

Imperfection Doesn't Diminish the Legitimacy of the PSI

By Yong-joon Lee

THERE IS NOTHING TRUER than saying that our world is imperfect, and hardly anything is less perfect than the difficult endeavor of devising workable non-proliferation regimes. As we know, existing regimes such as the Nuclear Non-proliferation Treaty and the Missile Technology Control Regime are anchored in a source-based approach that seeks to control the technologies and materials that could be used to produce weapons of mass destruction. These regimes focus on prohibiting countries that are outside the WMD-technologies club from developing or acquiring them, and imposing strict limits on countries that already have these technologies from improving them or transferring them to other countries. These types of non-proliferation regimes are inherently defective because they are binding only on those countries that voluntarily agree to join the effort. In a world of sovereign nation-states, no obligation, however legitimate, can be enforced on a state that does not want to accept it. If a state already possesses WMD-related technologies and materials outside these regimes, and is determined to sell them in the name of its own sovereignty, then existing non-proliferation regimes have only limited effectiveness.

The tragedy of September 11, 2001 struck a deep chord in the international community, particularly given the limits of non-proliferation regimes at that time. While the use of hijacked airplanes as weapons was not in itself an application of WMD, the brazenness of the action demonstrated that a terrorist attack with WMDs was no longer merely a nightmare but a real possibility. It engendered a growing consensus that the international community needs to cope with the new threat of WMD terrorism by reinforcing and complementing existing non-proliferation regimes. Such a consensus was at last forged with the launch of the Proliferation Security Initiative in 2003.

The PSI emerged from an awareness of the defects of existing non-proliferation regimes. If we cannot effectively prohibit those states already in possession of WMD materials—but who don't belong to existing regimes—from selling them, then we should at least stop them from using our own flag vessels, territorial seas and airspace to transport the materials. If the sources of WMD technologies cannot be properly controlled due to the absence of an international consensus to do so, then the only possible means to prevent WMD proliferation is to block the pathways of proliferation through joint efforts among like-minded countries. If not, then it would be a bitter irony, indeed, if those states that voluntarily committed themselves to non-proliferation regimes found their hands tied in the face of real WMD threats, while those states that ignored the regimes enjoyed the freedom of a “sovereign state.”

In this brief essay, I would like to touch upon two widespread controversies regarding the legitimacy of the PSI, rather than review the whole initiative. I hope this will promote better understanding of the PSI as a realistic and necessary choice in an imperfect international legal and political environment.

PSI AND THE INTERNATIONAL LAW OF THE SEA

One of the ongoing debates regarding the PSI involves the reinforced authority of coastal states to interdict the transfer or transport of WMD materials. Some argue that the “Statement of Interdiction Principles” outlined by the PSI actually erodes the international law of the sea, which enshrines the right of innocent passage in territorial seas and the freedom of the high seas, by allowing PSI interdictions.

So far, the debate over the potential conflict between the PSI and the international law of the sea has remained mostly theoretical, with each side exchanging arguments. Interestingly, no one in this debate doubts that there is a pressing challenge in coping with the possibility of WMD proliferation—a possibility that traditional international law was not able to anticipate. That is to say, the real question lies in how to comple-

ment existing international law with effective counter-proliferation measures, while keeping the core value of the right of innocent passage as intact as possible.

Before scrutinizing this question, we need to bear in mind that the PSI stands on two core

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premises: the first is that it requires supporting states “to take actions to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks” (Article IV of the Statement of Interdiction Principles); the second is that the implementation of the PSI principles ultimately relies upon the discretion and accountability of each sovereign state that participates in PSI activity.

Now let us consider a hypothetical situation in which a coastal state spots a vessel it strongly suspects of carrying WMD materials crossing its territorial sea. That state would then have to take into consideration all of the available intelligence and legal concerns, and choose the best course of action among many possibilities. If it judges that those materials are on the verge of falling into the hands of terrorists unless properly interdicted at sea and that the threat of WMD proliferation overwhelms the right of innocent passage, then it will take the necessary action to interdict the vessel.

However, in dealing with such a case, the coastal state would still seriously consider whether it has better options that might allow it to avoid legal controversy. Say, for example, if the situation

allowed the state to wait until the vessel came into its internal waters, where it would enjoy perfect legitimacy in seizing it, or to pass the intelligence to another state whose port is the final destination of the vessel, then the state would not run the risk of legal controversy by interdicting the vessel in its territorial seas. Given the possibility of legal liabilities stemming from the violation of the right of innocent passage, it would also be prudent to judge the soundness of the intelligence on which suspicions regarding the vessel are based. In addition to these legal considerations, the coastal state may feel pressure to take into account the political or diplomatic relationship it has with the flag state of the vessel.

