

The Proliferation Security Initiative

Towards a new anti-proliferation consensus?

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Key Points

- The PSI is an American-led 17-country 'coalition of convenience' seeking to strengthen non-proliferation cooperation and to develop legal instruments to control weapons traffic on land, in the air and at sea.
- Each of the 17 participating states has agreed to a politically binding 'Statement of Interdiction Principles'; 60 additional countries are reported by the US State Department to have shown support for the initiative and its principles.
- With all the G-8 countries on board, the PSI is gaining momentum, with China seemingly next earmarked for participation.
- With the successful enlargement of the initiative, it becomes increasingly imperative for European countries and institutions to raise the issue of the governance of the PSI.
- A new UN Security Council resolution extending jurisdiction of states beyond territorial sea, appears to be the most comprehensive and feasible option for closing legal loopholes. Against US reluctance to engage on this option, European countries, especially the two European permanent members of the Security Council, together with Russia, could pull in this direction.
- The lack of plan to define and codify within the PSI a threshold of probable cause or a burden of proof for suspicions of weapons trafficking is another area of concern. A more assertive European group could turn this situation into an opportunity to engage with the United States and the international community on the development of a new framework that re-defines the idea of 'just war' or 'just intervention'.
- The effectiveness of the PSI in increasing the risk and costs of weapons trafficking has still to be demonstrated.

Introduction

Beyond differences in style, the US Presidential contest will certainly be remembered for the strong consensus between US leaders on the need for new, effective counter proliferation measures. The Proliferation Security Initiative is one of the post 11-September measures that has contributed to shift the security paradigm, and which was supported by both Presidential candidates. In this context, European governments are faced more than ever with the challenge of developing a more comprehensive and pro-active response to new counter-proliferation measures.

Following the failed interception of a North Korean shipment of Scud missiles to Yemen, US President Bush announced the Proliferation Security Initiative (PSI) on May 31, 2003 in Krakow, Poland. The PSI is an American-led 'coalition of convenience' seeking to strengthen non-proliferation cooperation and to develop legal instruments to control weapons traffic on land, in the air and at sea. Beyond its operational purpose, the PSI is yet another US Administration effort to shift traditional anti-proliferation cooperation to more disaggregated grounds. However innovative, one must ask whether this initiative provides an effective and legitimate collective response to the re-defined threat of weapons proliferation? This note looks at the broader strategic implications of the PSI, particularly how it provides European countries with the opportunity to play a more active role in the definition of a new international security consensus.

Other BASIC analyses on the PSI include:

- Sailing Into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea, by Andreas Persbo and Ian Davis, BASIC Research Report 2004.2, June 2004;
- The Proliferation Security Initiative: Dead in the water or steaming ahead?, BASIC Notes, 12 December 2003; and
- Interdiction Under the Proliferation Security Initiative: Counter-Proliferation or Counter-Productive? BASIC Briefing, 6 October 2003

An attempt to re-define the global anti-proliferation consensus

From the 11 initial countries - Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the United States - the PSI became, in December 2003, a 16-country coalition with the addition of Singapore, Denmark, Norway, Canada and Turkey. Recently, Russia overcame its initial reservations and joined the initiative on the occasion of its first anniversary.[1] Each of the 17 participating states has agreed to a politically binding 'Statement of Interdiction Principles'. [2] 60 additional countries are reported by the US State Department to have shown support for the initiative and its principles, but their names have never been disclosed. In this time of soul-searching between both sides of the Atlantic, it is interesting to note that the PSI has certainly provided a pragmatic opportunity to mend the Iraq war crisis, both between European countries and with the United States.

With all the G-8 countries on board, the PSI is gaining momentum. China seems to be next on Washington's list of participants. Despite Beijing's strong criticisms towards the initiative, Undersecretary John Bolton recently suggested that China is more open to cooperation in weapons interdiction activities than it will publicly acknowledge. [3]

