

# Proliferation Security Initiative – India at the Crossroads

Lieutenant Commander Srinivas Maddula

Let us begin by considering a hypothetical case. North Korea has started commercial production of the advanced Taepodong 2 missile.<sup>1</sup> A Chinese flagged ship *Yan Wei II* carrying sub-assemblies of the missile has just entered the Bay of Bengal after transiting the Malacca Straits. The Research and Analysis Wing (RAW) learns about the shipment, which is bound for Karachi, from Singapore Intelligence Agencies. Singapore has received the information too late to interdict the vessel and requests India, a recent signatory to the Proliferation Security Initiative (PSI), to do so. Indian Naval frigates swiftly dispatched from Port Blair, establish contact with the vessel, which refuses to stop. She alters course north, presumably towards Yangon in Myanmar. India seeks Chinese permission to board the vessel, but China does not respond. The vessel is close to entering Myanmarese territorial waters. The Indian naval ships decide to stop the *Yan Wei II* by firing across her bows, after which the vessel is boarded. China then responds, issuing a public statement considering this interdiction as trespassing into Chinese sovereign territory and thereby an act of war. Chinese troops cross the Indo-China border in Sikkim. The United States and other western powers condemn the action but refuse to interfere in what they call a bilateral incident.

Considering the shaky legal foundation of the PSI, interdictions under its authority may result in such dangerous repercussions. Defence Minister Pranab Mukherjee rightly believe that despite a real risk of Weapons of Mass Destruction (WMD) proliferation through sea lanes, the PSI proposal 'needs to be examined in greater detail' before India would join.<sup>2</sup> This article reasons that the PSI has significant legal, political and operational problems and efforts being made to overcome them may not all be successful. Despite this fact, joining the initiative would benefit India if she limits her PSI activities to within the boundaries of international law.

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**Lieutenant Commander Srinivas Maddula** is a graduate of Marine Corps Command and Staff College, Quantico, USA.

The PSI's legal, political and operational issues include – one, the possible violation of the innocent passage regime and the undermining of both the Law of the Sea and the United Nations (UN); two, confused and seemingly unfair operational practices; and three, failure to provide a foolproof plan to stop WMD traffic. These factors weaken the prospects for international support for, and effectiveness of, the PSI. The US is, however, spending a significant amount of political capital to garner support and contain collateral political damage.

### Variance with International Law

PSI undermines international law. PSI interdictions on the high seas, undermines the freedom of the high seas promised by United Nations Convention on Laws of the Sea (UNCLOS), which the US has not ratified<sup>3</sup> but has maintained that it is customary international law.<sup>4</sup> Also, UNCLOS Article 23 explicitly gives ships carrying nuclear weapons the right of innocent passage.<sup>5</sup> The UN Security Council Resolution 1540 introduced in 2005, requires the UN's members to strengthen domestic laws and border-controls to prevent WMD-proliferation to non-state actors. But, the resolution does not authorise high seas interdiction, or any action outside current international law. Even if each PSI country were to enforce the PSI principles only in its own territorial waters, Security Council approval would be required." The US attempts to secure a Security Council resolution specifically authorising interdiction in the high seas and in territorial waters, is likely to be vetoed by China, quoting that her sovereignty is inviolable. Second, Uniting for Peace Resolution<sup>7</sup> to obtain legal justification is unlikely to gain two third majority. Third, the possibility for the UN to issue sanctions against a specific country such as North Korea or Iran would not gain support from China, South Korea and Japan, wary of antagonising North Korea.<sup>8</sup> Fourth, proposed amendments to the Suppression of Unlawful Acts (SUA) against the Safety of Maritime Navigation Convention,<sup>9</sup> allowing boarding of a suspect vessel without permission of the flag state if no response is received within four hours, would not prevent such shipments on a non-state party's own flagged vessels. Fifth, the US argument that pre-emptive self-defence justifies interdiction of suspected North Korean ships' is invalid as the December 2004 report of the UN Secretary General's High Level Panel on Threats, Challenges and Change has declared

that such an action requires approval of the Security Councils.<sup>11</sup> Lastly, the US efforts to use the UN Charter authorising regional security organisations, such as the North Atlantic Treaty Organisation (NATO), to secure their regions would not justify interdiction globally.<sup>12</sup>

Some developing countries feel threatened by the PSI undermining the concept of sovereignty of nations. The sovereignty of a ship, particularly a government ship, is akin to that of an embassy in a foreign country.<sup>13</sup> Violations challenge the very definition of state sovereignty, a principle regarded as fundamental by most countries including the US.

On a positive note, bilateral boarding agreements which the US has forged with four 'Flags of Convenience' states, enable boarding of a significant portion of global shipping (over 60 per cent of the world's 50,000 largest cargo ships)<sup>14</sup> and are consistent with international law. China has the third largest fleet of flagged vessels in the world. But, having decided not to join the PSI<sup>15</sup>, it is unlikely that she would accede to such an agreement.

