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# The Proliferation Security Initiative

Lessons for Using Nonbinding Agreements

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## Introduction

The ongoing nuclear crises in Iran and the Democratic People's Republic of Korea (DPRK) and the threat of terrorist groups using weapons of mass destruction (WMD) demonstrate the nuclear non-proliferation regime's difficulty in dealing with noncompliance and preventing the illicit use of dual-use materials. To address these weaknesses, the United States established the Proliferation Security Initiative (PSI) as an innovative and effective approach to interdict the shipment of WMD parts and materials for illicit purposes.<sup>1</sup>

The PSI is a nonbinding political pledge through which states voluntarily interdict shipments of illicit WMD-related materials to and from states and nonstate actors. U.S. president George W. Bush established the PSI in May 2003 and named its initial participants—Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. As of May 2011, the PSI boasted the participation of over ninety-five states.<sup>2</sup>

Nonbinding agreements are nothing new in global governance. However, the PSI's development was unique. Bush's announcement of the PSI did not spell out the rules of the road for interdiction—these details would be worked out later. Rather, his aim was to counter an urgent problem by immediately deterring would-be proliferators. Working-level officials were then left to “put meat on the bones” of the Bush statement.<sup>3</sup>

Many observers—foreign governments and independent analysts alike—were initially skeptical of the PSI and its nonlegally binding status. They were critical of its “coalition-of-the-willing” nature, claiming that the PSI was an example of the Bush administration's blatant disregard for formal multilateralism and the United Nations. Some countries, including China, Indonesia, India, and Malaysia, questioned its legality.<sup>4</sup> In particular, Russia and China expressed concern that the PSI would become a de facto blockade of the DPRK.<sup>5</sup> Not surprisingly, so did the DPRK, which claimed that it would consider any PSI action against it an act of war. Others feared that the PSI would “dilute” other non-proliferation efforts.<sup>6</sup>

The PSI has, however, proved to be a success. To date, it is credited with more than two dozen interdictions of WMD-related technology, including shipments to Iran.<sup>7</sup> The most publicized success involved the *BBC China*, a German-owned ship discovered to be transporting centrifuge parts procured through the A. Q. Khan network to Libya. Officials cited this seizure as a factor in Libyan leader Muammar al-Qaddafi's decision to renounce Libya's WMD programs.<sup>8</sup> Recently, Belize, a PSI participant, gave the United States permission to interdict a ship flying its flag that the United States suspected was transporting illicit parts to Myanmar. While the United States did not interdict for political reasons, the ship ultimately aborted its journey to Myanmar and returned to the DPRK.<sup>9</sup>

The PSI's track record suggests that nonlegally binding agreements can be useful instruments to spur rapid international cooperation on critical global security challenges. The PSI has mobilized cooperative nonproliferation activities, led to international legal developments, and been adopted to promote new nonproliferation initiatives. Initial resistance has been replaced by acceptance (albeit, in some cases, grudging) among governments and independent analysts, out of recognition that its in-

formal and flexible nature makes it a valuable complement to formal mechanisms. Moreover, it has been influential in developing new international legal arrangements, such as the Suppression of Unauthorized Acts (SUA) Protocol of 2005 and the Beijing Convention, as well as UN Resolution 1540 and the Iran and DPRK sanctions-specific resolutions—all of which were developed after the PSI.

The PSI model has also reached beyond nuclear interdiction. The Global Initiative to Combat Nuclear Terrorism (GICNT) adopted a similar model, and the April 2010 Nuclear Security Summit took an informal approach to developing consensus around the goal of securing all nuclear materials by 2014, particularly through its nonbinding communiqué. These initiatives supplement the existing nonproliferation regime and create a sophisticated nuclear governance structure.

The success of the PSI leads to four important recommendations:

- Policymakers should resist formalizing the PSI by making it legally binding or giving it a decision-making mechanism;
- The United States should signal intent to comply with international law by ratifying the United Nations Convention on the Law of the Sea (UNCLOS);
- Policymakers should add incentives for participation in the PSI; and
- The PSI model should be promoted to fit select transnational issues, particularly for areas where concluding treaties rapidly is politically difficult, but which require immediate attention.

Strengthening the PSI in this manner and adopting its model would advance U.S. interests in preventing proliferation and provide a useful framework to mobilize international action on important global issues.

## Impetus: The *So San* Case

The Bush administration launched the PSI in response to an incident in November 2002 that highlighted a serious gap in the WMD nonproliferation regime: namely, the lack of clear rules to interdict and seize shipments of WMD or WMD-related materials. At the time, international law did not address interdiction on suspicion of WMD trafficking.

That November, U.S. officials were tracking a Cambodian ship, the *So San*, on its voyage from the DPRK to Yemen. Officials believed the ship was carrying materials that could be used for WMD purposes. Upon a U.S. request, Spanish authorities interdicted the *So San* in the Arabian Sea and discovered twelve SCUD missiles, hidden under thousands of bags of cement.

Nevertheless, per a subsequent U.S. request, Spanish authorities allowed the ship to proceed with its cargo intact. Though the ship's failure to display a flag meant the stopping and searching of the vessel was legal, and Yemen had previously committed to stop purchasing missiles from the DPRK,<sup>10</sup> the United States ultimately allowed the shipment to continue because of the value it placed on Yemen as a counterterrorism partner, and because of Yemeni assurances that the missiles would not be used for WMD purposes.<sup>11</sup> This embarrassing incident prompted deliberation by Bush administration officials to assess how future cases of potential WMD or WMD-related shipments could be better handled.<sup>12</sup>

The *So San* incident exposed a fundamental problem: transshipment of WMD-related material for illicit purposes was not criminalized under international law, and there were limited legal grounds for seizure.<sup>13</sup> UNCLOS—the foundational treaty governing maritime law—defines areas of the sea, states' jurisdiction over those areas, and the limited conditions under which interdiction is permitted.<sup>14</sup> WMD suspicion is not one such condition.

