

POLICY BRIEF

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A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

WHAT IS THE PROBLEM?

United Nations Security Council Resolution 1874 of June 2009 puts extra sanctions on North Korea and encourages lawful interdictions. This adds credibility to the 95-member Proliferation Security Initiative (PSI), a US-initiated arrangement to promote interception of transfers of cargoes related to weapons of mass destruction (WMD). South Korea's recent decision to join PSI is another positive step.

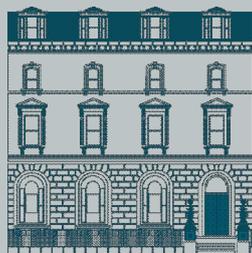
But the PSI net has serious gaps. It relies on participants and their laws, yet some key states remain outside, including China, India, Pakistan, South Africa, Egypt, Indonesia and Malaysia. They question its legitimacy and transparency. And within PSI, information-sharing is limited.

WHAT SHOULD BE DONE?

Participants should redouble efforts to recruit missing states by persuading them of the PSI's legitimacy and providing incentives. These could include legal and operational capacity-building, plus a mechanism to share information about interdictions.

Australia should take a lead in bringing more Asian countries on board, beginning with Indonesia and Malaysia.

Australia should also renew efforts to urge the US to ratify the UN Convention on the Law of the Sea (UNCLOS), which would reinforce the legitimacy of US-led maritime operations. PSI states could strengthen the legality of interdictions by pushing the limits of Article 27 of UNCLOS.



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POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

Introduction

The proliferation of weapons of mass destruction (WMD) remains a pressing international security problem, despite decades of efforts to control and eventually destroy them through treaties. Old challenges remain and new ones abound, particularly in the nuclear realm, which will be the focus of this Lowy Institute Policy Brief. The test of a second nuclear device in May 2009 by the Democratic People's Republic of Korea (DPRK), and its regime's sustained intransigence in the face of UN Security Council resolutions, has again thrust this issue to the fore, as has Iran's continued pursuit of uranium enrichment and prevention of International Atomic Energy Agency (IAEA) access to certain sites.

New actors have entered the mix: terrorists who cannot be deterred from using WMD should they acquire them, and illicit traders who gain financially from proliferation. WMD components are becoming more easily procured and dangerous technical knowledge more easily attained. Moreover, nuclear-armed states remain attached to their arsenals as national security tools, notwithstanding current talks by the United States and Russia to reduce their deployed forces, and recent indications by the UK of its willingness to consider a mutual reduction.¹ Amid these challenges, the cornerstone of the nuclear weapons regime, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), is under strain ahead of a Review Conference in May 2010.

States have taken a range of approaches to remedy the situation, including through United Nations Security Council resolutions (notably Resolution 1540, which obliges states to take

action to prevent WMD proliferation to non-state actors), and through regional efforts, notably the Six-Party Talks in relation to North Korea.² The most recent measure to deal with the DPRK, UNSC Resolution 1874 of 12 June 2009, has broadened sanctions and called on states to interdict vessels in support of them.

This makes it timely to consider prospects for the Proliferation Security Initiative (PSI), one of the few practical means available to the international community to prevent WMD proliferation. It aims to encourage and assist the interdiction of parts and materials for WMD programs – nuclear, chemical and biological – and their means of delivery (eg. missile systems) while not impeding legitimate trade. Although it has enjoyed some success,³ and a healthy expansion in participation, it continues to encounter many challenges – notably the complexity of the materials trade, the absence of some critical participants and limited legal grounds for taking action. It can and should be strengthened.

Background

The PSI emerged in 2003 in response to major international developments that exposed gaps in the non-proliferation regime. In August 2002, details had begun to emerge about Iran's undeclared nuclear facility at Natanz. Around the same time, North Korea's clandestine program came to light, with the US suspecting a Pakistani link.⁴ Furthermore, there were concerns that Iraq was reconstituting its nuclear program, given that International Atomic Energy Agency (IAEA) inspectors had been denied access to the country since 1998. Both states were party to the NPT.

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

In November 2002, at the request of the US, Spanish authorities interdicted the *So San*, a Cambodian ship en route to Yemen from North Korea.⁵ They discovered SCUD missiles, hidden under thousands of bags of cement. Ultimately, under instruction from the US, the Spanish allowed the ship to proceed. While there was disagreement as to whether there were legal grounds to seize the cargo, John Bolton has claimed that the US ultimately allowed the shipment to continue because of the value the US placed on Yemen as a partner against terrorism.⁶

This embarrassing turn of events was a catalyst for deliberation by Bush administration officials about how future cases could better be handled. Once it became clear that they would need international support to maximise chances of successful interdictions, US officials approached the United Kingdom and Australia.⁷ They then approached other likeminded states to develop a framework for operation. President Bush announced the PSI in Poland on 31 May 2003, along with its initial participants: the US, Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the UK. These states then met over several months to determine how the PSI would work. The group published its Statement of Interdiction Principles after its third meeting in France,⁸ and encouraged other states to participate. The PSI has grown to 95 participants in just six years – the Republic of Korea became its most recent adherent in May 2009.⁹

Structure

The PSI is a political agreement among states, which promise to take action alone or together to interdict transfers or transport of illicit WMD-related materials over land, in the air, or at sea to and from states and non-state actors of proliferation concern.¹⁰ However, officials say that most PSI activities to date have focused on shipping, given that it is easier – but by no means easy – to interdict, legally and practically. Further, in addition to the fact that most of the world’s international trade takes place via sea, it is more likely that large items, such as delivery systems, will need to be transported by ship. This Policy Brief focuses on interdiction at sea.