The PSI is firmly grounded in the new terrorism-weapons proliferation security orthodoxy that emerged in the United States in the aftermath of the 11 September 2001 attacks. In its 2002 National Strategy to Combat Weapons of Mass Destruction, the US Administration gave 'pre-emptive interdiction' pre-eminence over more traditional non-proliferation efforts. As explained by the leading promoter of the PSI himself, US Undersecretary of State for Arms Control John Bolton, the initiative seeks to be 'more dynamic, creative and robust' than, supposedly, traditional anti-proliferation frameworks.[4] This view, and in fact the very origin of the PSI, is not far from the belief held by some in Washington that, when it comes to new security threats, the United States does not need the collective legitimacy of the United Nations. On the other hand, the agreed principles suggest that the PSI is no more than a new enforcement mechanism to supplement existing non-proliferation regimes (Proliferation Security Initiative 2003: para 1). The reality, described by some as *à la carte* or selective multilateralism, lies somewhere in-between: on the one hand, it provides a flexible answer to the US view on the lack of effectiveness of the traditional arms control system, on the other, it addresses European states' commitment to multilateral approaches.[5] In this light, the PSI can be described as bridging American and European views on international security.

The PSI is 'an activity, not an organisation' or as 'an intergovernmental initiative with no secretariat' in the words of the last report of the House of Commons Foreign Affairs Committee. Some would say that this is the blueprint of true 'counter-proliferation' action, which is up-to-the-minute, practical and efficient. Others would say that this characterization raises serious questions regarding the governance of the PSI. For instance, how can the actions undertaken under the umbrella of the PSI, particularly the actions directly affecting the international law of the sea, be scrutinised by external players such as intergovernmental organisations, national parliaments and civil society? With the successful enlargement of the initiative, it becomes increasingly imperative for European countries and institutions to raise the issue of the governance of the PSI.

The issue of jurisdictions

By relying on the 'inventive use of national laws', the PSI applies the same principle of flexibility to law as it does to intergovernmental cooperation. John Bolton insists that the PSI's 'interdiction efforts are grounded in existing domestic and international authorities' (i.e. this does not necessarily mean consistent with said authorities), and therefore do not require to be spelled out in a new international framework or in a new UN resolution.[6] If multiple legal responses have been developed by the US Administration, the question remains on the exceptions of freedom of

navigation on the high-seas. The lawfulness of interdiction strategies 'becomes more complex and less certain the further a ship is away from the coast'.^[7] Under the UN Convention on the Law of the Sea countries are not forbidden to carry weapons of mass destruction and/or their related materials at sea (although nuclear powered vessels or vessels carrying radioactive materials have to carry proper documentation while exercising innocent passage). Unless the state concerned permits the interception of a ship on the high-seas or the grounding of an aircraft in international airspace (i.e. in accordance with the recent bilateral agreements between the United States and flag of convenience states like Panama, Liberia and the Marshall Islands), any interdiction would potentially amount to an act of belligerence. But what if the flag state of the intercepted cargoes is not bound by any specific arrangement?

In the case of the lack of clarity on the exceptions of flag-state jurisdiction, the PSI conflicts with international law. Thus far the US Administration has shown no eagerness to resolve the potential conflict although different avenues exist, including a new UN Security Council resolution extending jurisdiction of states beyond territorial sea, which appears to be the most comprehensive and feasible option available to date. Against the US reluctance to engage on this option, European countries, especially the two European permanent members of the Security Council, together with Russia, could pull in this direction. Such action will have the advantage of providing the PSI with a clear and full international mandate without compromising on its flexibility.

The extension of the doctrine of pre-emptive self-defence

The lack of plan to define and codify within the PSI a threshold of probable cause or a burden of proof for suspicions of weapons trafficking is another area of concern. By stretching the definition and application of traditional pre-emptive self-defence as outlined by Article 51 of the UN Charter, the US Administration could well set, through the PSI, a dangerous precedent. Indeed, based on this principle, any states could cut off shipments where it served their purposes and without having to comply with any clear international obligations. Despite its emphasis on the doctrine of pre-emptive self-defence, the Bush administration has not attempted to define the line separating legitimate prevention from unlawful intervention. And although the PSI purports to be based on national and international authorities, this US ambiguity illustrates an important flaw of the initiative. Former Canadian Foreign Minister Lloyd Axworthy recently pointed out about the PSI; 'Any time you set a precedent for unilateral intervention, you're giving a licence to everyone else to do the same'.^[8]

As Michael Byers has remarked, the ambiguity with regards to the status of pre-emptive action within the PSI could be part of a broader strategic effort by the US Administration to secure a de facto agreement on the Bush doctrine of self-defence from other coalition states.^[9] However, a more assertive European group could turn this situation into an opportunity to engage with the United States and the international community on the development of a new framework that re-defines the idea of 'just war' or 'just intervention'.