If a state cannot exert jurisdiction over a vessel based on its location, it is permitted to interdict the vessel only with permission of the state to which the vessel is registered or flagged. Absent this permission, there are limited circumstances under which states can interdict; on the high seas, international law permits interdiction on suspicion of piracy, but not for WMD proliferation. States can also interdict a "stateless vessel"—a ship that is not displaying the flag of the state in which it is registered.

Even if states lawfully board and search a vessel, however, there are not always legal grounds for seizure and prosecution, as the vessel's conduct may not be illegal. The WMD treaties—the Nuclear Nonproliferation Treaty (NPT), Chemical Weapons Convention (CWC), and Biological Weapons Convention (BWC)—do not criminalize trade in related materials, even if they are intended for illicit purposes, because such materials also have legitimate uses. Hence—barring UN resolutions that explicitly ban the transfer of such material to certain states—seizure and prosecution rely on the strength of domestic criminal codes in the state entitled to exert jurisdiction. Some states have strong domestic codes that allow for seizure and appropriate prosecution, while others' codes are weak. Even though states are legally bound to adopt domestic legislation to criminalize WMD terrorism activities under UN Resolution 1540, implementation varies.<sup>15</sup> Though the SUA Protocol and the Beijing Convention criminalize the trade for illicit purposes, they do so only for states parties. Fur-

thermore, neither Resolution 1540 nor the SUA Protocol nor the Beijing Convention was in place at the time of the *So San* interdiction.

## Approach to the Problem

U.S. officials could have taken several approaches to the problem of WMD interdiction at sea. They could have tried to change international law in two ways to allow for interdiction absent flag-state permission on the basis of WMD proliferation suspicion. The first option would have directly challenged current practice by interdicting on the high seas absent permission, in the hopes of building a new custom over time. Although Undersecretary of State for Arms Control and International Security John Bolton apparently supported taking this route, it would have been politically dangerous, potentially subjecting the United States to accusations that it was committing acts of war.<sup>16</sup> The second would have been to develop a new treaty, or to amend existing treaties such as UNCLOS or the NPT, to allow for interdiction among treaty members and provide accompanying punishment.

Neither option was particularly attractive. Amending UNCLOS to add shipments of material bound for illicit WMD programs to the list of interdiction exceptions would have been politically difficult. UNCLOS took decades to negotiate, and amending one article would risk reopening others. Also, the United States had not—and still has not—ratified UNCLOS, even though it relies on the freedom-of-navigation norm the treaty codifies. U.S. nonratification leaves it with little power to influence change regarding maritime practices. Similarly, opening up the NPT for amendment would have been time-consuming and cumbersome, and there was little indication that changes would be possible.

It became clear to U.S. officials in interagency deliberations that they would have to rely on existing international law and encourage states to bolster their domestic legislation and exercise their jurisdiction where they could. Thus, officials chose to solidify commitments to the concept of interdiction for WMD purposes and strengthening domestic legislation to prosecute criminals.

## Design

### *A NONBINDING AGREEMENT*

U.S. officials could have sought to solidify this commitment by negotiating a legally binding international treaty that would have committed states to interdict where possible under existing law and strengthen their domestic regulations. This would have granted the agreement all the benefits that treaties bestow: international legitimacy, a credible signal of intent to comply, and deterrence against violations.<sup>17</sup> However, treaties can take a long time to negotiate and come into effect, be watered down to the lowest common denominator, and provide no guarantee of compliance or enforcement. The United States did not have time on its side. The frequent intelligence reports of WMD-related shipments, and concern over the DPRK's and Iran's nuclear activities, meant that action had to be taken quickly.

By pursuing the PSI as a nonbinding political pledge, the United States was able to address many of the shortcomings associated with developing a legally binding treaty. Pledges can be easier to negotiate, faster to implement, easier to adapt, contain stronger commitments, and protect state sovereignty. Moreover, a nonbinding instrument can allow parties to develop new norms that are not part of—or are not straightforward in—international law.

However, though a political pledge meant the United States was able to conclude an agreement quickly, it still faced a drawback: less certainty about compliance. The lack of a binding commitment means that states can more easily pick and choose when to comply and can encourage free riding. Moreover, pledges can be abandoned more easily than treaties.

### *MITIGATING THE WEAKNESS OF PLEDGES*

U.S. officials were well aware of these pitfalls.<sup>18</sup> They dealt with them by inviting likeminded states to form the initial agreement, announcing the general concept before the specific text was negotiated, publishing the interdiction principles quickly, and giving the issue high-level attention.

#### **Likeminded States**

U.S. officials took a strategic approach to creating the PSI coalition and decided to invite only a small number of likeminded states. They built the coalition in a sequence that was designed to secure strong initial support and branch out from there.

Based on this strategy, officials approached the United Kingdom and Australia first. Both states supported the United States in Iraq when few others did. Moreover, they were viewed as capable of taking leadership roles in recruiting others in their regions: the United Kingdom in Europe and Australia in the Asia-Pacific.

Once officials secured in-principle support from the United Kingdom and Australia, they asked other democracies, including France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, and Spain, to join the initiative. These participants became known as the Core Group.

By selecting likeminded partners who would take action to interdict, U.S. officials sought to accelerate agreement, devise strong commitments, and minimize the chances that states would fail to comply with their pledge. They deliberately excluded states that would stymie agreement or shirk their commitments.

U.S. officials excluded Russia and China for these reasons, despite their relevance as nuclear weapon states. Cooperation between Russia and the United States on nuclear terrorism, which began in the aftermath of the September 11, 2001, attacks, had stalled, and U.S. officials were increasingly frustrated.<sup>19</sup> Similarly, U.S. officials felt it would be difficult to reach agreement on cooperation with China, given Chinese sensitivities in the South China Sea and a failed interdiction in 1993 that had strained U.S.-China relations. Complicating matters, the United States was at the time in the process of sanctioning some Chinese firms for trading with North Korea.<sup>20</sup> Thus, China was not viewed as a likely supporter of the PSI, and U.S. officials felt there was a possibility it would cheat on its commitments.