States pledge to consider interdicting vessels at the request of another participant, or to allow that participant to interdict their shipping. To support these activities, they undertake to adopt streamlined procedures for information exchange, and to strengthen domestic and international legal frameworks.¹¹

The PSI is not a treaty and is not legally binding. It does not create any new legal authority for its members to conduct interdictions. Rather, it aims to facilitate interdiction activity through existing domestic and international legal frameworks, by sharing intelligence, and military and law enforcement assets. This is fostered practically through gaming exercises to enhance cooperation and prepare for likely scenarios.¹² An Operational Experts Group (OEG) meets periodically to discuss operational and legal issues.¹³ While the US maintains legally-binding shipboarding agreements with certain open registry states, which provide for expedited boarding under

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

specific conditions, this complements PSI activities and is not an official part of the PSI.¹⁴

The PSI has no secretariat or formal decision-making mechanism. A decision to undertake an interdiction need not be agreed upon by all members – a PSI interdiction can be unilateral. There is no requirement or expectation for all interdictions to be reported to other participants.

Officials describe the PSI as a forum for developing best practices for conducting interdiction and resulting prosecution, rather than a mechanism for dealing with individual cases. States cooperate to conduct interdictions, but prosecutions for WMD trafficking resulting from a specific interdiction take place at the national level. While states may request assistance from other governments, this is done bilaterally outside the PSI.¹⁵

The rationale for establishing the PSI as a political commitment rather than a legally-binding treaty was that it could quickly be formed and implemented with sufficient state compliance to have a practical impact. Its founding participants also doubted whether a legally-binding treaty would even be possible to negotiate.¹⁶

PSI states form a network across six continents, and its informal nature allows those states to intercept suspicious shipments quickly, thus keeping pace with global trade and the movement of goods. By restricting the avenues for illicit WMD trade, the theory is that the PSI increases the costs and risks for proliferators. In this manner, the PSI is also designed to serve as a deterrent, by making proliferation more difficult and costly, and thus less attractive.

The PSI's informal nature also allows participants to plan the timing and location of an interdiction according to assets available, and so that any convicted proliferator would be subject to the harshest jurisdictional penalties. For example, PSI participants with knowledge of the projected route of a ship containing nuclear-related parts could delay intervening until the ship's flag state or owner could order it to divert to the port of a PSI country with stringent counter-proliferation laws.

Effectiveness

It is difficult to measure the PSI's effectiveness. The classified nature of PSI activities means that there is little information about interdictions in the public domain. However, as early as 2005, US officials were claiming that more than two dozen interdictions had denied WMD-related technology, including to Iran.¹⁷ In June 2008, the US State Department released details of five interdictions that took place between February 2005 and July 2007.¹⁸ The most publicised success involved the *BBC China*, a German-owned ship discovered to be transporting centrifuge parts procured through the AQ Khan network to Libya. Officials cited this as a factor in Qaddafi's renouncing Libya's WMD programs.¹⁹

Critics claim that, if the PSI had been truly effective to date, there would be more publically available accounts of successful interdictions. In countering this, officials from PSI governments argue that they are unable to release information about most interdiction activity, given the sensitive nature of their sources and ongoing investigations.²⁰

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

The most damaging blow to the PSI's credibility was its failure to thwart the DPRK's trade in proliferation-related materials with Syria. According to the CIA, the DPRK and Syria had engaged in an 'intense level' of nuclear cooperation for over a decade by the time the near-operational al Kibar facility in Syria was destroyed by Israeli strikes in September 2007.²¹ The CIA acknowledges that officials from a DPRK nuclear facility and the Syrian government were involved in a cargo transfer from the DPRK to Syria in 2006, which they suspect was to al Kibar.²² Given the DPRK's limited means to transship material and the PSI's focus on this type of activity, it is surprising this activity was not discovered earlier.

The PSI's most effective contributions may be in elevating the international focus on the problem of WMD proliferation and in promoting cooperation and coordination. While some critics claim that the PSI creates nothing new and that such cooperation was taking place previously, many PSI officials laud the initiative for the catalytic manner in which it has enhanced such cooperation among professionals in the domestic and international counter-proliferation community. Australian officials, for example, say it has been invaluable in assisting Australia's inter-agency cooperation on nonproliferation, as well as in building relationships with international counterparts.²³ Other officials say that the PSI has resulted in swifter action than might previously have occurred – essential when dealing with rapid transfers.²⁴ OEG workshops, where interdiction scenarios are gamed, have brought to light unforeseen difficulties and have allowed states to determine where their processes and legal regimes need improvement. That said,

cooperation has largely taken place among the 20 OEG participants, so the benefits may not have filtered down to all PSI participants.²⁵

Challenges

The PSI's activities face inherent difficulties. They rely on intelligence that can somehow distinguish between materials destined for weapons and for peaceful purposes. Given that many materials are dual-use, and that global trade dynamics enable a large number of fast technology transfers through multiple jurisdictions, their end use is difficult to determine.²⁶ Moreover, there are important barriers to sharing information with all PSI participants, such as sensitivities about collection sources and methods, or a more general lack of willingness to share intelligence.