### **PSI Perceived as Driven by the US Interests**

The United States believes that it has the legal authority for high seas interdictions. Previous Chief of Naval Operations (CNO) Admiral Vern Clark, says "...We would not, for example, need permission from the United Nations to board and search ships."<sup>16</sup> International law, however, unequivocally prohibits such conduct. Also, the US is seen as setting up multilateral structures operating outside the UN to suit her interests.<sup>17</sup> This poses two problems – firstly, concern for further weakening of UN's authority and secondly, loss of support from nations which hold the UN in high esteem.

The PSI is widely perceived as an example of the United States flouting international legal consensus and non proliferation solutions.<sup>18</sup> Non ratification of UNCLOS and Comprehensive Test Ban Treaty (CTBT) and withdrawal from the Anti-Ballistic Missile Treaty are indicators.<sup>19</sup> By developing PSI norms outside existing international legal convention, the US hopes that the practice would become customary international law over a period of time. The issue of legality has been considered by the US as little more than an irritant. The defiant stance being taken by the US, however, undermines its position of leadership.

The US anti-proliferation actions appear to be inconsistent. According to the US Congressional Research Service, the Russians were caught 16 times and the Chinese 21 times transferring technology to Iran, Iraq, Syria, Libya and North Korea.<sup>20</sup> Yet, sanctions were imposed only once each on China and Russia. Alexander Downer, Australia's Foreign Minister has stated that the PSI is largely directed at North Korea, a 'state of concern' along with Iran.<sup>21</sup> But, other no less dangerous state and non-state proliferators, like Pakistan, China, Russia, Central Asia or the Middle East are being sidelined. The AQ Khan network involved some of these countries, proving the reality and possibility of such proliferation. In the words of one US top non-proliferation expert: "PSI seems to be adopting a troubling double standard by choosing which countries are subject to interdiction and which countries are not."<sup>22</sup>

The US is carrying out proliferation activities herself, bringing about a dichotomy between her rhetoric and actions. Her plans to develop small, low yield nuclear weapons may prompt others to do the same.<sup>23</sup> Israel has modified the US supplied Harpoon cruise missiles to carry nuclear warheads.<sup>24</sup> Such missile shipments violate PSI principles and such double standards cost much international support.

### **Impracticalities of Enforcement**

A practical problem about PSI is the near impossibility of ensuring that the shipments are interdicted. Among impediments is the inadequacy of resources, intelligence information and geographical coverage among participants. Unofficial US claims of the "ability to track anything going in or out of North Korean waters"<sup>25</sup> are unrealistic and could not be claimed for the entirety of the world's seas, airspace, and land territory. Any nation or terrorist group wishing to circumvent interdiction efforts could simply operate through the territory of a non-cooperating state.<sup>26</sup> An example is, the use of Chinese airspace by the AQ Khan network, used for proliferation of missile components between North Korea and Pakistan.<sup>27</sup>

The AQ Khan network emphasises that it is intelligence and enforcement that matter much more than the written rules.<sup>28</sup> Intelligence leading to such operations may not be necessarily available, however, advanced intelligence networks may be.<sup>29</sup>

The US may not even consider it prudent to share sensitive intelligence with all participating countries. The withholding of details about the 11 successful interdictions claimed by the US Secretary of State, Condoleezza Rice,<sup>30</sup> is illustrative.

The fact that the initiative lacks machinery to ensure participant compliance suggests that PSI states such as Russia, which may possess relatively relaxed understandings of what constitutes a proliferation concern, will support PSI actions only marginally and mobilise resources only when economic or other interests are not affected.<sup>31</sup> Also, the clause of reparations for unjustified interdictions, in the proposed amendment to the SUA protocol,<sup>32</sup> would deter many countries from full cooperation, naturally reducing PSI's efficacy.

A difficult issue is the proving of 'intent to proliferate' in the traffic of dual use materials. The 1993 detention of the Chinese vessel *Yinhe*, en route from Iran, which was suspected of carrying material that could be used for chemical warfare but had non threatening applications as well, is a specific example of an unjustified interdiction.<sup>33</sup> Michael Beck, executive director of the Centre for International Trade and Security, writes, "No countries are known to be exporting ready-made WMD. The problem is the export of components, technologies, and production materials associated with WMD – items which are far more elusive because they have civilian as well as military end-uses and their trade is not illegal... 95 per cent of the ingredients for WMD are dual-use in nature."<sup>34</sup>

The PSI requires global participation to achieve full effectiveness. Presently, there are, gaps in maritime coverage given the relatively narrow geographical diversity of the original core member participants. Out of the initial 11 participants, all but Australia, Japan and the US are located in Europe.<sup>35</sup> The US requests for India's participation stem from India's geo-strategic location astride likely proliferation routes in the Indian Ocean and its possession of potent interdiction resources.

### **PSI and India**

PSI is of direct relevance to India – indeed the *Ku Wol Sun* incident of 30 June 1999, in Kandla was one of several cases that stimulated the creation of PSI.<sup>36</sup> India has recently signed the 10-year 'Framework for US – India Defence Relationship,' which

obligates signatories to 'prevent the spread of WMD' and to enhance cooperatively their ability to do so.<sup>37</sup> Such a framework resembles an unofficial entry into the PSI. India has, however, desisted from publicly signing the PSI because of issues discussed earlier. But, in spite of PSI's limitations, India would benefit being a signatory.