By limiting initial participation to states that took a likeminded view of WMD proliferation, the United States sought to conclude an agreement that was not “wishy-washy or watered down. . . . [G]aining adherence to [the] statement was less important as a first step than a strong statement.”<sup>21</sup>

U.S. officials quickly assembled the Core Group, and Bush announced the PSI in Krakow, Poland, in May 2003:<sup>22</sup>

[T]oday I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world’s most destructive weapons away from our shores and out of the hands of our common enemies.<sup>23</sup>

### The Cart Before the Horse

President Bush’s announcement of the PSI represented an in-principle agreement among participants to undertake interdictions. By making a strong public statement of intention to interdict shipments of materials bound for illicit programs, states aimed to put would-be proliferators on notice that their movements were being closely monitored and that states were willing to take action against them and, ultimately, change their risk-reward calculus.<sup>24</sup> After all, the aim was to have no need to undertake interdictions in the first place.

By announcing the PSI before details were finalized, the United States intended for it to have an immediate deterrent effect. It was a creative way to address an urgent problem. In this sense, the PSI was a “bluff” in the beginning.<sup>25</sup>

After the Krakow speech, participants needed to move quickly to give meaning to Bush’s announcement. As John Bolton recalls, “[w]e needed to flesh out the two sentences in Bush’s Krakow speech and make PSI as real as possible.”<sup>26</sup>

Participants met several times over the next few months and discussed how the PSI would operate. It became clear early in the process that the PSI would adhere to existing legal frameworks. While Bolton apparently envisioned interdictions that might not accord with international law, such as on the high seas absent flag state permission, many international partners and even other U.S. officials were vehemently opposed to an agreement that did not adhere to international law.<sup>27</sup> This discussion resulted in an assurance in the PSI's agreement text that it would be "consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council."<sup>28</sup>

In determining the targets of the PSI, participants considered explicitly defining what materials were WMD-related and which actors were of proliferation concern. For materials, the PSI would draw on lists outlined by complementary regimes—including the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG), and the Australia Group (dealing with chemical and biological weapons)—to avoid duplication.

However, discussions became laborious and politically difficult when centered on which states and nonstate actors should be on a list of proliferation concern.<sup>29</sup> Clearly, the DPRK and Iran were prime targets of the PSI's activities, but officials felt it would be foolish to restrict the PSI's potential activities to those two states. Likewise, there could be many private entities involved in the illicit trade, the identities of which would not always be known. Following lengthy debate, the participants decided against identifying specific actors and materials, referring to them only in a generic sense. This granted flexibility for future operations.

### **Publishing Interdiction Principles Quickly**

Negotiation of the PSI's principles was heated and demonstrated that states were taking their interdiction commitment seriously, even though the agreement would not be legally binding. After months of negotiation, the United States was keen to finalize and publicize the agreement. However, a final text was still elusive by the third PSI meeting in September 2003. In particular, France wanted greater reference to international law and requested additional time to consider the text.

To combat French resistance and move the process forward, Bolton used the fact that the agreement was nonbinding to his advantage. He explained that the principles could be changed fairly easily down the road. This was a clever tactic to get participants to agree, as Bolton never intended for changes to be made. In talking later to Russia about the principles, he said that they were "not carved in stone," but neither were they still "in the word processor."<sup>30</sup>

### **Giving the Issue High-level Attention**

Another way Bolton was able to push the principles forward was by reminding the group that their heads of government had already agreed to the concept with President Bush. This put pressure on foreign officials at the working level to agree to the principles. Bolton told the group that he would be publicly announcing the principles as they were, and that any state that did not agree with the text could withdraw from the PSI if they wanted to. No one did.<sup>31</sup>

## AGREEMENT

Bolton announced the PSI's interdiction principles on September 4, 2003. The agreement complemented existing international law, contrary to the initial perception of many states and analysts. It was fully consistent with UNCLOS and other instruments, such as export control regimes, and served as mortar to fill in the gaps rather than as an alternative to existing arrangements. It consists of a preamble and four operational principles.<sup>32</sup>

The first principle articulates the basic agreement. States pledge 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. . . .<sup>33</sup>

Through the subsequent principles, states pledge to consider interdicting vessels at the request of another participant, or to allow that participant to interdict their shipping. Interdiction can be undertaken by one PSI participant on its own or by several acting in concert.<sup>34</sup> To support this, states undertake to adopt streamlined procedures for information exchange and to strengthen domestic and international legal frameworks.<sup>35</sup>

It is important to recognize that the pledge did not manage to change the law. But it served as a commitment by states that they would do as much as they could to combat the problem consistent with existing international law and their individual domestic regulatory regimes. And concluding the agreement at the head-of-government level added weight to a U.S. request for cooperation and compliance, even though the PSI was technically voluntary. In the event of obstacles to cooperation, President Bush could call on his counterparts and remind them of their pledge to cooperate through the PSI, thus exerting pressure to comply.

After PSI participants negotiated the agreement, they presented it to others, including Russia and China, as a *fait accompli*. China, Indonesia, India, Malaysia, and Russia questioned PSI's legality, expressed concern about sovereignty, and some cited the United States' failure to ratify UNCLOS as cause for suspicion.<sup>36</sup> Others questioned its legitimacy, and accused the PSI of being a hub and spoke arrangement concealed as a multilateral one.<sup>37</sup>

Though Russia ultimately joined the PSI in May 2004, many other important states have not. These include China (important both for its location in Northeast Asia and its nuclear weapon status), India and Pakistan (for their location beside major Indian Ocean trade routes and nuclear weapon status), Malaysia and Indonesia (for their location on the Malacca Straits), and Egypt (for its location on the Suez Canal). The absence of these states means that the PSI network has critical gaps, which proliferators could exploit.