There are also two fundamental legal challenges for the PSI: first, opportunities to stop, board and search ships without permission are limited by the law of the sea; and second, materials for illicit WMD purposes cannot easily be seized or traffickers prosecuted, because their transport is not an international criminal offence.

Opportunities to interdict will depend on where the suspect ship is located. On the high seas, UNCLOS protects ships from being stopped and searched without the permission of the state in which it is registered or whose flag it is entitled to fly. There are several exceptions: states can interdict ships without permission on suspicion of slavery, piracy, drug smuggling and unauthorised broadcasting, but not for trafficking in WMD and related materials.

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

Even if states board and search on the high seas lawfully, the grounds for seizure and prosecution are seldom straightforward, as the transport of WMD materials is not an international criminal offence. While the 2005 Protocol to the Suppression of Unlawful Acts (SUA) Convention makes it an international offence to unlawfully and knowingly transport material for illicit WMD purposes by sea, this has not yet come into force and will bind only those states that ratify.²⁷

The upshot of this is that states have to rely on their domestic laws dealing with proliferation in order to seize materials. States have the most authority to interdict in their internal waters, where they can enforce their domestic non-proliferation laws.²⁸ However, ships travelling through states' territorial seas have a right of 'innocent passage', which precludes interdiction except in a few specified circumstances, such as to suppress drug trafficking.²⁹ Again, however, WMD proliferation is not a specified circumstance. This complicated legal structure means that determining where an interdiction should occur requires a creative application of international and domestic law.

Weaknesses

The PSI's lack of critical state participants weakens its coverage of important sources and trade routes. Nuclear weapon states such as China, India, Pakistan are glaringly absent, as are those located at maritime chokepoints such as Indonesia, Malaysia and Egypt. Some of these countries have poor records in relation to WMD proliferation, including as transit points.

In North East Asia, China's absence from the PSI is important for many reasons. This country: is a major global trading nation and a member of the P5; possesses nuclear weapons and missiles; has major civilian chemical, bioscience and nuclear sectors; and has a crucial relationship with and geographical proximity to the DPRK. North Korea continues to rely on trade with China to prop up its economy and its regime.³⁰ China cites concerns that the PSI might violate international law as its reason for remaining outside the agreement.³¹ However, China's cooperation behind the scenes with the US in some interdiction activities suggests that it is not opposed to interdiction as such.³² Another, more plausible, reason for China's refusal formally to participate in the PSI may be its concern not to upset the DPRK and stability on the Korean Peninsula.³³ The DPRK has long held that the PSI directly targets it, and that any PSI activity against it would be considered an act of war. In particular, it warned the Republic of Korea not to become a PSI participant,³⁴ which the ROK refrained from doing until May 2009, after the North's second nuclear test.

China's stance will be tested in the coming months in the wake of Resolution 1874,³⁵ which tightens sanctions imposed on the DPRK through Resolution 1718,³⁶ and which calls on states to interdict (or 'inspect') cargoes to support the sanctions. It is significant that China has backed Resolution 1874, given its reluctance to join the PSI and its opposition to including reference to the PSI in the earlier Resolution 1540.

In South Asia, India and Pakistan remain critical missing states. This is not only because

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

of their nuclear weapon possession, and the clandestine manner in which they acquired those weapons, but also because of their location beside major Indian Ocean trade routes and their civilian industries that could have dual uses.³⁷ India cites concerns over the legality of PSI activities as its reason for non-participation. However, it is more likely that the government is guided by domestic political concerns, including about being seen as too much in step with the US. India's accession to the PSI was discussed as part of the nuclear deal between it and the US,³⁸ but did not eventuate. Pakistan, too, cites legal concerns as its reason for not joining the PSI, although presumably its concerns also relate to how participation might affect its own nuclear activities.

In South East Asia, Singapore's participation is an important accomplishment, given the size of its port, its massive role as a cargo transit hub and its location on the Malacca Straits, through which much of the world's shipping flows. However, neighbouring Malaysia and Indonesia remain outside the PSI, which weakens the network's coverage of this vital maritime region. Malaysia cites legal concerns, as does Indonesia,³⁹ despite assurances from the US and Australia to the contrary.⁴⁰ Likewise, in the Middle East, Egypt's absence is a problem, including because of its strategic location on the Suez Canal.⁴¹ These states have jurisdiction over some of the world's critical trade chokepoints, through which proliferators would typically operate.

Reasons for non-participation

Most of these missing critical states cite legal concerns as their reasons for non-participation in the PSI. Many have expressed concern over the US's failure to ratify UNCLOS, which regulates activity at sea, even though the US treats this convention as customary international law.⁴² There are, however, several plausible alternative explanations for non-participation.

