

The Proliferation Security Initiative: Dead in the water or steaming ahead?

Prospects for the 16–17 December 2003 PSI meeting in Washington

Andreas Persbo

Basic Notes – occasional papers on international security policy,
12 December 2003



British American Security
Information Council

Introduction

The eleven original participants of the Proliferation Security Initiative (PSI) have been trying to gather support for their new approach to weapons of mass destruction (WMD) proliferation. On 9-10 October 2003 participants of the PSI met at Lancaster House in London. The London meeting was the fourth meeting of the PSI. The group has previously met in Madrid (12 June 2003); Brisbane (9-10 July 2003); and Paris (3-4 September 2003). The United States will host the fifth meeting of the Proliferation Security Initiative (PSI) Operational Experts in Washington on 16-17 December 2003. This meeting will bring together military and law enforcement personnel from the original eleven participating countries, as well as Norway, Denmark, Singapore, and Canada.[1] The next plenary meeting of the PSI is going to be held in January 2004.

The PSI participants have released a joint statement on interdiction principles.[2] Claiming that the United States needs, "the option of interdicting shipments to ensure [that WMD] technology does not fall into the wrong hands".[3] John R. Bolton, US Under-Secretary for Arms Control and International Security, has stated that, "the PSI is legitimate and will ... be extremely efficient in its efforts against weapons of mass destruction".[4]

The response from the international community has been mixed. Canada, Denmark, Norway and Singapore have joined the initiative, bringing the total number of participating states up to 15, while the media have been reporting that as many as fifty states support it. However, some states have openly raised their concerns.

For example, in the view of the Chinese government, "... the legality of some of the PSI measures have some negative aspects that could result in bad consequences and have raised a lot of concerns. PSI member states should earnestly consider this ...".[5] On 3 December 2003, China released a White Paper on its non-proliferation policy and measures. It states that, "... the international non-proliferation mechanism must be continually improved and export controls of individual countries must be updated and strengthened, and on the other hand, proliferation issues must be settled through dialogue and international cooperation".[6] Stressing the need to consider the development of the initiative within a multinational framework, Mr. Jianchao, spokesperson for the Chinese government, previously argued, "... China has all along maintained that the resolution of non-proliferation issues should be done within the framework of international law and based on political and diplomatic methods to resolve proliferation concerns ... Any non-proliferation efforts should be beneficial to regional and international peace, security and stability".[7]

Mr Bolton has described the PSI as, "more dynamic, creative, and robust"[8] than, by implication, existing arms-control and non-proliferation regimes. He has also maintained that the interdiction efforts would be, "grounded in existing domestic and international authorities". It appears that the initiative parties have not, however, fully exchanged information on what they believe international authorities permit. A draft boarding agreement has been circulated among the initiative participants, but has not been formerly accepted since there still are unsolved questions pertaining to its conformity to international law. Mr. Bolton has said that the "... national legal authorities of each participant will allow us to act together in a flexible manner, ensuring actions are taken by participants with the most robust authorities in any given case. By coordinating our efforts with other countries, we draw upon an enhanced set of authorities for interdiction".[9]

Thus, each participating country will conduct interdictions according to its national authorisation for the time being. For now, the interdiction framework will not be consensually agreed, but rather a 'coordinated', loose set of agreements. This would make the PSI appear multilateral, when it, in essence, is unilateral.

Lessons learned and future outlooks

The objective of the initiative is to, "stop the flow of [WMD items] to and from states and non-state actors of proliferation concern".[10] The participants already have their own view of which states are the targets of the initiative. Mr Bolton has held that it, "...was never contemplated as a blockade

of any place. We are obviously worried about some places more than others as proliferants or would-be proliferants. In fact in Brisbane, at the meeting there, the 11 PSI participants said that North Korea and Iran were two states of particular concern".[11]

Mr Bolton stated that, "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" at the December 2003 Operational Meeting of the PSI.[12] When it comes to the participant's territorial waters, Mr Bolton said, "... we can find a variety of ways to interdict illegal shipments when the vessels carrying them come to port, given that sovereign power is at its greatest in national waters".[13]

The sovereignty of a state can be said to increase as a foreign ship draws closer to its coast. The coastal state has limited criminal jurisdiction over ships passing through its waters. By virtue of article 27 of the United Nations Convention on the Law of the Sea (UNCLOS),[14] the coastal state may conduct an investigation in connection with a crime committed on board the ship during its passage if the consequences of the crime extend to the coastal state; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