## Evolution of the PSI

By September 2003, U.S. officials claimed that the PSI had more than fifty participants, although not all of them had endorsed the PSI publicly. Over the next few years, several aspects of the PSI evolved, as participants put their commitments into practice.

### *OPERATIONAL DEVELOPMENT*

Though policy officials created the PSI's basic principles, they left operational experts to flesh out the details. Some U.S. and foreign practitioners at the operational level claimed that the broad language was useful, as it allowed those who would be responsible for interdictions to determine the best procedures. Others criticized it as a lack of policy direction from their political masters and expressed frustration. In particular, some operational officials were concerned that they might undertake an interdiction that would have negative political consequences, or that an interdiction could unintentionally provoke an incident that might escalate rapidly.<sup>38</sup>

To work through potential problems, the PSI established an Operational Experts Group (OEG) consisting of officials from certain participant states with legal, operational, and intelligence backgrounds to clarify the procedures for carrying out the overarching policy. The OEG meets periodically and is made up of a subset of PSI participants, including 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.<sup>39</sup> These states were largely members of the Core Group at the time of formation and decided together to create the OEG.<sup>40</sup>

Though not all PSI participants are represented in the OEG, all are able to take part in joint interdiction exercises, during which they can work on building relationships and identifying any inter-operational difficulties. As a result of this work, participants have established points of contact and best practices for conducting interdictions, both of which were missing from the original agreement.

The exercises are also intended to have a deterrent effect. The first exercise was designed to send a strong signal to the DPRK.<sup>41</sup> It took place off the coast of Australia, with Australia's defense minister, Robert Hill, delivering a speech onboard the primary vessel.<sup>42</sup>

### *HYBRID APPROACH*

Underpinning the PSI's political pledge are legally binding bilateral shipboarding agreements between the United States and open-registry states, known for their relaxed maritime laws and status as havens for illicit activity. These open-registry states include the Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Mongolia, the Marshall Islands, Panama, and Saint Vincent and the Grenadines.

Prior to the United States negotiating these bilateral agreements, the Core Group considered whether they should be made part of the PSI. Ultimately, it decided that the United States should conclude them bilaterally. Thus, they are not formally attached to the PSI. The United Kingdom considered concluding its own bilateral agreements with these states but decided that the U.S. agreements would be sufficient to cover open registry interdiction, obviating the need to negotiate additional legally binding agreements.<sup>43</sup> The United States is the only party that may interdict open registry vessels, but the American bilateral agreements can be called upon if necessary.

The United States negotiated these agreements after developing the PSI, basing them on the PSI's principles.<sup>44</sup> Though the shipboarding agreements are similar in concept and language to the PSI principles, the wording is more precise and provides more details. The bilateral agreements span an average of eleven pages, whereas the PSI's principles account for one-and-a-half pages. They provide processes and points of contact for expedited interdiction, thus avoiding delay and the potential destruction of evidence, and have information-sharing and dispute-resolution mechanisms. They address some of the thornier details that the PSI avoided specifically addressing. For example, they cover: which state has jurisdiction over detained vessels; the conditions under which the use of force may be used; and how to address claims, including injury and the loss of life.<sup>45</sup> These binding agreements were also intended to deter. They were highly publicized to signal to proliferators that the trafficking routes on which they might rely were no longer immune from interdiction, and that PSI was paying significant attention to the problem.

By combining legally binding bilateral agreements with an overarching multilateral pledge, the United States created a hybrid regime. This framework was a creative solution to the compliance problem, given the urgency of the situation. By initiating the PSI with states for which there was little concern about compliance, the United States concluded the PSI's principles rapidly. Once the basic agreement was in place, the United States could take additional time to negotiate legally binding agreements with states for which compliance was important but not guaranteed. In this manner, the sequencing of agreement formation mattered: the existence of the PSI served to facilitate the formation of the bilateral agreements.

## *INSTITUTIONALIZATION*

The PSI is a flexible agreement. There is no decision-making mechanism and no authority that must approve an interdiction. There is no governing body to coordinate activity, nor any formal information-sharing mechanism. Some analysts have criticized this design, claiming the PSI lacks transparency and legitimacy.

In an apparent attempt to correct these perceived flaws, President Barack Obama called on the international community to strengthen the PSI by turning it into a “durable international institution” in his April 2009 Prague speech on nuclear nonproliferation and disarmament. But the administration never divulged additional details on this initiative, and the May 2010 National Security Strategy retreated from this position, stating that the United States would turn the PSI into a “durable international effort” rather than an institution.<sup>46</sup>

Though the Obama administration continued to support the PSI, the initiative lost some high-level attention, which affected its momentum. Arguably, the early high-level attention, which kick-started the PSI, is no longer critically important since the initial political commitment has been made and important operational and legal developments have durably formed.

## PSI's Influence

In the eight years after the PSI's inception, participation has grown to almost one hundred states, and it has been credited with successfully interdicting WMD parts to Iran and publicly exposing the A. Q. Khan network and Libya's WMD program through the *BBC China* interdiction. Rather than undermining the nonproliferation regime, the PSI plugs an important gap in an efficient manner. It is effectively an informal enforcement mechanism for export control agreements such as the NSG and the Australia Group. In addition, the PSI appears to have had some influence over several recent legal developments toward criminalizing the transport for WMD-related materials for illicit programs, and its approach has been adopted to fit other U.S. security objectives.

### LEGAL DEVELOPMENTS

#### UN Resolution 1540

The PSI was an informal approach that the United States took to address the lack of criminalization of the trafficking of WMD and related materials for illicit purposes. Concurrently, the United States sought a formal approach to address the issue at the United Nations. Resolution 1540 was passed in April 2004. Though, at China's insistence, it does not explicitly mention the PSI, it reflects the general concepts of cooperation and states' responsibilities for WMD terrorism activities taking place within their jurisdictions, and some of the language is markedly similar to the PSI's principles.

