As we approach the fourth anniversary of President George W. Bush’s May 31, 2003, launch of the Proliferation Security Initiative (PSI), it is appropriate and fair to compare rhetoric with reality, assess the effort’s effectiveness, and attempt to divine the way forward. The PSI was announced with considerable fanfare in Krakow, Poland, as an activity designed to prevent the spread of weapons of mass destruction (WMD), their delivery systems, and related materials from entering or leaving states “of proliferation concern.”

The focus was to be on interdiction because of the fear of rapid growth in states and groups pursuing WMD programs, worries of an expanding nexus between weapons of mass destruction and terrorism, and gaps in the existing nonproliferation architecture. It was thought that interdiction could fill the gaps by ensuring commitments are kept and by stopping proliferation-related exports from states whose activities fall outside existing source-based nonproliferation regimes. At the least, it was assumed that it would deter suppliers and customers and make proliferation more costly and difficult. Although interdiction was not novel to the PSI, the focus on this tool elevated consideration of its use at borders, in ports, in the air, and at sea.

The Bush administration clearly had high hopes and expectations for the PSI. On the first anniversary of its initiation, John Bolton, then undersecretary of state for arms control and international security, proclaimed that the PSI would evolve to the point where it “will have shut down the ability of persons, companies, or other entities to engage in this deadly trade.” He claimed that the PSI was “succeeding because it is based on practical actions that make maximum use of each country’s strengths to counter proliferation. The partnerships being forged, the contacts being established, the operational readiness being enhanced through [the] PSI are all helping to create a lasting basis for co-operative action against proliferation.” The administration made the PSI a key foreign policy and defense goal in 2005, and Congress approved $50 million to help states support the initiative.

On the PSI’s second anniversary, in May 2005, Secretary of State Condoleezza Rice claimed that the United States and its PSI partners had undertaken 11 successful intercepts since its inception, including the prevention of two WMD-related deliveries to North Korea as well as the transfer of ballistic missile-related and nuclear program-related materials to Iran. A 12th successful PSI interdiction was subsequently announced, although the details of these interdictions were left vague. These claims of success were repeated by Robert Joseph, Bolton’s replacement, who subsequently increased the figure to “more than 30.”

A few weeks after the PSI’s third anniversary, representatives of 65 states met anonymously behind closed doors in Krakow to discuss its political, policy, and legal issues. The chairman of the conference, Polish Ambassador Tadeusz Chomicki, reiterated the claims of the PSI’s success, including providing a “platform” for impeding traffic in weapons of mass destruction and related materials, enhancing numerical and geographic support, and improving national capacities to interdict shipments of proliferation concern. Detailed information to support these claims or even a list of countries attending the meeting were not made available.

To be sure, the PSI and other U.S.-driven supportive efforts have improved the awareness of the danger and urgency of the problem. The focus on interdiction also has no doubt constrained some trade in weapons of mass destruction, their delivery systems and related materials or at least forced...
rogue traders to change their tactics. PSI exercises have increased national capacities for coordinated detection and interdiction of suspect shipments. With the United States having successfully negotiated ship-boarding agreements with the countries whose flags fly on the bulk of the world’s ships, flag-state consent for boarding to search for weapons of mass destruction has become an expectation for and of many states (but not a legal obligation). Most importantly, the PSI has evolved and metamorphosed from a focus on interdiction of ships at sea to inspection in ports, to carriage of weapons of mass destruction by aircraft, and for the United States, to disruption of financial networks involved or supporting such trafficking.

However, much water has flowed under the stern since the PSI’s early heady days of full steam ahead. The PSI’s architects and principal champions, Bolton and Joseph, are no longer in the U.S. government. Moreover, the PSI has been criticized for lack of transparency and public accountability, stretching if not violating the principles of international law, impeding legal trade, weakening the UN system, being politically divisive, diluting other nonproliferation efforts, and for all these reasons, having limited effectiveness.

Rhetoric Versus Reality

Because PSI interdictions are cloaked in secrecy, an assessment of the PSI must rely on an examination of publicly available information regarding specific claims for the PSI made by the U.S. government and PSI advocates. In many cases, the reality does not appear to match the Bush administration’s rhetoric.

The Limits of Support

The Bush administration claims that nearly 80 countries support the PSI, but it is unclear what “support” means. The “concrete steps” for contribution to the PSI listed on the Department of State’s website are rather vague and conditional. First and foremost, participating states are encouraged to commit formally to and endorse publicly, if possible, the PSI’s Statement of Interdiction Principles. Follow-up steps are also replete with conditional language such as “indicate willingness,” “as appropriate,” “might contribute,” and “be willing to consider.”