The PSI's origin in the Bush administration has probably made it difficult for some states openly to demonstrate support. Some wondered about US motivations, and whether this was another means for technologically-advanced states to retain control over nuclear and other advanced technology. Further, the fact that many of the states initially approached to be involved were typically members of other US-led 'coalitions-of-the-willing', while other countries were left out, may have added mistrust.

The perception that the PSI was a tool of the US was likely heightened because the original intention was for participants to share little or no information about interdictions: in other words, the US would be trying to gain support while giving little intelligence away. While it is understandable that the classified nature of such information might often preclude its wide dissemination, the fact that not all PSI participants are notified of interdictions undertaken by others means that the PSI remains deficient in transparency. Under these circumstances, it is unclear precisely what benefit states are gaining from being part of the PSI, and what real incentives they have to join, aside from a general sense of being part of a

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

club concerned to take action over proliferation.

Another plausible explanation for non-participation is that certain states fear they might be implicated in proliferation activities or that their inability to control such activities within their jurisdiction could become widely exposed.

Commercial concerns might also drive resistance to PSI participation – states might fear that they would lose critical commerce because of a perception that their PSI commitments impede smooth or quick passage through their jurisdictions.

Future

The Obama administration has embraced the PSI, despite these challenges. In the transition period before taking office, the administration highlighted ‘institutionalising’ the PSI as a way to help prevent nuclear terrorism.⁴³ The first OEG outreach meeting was held in Florida in May 2009 to advance this goal.

Some have called for the PSI to be formally endorsed through a United Nations resolution, to give it a greater sense of legitimacy.⁴⁴ This appears unlikely at this point. Precise details of what the US might instead mean by institutionalisation are yet to be released; however, there are some clues. US Deputy Secretary of State James Steinberg has stated that the PSI could benefit from a small central mechanism to help coordination.⁴⁵ Such a mechanism was resisted in the formation of the PSI. However, given the large number of participants today, such a mechanism could be

crucial to retain the original PSI’s ability to mobilise quickly. The Global Initiative to Combat Nuclear Terrorism (GICNT), which adopted the PSI’s model for cooperation, has an Implementation Assessment Group, a model of an information-sharing mechanism that the PSI could copy in turn.⁴⁶

The passage of UNSCR 1874 on North Korea provides a boost to the PSI’s credibility. While it does not grant any additional authority to interdict without permission of the flag state, it criminalises the trade in weapons and related materials from, and most weapons to, the DPRK and thus provides grounds for seizure should permission to board be granted by a flag state. It calls on states to interdict vessels to support these sanctions. Absent the DPRK’s cooperation, options for legal interdiction are limited.⁴⁷ However, evidence of continued intransigence by Pyongyang would add political pressure even on Beijing. Looking beyond the Korean Peninsula, while UNSCR 1874 applies only to the DPRK, its passage could be taken as supporting the PSI’s activities and adding weight to the argument for illicit WMD-related trade to be treated as an international criminal activity.

Recommendations

Heightened concerns over North Korea, the passage of UNSCR1874, and the advent of an Obama administration in favour of exploring fresh approaches to PSI, all add up to an opportunity to bolster this important non-proliferation mechanism.

PSI participants should take steps to strengthen the PSI, by convincing remaining critical states

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

to join, by extending practical benefits to those already in the PSI network, adding select institutional features to improve incentives for participation, and encouraging the development of international law regarding interdiction.

To recruit critical missing states, participants should emphasise that the PSI need not be identified solely with the Bush administration or indeed with the US. To do so, they should use the political goodwill generated by the transition to the Obama administration, emphasise the attention paid to law and accountability in PSI activities, and demonstrate that the PSI is not somehow a tool for the exclusive use of developed or Western states. They should encourage China in particular to become an official PSI participant, prospects for which might improve as it works with the international community in the context of Resolution 1874. Participants should assure potential recruits that the emphasis will not be on finger pointing over past proliferation allegations and failures, but on working together to resolve problems. Participants should emphasise that WMD proliferation is a danger to all states. The message to prospective new participants should note that PSI participation would be in their interests for multiple reasons – not only from the perspective of doing more to prevent proliferation, but also to avoid potential diplomatic and commercial damage should illicit trafficking be discovered to have taken place in their jurisdictions. Care would need to be taken, of course, to ensure this last point did not have the appearance of a threat.

All PSI participants should be involved in the gaming exercises that were previously only open to OEG experts. This would enhance the

contribution of current participants and help to dispel the impression that the PSI is a tool for the few. Participants should assist states both within and outside the PSI to develop domestic non-proliferation laws, given that most successful interdictions will likely take place in domestic jurisdictions where interdiction is less complicated. Strengthening participants' domestic legal frameworks would help to create harsher penalties for WMD proliferators worldwide.