It is important to note, however, that UN Resolution 1540 does not make trafficking in WMD and related materials an international crime. Rather, it requires states to pass domestic laws that criminalize these activities within their jurisdictions. Thus, it does not provide additional recourse to undertake interdictions on the high seas, and the state in whose jurisdiction a circumscribed activity might take place must have passed relevant laws for it to take action. Though Resolution 1540 is legally binding on all states, it is difficult to envision a situation in which the UN Security Council might take action against a state it feels has not sufficiently adhered to the resolution. Thus, the extent of criminalization depends on each individual state's progress in passing laws.

#### SUA Protocol 2005

The International Maritime Organization's Suppression of Unlawful Acts Protocol 2005 makes it an international offense to unlawfully and knowingly transport material for illicit WMD purposes by sea and provides for interdiction on the high seas.<sup>47</sup> However, the protocol's provisions are binding only on those states that ratify—only thirteen states have ratified so far, and they represent only around 7 percent of world merchant shipping tonnage.<sup>48</sup> Moreover, it does not grant any additional legal means to board on the high seas without flag state consent. Nonetheless, it is an important de-

velopment that helps to set a norm of criminalization. It is consistent with the PSI's calls on the international community to strengthen the international counterproliferation regime, and some officials attribute the PSI as facilitating the protocol's development.<sup>49</sup>

### Beijing Convention

A treaty concluded in Beijing in September 2010 addresses illicit transport by air. Although not yet in force, the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation will criminalize the unlawful transport of WMD and related material and make such smuggling punishable under the convention—although, like Resolution 1540, it requires states to adopt domestic legislation criminalizing this conduct.<sup>50</sup> Similar to the SUA Protocol, while it will be binding only on state parties, it promotes a norm against transport for illicit purposes. Though the Beijing Convention was not concluded as a PSI activity, officials report that the PSI relationships facilitated diplomatic efforts to negotiate the convention.<sup>51</sup>

### Sanctions Resolutions

Several UN Security Council resolutions prohibit the shipment of material for WMD purposes to and from the DPRK and Iran and authorize states to conduct interdictions to enforce this prohibition. Though the resolutions do not name the PSI as an instrument to conduct these interdictions, and states must still receive permission to board and search from flag states, the resolutions do provide authority to seize materials. The resolutions plug a critical gap by prohibiting the trade in WMD-related materials for illicit programs in these two countries. Though these additional legal authorities apply only to the DPRK and Iran, they signal that trafficking materials for illicit WMD purposes is increasingly moving toward criminalization.

These legal developments emerged from the consensus that interdiction is an important part of preventing proliferation—a concept that the PSI established. In this manner, the PSI complements the existing nonproliferation regime and has enabled the development of international law.

## *ADOPTION OF PSI APPROACH*

U.S. officials have adopted the nonbinding model for other agreements in the nuclear realm, most notably the Global Initiative to Combat Nuclear Terrorism (GICNT). Like the PSI, the GICNT has a statement of principles, containing a short preamble and eight operational paragraphs. However, the principles of GICNT had greater clarity from the outset than those of the PSI, thanks to published operational documents and a defined organizational structure, with the United States and Russia serving as co-chairs—a choice that partly reflects lessons learned from the PSI.<sup>52</sup> Presidents Bush and Putin announced the GICNT in Saint Petersburg, Russia, in July 2006. Thirteen participants and the International Atomic Energy Agency (IAEA) attended the first meeting in Rabat, Morocco, in November 2006. Currently, the GICNT has eighty-two participants and four official observers (the IAEA, European Union, International Criminal Police Organization, and United Nations Office on Drugs and Crime).

In a different manner, the Obama administration has used the nonbinding concept to foster cooperation quickly, as through the 2010 Nuclear Security Summit.<sup>53</sup> Forty-seven states gathered in

Washington, DC, in April 2010 to discuss the threat of nuclear terrorism. At the end of their two-day discussion, states endorsed a nonlegally binding communiqué, in which they pledged to enhance nuclear security and counter nuclear terrorism. The communiqué endorses Obama's goal to secure the world's vulnerable nuclear material by 2014.

Although nonbinding, the communiqué does have teeth, contrary to the assertions of opponents such as U.S. senator Jon Kyl (R-AZ).<sup>54</sup> By publically committing to adhere to the communiqué's principles, a country signals its intentions and it risks damaging its reputation if it fails to deliver. Many countries made national commitments in addition to the communiqué, to which they can be held accountable at the next summit in Seoul, Republic of Korea, in 2012.<sup>55</sup>

## Lessons for Using Nonbinding Agreements

The PSI case provides lessons about the use of nonbinding agreements, suggesting five main conclusions.

First, nonbinding agreements can be useful complements to existing treaties and other formal mechanisms of international cooperation. They can be formed quickly to address urgent problems, which can then pave the way for stronger commitments through complementary agreements, hybrid arrangements, and other legal developments. Nonbinding agreements need not evolve into binding treaties themselves.

Second, even though nonbinding agreements can be easily modified in theory, real-world political considerations preclude changes at whim. Reopening a nonbinding agreement for negotiation would have similar dynamics to a legally binding agreement. It would require a considerable degree of consent by parties, risk destroying any previously hard-fought consensus, and require considerable resources, making modification unattractive. This makes nonbinding agreements more difficult to alter than one might assume.

Third, agreement at the head-of-government level and continued high-level attention can mitigate problems associated with nonbinding agreements by adding to reputational and political costs for noncompliance. It can confer seriousness of purpose, provided the state has a good reputation for compliance. Head-of-government attention might be the most cost-effective approach to securing important cooperation.<sup>56</sup> However, this is a double-edged sword—if high-level attention wanes, for example because of leadership change, so too can the momentum of the agreement.