Although the State Department has posted a list of some 81 nations that have participated in PSI meetings or exercises, it is not at all clear that “participation” equates with “support” as defined by the State Department. Indeed, apparently some participating states have not publicly (or even privately) endorsed the PSI Principles. Reasons given include not perceiving the PSI as a top security priority and wanting to avoid possible reprisals as well as domestic criticism for cooperating with the United States. This reluctance in itself indicates less than stalwart support. Further, given the flexibility of cooperation, many if not most of these 80 so-called supporters would not be obligated to interdict vessels or aircraft at the behest of the United States and might well decline doing so. Thus, in a pinch, such “support” could easily evaporate.

Weak Support in Asia

Although there is indeed a growing list of nations willing to associate themselves with different aspects of the PSI on a case-by-case basis, support in Asia, a major focus of proliferation concern, is weak. Despite considerable U.S. pressure to participate fully and publicly, key countries such as China, India, Indonesia, Malaysia, Pakistan, and South Korea remain outside the “coalition of the willing.” The cooperation of others, such as Japan and Russia, is lukewarm at best.

Unsupported Claims of Success

There is insufficient public information and no objective measure of PSI success or failure. Thus it is unclear how the much-touted 12 or even 30 PSI interdictions in three years compares to efforts prior to the initiative or if an increase in successful interdictions is due to an increase in proliferation activity. The reported interdictions could actually be considered a rather poor result compared to the Stanford Database estimate of an average of 65.5 nuclear trafficking incidents per year. Furthermore, the much-touted October 2003 interdiction of WMD-related materials bound for Libya was most likely not due to the PSI, contrary to assertions by some U.S. officials. Rather, it was the
result of an unrelated effort to get Libya to abandon its ambition to possess weapons of mass destruction.[9]

**Limited Support Under International Law**

PSI critics contend that the United States should seek specific backing for the initiative under international law, but its supporters say several measures already provide such a legal foundation. They include UN Security Council Resolutions 1540 and 1718, amendments to a relevant international maritime convention, a series of ship-boarding agreements, and the right to self-defense under the UN Charter.

**Resolution 1540**

In March 2004, the United States and the United Kingdom began an effort to obtain a UN Security Council resolution specifically authorizing states to interdict, board, and inspect any vessel or aircraft if there is reason to believe it is carrying weapons of mass destruction and/or their means of delivery. This was a difficult tacit admission by the United States that it needs a UN mandate to legitimize high-seas PSI interdictions. It was hoped that such a resolution would also prohibit UN member states from purchasing, receiving, assisting, or allowing the transfer of weapons of mass destruction from specified states.

The resolution that passed, Resolution 1540, was a much watered-down version of the original. For example, under a veto threat from China, the United States dropped a provision specifically authorizing the interdiction of vessels suspected of transporting weapons of mass destruction. China has questioned the efficiency and legality of the PSI as it involves interdictions, arguing that the best way to prevent WMD proliferation is through dialogue, not force.[10]

The resolution does not specifically mention the PSI and does little to strengthen its effectiveness against state-supported trafficking because it focuses on nonstate actors. Moreover, large gaps exist between obligations incurred under the resolution and the number of countries that have taken steps to meet those obligations, i.e., strengthening their domestic laws criminalizing the spread of weapons of mass destruction and enhancing their export and border controls.[11]

Finally, some states consider Resolution 1540 imbalanced because it does not address disarmament and it obliges governments to devote resources to problems they do not consider a high priority. In other words, they view Resolution 1540 as another example of U.S. hegemony and are therefore not likely to be robust in their application of it.

**Resolution 1718**

This resolution, drafted by the United States and Japan, prohibits the transfer to and from North Korea of nuclear, chemical, or biological weapons; their means of delivery (ballistic missiles); and related materials. This language is very similar to that used in the principles guiding PSI implementation. The United States clearly wanted to conflate the PSI with Resolution 1718 and thereby legitimize it. The resolution does require all UN member states to prevent the transfer of such material to North Korea on their flag vessels or aircraft, in theory a boost for the PSI. For compliance with these requirements, however, it merely “calls upon” states to take cooperative action to prevent illicit trafficking in such materials. It does not require them to do so.

Moreover, it clearly states that measures must be taken under UN Charter Chapter VII, Article 41, which specifically does not authorize the use of armed force. Such use of armed force would probably be necessary if a country operating under the PSI tried to interdict and board a vessel that refused to stop. Thus, the use of force in such a situation could still be interpreted as an act of war. Even Secretary of Defense Donald Rumsfeld in 2006 conceded that the PSI “has holes in it,” including the lack of a legal basis for interdiction of vessels and aircraft and confiscation of their cargo on the high seas.[12]

China was again the main obstacle to a more robust resolution. At China’s and Russia’s insistence, the authority to use military force was dropped from the draft resolution as was the requirement to
check all cargo bound to or from North Korea. Although China voted for the resolution, it immediately ruled out its participation in interdiction of vessels or aircraft on or over the high seas, saying that it was not required. South Korea also demurred. Japanese Prime Minister Shinzo Abe and leading hawks in his administration support such interdictions on the high seas or in Japanese territorial waters, even though there are many inconvenient legal obstacles to Japan's direct involvement. There have been several inspections of North Korean vessels in foreign ports under Security Resolution 1718, but there have been no reports of interdictions at sea.

