
China's Position on the Proliferation Security Initiative and Its Reappraisal

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China did not join the Proliferation Security Initiative due to deep legal and policy considerations. China now has sufficient reasons to reappraise its existing stance in light of the establishment and continuous development of a positive, cooperative and comprehensive Sino-U.S. relationship, institutionalization of the PSI by U.S. President Barack Obama, and new changes in nuclear nonproliferation and disarmament. China's participation in the PSI will be much more useful in enhancing the construction of international nonproliferation systems rather than remaining disengaged. Now it is the time for China to make the political decision and participate in the PSI.

Keywords

Proliferation Security Initiative Institutionalization of PSI Positive, Cooperative and Comprehensive Sino-US Relationship Reappraisal

I. Introduction

The PSI was formally launched by former U.S. President George W. Bush, in Krakow, Poland, on May 31, 2003. After four months, the Proliferation Security Initiative ("PSI") partner countries issued the Statement of Interdiction Principles ("SOP"), the PSI's founding document, aiming at establishing a multilateral cooperative framework for the interdiction of proliferation-related traffic of weapons of mass destruction, their delivery

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systems, and related materials¹ at sea, on land, and in the air, flowing to and from states and non-state actors of proliferation concern. Since its inception, support for the PSI has grown from 11 states initially to more than 90 states, including all G8 and E.U. member states.² Unfortunately, some key states, including China, have yet to support the PSI.

What were the reasons China did not endorse the PSI? Should China maintain its current posture or change it in the near future? This Article addresses the legal and policy aspects of these issues in four parts. The first part briefly introduces the PSI. The second part focuses on the legal and policy considerations in China's decision not to participate in the PSI. The third part addresses how President Obama has treated the U.S. government's position on the PSI. The final section details the reasons why China should reappraise its position vis-à-vis the PSI.

II. China's Position on PSI and Its Reasons

From the beginning, China did not join the PSI. The common argument made by the Chinese Ministry of Foreign Affairs Spokesperson and other high ranking officials is that China did not join the PSI due to concerns of its overreach. The Chinese government worried about possible armed interceptions and, as such, did not join the PSI.³

A. Legal Concerns

Some PSI interdictions do not have sufficient legal bases, especially operations taking place on the high seas. According to the international law of the sea, all ships or aircrafts of all states have freedom of navigation and flight both on and over the high seas. Except flag state vessels, the law does not generally subject a ship to the jurisdiction of any other state.

The SOP does not specify the legal bases for the interdiction of a shipment suspected of proliferation, other than just mentioning actions taken consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.⁴ Former U.S. high ranking officials and commentators usually described the

¹ These are collectively referred to WMD.

² Bureau of International Security and Nonproliferation, *PROLIFERATION SECURITY INITIATIVE PARTICIPANTS*, May 27, 2009, available at <http://www.state.gov/t/isn/c27732.htm> (last visited on Jan. 22, 2010).

³ Foreign Ministry Spokesperson Zhang Qiyue's Press Conference on Oct. 26 2004, available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t167984.htm> (last visited on Oct. 12, 2009).

⁴ Bureau of International Security and Nonproliferation, *Statement of Interdiction Principles for the Proliferation Security Initiative*, September 4, 2003, available at <http://www.state.gov/t/isn/c27726.htm> (last visited on Dec. 4, 2009).

stateless ships as engaging in piracy, and that the Security Council Resolution 1540 proves the legal grounds for interdiction on the high seas.⁵