Fourth, just as the PSI case suggests important lessons for the use of nonbinding agreements in global governance, it raises additional issues. Though nonbinding agreements can provide useful focal points to garner swift cooperation on important issues and can help set norms by moving state behavior and practices in certain directions, they might need accompanying or subsequent treaties to truly develop international law. Thus, they are probably best used in situations where the behavior they circumscribe is not too controversial or groundbreaking.

Finally, the PSI model, and the United States' approach to forming it, has implications for the form of international cooperation in the future. As global power increasingly diffuses to other power centers, the United States should anticipate that other major countries will increasingly avail themselves of the opportunity to form their own "coalitions of the willing" in which they determine the agenda, potentially excluding the United States. There are already organizations that do so, of course, such as the Shanghai Cooperation Organization and the EU trade area. However, these are not on the same scale as the PSI and do not have as powerful a benefactor as the United States, nor are they global in scope. Nonetheless, it is not difficult to image countries adopting similar strategies in the not-too-distant future, particularly the so-called BRIC countries (Brazil, Russia, India, and China), as they seek to reshape institutional arrangements.<sup>57</sup>

## Recommendations

The following recommendations flow from the case of the PSI and its lessons learned. They are intended for U.S. policymakers. The first two deal with the PSI specifically, and the third with the PSI model.

*Policymakers should resist calls to turn the PSI into a legally binding agreement or give it a decision-making mechanism.*

Some commentators have called for the PSI to be formally endorsed through a UN resolution to give it a greater sense of legitimacy.<sup>58</sup> This is not a good idea. Not only would China oppose it, but changing the PSI's structure could undermine the very attributes that make it effective. A formalized decision-making process, if it even managed to produce consensus, might slow down operations, robbing the PSI of its ability to respond quickly to evolving situations with limited windows of opportunity for action.<sup>59</sup> Moreover, there is anecdotal evidence that at least a few current participant states would leave the PSI should it become formalized.<sup>60</sup> Participants should consider a reporting mechanism that informs other participants of actions undertaken under PSI auspices, thus adding transparency and building confidence in the PSI's value. Critics will claim this would be impossible because of the sensitivities surrounding intelligence sharing. But reports could be sanitized for sensitive information, and there is a related precedent: states are required to report on their actions undertaken under the resolutions against Iran and the DPRK.

*The United States should signal intent to comply with international law by ratifying UNCLOS.*

U.S. ratification of UNCLOS would help the United States garner greater support for the PSI. It would signal U.S. intent to conform to international law at sea and that the PSI is fully consistent with UNCLOS, doubt over which states such as China and Indonesia cite as reasons for their nonparticipation. Continued refusal by these states to participate following U.S. ratification would reveal the legal argument as a smokescreen for their real objections.<sup>61</sup> Thus, rather than an impediment to the PSI, as some argue, UNCLOS ratification could strengthen the PSI.<sup>62</sup>

*Policymakers should add incentives for participation in the PSI.*

The United States could secure greater buy-in among countries that are not currently members by providing tangible benefits for participation, such as donating maritime assets to conduct interdictions and legal assistance to develop their WMD terrorism laws, as required under UN Resolution 1540. Such assistance would enable states to undertake their own interdictions when they see fit and punish proliferators within their jurisdiction, thus preserving their sovereignty.

By assisting in this manner, the United States would enable states to conduct regional interdiction cooperation. This would not only reduce the U.S. burden; it would also help reduce the perception that the PSI is a hub-and-spoke instrument of the United States. Improving maritime capacity would have the additional benefit of assisting states, such as Indonesia and Malaysia on the busy Malacca

Straits, to better police their territories for the full range of criminal activity that affects their commerce, beyond WMD proliferation. This could be an attractive benefit to entice additional adherents. The United States could seek India's participation in the PSI as it strives to become accepted into the NSG. Though the United States was unsuccessful in securing India's participation in the PSI during its 2005–2008 negotiations on the U.S.-India nuclear deal, renewed discussions by the Obama administration, which emphasize India's need to portray itself as a responsible and committed partner on nonproliferation, might prove more successful. Given that U.S. policy is to back India's NSG membership, it should at least insist on PSI participation in exchange.

*The PSI model should be promoted to fit select transnational issues.*

Policymakers should consider nonbinding agreements in cases where concluding treaties are politically difficult but need immediate attention. Nonbinding agreements are not suitable when they would entail controversial reinterpretation of law. Suitable issues include those about which there is growing consensus but which would benefit from political momentum. Over time, even if the agreement itself does not become binding, it might influence development of other legal mechanisms along similar lines. A good issue for nonbinding agreements is climate change, where hopes for an overarching, legally binding treaty are dim, but there is scope for political agreements on some of the composite issues, such as deforestation.<sup>63</sup> However, if a nonbinding model is adopted, it must have high-level attention or it will not yield strong reputational costs for violation, and will therefore likely be less effective.

## About the Author

**Emma L. Belcher** wrote this paper while she was a Stanton nuclear security fellow at the Council on Foreign Relations. She is currently a program officer at the MacArthur Foundation. The views expressed herein are solely her own and do not necessarily reflect the views of the MacArthur Foundation.