Amendments to Maritime Convention

In October 2005, the International Maritime Organization approved U.S.-proposed and British-supported amendments to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. The convention already obligates states-parties to incorporate into their domestic laws the offenses it identifies. The amendments broadened the covered offenses to include the use of a vessel as an instrument of or platform for terrorist activity; the transport of weapons of mass destruction and “any equipment, materials or software or related technology that significantly contribute to [WMD] design, manufacturing or delivery;”[13] and the transport of a person who has committed a terrorist act. Direct consent from the flag state is still required to board, inspect, or take any other action.

Moreover, there must be evidence of knowledge of intent that the material in question will be used for terrorism. Finally and most importantly, the convention and its amendments apply only to states-parties, and most states of proliferation concern are not states-parties. Moreover, few countries have yet taken legislative action to turn the amendments into domestic law.

Ship-boarding Agreements

Some argue that bilateral agreements between the United States and other states make interdiction and boarding of suspect vessels allowable under customary international law. The United States has entered into seven PSI ship-boarding agreements, with Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, and Panama. Together with PSI “core supporters,” these agreements cover perhaps 70 percent of the world’s commercial fleet by tonnage. The agreements use language from the PSI principles and make it easier for the United States to board and inspect vessels from these flag states reasonably suspected of transporting weapons of mass destruction, their delivery systems, and related materials. All the agreements respect flag-state consent for boarding on the high seas, although in four such agreements a lack of response by the flag state in two or four hours authorizes boarding and search for weapons of mass destruction.

Nevertheless, such interdiction, boarding, and search would not apply to flag states not party to these agreements. Freedom of the high seas and its corollary, the flag-state consent regime, remain fundamental principles of international law and cannot be overturned or eroded by the practice of a few countries over such a short period of time.

The UN Charter

A final legal argument for PSI interdictions relies on the right of self-defense in Article 51 of the UN Charter. Preemptive self-defense includes anticipatory self-defense and preventive self-defense.[14] For an action to be compatible with current international legal interpretations of anticipatory self-defense, the United States and its coalition partners would probably have to demonstrate not only that the interdicted cargo required such action because it posed a specific and imminent threat of attack on the United States or one of its allies but also that the necessity of self-defense was instant and overwhelming, leaving no choice of means and no time for deliberation.[15] In other words, a response was necessary, proportional to the threat, and the threat was imminent.[16] Otherwise, such action and rationale would be greatly expanding the traditional definition of self-defense to include preventive self-defense regarding nonimminent threats and would set a dangerous precedent that could undermine the very foundations of the United Nations.

In fact, Article 51 provides the right of self-defense only in the case of an armed attack and only until the UN Security Council "has taken measures necessary to maintain international peace and
security.”[17]

The PSI’s Limited Effectiveness

Reflecting the Bush administration’s philosophical disdain for the UN, the PSI was conceived, originated, and implemented outside the UN system. In reality, it remains a U.S.-initiated and driven ad hoc activity designed primarily to deter trade in WMD components and “related materials” to and from North Korea and now Iran. It is far from clear that 12 successful interdictions in two years or even 30 in three years[18] mean that the PSI is effective. State and nonstate actors that want to avoid PSI interdictions can still transport WMD components on their own flag vessels or aircraft or on those of nonparticipating states, such as Cambodia. This is particularly applicable to warships and government ships operated for noncommercial purposes, which under Article 32 of the 1982 UN Convention on the Law of the Sea have immunity from other state’s jurisdiction.

Moreover, countries that are key to an effective PSI, such as China, India, Indonesia, and South Korea, have not publicly joined the activity despite U.S. pressure to do so, and Japan and Russia seem to be rather reluctant participants. Some states feel that the United States is applying double standards[19] and are concerned by the lack of clarity in some PSI definitions, such as what determines which states are “of proliferation concern” and what constitutes “good cause” (for interdiction), as well as the obligations linked to these vague and subjective definitions.

The secrecy surrounding PSI interdictions and the methods employed make it difficult to evaluate its effectiveness or its legitimacy and, more importantly, the garnering of support from countries suspicious of U.S.-driven endeavors. Some fear that the United States would like to change existing international law to allow PSI interdictions on or over the high seas or to erode the regimes of freedom of the high seas and innocent passage. Others were alarmed by Bolton’s argument that such interdictions are warranted by a right to preemptive self-defense. Indeed, they do not want to see the PSI lead to instability or the weakening of the international prohibition against the unilateral use of force outside the constraints of the UN Charter. Moreover, public support for the PSI by some countries would be a domestic public liability as it would make the government appear to be the handmaiden of the United States and reliant on U.S. intelligence.