For example, in 1999 India seized a shipment of North Korean missile components en route to Pakistan. The ship was not interdicted but seized when it had docked at an Indian port on the West coast.[15] The *Ku Wol San* had begun offloading sugar and when Indian port officials boarded the ship on 25 June 1999, they found that it was also carrying missile production blueprints, drawings and instruction manuals, in addition to a sizeable shipment of missile components and production materials.[16] On 17 September the captain and chief officer were allowed to return to the ship after an Indian magistrate said that no charges would be pressed. No reason was given for the decision not to prosecute.[17] The ship was later released on a sovereign guarantee.[18] No state, except North Korea, raised objections to the way the Indian authorities handled the incident.

On 23 June 2003 Greek forces interdicted the *Baltic Sky* in its territorial waters.[19] About 680 tonnes of explosives and 8,000 detonators were discovered on board. The ship was steaming towards Sudan and it later turned out that the recipient was a company with a post office box address. The cargo ship had been sailing under a flag of convenience from Comoros, an African country.[20] Later, Mr. Essam Bakry Al-Khalifa, director of the recipient company, insisted that the explosives were for routine projects such as road construction, cement and oil production, and telecommunications.[21] The captain and crew were put in remand by a Greek court pending full investigation. This sparked a fierce exchange of views between Sudan and Greece, but other than that, no state raised objections to the way the Greek authorities handled the incident.

International law provides that if a ship has entered port, it is within the internal waters of the coastal state and thus, provided that the ship doesn't enjoy state immunity, subject to the coastal state's criminal and customs laws. Thereafter, the state can make arrests or conduct investigations in accordance with its own criminal or customs legislation. However, according to widely accepted practice, the exercise of the power of coercion is not generally applied to foreign vessels in internal waters except with regard to acts, committed on vessels, likely to disturb public order.[22] That same principle applies if the ship has left the coastal states internal waters and is steaming for the high seas.

Generally, PSI participants may find that the UNCLOS restricts the coastal states options to enforce its laws on the high seas. Mr Bolton has said that: "It is not the case that all of the interdictions will take place in international waters or international airspace".[23] But he has nevertheless maintained that states, "... may, under well-accepted principles of customary international usage, be boarded by any navy if they do not fly colors or show proper identification".[24]

On 9 December 2002 the *Sosan*, a Cambodian registered ship, was intercepted in the Arabian Gulf by a combined Spanish and American naval force - it was not flying its flag. UNCLOS provides that any vessel sailing on the high seas is subject to the exclusive jurisdiction of the flag

state.[25] But the commander of a warship can decide to board if there, inter alia, is reasonable ground for suspecting that the ship is engaged in piracy or is without nationality.[26] Accordingly, in the case of the *Sosan*, there existed objective reasons for investigation and boarding since it was flying no flag proving its nationality.

Seizing of cargoes

Mr Bolton was vague on whether or not a boarding party may seize contraband it found, and said: "The question of what is permissible for seizure and what is not must be determined on a case-by-case basis".[27] In the case of the *Sosan*, the Spanish and American navies had to let the ship go after its identity had been established. A warship may send a boat under the command of an officer to the suspected ship to check its documents. If the suspicions remain after the documents have been checked, the warship may conduct further examinations on board the ship. These examinations 'must be carried out with all possible consideration' and if the suspicions prove to be unfounded, the ship boarded is entitled to redress. In the *Sosan* case, US grounds for confiscation were weak, which was confirmed by the White House on 11 December 2002, when Mr. Ari Fleischer stated that:

There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea. While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. And therefore, the merchant vessel is being released.[29]

Now, however, Mr Bolton has stated that: "Properly planned and executed, the interception of critical technologies can prevent hostile states and terrorists from acquiring these dangerous capabilities. At a minimum, interdiction can lengthen the time that proliferators will need to acquire new weapons capabilities, increase their cost, and demonstrate our resolve to combat proliferation"[30] (emphasis added). What he is saying, apparently, is that US naval power may be used to harass legitimate shipping by boarding the vessels, even if the cargo can't be confiscated. The Australian Foreign Secretary, Mr. Alexander Downer, has said that even though the "initiative sends a clear message that the world will not tolerate the illicit trade in these dangerous capabilities"[31] a boarding party would have to act within the constraints of international law. He foresaw that the greatest use of the PSI would be the sharing of naval intelligence.[32]