We may assume that there would be a state whose territorial seas are frequently used by foreign vessels carrying WMD-related materials. Such a state would devise domestic legal measures granting its coastal authorities more discretion to interdict suspicious vessels in its territorial seas. In this case, we should note that such domestic legislation would normally be subject to a process of debate and deliberation within the state. Through this process, the need to strengthen the powers of coastal authorities would be weighed against the risk of facing legal liability and diplomatic incidents. More to the point, such legislation would serve as a strong signal to other states to refrain from using that state's territorial seas for proliferation activities. This would have the effect of eliminating the root cause of such controversies.

As such, the appropriate balance between counter-proliferation measures and the right of innocent passage can be achieved in the actual practice of the PSI, rather than in theoretical debates between realists and idealists. The international and domestic legal systems have different ways of establishing checks-and-balances that force each state to refrain from going too far, or making hasty judgments, in implementing interdiction in its territorial seas at the expense of the right of innocent passage. Indeed, the PSI itself requires each state supporting the Interdiction Principles to respect both international and domestic legal systems.

Nevertheless, there is still a need to address the theoretical possibility of contradictions between the existing international law of the sea and the PSI. And such attempts are under way. The US has concluded PSI "Shipboarding Agreements" with countries allowing flags of convenience, such as Panama and Liberia, in order to ensure legal access for inspection of ships under their flag. The UN Security Council in 2004 adopted Resolution 1540 calling upon member states to detect, prevent and combat illicit trafficking of WMD, missiles and related materials. And the revised Convention for the Suppression of Unlawful Action, which criminalizes the illegal transportation of WMD, was concluded in September 2005 and is awaiting implementation.

WORTHWHILE INTELLIGENCE?

Another concern raised by some commentators regarding the PSI has to do with the reliability of the intelligence upon which interdictions are carried out. The major argument is that practices of this kind can hardly be impartial since the intelligence is susceptible to the prejudices and political intentions of the United States—the country that is expected to be the key provider of such intelligence. Some worry that the US may provide imprecise, distorted or exaggerated intelligence in order to contain countries that it has targeted as "states of proliferation concern."

Intelligence sharing is the core element of the PSI. Without sound intelligence, effective interdictions are nearly impossible. More to the point, the intelligence capability of most states is limited, so the timely sharing of intelligence is indispensable for detecting and interdicting suspected vessels. The problem is that the gap in intelligence capabilities among states is so wide that most nations inevitably depend on intelligence from a country with greater capability—in most instances the United States, which happens to be the architect of the PSI.

However, before casting a suspicious eye on the integrity of the PSI, we need to note that such intelligence dependency, if we can call it that, is not a new phenomenon in the field of non-proliferation efforts. Existing regimes such as the Nuclear

Non-proliferation Treaty, the Missile Technology Control Regime and the Nuclear Suppliers Group are also heavily dependent upon US intelligence to monitor member states' performance and to detect violations. Skepticism about the soundness of US intelligence has been intermittently expressed regarding these regimes, and sometimes with good reason. Still, no one maintains that these regimes are unreliable due to imper-

ning the risk of political complications in a world of compromised multilateralism.

AN IMPERFECT BUT INEVITABLE OUTCOME
International law in general is the product of long-standing global practices based upon common understandings of universal values. Though there are still some controversies over the legitimacy of the PSI, it seems that its principles and

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fections in intelligence. Intelligence failures happen, and they are not unique to US intelligence. This, however, does not mean that the PSI and other non-proliferation regimes are inherently unreliable or useless.

One might argue that the possibility of bias in US intelligence, whether true or not, undermines public trust in the PSI. Taking things a step further, one might recommend alternatives such as the establishment of an institution specializing in the PSI under UN auspices. However, I strongly doubt that it would enhance the effectiveness of the PSI. The effective implementation of the PSI relies upon sensitive intelligence, subtle judgment and timely actions.

Despite our high ideals for the UN, it would not be the most appropriate place to implement the PSI. The process of adopting UN Security Council Resolution 1540 dramatically illustrates the difficulty. Despite the need for urgent action to address the pressing challenges of non-proliferation, the UN Security Council, perhaps conscious of a potential veto by some permanent council members, did not express support for the Statement of Interdiction Principles, and thus failed to adopt an action-oriented resolution. I believe it is much more realistic to rely on the prudence of individual states to implement the PSI rather than run-

practices are maturing into a new international norm, with a rapidly increasing number of countries ready to join the concerted effort to secure a WMD-free world. As of May 2008, it had as many as 91 member states including all of the European countries, all of the CIS countries in Europe and Central Asia, all of the GCC countries, and more than half of Arab League and ASEAN countries. Also included were those countries that were previously targets of non-proliferation activities such as Libya, Iraq and Afghanistan.

In view of the lack of consensus over the legitimacy of the PSI principles of interdiction, the PSI may be imperfect, at least for now. However, the imperfections do not justify the claims of some critics that the initiative is neither necessary nor useful for a safer world. Given the imperfect nature of the current nation-state system itself and the urgent need to fight "the proliferation of WMD in the name of sovereignty," the rise of a coalition of countries intent on defending their own sovereign right to peace and security is, in a sense, an inevitable outcome.

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