As no states are explicitly named as targets of the initiative, the wording allows India to take advantage of the ambiguity to include Pakistan and China, states of concern to India and also states that have been suspected of nuclear proliferation. India could gain access to western intelligence on transactions carried out by these states and possibly propose their interdiction. Also, once India joins the PSI, Pakistan may either consider joining the initiative on her own will or under diplomatic pressure from the US. This would benefit regional security, as it would check within limits, possible Pakistani intentions to proliferate. The PSI's major advantage is "Reciprocity".<sup>38</sup> Other PSI-states might be more likely to act on a proliferation case that affects India even if it does not imperil them.

The Indian Navy's job includes preventing WMD proliferation – for India's own security and also for regional security, which is linked to her own. Also, developing capabilities for maritime interception operation, prepare the Indian security forces to preempt and respond to any possible maritime terrorist campaign. It may only be a matter of time before terrorists recognise that attacks on relatively vulnerable maritime targets will attract enormous attention.

The bombing of the *Superferry 14* in Manila in February 2004 demonstrated the reach of the Al Qaeda. Some critics have argued that deployment of naval and air assets for PSI operations may degrade India's warfighting capability.<sup>39</sup> It can be countered that the Indian Navy and Coast Guard and the Indian Airforce have reached a level of ability and maturity to address all of India's operational commitments.

An initial argument against signing the PSI was the bearing of India's strategic relationship with Iran. However, because of Iran's recommencement of her Uranium enrichment programme, it has been increasingly necessary to rethink India's partnership with Iran objectively. India has recently supported the UN and

International Atomic Energy Agency involvement in the inspection and containment of Iran's nuclear facilities.

The PSI has not been linked to the Nuclear Non Proliferation Treaty (NPT). Signing the PSI, therefore, gives India an opportunity to demonstrate her continuing adherence to the principles of non-proliferation and simultaneously her continued dissatisfaction with the discriminating nature of the NPT.

Most governments seem to take PSI measures, if at all, within existing domestic and international legal frameworks. The interest shown by the US in proposing amendments to the SUA and in getting a Security Council resolution to support PSI interdictions is from a recognition of the need to change focus to what actions might be taken under existing international and domestic laws. India could take advantage of this situation to actively support the PSI within legal confines.

PSI is an activity, not a treaty, and requires only a broad political obligation, not legal commitments. This gives India the flexibility to act on a case-to-case basis, providing resources but desisting from actual interdiction until flag state approval has been obtained. India can find ways to develop national laws to allow interdiction in her territorial waters under customs regulations. India can also increase her regional standing by hosting PSI exercises. Participation in PSI exercises and integration of Indian intelligence resources with that of other PSI nations would be beneficial.

But, even though there are merits in participating in this initiative, India cannot wish away the issues that are in conflict with her principles and policies, which uphold the sanctity of the UN and international law. Signing the PSI is, therefore, a difficult decision. Here, India may take the cue from the Russians who have signed the PSI but have made their apprehensions publicly known. Russia has decided to limit her obligations of the initiative to legal confines.

The PSI has made considerable progress since its inception. But, faulty implementation has created considerable controversy. Criticism includes PSI's stretching, if not breaking, limits of international law, undermining the UN, being limited in its effectiveness and being politically discriminatory.<sup>40</sup> Moreover, countries that are crucial to success of the initiative, like China,

India, Indonesia and South Korea have not publicly joined the initiative.

The US has paid considerable attention to ironing out the deficiencies but continuing lack of clarity of the initiative remains a deterrent for increased participation. Legal issues include undermining of the Law of the Sea, with possible violation of the regimes of innocent passage and freedom of the high seas, and of national sovereignty. Political issues include undermining of the UN, disregard for the sanctity of international law and national sovereignty, discrimination between nations and proliferation by the US. Impracticalities of enforcement stem from inadequate intelligence and global coverage, difficulty of proving 'intent to proliferate' in dual use material trafficking and the ease of proliferation of compact WMD components.

The PSI concerns will remain unanswered if the current efforts to answer them are anything to go by. Additionally, the secretiveness surrounding it, makes it difficult to assess its success and to garner support from nations suspicious of the US driven endeavours.<sup>41</sup> The PSI is not the centrepiece of counter proliferation efforts, even though the US focus on the initiative may indicate otherwise. Rather, it complements other initiatives. The PSI is a useful, though limited step towards aiding global non-proliferation attempts. India would benefit if she joins the initiative, considering her new strategic partnership with the US, her commitment towards non proliferation and her emergence as a regional power with its accompanying unwritten responsibility towards ensuring regional security. But, to subscribe to the current modalities of the PSI in total would be against India's beliefs in the principles of the UN, sanctity of international law and regard for fair international practices. India must, therefore, take a middle path - endorsing the PSI's principles, but limiting her actions in accordance with her guiding principles.

### Notes (Chicago Convention)

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