Recommendations

The movement of goods and personnel on the oceans is largely unregulated and free. Commercial freighters are capable of moving bulky and heavy equipment, such as missiles, as well as large quantities of explosives. It is also possible to hide smaller items of WMD supplies, such as nuclear materials, within a larger cargo. Therefore, proliferants are likely to use the seas to transport their goods.[33] However, the oceans are also an important lifeline of international trade and commerce, and any venture to restrict the free flow of goods should therefore be carefully implemented. Even though states do enjoy a high level of sovereignty over their territorial waters, they should consider that ships do enjoy the right of innocent passage through it. The PSI is by no means dead in the water, but in order to make it steam ahead, participants should at their forthcoming Washington Operational Meeting:

- Consider harmonization of their national regulations in respect to interdiction in their internal and territorial waters;
- Consider what limitations the freedom of navigation on the high seas place on the initiative;
- Emphasise the development of a consensually agreed interdiction framework, preferably in the form of a legally binding and publicly deposited document;
- Recommend to the Portugal plenary meeting scheduled in January 2004, that such an agreed interdiction framework should be in harmony with current international legal authorities, rather than being based on a reinterpretation of customary international law.

Notes

- [1] Daily Press Briefing, US Department of State, 3 December, 2003.
- [2] 'Proliferation Security Initiative (PSI): Statement of Interdiction Principles', 4 September 2003.
- [3] "'Legitimacy" in International Affairs: The American Perspective in Theory and Operation', Remarks to the Federalist Society, Washington, DC, 13 November, 2003.
- [4] Ibid.
- [5] 'China voices concern over WMD non-proliferation plans legality': in HiPakistan, 9 December 2003.
- [6] 'White paper on China's non-proliferation policy and measures': chapter 1, paragraph 2 in fine.
- [7] 'China voices concern over WMD non-proliferation plans legality': in HiPakistan, 9 December 2003.
- [8] See note 4 supra
- [9] 'Nuclear Weapons and Rogue States: Challenge and Response': Under Secretary Bolton's remarks to the Conference of the Institute for Foreign Policy Analysis, 2 December 2003.
- [10] 'Proliferation Security Initiative (PSI): Statement of Interdiction Principles', 4 September 2003.
- [11] 'The New Proliferation Security Initiative: an interview with John Bolton': Arms Control Today, December 2003.
- [12] 'Nuclear Weapons and Rogue States: Challenge and Response': Under Secretary Bolton's remarks to the Conference of the Institute for Foreign Policy Analysis, 2 December 2003.
- [13] See note 4 supra
- [14] U.N. Convention on the Law of the Sea, 1833 UNTS 3, 21 ILM 1261.
- [15] 'India and proliferation security': Raja Mohan, The Hindu, 6 October 2003.
- [16] CDISS Coverage, 23 July 1999.
- [17] CDISS Coverage, 29 September 1999.
- [18] 'India asks North Korea to pay for ship carrying missile parts', New Kerala, 7 December 2003.
- [19] 'Nato 'terror' tipoff on explosives ship sailing to Sudan', The Guardian, 24 June 2003.
- [20] 'Greece traces route of seized ship', CNN 24 June 2003.
- [21] 'Black ship' down', Al-Ahram Weekly On-line, Issue no 646, 10-16 July 2003.
- [22] 'The Distinction Between the Régime of the Territorial Sea and the Régime of Internal Waters', Institute de droit international (1957).
- [23] See note 4 supra.
- [24] Ibid.
- [25] UNCLOS Article 92.
- [26] UNCLOS Article 101.
- [27] See note 4 supra.
- [28] UNCLOS Article 101.
- [29] White House Press Briefing on 11 December 2002.
- [30] 'Nuclear Weapons and Rogue States: Challenge and Response': Under Secretary Bolton's remarks to the Conference of the Institute for Foreign Policy Analysis, 2 December 2003.
- [31] 'The myth of "little" Australia', address by Mr. Alexander Downer to the National Press Club on 26 November 2003.
- [32] 'Legal doubts over ship interceptions', Newscom, Australia.
- [33] See 'Al Qaeda's 'Navy' - How Much of a Threat?', Center for Defense Information, 20 August 2003.