Participants should also work to develop customary international law in favour of interdiction for illicit WMD proliferation. While it is unlikely that states could simply or easily make proliferation an international crime warranting interdiction on the high seas,⁴⁸ states could push up to the boundaries of the law with respect to ships transiting their territorial waters.⁴⁹ Close inspection of Article 27 of UNCLOS suggests scope for enforcing states' domestic jurisdiction with respect to WMD proliferation, as the language encourages restraint from enforcement, but does not prohibit enforcement. The more that states act with a view that enforcement action against proliferation is permitted in their territorial seas, the greater the prospect of state practice tipping custom in favour of interdiction.⁵⁰

In their quest to institutionalise the PSI, participants should be careful to enhance cooperation without sacrificing the flexibility that has apparently allowed rapid action in the past. They should strive to develop a reporting procedure, through which to inform all other participants of actions undertaken under PSI auspices. Such a mechanism could serve two purposes. First, it could add transparency,

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

making states more confident about others' motives in supporting PSI and reducing perceptions that the arrangement is somehow discriminatory. (After all, in the absence of a wider information-sharing arrangement within PSI, states will continue to rely only on their existing intelligence-sharing networks, which are widely assumed to favour the US and its allies.) Second, an information-sharing mechanism could expand the intelligence picture available to many states about proliferation patterns and attempts, improving their collective ability to act. At the very least, participants could submit sanitised reports or statistics on interdictions. This could demonstrate the extent of transnational cooperation and add an incentive for participation.⁵¹ Otherwise, the difficulty in measuring the PSI's success could pose a problem for sustaining commitment and attracting new members.⁵²

Australia's role

As a founding participant in PSI and a country strongly committed to WMD non-proliferation, Australia has a major stake in extending the coverage and effectiveness of the initiative. Australia is unusually well-placed to contribute to strengthening the PSI, including because of qualities as a major trading nation, a maritime power, a US ally and a nation with strong diplomatic and security links in Asia. Such enhanced effort would be in keeping with the Rudd Government's aspiration for Australia to be an active middle power and to expand the country's maritime reach and capabilities.

Australia should encourage key states in the Asia-Pacific to join the PSI by providing tangible benefits

Australia should redouble its efforts to lead the promotion of PSI in the Asia-Pacific region, working to recruit key missing players, such as Indonesia and Malaysia, by providing tangible benefits to participation. This could include capacity building to allow them to take part in operations, through the provision of equipment and training, as well as legal assistance to strengthen their legal frameworks for penalising proliferation. It could model this work on efforts undertaken with ASEAN and Pacific states on chemical, biological and nuclear non-proliferation treaty accession and implementation, including export controls and safeguards.⁵³ An important component of this endeavour would be to ensure that laws are not only passed and that penalties are commensurate with seriousness of the crime,⁵⁴ but that there is political will and capacity to enforce them, and more broadly to promote a culture of awareness of non-proliferation challenges. Australia's leadership in the region could help modify the impression that the PSI is primarily a US tool, emphasising that it can confer benefits on all who join. Australia should promote PSI participation as a means for regional states to bolster their reputation as secure and reliable jurisdictions through which to conduct commerce, rather than as an impediment to legitimate trade.

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

Australia should use its strong relationship to influence the United States to ratify the United Nations Convention on the Law of the Sea (UNCLOS), and encourage PSI participants to push the limits of Article 27.

Given that some states appear to use their concerns over US non-ratification of UNCLOS as a smokescreen for other objections to the PSI, progress by Washington towards ratification would make it harder for states to criticise PSI and would confirm US intent to follow international law at sea. It would create a political opening for such states to join PSI, given the sensitivities of their domestic constituencies, or expose the real reasons for their continued nonparticipation.

Views continue to vary within the US on the merits or otherwise of UNCLOS ratification. Friends of the US and of the PSI would do well to focus their lobbying efforts on reluctant members of Congress. In doing so, Australia should encourage the US and other PSI participants to push the limits of Article 27 in favour of interdiction for illicit proliferation purposes.

Australia should propose a reporting and information-sharing mechanism for the PSI

Australia should propose that the PSI develop a voluntary and sanitised information-sharing arrangement, perhaps along the lines of mechanisms used by the ITDB or informal export control regimes (such as the Australia Group and the Nuclear Suppliers Group). Such a proposal would need to factor in implementation challenges, such as who would hold the information, who would analyse it, and how costs could be minimised.

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POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

NOTES

¹ UK willing to reduce nuclear arsenal, Brown says, *Global Security Newswire*, 10 July 2009: http://gsn.nti.org/gsn/nw_20090710_1911.php.

² UNSCR 1540 (2004).

³ Significant successes include the interdiction of the *BBC China* en route to Libya with centrifuge parts procured through the AQ Khan network, as well as interdictions that prevented the passage of nuclear-related materials to Iran.

⁴ David E. Sanger and James Dao, A nuclear North Korea: intelligence; U.S. says Pakistan gave technology to North Korea, *The New York Times*, 18 October 2002.

⁵ Interdiction is the stopping and searching of vessels and potentially, but not necessarily, the seizing of materials and arresting of persons aboard. See Douglas Guilfoyle, Maritime interdiction of weapons of mass destruction, *Journal of Conflict & Security Law*, 12 (1) 2007, pp 1-36.

⁶ John Bolton, *Surrender is not an option: defending America at the United Nations and abroad*. New York, Threshold Editions, 2007, pp 120-121. John Bolton and other National Security Council officials insist that seizing the missiles would have been legal, but that the real reason for allowing the cargo to continue to Yemen was because of Yemen's perceived value in the war on terror. However, the White House press briefing attributed the decision to a lack of international legal means. See Press briefing by Ari Fleischer, Washington DC, 11 December 2002: <http://www.presidency.ucsb.edu/ws/index.php?pid=47463>. Bolton claims the missiles could have been seized as the vessel had violated its obligations as a commercial vessel. See *Surrender is not an option*, p 120. The author's interviews with officials from other US government agencies suggest Bolton's view is not uniformly held.