Because finding and interdicting suspected WMD-related cargo is so difficult, the PSI relies heavily on intelligence sharing. Unfortunately, U.S. intelligence failures have been all too common and are not new. The 1993 detention of the Chinese vessel Yinhe, which was suspected of carrying chemical warfare precursors to Iran, is a specific example of faulty intelligence resulting in an unjustified interdiction.[20]

Intelligence sharing has constraints both for the provider and the receiver. For the provider of intelligence, there will have to be a careful trade-off between providing sufficient intelligence to show “good cause” and protecting intelligence methods and sources.

For the receiver that is requested to interdict, it would have to decide if the WMD material in the hands of the intended recipient constitutes a threat significant enough to warrant action.[21] It would also want to know if the intended recipient has a legitimate civilian use for the material. Further, the intelligence will probably have to pass different thresholds regarding its ability to support a decision for interdiction.[22] These thresholds will likely vary between and even within nations and with the action intended (e.g., interdiction, boarding, inspection, diversion or seizure).

In sum, the United States is unlikely to trust all PSI participant nations equally with its intelligence, and given past U.S. intelligence failures, some countries may not be willing to act on skimpy or suspect intelligence.

As is often stated by its proponents, the PSI is an activity rather than an organization, and thus it lacks an independent budget or coordinating mechanism. Although these features may enhance its flexibility, as well as the speed of decision-making and resultant action, they also constrain its capacity. Moreover, placing such emphasis on interdictions may undermine other nonproliferation efforts.
Perhaps the greatest obstacle to PSI effectiveness is the dual-use nature of WMD materials and technologies. Few if any countries export “turn-key” weapons of mass destruction. The harsh reality is that countries and nonstate actors can build their own weapons of mass destruction from items that have civilian application. This means that it is very difficult to make decisions regarding “good cause” for interdiction and that such decisions will inevitably be politically influenced and based on who is sending or receiving the shipment. Moreover, a proliferation of interdictions of dual-use materials may hamper legitimate commerce and thus engender opposition, even from allies.

Enhancing PSI Effectiveness

The PSI obviously has some way to go before it becomes the widely supported, effective tool its founders envisioned and its advocates desire. Indeed, for the PSI to be fully successful will require near universal support. Even if global support is forthcoming, inadequate resources, intelligence, and capacity may ensure that a significant portion of WMD-component shipments will avoid detection and air or sea interdiction.

Most of the PSI’s shortcomings stem from its ad hoc, U.S.-driven nature outside the UN structure. Bringing it into the UN system and providing a budget for it, as advocated by a recent House of Representatives-approved bill, [23] would rectify many of these shortcomings and in the long run improve its effectiveness. One way to do this would be to seek a UN Security Council resolution authorizing the use of force for interdiction on or over the high seas and in territorial waters of weapons of mass destruction and related materials, either in specific cases or in general.

The PSI’s reach and effectiveness could also be improved by eliminating double standards, increasing transparency, and establishing a neutral organization to assess intelligence, coordinate and fund activities, and make recommendations or decisions regarding specific or generic interdictions. Such an organization, perhaps built on the 1540 Committee, if seen to be neutral, transparent, fair, and objective, could answer key questions, such as what combinations of actors and materials represent threats and what is good cause. It would also help avoid erroneous judgments and disagreements that might impede legitimate commerce or delay action. The organization would also give the PSI a concrete structure with a consistent strategy and modus operandi, as well as a budget to fill gaps in interdiction and intelligence-collection efforts. Moreover, it could ensure that PSI activities stay within existing international law or serve as a vehicle for changing it. Last but not least, it would also ensure that the effort complements other nonproliferation efforts rather than undermines them.

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ENDNOTES


14. Anticipatory self-defense is an attack on another state that actively threatens violence and has the capacity to carry out the threat but has not yet done so. Preventive self-defense is an attack against another state when a threat is feared or suspected but there is not evidence that the threat is imminent. Daniel H. Joyner, “The PSI and International Law,” The Monitor, Vol. 10, No. 1 (Spring 2004), pp. 7-9.


16. Ibid.


19. The United States apparently exempts suspect shipments to and from India, Israel, and Pakistan for political reasons.


22. Ibid.

23. “It is the sense of Congress...that the President should strive to expand and strengthen the Proliferation Security Initiative (PSI)...with a particular emphasis on...working with the United Nations Security Council to develop a resolution to authorize the PSI under international law.” “A Bill to Provide for the Implementation of the Recommendations of the National Commission of Terrorist Attacks Upon the United States,” Subtitle B - “Proliferation Security Initiative,” Sec. 1221, 110th Cong., 1st sess.

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