## Endnotes

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1. Interdiction is the stopping and searching of vessels, including aircraft, 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 and Security Law*, vol. 12, no.1, 2007.
  2. "Proliferation Security Initiative Participants," Bureau of International Security and Nonproliferation, Washington, DC, September 10, 2010, <http://www.state.gov/t/isn/c27732.htm>.
  3. John Bolton, *Surrender Is Not an Option: Defending America at the United Nations and Abroad* (New York: Threshold Editions, 2007).
  4. Though Russia initially cited concerns about international law, it ultimately joined the PSI in May 2004.
  5. Bolton, *Surrender Is Not an Option*, p. 125.
  6. See Siew Gay Ong, "The PSI: A View from Asia," in Olivia Bosch and Peter van Ham, ed., *Global Non-Proliferation and Counter-Terrorism* (Washington, DC: Brookings Institution Press, 2007); Mark Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Paper (London: International Institute for Strategic Studies, 2005), p. 8.
  7. Condoleezza Rice, "Remarks on the Second Anniversary of the Proliferation Security Initiative," Washington DC, May 31, 2005, <http://merln.ndu.edu/archivepdf/wmd/State/46951.pdf>.
  8. See "Proliferation Security Initiative Frequently Asked Questions," U.S. Department of State, Washington DC, May 26, 2005, <http://2001-2009.state.gov/t/isn/rls/fs/46839.htm>. In the face of criticism that the *BBC China* was not a "PSI interdiction," one former official has expressed the view that the interdiction would have taken much longer had Germany and Italy not recently made the political decision to participate in the PSI. Interview with former U.S. government official A, Washington, DC, March 2008.
  9. David E. Sanger, "U.S. Said to Turn Back Missile Shipment to Myanmar," *New York Times*, June 12, 2011, available at [http://www.nytimes.com/2011/06/13/world/asia/13missile.html?\\_r=1&scp=1&sq=DPRK%20US%20Myanmar&st=cse](http://www.nytimes.com/2011/06/13/world/asia/13missile.html?_r=1&scp=1&sq=DPRK%20US%20Myanmar&st=cse).
  10. Yemen had agreed with the United States in 2001 that it would end its missile purchases from the DPRK. Yemen renewed this promise in August 2002, after the United States imposed sanctions against a DPRK corporation and the DPRK government for transferring missile technology to Yemen. At the *So San* interdiction, Yemen argued that the shipment from the DPRK had been negotiated prior to the U.S.-Yemen agreement and should not be considered illicit. See Paul Kerr, "U.S. Stops Then Releases Shipment of N. Korean missiles," *Arms Control Today*, January/February 2003.
  11. John Bolton and other 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, despite the White House briefing the press to the contrary. Bolton claims the missiles could have been seized since the ship had violated its obligations as a commercial vessel. See Bolton, *Surrender Is Not an Option*, pp. 120–21. Others claim that the "legal" justification for allowing the missiles to proceed to Yemen was based on Yemen's claim that the transfer negotiation predated the U.S.-Yemen agreement.
  12. For an account of how events unfolded, including the media attention it received, see Bolton, *Surrender Is Not an Option*, pp. 119–21.
  13. There are some circumstances under which interdiction could be undertaken in states' territorial seas. For a discussion of such circumstances and state practice, see Guilfoyle, "Maritime Interdiction."
  14. In general, unless otherwise provided by law, jurisdiction to board and inspect foreign flag vessels is dependent on several factors, including the location of the vessel (e.g., internal waters, territorial sea, contiguous zone, exclusive economic zone, or high seas) and the vessel's registry/flag state, the vessel's status (i.e., public or commercial) and the vessel's conduct (i.e., legal or illegal). In order to interdict, it is important to determine where the vessel may be, what flag it is flying (if any), and under what legal basis the inspection authority may be proceeding.
  15. Reasons for this variation include some states' lack of capacity to enact legislation and relevant regulations and others' lack of political priority accorded to preventing WMD terrorism.
  16. Comment made by John Bolton at Tufts University Fletcher School "preemption" conference, 2004.
  17. Though pledges can also deter violation by imposing reputational costs, the deterrent effect is generally less than for treaties.
  18. Interview with former U.S. government official D, Washington, DC, January 11, 2010. Also, Bolton knew that initial discussions could get bogged down in "diplomatic miasma." See Bolton, *Surrender Is Not an Option*, p. 123.
  19. Interview with former U.S. government official C, February 25, 2009.
  20. Interview with former U.S. government official B, June 2008.
  21. Bolton, *Surrender Is Not an Option*, p. 126.
  22. Singapore joined as a Core Group member the next month.