⁷ According to a US official involved in the early stages of the PSI. Interview with author, June 2008.

⁸ For a list of the principles, see US Department of State, Interdiction principles for the Proliferation Security Initiative, Washington DC, 4 September 2003: <http://www.state.gov/t/isn/c27726.htm>.

⁹ As of July 2009, the U.S. Department of State had listed 95 participants, including: Afghanistan, Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, The Bahamas, Bahrain, Belarus, Belgium, Belize, Bosnia, Brunei Darussalam, Bulgaria, Cambodia, Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Holy See, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Kuwait, Latvia, Liberia, Libya, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Moldova, Mongolia, Montenegro, Morocco, The Netherlands, New Zealand, Norway, Oman, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russia, Samoa, Saudi Arabia, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, United Arab Emirates, United Kingdom, United States, Uzbekistan, Vanuatu, Yemen. See US Department of State, Proliferation Security Initiative participants, Washington DC, 27 February 2009: <http://www.state.gov/t/isn/c27732.htm>. The US also maintains nine legally-binding shipboarding agreements with open registry states – Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, Mongolia and Panama.

¹⁰ The principles do not name 'states of proliferation concern', but define them as 'those countries or entities that the PSI participants involved establish should be subject to interdiction activities because

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.’ See US Department of State, Interdiction principles for the Proliferation Security Initiative.

¹¹ Ibid.

¹² Since 2003, PSI participants have undertaken 37 interdiction exercises around the globe. See US Department of State, Calendar of events: <http://www.state.gov/t/isn/c27700.htm>.

¹³ These are Argentina, Australia, Canada, Denmark, France, Germany, Greece, Italy, Japan, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Singapore, Spain, Turkey, the United Kingdom, and the United States. See *Nonproliferation*, United States Government Accountability Office Report to Congressional Committees, GAO-09-34, Washington DC, 3 November 2008. Since 2003, there have been 24 OEG-type meetings. See US Department of State, Calendar of events.

¹⁴ The US maintains these agreements with Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia and Panama. They cover over 70 percent of the world’s shipping tonnage and thus complement the PSI’s activities. However, they do not provide for automatic boarding – flag state permission is still required. Further, boarding absent explicit authorisation after a certain amount of time, a provision specified in some of these agreements, can only take place if an original acknowledgement of the request has been received. This precludes creative interpretation of the time limit provision. See US Department of State, Shipboarding agreements: <http://www.state.gov/t/isn/c27733.htm>.

¹⁵ Meeting with Australian government officials, 12 June 2009.

¹⁶ Interview with former National Security Council government official who was involved in the inception of the PSI, Washington DC, May 2008.

¹⁷ Condoleezza Rice, Remarks on the second anniversary of the Proliferation Security Initiative, Washington DC, 31 May 2005:

<http://merln.ndu.edu/archivepdf/wmd/State/46951.pdf>.

¹⁸ See Wade Bose, Interdiction activities assessed, *Arms Control Today*, July/August 2008.

¹⁹ See US Department of State, Proliferation Security Initiative frequently asked questions, Washington DC, 26 May 2005:

<http://2001-2009.state.gov/t/isn/rls/fs/46839.htm>.

²⁰ Interviews with former and current US and Australian government officials, March 2008 to June 2009.

²¹ Director of National Intelligence, Background briefing with senior US officials on Syria’s covert nuclear reactor with North Korea’s involvement, Washington DC, 24 April 2008:

http://www.dni.gov/interviews/20080424_interview.pdf.

²² Ibid.

²³ According to an Australian official involved in counter-proliferation work, including the PSI, it brings together the broadest range of experts dealing in counter-proliferation. Interview with Australian Government officials, 12 June 2009.

²⁴ Interview with former NSC officials, March 2008 and June 2008. One official hypothesised that the interdiction of the *BBC China* would have taken much longer, had Germany and Italy not recently taken the political decision to participate in the PSI.

²⁵ *Nonproliferation*, United States Government Accountability Office.

²⁶ Part of the problem, of course, is that only a small amount of some materials is necessary for nuclear weapons, such as plutonium. This makes detection without solid intelligence extremely challenging.

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

²⁷ To date, only six of the 12 states needed for entry-into-force have ratified. Moreover, the Protocol does not grant any additional legal means to board on the high seas without flag state consent. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc LEG/CONF.15/21, 1 November 2005.

²⁸ Resolution 1540 obliges all states to take action to suppress the transfer of WMD material to non-state actors. Enforcing their laws in their internal waters would be one way of fulfilling this obligation.

²⁹ Territorial seas are defined as up to 12 nautical miles from states' coastlines.

³⁰ See Neil MacFarquhar, North Korea could face new round of sanctions, *The New York Times*, 10 June 2009.