Persuant to Article 110 of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”), if a foreign ship suspected of carrying WMD is stateless or engaged in piracy, U.S. warships have the right to board and search it. However, boarding a ship in accordance with Article 110 is not synonymous with interdiction as found in the PSI. The term interdiction includes not only the boarding of ships, but also allows for seizure of the ship and its contents.⁶ Article 110 does not expressly grant the intercepting countries with the right to seize the suspect ship or its cargoes after boarding, even if the suspicions are proven true. Boarding and seizure are generally conducted under two different procedures. Permission to board will seldom automatically include permission to seize.⁷ The 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter, 2005 SUA Protocol), the first multilateral treaty addressing the boarding of ships suspected of proliferation, did not mention the seizure of ships. The PSI ship boarding agreements, recently signed by the U.S. and so-called flag of convenience countries, stipulate that seizure of the ship or its cargo requires consent of the state of the vessel for which seizure is requested. The same is true for the Security Council Resolution 1874 in 2009: inspection of suspect vessels, flowing to and from North Korea on the high seas, requires the consent of the flag state, while seizure of them has been authorized by the Security Council.⁸

Whether boarding results in the seizure of ships depends on the effects of combining the relevant articles in UNCLOS. In comparing Article 110 with Articles 105 and 109, which permit the detention of a pirate ship or unauthorized broadcasting ship or its cargoes, boarding the nation less ship suspected of proliferation does not lead to detention of it. This was confirmed in a statement by the U.S. in the *So San* incident⁹ that “[w]hile there is authority to stop and search . . . there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen.”¹⁰ Although boarding a pirate

⁵ See e.g. JOHN BOLTON, THE PROLIFERATION SECURITY INITIATIVE: A VISION BECOMES REALITY (2004); *Remarks to the First Anniversary Meeting of the Proliferation Security Initiative*, available at http://www.state.gov/t/us/rm/33046_pf.htm (last visited on Mar. 3, 2005); Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 532 (2004).

⁶ *Supra* note 4.

⁷ Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. CONFLICT & SECURITY L. 5 (2007).

⁸ S/RES/1874, paras. 12 & 14 (June 12, 2009).

⁹ On December 10, 2002, Spanish naval forces, with help of US intelligence, intercepted and boarded the vessel *So San* without flying a flag in the Arabian Sea, and discovered a cache of fifteen Scud missiles hidden under sacks of cement, although only the cement shipment was listed on the ship’s manifest. US had to release the vessel eventually after Yemen Government recognized its purchase. See Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L. J. 153-54 (2005).

¹⁰ Press Secretary Ari Fleischer, *Press Briefing: Missile Ship*, WMD Strategy, Dec. 11, 2002, available at <http://www>.

ship leads to seize it, such a ship suspected of proliferation is not within the definition of piracy. Because a condition of piracy is the commission of violence for private ends, however, this is not the case with WMD.¹¹

Furthermore, all of the multilateral nonproliferation treaties, including the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”), the 1972 Biological Weapons Convention (“BWC”), and the 1992 Chemical Weapons Convention (“CWC”), do not authorize the contracting countries to board a ship suspected of violating the treaties. The treaties also recognize the right by countries of peaceful use of nuclear, biological and chemical materials and their lawful transportation.¹² The U.S. admitted as much in the *So San* incident when it stated that “[t]here is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea.”¹³ Approximately 95 percent of the materials related to WMD are dual-use goods.¹⁴ The SOP neither defines what cargo is prohibited or the procedure to be following when board ships. The SOP also does not address available reparation for the unreasonable boarding, especially defining what is a permissible use of force and the procedures to be followed, which is required in recent international treaties involving shipboarding, such as the 2005 SUA Protocol, the Shipboarding Agreements and the 1995 United Nations Fish Stocks Agreement. The Security Council Resolutions on nonproliferation, designed for specific member states, specifically includes the clause “[a]cting under Article 41 of Chapter VII of the Charter of the United Nations,” so as to prevent the use of force when other member states board and search a suspect ship.¹⁵ It seems that the U.S. preferred to interdict the suspect ship at sea by military means. The aggressive interdictions will weaken the international prohibition on the use of force in the UN Charter, and will undermine the inalienable rights of related countries enjoyed in international law, which will likely increase tensions among countries. For example, North Korea announced any interdiction of its ships was tantamount to a declaration of war.¹⁶

Similarly, countries generally cannot interdict trafficking on the high seas in self-defense, in that shipment itself cannot be equal to the armed attack triggering the

whitehouse.gov/news/releases/2002/12/20021211-5.html (last visited on Aug. 7, 2005).