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23. "Remarks by the President to the People of Poland," Krakow, Poland, May 31, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html>.
24. Some analysts are critical that the PSI does not publicize news of its interdictions. Given the secrecy surrounding interdictions, it is impossible for outsiders to assess how many interdictions have been undertaken and how many resulted in successful prosecution. Some even question whether the lack of publicity is indicative of its limited success. They question the actual deterrent effect if interdictions are not widely publicized. However, some officials express the view that news of interdictions becomes known to states and criminals involved in the supply chain, and thus the PSI does not need general publicity. The announcement of the PSI aimed to deter at the political level, and the interdictions, even if not made public, are felt where needed.
25. Interview with former U.S. government official, January 11, 2010.
26. Bolton, *Surrender Is Not an Option*, p. 122.
27. Comment made by John Bolton at Tufts University Fletcher School "preemption" conference, 2004. Interview with U.S. government official B, February 29, 2008.
28. "Interdiction Principles for the Proliferation Security Initiative," Bureau of International Security and Nonproliferation, September 4, 2003, <http://www.state.gov/t/isn/c27726.htm>.
29. Interview with former U.S. government official B, February, 2008.
30. Bolton, *Surrender Is Not an Option*.
31. Interview with former U.S. government official B, February 2008.
32. The preamble to the interdiction principles is as follows: PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and nonstate actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. See "Interdiction Principles for the Proliferation Security Initiative."
33. *Ibid.*
34. For example, one participant could interdict another state's vessel using its own resources exclusively, or several participants could undertake a joint interdiction operation, sharing resources. For example, Australia and France could cooperate on one interdiction without seeking approval from any other participants, and the United States, France, and Japan could cooperate on another jurisdiction without informing Australia or the United Kingdom. The combination of participants would depend on the nature of the situation, such as the projected route of a vessel's passage and the nationality of any assets in place. Moreover, an interdiction need not include more than one participant. For example, the United Kingdom could undertake an interdiction entirely on its own—relying on its own intelligence and employing its own navy to undertake interdiction. It might not even need jurisdictional waiver from another participant, if the United Kingdom possesses clear authority to interdict under international law. This could be the case if the suspect vessel is flagged to the United Kingdom, or if it is in the United Kingdom's internal waters.
35. See "Interdiction Principles for the Proliferation Security Initiative."
36. See Patricia McNerney, "China's Nonproliferation Practices," International Security and Nonproliferation Statement before the U.S.-China Economic and Security Review Commission, Washington, DC, May 20, 2008, [http://www.nti.org/e\\_research/official\\_docs/dos/dos052008.pdf](http://www.nti.org/e_research/official_docs/dos/dos052008.pdf). Both Malaysia and Indonesia have stated their belief that the PSI is contrary to UNCLOS. Indonesia appears particularly concerned about Article 27 of UNCLOS, claiming that "implementation of the PSI would disturb the country's sovereignty as under the PSI the US could conduct check [sic] on ships passing through the country's waters." Furthermore, both states cite suspicions the United States' failure to ratify UNCLOS as indication that it might disrespect their international maritime jurisdiction, and that, by extension, the PSI might act contrary to international law. See "Indonesia rejects US request to join Proliferation Security Initiative," *BBC Monitoring Asia Pacific—Political*, March 18, 2006; "Paper Urges Indonesian to Join US-led Proliferation Security Initiative," *BBC Monitoring Asia Pacific—Political*, September 14, 2009; Michael Richardson, "Testing the water," *South China Morning Post*, October 5, 2007, p. 23. See also "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](http://www.wmdinsights.org/I21/I21_EA1_ProliferationSecurity.htm).
37. Discussions with scholars.
38. Discussions with U.S. and UK officials.
39. *Nonproliferation: US Agencies Have Taken Some Steps, but More Effort Is Needed to Strengthen and Expand the Proliferation Security Initiative*, Government Accountability Office Report to Congressional Committees, GAO-09-34, Washington, DC, November 3, 2008, p. 3, note 4, <http://www.gao.gov/new.items/d0943.pdf>. Since 2003, there have been over twenty OEG-type meetings. See "Calendar of Events."
40. A U.S. official claims the United States did not dictate which states would be part of the OEG, but that the OEG formed from those states that were part of the Core Group at the time.
41. Interview with former U.S. government official D, January 11, 2010.
42. See Robert Hill, "Media Conference for PSI Exercise, On Board HMAS Melbourne," transcript, September 13, 2003, <http://www.minister.defence.gov.au/2003/140903.doc>.
41. Interview with former U.S. government official B, June 2008.

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42. Although they only cover interdiction at sea, whereas the PSI covers interdiction in the air and over land, as well as a commitment to strengthen domestic legal frameworks.
43. See Bureau of International Security and Nonproliferation, "Ship Boarding Agreements," available at <http://www.state.gov/t/isn/c27733.htm>.
46. "National Security Strategy," The White House, May 2010, available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).
47. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA PROT 2005), IMO Doc LEG/CONF.15/21, November 1, 2005, [http://www.imo.org/inforesouce/mainframe.asp?topic\\_id=835#04b](http://www.imo.org/inforesouce/mainframe.asp?topic_id=835#04b).
48. "Status of Conventions," International Maritime Association website, <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.
49. Discussions with Australian officials.
50. As of June 2011, there are twenty-one signatories but no parties. To enter into force, the convention requires twenty-two instruments of ratification, acceptance, approval, or accession. Interestingly, China is among the signatories, despite its firm opposition to the PSI.
51. Discussions with government officials.
52. Discussion with U.S. government official, 2010.
53. For the text of the communiqué, see "Communiqué of the Washington Nuclear Security Summit," Office of the Press Secretary, The White House, April 13, 2010, <http://www.whitehouse.gov/the-press-office/communiqu-washington-nuclear-security-summit>. For an analysis of the value of the communiqué as a non-binding political pledge, see Emma Belcher, "The Ties that Bind are Not Always Best," *Huffington Post*, April 27, 2010, <http://www.huffingtonpost.com/emma-belcher/the-ties-that-bind-are-not-always-best.html>.
54. Jon Kyl, "Kyl Statement on Nuclear Security Summit," April 13, 2010, <http://kyl.senate.gov/record.cfm?id=323782>.
55. For example, Ukraine committed to removing all highly enriched uranium from its territory by the next summit in 2012. Ukraine's progress can be monitored and pressure brought to bear if its commitment is not met. Since the summit, Belarus has also committed to removing its HEU by the next summit.
56. Some commentators advocate abandoning the traditional treaty-making process. While New START was being debated in the Senate, reporter James Rubin suggested that if the Senate continued to stall ratification, the United States and Russia could agree to pursue changes to their respective domestic legislation, which would require a simple majority, rather than two-thirds for a treaty, in the Senate. See James Rubin, "Farewell to the Age of the Treaty," *New York Times*, November 21, 2010, <http://www.nytimes.com/2010/11/22/opinion/22rubin.html>. Michael Levi, "Why Cancun Matters: Don't buy into the apathy about this year's climate negotiations," *Slate.com*, November 29, 2010.
57. Stewart Patrick, "Irresponsible Stakeholders? The Difficulty of Integrating Rising Powers," *Foreign Affairs*, November/December 2010.
58. See Valencia, *Making Waves*, p. 74.
59. This view is also held by Franklin C. Miller and Andrew Shearer, "Don't be Disarmed by Anti-Nuke Drive," *Australian*, December 18, 2009, p. 9.
60. Interviews with U.S. and Australian government officials.
61. For this argument, see Emma Belcher, "A Tighter Net: Strengthening the Proliferation Security Initiative," Lowy Institute Policy Brief, Lowy Institute for International Policy, 2009.
62. Jack Goldsmith and Jeremy Rabkin, "A Treaty the Senate Should Sink," *Washington Post*, July 2, 2007, p. A19.
63. Levi, "Why Cancun Matters."