³¹ See Patricia McNerney, China's nonproliferation practices, International Security and Nonproliferation Statement before the U.S.-China Economic and Security Review Commission, Washington DC, 20 May 2008:

http://www.nti.org/e_research/official_docs/dos/dos052008.pdf.

³² According to former US government officials, China has cooperated on interdiction activities behind the scenes. Interviews with author.

³³ See China's nonproliferation practices.

³⁴ See DPRK regards S. Korea's full participation in PSI as declaration of war against DPRK, *KCNA*, 27 May 2009:

<http://www.kcna.co.jp/item/2009/200905/news27/20090527-17ee.html>.

³⁵ UNSC Resolution 1874 (2009) provides for an arms embargo on all arms transfers to and most from the DPRK. The resolution calls on states to, inter alia, 'consent to inspections on the high seas of their flag vessels where such grounds exist', but places an obligation on states to direct their ships to ports for inspection if they do not allow inspection

on the high seas. See Department of Public Information, Security Council, acting unanimously, condemns in strongest terms Democratic People's Republic of Korea nuclear test, toughens sanctions, New York, United Nations Security Council SC/9679, 12 June 2009:

<http://www.un.org/News/Press/docs/2009/sc9679.doc.htm>.

³⁶ UNSCR 1718 (2006).

³⁷ India was able to develop its program under the guise of peaceful purposes, which prompted closer scrutiny of the responsibilities and processes for trade in nuclear-related materials among nuclear exporting states. Pakistan nuclear scientist AQ Khan stole plans from URENCO, where he worked in the 1970s. In developing Pakistan's program, AQ Khan built a network of nuclear-related sources and continued to operate this clandestine network for his own commercial gain after he had established Pakistan's program. The network was extensive, involving front companies and middlemen from states including the United Arab Emirates, Germany, South Africa and Malaysia. Director General of the IAEA, Mohammed ElBaradei described it as a nuclear 'Wal-Mart of private sector proliferation.' See Mark Landler, Trafficking in nuclear arms called widespread, *International Herald Tribune*, 24 January 2004. For a comprehensive analysis of the AQ Khan network, see Mark Fitzpatrick, ed., *Nuclear black markets: Pakistan, A.Q. Khan and the rise of proliferation networks*. London, International Institute for Strategic Studies, May 2007.

³⁸ Interview with former US National Security Council official, May 2008.

³⁹ Proliferation Security Initiative exercise hosted by Japan shows growing interest in Asia but no sea change in key outsider states, *WMD Insights*, December 2007 – January 2008:

http://www.wmdinsights.org/I21/I21_EA1_ProliferationSecurity.htm.

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

⁴⁰ Assurances along these lines were evident at an Indonesian government seminar open to the public. Jakarta, Indonesia, December 2007.

⁴¹ There is little public information about Egypt's specific reasons for not participating in the PSI. Perhaps an incident in the 1980s sheds some light. In 1985, the US intercepted an Egypt Air flight carrying four Palestine Liberation Front members who had hijacked an Italian cruise liner three days earlier. Egypt condemned the interception and demanded an apology from the US, which the US did not provide. See Andrew S. Williams, The interception of civil aircraft over the high seas in the global war on terror, *Air Force Law Review*, 22 March 2007.

⁴² See Proliferation Security Initiative exercise hosted by Japan. Opinions within the US on ratification of UNCLOS vary. President Bush argued for ratification for national security reasons in 2007. See *President's statement on advancing U.S. interests in the world's oceans*, Washington DC, Office of the Press Secretary, 15 May 2007: <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html>. Another proponent of ratification is Republican leader of the Senate Committee on Foreign Relations, Richard G. Lugar (see Richard G. Lugar, *An overdue step to greater security*, 15 May 2007:

<http://lugar.senate.gov/press/record.cfm?id=274361>). Opponents of ratification argue that it would be damaging for national security, subjecting the US' naval counterterrorism operations to unsympathetic foreign judges. See Jack Goldsmith and Jeremy Rabkin, A treaty the Senate should sink, *The Washington Post*, 2 July 2007, p A19.

⁴³ This was posted on the Administration transition website in January 2009, and then on the whitehouse.gov website following inauguration, but is no longer available.

⁴⁴ See Mark Valencia, *The Proliferation Security Initiative: making waves in Asia*. London,

International Institute for Strategic Studies, 2005, p 74.

⁴⁵ James B. Steinberg, *Speech to Carnegie International Nonproliferation Conference*, 6 April 2009:

http://www.carnegieendowment.org/files/npc_steinberg3.pdf.

⁴⁶ See *The Global Initiative to Combat Nuclear Terrorism*, U.S. Russia Joint Statement, St. Petersburg, 15 July 2006:

<http://www.state.gov/t/isn/c18406.htm>.

⁴⁷ In the likely scenario that the flag state were the DPRK, it would deny boarding on the high seas and refuse to direct its vessel to a port for searching. Even though the resolution was passed under Chapter VII of the UN Charter, which makes it binding on all states, the resolution did not provide for enforcement in the face of non-compliance and thus military action could not legally be taken to force the DPRK to comply. Although states might try to argue the contrary, China made it very clear in its note to the resolution that it did not consider that the resolution provided enforcement authority. See Security Council, acting unanimously, condemns in strongest terms Democratic People's Republic of Korea nuclear test, toughens sanctions. However, states are required to report to the Sanctions Committee any other state that refuses to allow boarding on the high seas or to divert its vessel to a port for searching. Presumably, should this happen, the US and its allies would seek another resolution that provided the right to interdict on the high seas without flag state permission. China would likely resist such a resolution, but political pressure would increase.

