLD/asiapcf/east/06/17/nkorea/>.

<sup>20</sup> See note 2.

<sup>21</sup> “More nations invited to join WMD traffic crackdown,” *Reuters Foundation AlertNet*, October 14, 2003, accessed at: <http://www.alertnet.org/thenews/newsdesk/SYD278284.htm>.

<sup>22</sup> The White House, Office of the Press Secretary, *op. cit.*, note 1.

<sup>23</sup> Interdiction Principles for the Proliferation Security Initiative, reprinted in the appendix to this paper.

<sup>24</sup> In April 2003, Australian intelligence forces seized \$50 million worth of heroin that had been carried aboard a ship owned by North Korea, the Pong Su, also seized the ship in territorial waters off the east coast of Australia, and arrested 30 crew members, including a member of North Korea’s Workers Party. “N Korea accused over drugs haul,” BBC News, UK Edition, May 2, 2003, accessed at: <http://news.bbc.co.uk/1/hi/world/asia-pacific/2994849.stm>. In March, 2003, Japanese Defense Forces boarded a North Korean fishing boat inside Japan’s territorial waters and seized hundreds of pounds of methamphetamines. Charles R. Smith, “North Korean Heroin,” NewsMax.com, May 7, 2003, accessed at: <http://www.newsmax.com/archives/articles/2003/5/7/30830.shtml>. After Japan adopted a practice of making detailed inspections of North Korean ferries for health, safety, and other violations in order to discourage illicit shipments, North Korea suspended the ferry service. See Hans Greiemesel, “Japan Bars N. Korea Vessel From Leaving,” SunHerald.com, June 10, 2003, accessed at: [http://www.sunherald.com/mld/sunherald/news/breaking\\_news/6058055.htm](http://www.sunherald.com/mld/sunherald/news/breaking_news/6058055.htm).

<sup>25</sup> See note 6.