



## THE PROLIFERATION SECURITY INITIATIVE: IS IT LEGAL? ARE WE MORE SECURE?

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 24 February 2005; participants included lawyers, academics, and representatives of international organisations, NGOs and of government departments.

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The subject of the discussion was the extent to which Proliferation Security Initiative (PSI) activities, in particular the interdiction of foreign vessels by participating States, fitted within the existing framework of international law. Is there a risk that such activities could violate international law and, if so, is the practical effectiveness of the strategy sufficient to justify the potential damage to international law in an important area of legal regulation, namely the law of the sea?

### HISTORY AND BACKGROUND

It was explained, by way of introduction, that PSI is an intergovernmental initiative established in 2003, which initially involved the participation of 11 States but has now expanded to over 60 States including Russia. Participating States are committed “to 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.” It was noted that the motivation behind PSI was the **So San** case in which Spanish and US forces cooperated in stopping and seizing a Cambodian registered vessel sailing in international waters off the Yemeni coast. The vessel was carrying missile parts and chemicals from North Korea to Yemen. It emerged that there was no basis in international law for seizure of the vessel or its cargo and it was released and allowed to continue to its destination.

One speaker also pointed to the weakening of the Non- Proliferation Treaty regime as an important reason underlying the development of PSI. Treaties concerned with non-proliferation tended to assume the possibility of a verifiable distinction between civilian and military use. In practice, such a distinction had become unsustainable as shown by Saddam Hussein’s nuclear programme after the 1991 Gulf War. This had led to a growing emphasis on regime type and intent instead. However, PSI should not be seen as an either/or approach when compared with conventional non-proliferation treaties but part of a wide-ranging set of measures and strategies both formal and pragmatic.

### LEGALITY

One speaker said that PSI can be characterized as existing and operating on four distinct planes: within the established rules of international law; on the boundaries of international law as a challenge and force for change; as rhetoric; and as strategy.

### **Territorial Waters and the High Seas**

It was noted that the question of legality was complicated by the fact that PSI contemplated interdictions in a wide range of locations from airports and harbours to territorial waters and the high seas. One speaker questioned the value of PSI making efforts to justify interdictions of vessels thought to be carrying WMD-related items instead of efforts to make the activity itself, ie the transfer of such items, illegal. This put the cart before the horse. The problem with PSI is that the target activity may not, in itself, be illegal. The vagueness of the formal non-proliferation instruments means that, in practice, there is often uncertainty as to substantive illegality both as regards transfer and possession of the items concerned. The only rules which have achieved some specificity in this area are those contained in multilateral export control regimes, but these are non binding under international law. It is notable that Article 110 of the Law of the Sea Convention limits interdiction to vessels engaged in only five possible “activities”, all of which are, in themselves, substantively illegal eg drug trafficking on the high seas which is made an illegal activity under the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In the absence of an objectively verifiable law on the possession and transfer of WMD-related items, to what extent could PSI interdictions legally take place, given that international law all but prohibited such interdiction on the high seas without consent or in the limited circumstances envisaged in Article 110? Another speaker referred to UN Security Council Resolution 1540 which obliges member states to take a wide range of steps aimed at preventing the proliferation of WMD, their delivery systems and related materials. Might this not have a bearing on the illegality of the activity targeted by PSI?

The possibility of possession and transfer of WMD related materials developing into an international crime akin to piracy or slave trading was briefly discussed. It was noted, however, that there was an inherent conflict in the prohibition of proliferation but not possession of WMD. The fact that PSI targets such activities only with regard to “States and non-State actors of proliferation concern” was also noted as an obstacle to any prohibition emerging as a general norm. One speaker pointed out that it would not be in the interest of many States, including those within the EU and NATO, for such a norm to emerge.

Reference was made to work within the International Maritime Organisation to achieve consensus on amendments to the 1988 International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) which would allow for interdiction of vessels engaged in weapons and WMD-related goods trafficking. The parties would be required to make the transport of WMD-related materials illegal but the legal requirement to obtain the consent of the flag State for interdiction in international waters would remain. It was noted that there would be an IMO Legal Committee meeting on the subject in April this year, followed by a full Diplomatic Conference in October.

### **Self-Defence**

One speaker said that PSI was a good example of a relatively recent change of emphasis by the United States and a few other countries from traditional nonproliferation approaches to a more preemptive strategy. It prescribes action in situations in which use of WMD is not an imminent threat, but instead perceived to be a serious developing threat. Another speaker countered that PSI was not developed in order to establish a right of preemptive action. In practice, it had been used to weave a web of agreements between participating States and flag States which mean that PSI can be operated within international law. There are agreements with Liberia, Panama, and the Marshall Islands. Others were being negotiated. Such agreements were in conformity with Article 110 as an exercise of “powers conferred by treaty.” There had been an emphasis on action within participants’ own land territory, internal waters and territorial waters where national jurisdiction is absolute over a State’s own flagged ships and fairly extensive even in relation to foreign vessels enjoying a right of innocent passage. Elsewhere, interdictions had taken place on the basis of consent or in the knowledge that the flag state would make no objection. It was acknowledged, however, that the rhetoric of PSI was pushing at the boundaries of international law and that certain grey areas had yet to be tested.