⁴⁸ It is unlikely that participants would be able to change the ability to interdict on the high seas absent flag state permission. Seeking an amendment to Article 110 of UNCLOS that would make WMD proliferation an international criminal offence –

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

permitting boarding on the high seas without flag state consent – would be extremely difficult politically, which is why PSI participants did not try this initially. Moreover, the custom that enabled these offences to be exceptions under Article 110 developed over a considerable period – time for which the pace of WMD proliferation hardly allows. Another idea, advanced by Etzioni, is that states could interdict in their territorial seas under Article 19 of UNCLOS on the basis that ‘transporting nuclear contraband’ could be deemed ‘prejudicial to the peace, good order or security of the coastal State.’ However, this might be stretching the law too far. See Amitai Etzioni, *Tomorrow's institution today: the promise of the Proliferation Security Initiative*, *Foreign Affairs*, 88 (3) May/June 2009, pp 7-11.

⁴⁹ According to legal scholar Douglas Guilfoyle, the language of Article 27 of UNCLOS – that states ‘should not’ enforce their domestic jurisdiction in their territorial waters – is not an absolute prohibition (such as the term ‘may not’ would be). Rather, it is permissive language that encourages restraint. Guilfoyle believes that states have refrained from exercising their criminal jurisdiction in their territorial seas not because they believe it is prohibited under UNCLOS, but out of reciprocity – states refrain from exercising their criminal jurisdiction in their territorial seas in the hope that other states will extend ships flying under their flag the same courtesy. Thus, enforcement of their criminal jurisdiction for WMD purposes might not be prohibited. Furthermore, states could argue that acting in this manner is fulfilling their binding obligation under Resolution 1540 to suppress the transfer of WMD materials to non-state actors where they are legally able to do so. See Guilfoyle, *Maritime interdiction of weapons of mass destruction*.

⁵⁰ Such an approach would undoubtedly leave open the possibility that targeted states could reciprocate. States would have to ensure that they used this option sparingly, and only with respect to illicit proliferation, lest the norm of non-enforcement erode too far against the majority of states’ interests.

⁵¹ The IAEA’s Illicit Trafficking Database (ITDB) and the NSG’s information-sharing mechanism are potential models. The ITDB stores information on illicit trafficking and other unauthorised nuclear and radiological activities, such as theft and loss of material. The IAEA’s ITDB office serves as the depository of the information, and ITDB staff analyses the material and provides regular reports or information on an ad hoc basis upon request. Currently, 96 states contribute to the database. Each state reports on incidents that take place within their own jurisdiction, providing a summary of basic details, followed by a more comprehensive report, which might include sensitive intelligence. That state can decide whether or not to make the entire report available to the other contributing states, or whether to restrict access to the summary. See IAEA Illicit Trafficking Database (ITDB) fact sheet, Vienna, International Atomic Energy Agency: http://www.iaea.org/NewsCenter/Features/RadSources/PDF/fact_figures2006.pdf.

Similarly, the NSG maintains an information exchange mechanism for its members, including information about entities to which states have denied exports. NSG states implement domestic guidelines to prevent their nuclear-related trade from being used for weapons purposes. Decisions on exports are taken at the domestic level. See Nuclear Suppliers Group website:

<http://www.nuclearsuppliersgroup.org/>. Both these mechanisms build useful intelligence, which is available to all members. Interestingly, some of the PSI’s key missing states – China, India, Pakistan, Indonesia and Malaysia – are members of the IAEA

POLICY BRIEF

A TIGHTER NET: STRENGTHENING THE PROLIFERATION SECURITY INITIATIVE

ITDB, and China is a member of the NSG. Granted, adoption of such a mechanism by the PSI would not be straightforward. The PSI deals in more than just nuclear-related materials – also in chemical and biological weapons materials and missiles for example – and interdiction activities of one state could be more sensitive than reporting on nuclear theft or loss. However, the ITDB and the NSG’s information exchange mechanism demonstrate that sensitive information can be shared for the benefit of a group.

⁵² The fact that Resolution 1874 requires states to report to the Sanctions Committee on interdictions reflects the international community’s general desire for transparency in interdiction activities.

⁵³ For example, Australian officials worked with Pacific states to develop their domestic legal regimes to bring them into compliance with the Chemical Weapons Convention and the Biological Weapons Convention. Interview with official who worked on such legal assistance, 15 June 2009

⁵⁴ As Matthew Bunn notes, many states do not have laws that deal sufficiently with theft, possession or smuggling. In some cases, punishment for such crimes is no greater than for stealing a car. Bunn also notes that many of those implicated in the AQ Khan network remain free. See Matthew Bunn, *Securing the bomb 2008*, Cambridge MA and Washington DC, Project on Managing the Atom, Harvard University and Nuclear Threat Initiative, November 2008, pp 74-75.

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