Prospects and questions for the future

As the 'most oversold yet promising proliferation instrument of recent years', the real effectiveness of the PSI in the long term remains an open question. One successful result has been reported so far: the interdiction in October 2003 of centrifuge parts bound for Libya. On the other hand, it is worth noting that the PSI has not played any apparent role in the dismantlement of the Kahn illegal network of weapons technology transfer.

Has the PSI not been primarily created by the US Administration to show the world, particularly weapon proliferators and sceptics, that Washington is acting effectively to curb weapons proliferation? ^[10] Beyond tough words and spectacular commando-like exercises, is the PSI capable, with its current shortcomings, of representing a sustainable effort to control weapons

proliferation worldwide? Would not the PSI benefit if more states were allowed to participate politically or practically? Participants have stressed that the PSI is not a closed club, and any state may participate, provided that they can contribute practically to the initiative. However, this practicality threshold effectively bars developing countries from the initiative, since their armed forces, coast guards and law enforcement agencies often are weak or in a state of flux.

The PSI is frequently presented by the US Administration as an innovative way to increase the risk and costs related to weapons trafficking. This assertion still requires further evidence, as other international enforcement strategies (in the area of drugs trafficking, for example) have failed to cut availability or increase the costs of drugs despite massive resources invested in interdiction measures. [11]

It also raises questions of how different new anti-proliferation instruments (such as the Container Security Initiative and the UN Security Council resolution 1540 (2004) on WMD in the hands of non-state actors, and the PSI) interact with each other. Again, European countries could take this issue forward and look at the coherence of new anti-proliferation instruments for maritime security in particular and global security in general.

During a private seminar on the PSI recently held in London, participants suggested that Europe and other coalition countries review the range of exceptions in maritime jurisdictions that the international community, shipping companies included, is willing to accept to fight weapons proliferation. This idea touches the broader debate on the price the international community is ready to pay to address the issue of weapons proliferation. European governments have traditionally put emphasis on multilateral means. For them, the PSI would be an opportunity to engage more actively with the United States on how renewed multilateralism can provide an effective and legitimate framework to address global security issues such as weapons proliferation.

Clearly, the PSI is well-intentioned in its purpose. It proposes to fill major gaps in the international arms-control regime, which have become salient in the post 9-11 climate. With the PSI, the problem lies in the way the participants intend to fill those gaps. Unilateral action has its merits, but however imperfect, the UN remains the most legitimate framework, since it is based on the essential principle that legitimate goals can only be attained through legitimate means. Under the condition that the PSI is given a clearer international mandate and brought closer to the UN framework (i.e. this is what Democrat presidential candidate John Kerry was committed to do if he had been elected), the initiative represents an important opportunity to bring the use of force and international legitimacy under a new collective security framework. Europe, alongside the United States, and within the UN, should use the PSI as an opportunity to show responsibility on weapons proliferation and global security, and on the most legitimate ways to meet these twin challenges.

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Endnotes

[1] Russia Joins Proliferation Security Initiative, Interfax, 31 May 2004, Moscow.

[2] The White House, Office of the Press Secretary (2003) Proliferation Security Initiative: Statement of Interdiction Principles, Fact Sheet, Washington, DC.

[3] Boese, Wade (2004) Russia Joins Proliferation Security Initiative, Arms Control Today, July/August 2004, Arms Control Association; China's State Council (2003) White paper on Non

Proliferation, 2003, China.

[4] Bolton, John (2003) Legitimacy in International Affairs: The American Perspective in Theory and Operation, Remarks to the Federalist Society, Washington, DC.

[5] Byers, Michael (2004) Policing the High Seas: The Proliferation Security Initiative, United States, p18; Persbo, Andreas and Davis, Ian (2004) Sailing into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea, BASIC Research Report 2004.2, London, p10

[6] Bolton, John (2003), Op.Cit.

[7] Persbo, Andreas and Davis, Ian (2004), Op Cit., p3.

[8] York, Geoffrey (2004) Canada part of ship-intercept plan, Globe and Mail, 16 February 2004, Canada.

[9] Byers, Michael (2004), Op.Cit., p20.

[10] This has been claimed by John Bolton. See Bolton, John (2004) An all-out war on proliferation, The Financial Times, 06 September 2004, United Kingdom.

[11] See, for example, The House of Commons, Home Affairs Committee (2002) The Government's Drug Policy: Is It Working?, Third Report of Session 2001-2002 London, p268.