One speaker admitted that earlier US government statements had relied on the concept of self-defence in justifying possible interdictions outside territorial waters. Given the technological changes in capability and objectives, it was not difficult to imagine a situation where an interdiction might be successfully defended on this basis, even with the limitations applied by **Caroline** principles. Such action would need to conform to **Caroline** criteria of “a necessity for self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.” The action must not be “unreasonable or excessive.” Much would depend on the circumstances but a narrowly crafted **Caroline** argument was possible. Another speaker disagreed, arguing that self-defence could not trump Article 110, which was effectively *lex specialis* on the subject. It was clear that interdictions should not take place unless the conditions set out in that Article were satisfied.

Another speaker asked whether the interdicting State would need to be directly threatened itself or could any PSI State interdict a vessel? It was noted that such action was not limited to the coastal or destination State and that, in practice, any PSI State could interdict.

One speaker asked how many PSI interdictions had occurred and whether any had taken place on the high seas without consent. It was agreed that there must have been hundreds of interdictions, but several speakers indicated that, so far as they were aware, none had taken place without consent. It was acknowledged, however, that the modalities of obtaining such consent might vary from one PSI State to another. The United States was prepared to act on the consent of the master of the vessel, whereas the UK regarded flag State consent as necessary.

## PRACTICAL UTILITY AND EFFECT

There was some discussion as to how effective PSI had been. One speaker commented that it was dual use items that constituted the biggest proliferation threat and that the interdiction of a vessel transporting nuclear enrichment centrifuges to Libya had undoubtedly had a positive effect. PSI sends a clear message that illicit or covert activities risk exposure. The fact that States were prepared to cooperate in this area and work to put in place a web of agreements could be seen as a policy success in itself. One problem was the fact that States of proliferation concern, so called “bad

flags”, were unlikely to participate in PSI or sign up to any amended SUA. However, such measures must have some effect in limiting the vessels available for such transfer and thus increasing costs.

One speaker commented that PSI had to be seen in context as part of a multi-faceted initiative in which timely and efficient exchange of information was probably the key activity. Interdiction at sea or in the air was very much a last resort. The main objective was to prevent any transfer taking place and, even if it did, it might make more sense to track and monitor that transfer rather than interdict. It was pointed out that there was a risk that PSI could drive transfers “underground”, encouraging greater secrecy on the part of proliferators who might choose to use unregulated shippers or less traceable land routes. This could make it easier for terrorists to interdict state to state shipments. Alternatively, PSI might have the effect of encouraging greater secrecy in trans-shipment, perhaps using even more unregulated, black-market shippers or other, less secure trans-shipment nets. A further possibility was that providers would stop using the sea or air at all, with unintended consequences for the abilities of intelligence to track shipments, that transport by land provided less information than transport by sea or air. Thus PSI must be part of a larger network of non-proliferation initiatives and counter-proliferation.

There was some discussion of the effect of PSI on commercial shipping. It was acknowledged that interdictions did take place and, realistically, were bound to affect the commercial interests of States that were not of proliferation concern. One speaker said there was a simple answer to this objection. PSI States must be prepared to compensate for commercial injury where mistaken interdictions take place. It was noted that the WTO had been silent on the subject so far, although the IMO and Lloyds List had been more vocal in their concern over the potential effect on commercial shipping. One speaker argued that it was important to recognise that PSI-inflicted injury to commerce was insignificant as compared to the damage caused by regular piracy in certain straits.

## CONCLUDING REMARKS

It was acknowledged that, if PSI was thought to violate international law, it would be necessary to weigh its practical utility against the damage to an important area of legal regulation. However, one speaker asserted that the argument that the benefits of a PSI of minimal efficacy in countering proliferation do not justify the damage to settled and important provisions of international law begs the question of how much damage to the international order PSI is expected to do. In his view the threat to international law is not as great as is sometimes made out: within territorial waters, and where states have given permission to act to others on the high seas, no damage to international law occurs; *Caroline* self defence would also fall squarely within accepted international law.

Another speaker conceded that PSI as currently conducted was not necessarily illegal but there was always a risk that action under it could be. Moreover, there was a risk that, once asserted as a policy, it would open the door to differing interpretations as to the principles governing interdictions of vessels. Another speaker criticised the discriminatory aspects of PSI with its targeting of States and non-State actors of “proliferation concern”. This was not a legal problem as such but was politically damaging and, inevitably, raised questions as to the long-term legitimacy of the initiative. One speaker concluded that on balance, PSI appeared to be working, within

a frame of reference limited by its stated ambitions. Whether it truly contributes to counter-proliferation depends on the health of both non- and counter-proliferation efforts, and on the resolution of larger issues of possession of WMD, support for terrorism, proliferation activities, and the efficiency of international organization and decision-making.