¹¹ Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT’L L. 532-533 (2005).

¹² Article 3 *bis* of the 2005 Protocol provides that the transportation of nuclear material is not considered an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-proliferation of Nuclear Weapons.

¹³ *Supra* note 10.

¹⁴ Michael E. Beck, *The Promise and Limits of the PSI*, 10 THE MONITOR 16 (Spring 2004).

¹⁵ *Supra* note 8, and S/RES/1803 (Mar. 3, 2008).

¹⁶ See North Korean TV says Missile Exports “Sovereign Right,” BBC MONITORING ASIA PACIFIC, Sept. 16, 2003, at 1.

exercise of the right of self-defense, in particular shipment of WMD materials. The armed attack in Article 51 of the UN Charter is usually understood as including an attack which has already occurred or is imminent, but does not include potential attack. The 2002 U.S. National Security Strategy proclaimed preemptive strikes against potential or probable threats, but preemption is not equivalent to self-defense in international law.¹⁷ In practice, the legality of the interception of a weapons shipment in self-defense has always been challenged. During the period from 1956 to 1962 when Algeria was fighting against France's colonial domination, France's interception of ships suspected for shipping weapons to Algeria on the high seas suffered strong protests from the flag states whose ships were boarded and searched.¹⁸

Resolution 1540 provides that all states shall take actions, individually or jointly, to prohibit and prevent the illegal transportation of WMD to non-state actors, but it does not use the term interdiction or mention the PSI. Indeed, the U.S. dropped a provision explicitly authorizing the interdiction of WMD at sea in exchange for China's vote. A British statement issued at the time was intended to reassure those who resisted an explicit authorization of interdictions on the high seas:

What this resolution does not do is authorize enforcement action against states or against non-state actors in the territory of another country. The resolution makes clear that it will be the Council that monitors its implementation. Any enforcement action would require a new Council decision.¹⁹

The Shipboarding Agreements do refer to Resolution 1540. However, they should not be regarded as the measures of implementing the Resolution.

Many states have voiced their concerns about the validity of the interdiction. During the Meetings of States Parties to UNCLOS, some delegations reiterated their view that the PSI should be in conformity with the legal regimes of the various maritime areas in UNCLOS.²⁰ The core PSI participants also admitted that no sufficient legal bases could

¹⁷ See Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 270 (2005).

¹⁸ R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 217 (1999).

¹⁹ Adam Thomson, Deputy Permanent Representative of the U.K. Mission of Gr. Brit. and N. Ir., *Statement to the Security Council of the U.N.* (Apr. 22, 2004), Quoted in Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT'L L. 820 (2006).

²⁰ See *Report of the sixteenth Meeting of States Parties*, SPLOS/148, July 28, 2006, para. 85, available at <http://www.un.org/News/Press/docs/2007/sea1883.doc.htm> (last visited on Mar. 20, 2010); *Report of the seventeenth Meeting of States Parties*, SPLOS/164, July 16, 2007, para.101, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/426/82/PDF/N0742682.pdf?OpenElement> (last visited on Mar. 20, 2010); *Report of the eighteenth Meeting of States Parties*, SPLOS/184, July 21, 2008, para.110, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=SPLOS/184&Lang=E> (last visited on Mar. 20, 2010).

be found for the interdiction on the high seas. Former Defense Secretary Donald H. Rumsfeld conceded that the PSI “has holes in it,” including the absence of an internationally accepted legal basis for confiscating some materials on the high seas.²¹ Former Australian Foreign Minister Alexander Downer said there was “a very real difficulty in terms of vessels that might be going through the high seas because international law requires that those ships should not be intercepted.”²² Some European states were less willing to promote aggressive PSI methods.²³

B. Policy Considerations

China advocates settlement of the proliferation issues by peaceful means, and believes that:

“[e]ither the improvement of the existing [non-proliferation] regime or the establishment of a new one should be based on the universal participation of all countries and on their decisions made through a democratic process. Unilateralism and double standards must be abandoned, and great importance should be attached and full play given to the role of the United Nations.”²⁴

Fundamentally, the PSI is the product of President Bush’s aggressive unilateralism, and is a selective and non-transparent mechanism imposed by U.S., which acts outside the United Nations.²⁵ The Bush administration listed North Korea, Iran and Syria as states of proliferation concern, while tolerating the proliferation-related activities carried out by the non-state parties to the Treaty on the Non-Proliferation of Nuclear Weapons, including Israel, India, and Pakistan.²⁶ The U.S. signed and ratified the agreement for civil nuclear energy cooperation with India in 2005 and 2008 respectively, while not supporting the initiative for the Middle East nuclear weapon-free zone and efforts made by Arabian countries to urge Israel to disclose its nuclear plan and to accept international verification. As to those targeted countries, the U.S. and other PSI partners took interdiction measures of counterproliferation by military, intelligence and law enforcement means per its own judgment, rather than in accordance with the nonproliferation mechanism. Such double standards and unilateral behaviors cannot

²¹ Burt Herman, *Searches of N. Korean Ships Sticky Issue*, ASSOCIATED PRESS, Oct. 18, 2006.

²² *N. Korea Ships Face more Scrutiny*, BBC, June 11, 2003.

²³ Becker, *supra* note 9, at 163.

²⁴ Information Office of the State Council of the People's Republic of China, *China's Non-Proliferation Policy and Measures*, Dec. 3, 2003.

²⁵ *See Promotion of multilateralism in the area of disarmament and non-proliferation: Report of the Secretary-General*, A/RES/61/62 (Jan. 3, 2007).

²⁶ Becker, *supra* note 9, at 163-164.

but make China seriously doubt about the real purpose of the PSI.

As a matter of fact, China is a victim of double standard of U.S. policy. The Bush administration had been persuading China to join the PSI, while regarding it as a proliferation country. China's participation in this circumstance may not only jeopardize the safety of China's maritime shipping industry, but also cause negative effects on the traditional friendship with North Korea. In addition, it seems that the political atmosphere to participate at the time was lacking due to lingering tension resulting from the 2001 Sino-U.S. aircraft crash over the South China Sea.

The negative remarks from the Chinese academic school might also play some part in China's consideration to remain outside the PSI. Nearly all Chinese commentators took a critical attitude towards the PSI. An article in the People's Daily described the PSI as "dangerous" and reported that "the U.S.-led initiative sneered at the U.N. and international law by sidestepping the organization."²⁷ Systematic interdictions on the high seas raised legal concerns and "[a]rmed conflicts are possible if the legally-controversial detention and searching of vessels occur."²⁸ Others criticized that the PSI was a U.S.-led group mechanism, and allowed for far more aggressive and intrusive activities in conflict with international law. Majority of scholars recommended that China should not join the PSI.²⁹

III. President Obama's Succession and Institutionalization of the PSI

How President Obama treats the PSI is the prerequisite of whether China should reappraise its current stance. Unlike his treatment of President Bush's policy of the anti-missile base plan in the East Europe, Obama has succeeded and would improve the PSI.

Obama is an active participant and advocator for U.S. policy in combating WMD proliferation, and has always been committed to enhancing the efforts for interdiction. During his Senate campaign, he identified the threat posed by unsecured WMD as the greatest national security threat existing for U.S.³⁰ Ever since he entered the U.S. Senate,

²⁷ *No Legal Grounds for Stopping N. Korean Ships*, PEOPLE'S DAILY, July 12, 2003, available at http://english.people.com.cn/200307/12/eng20030712_120082.shtml (last visited on Oct. 3, 2009).

²⁸ *Id.*

²⁹ Gu Guoliang, *Comments on the United States' Proliferation Security Initiative*, 3 AM. STUD. Q. (available only in Chinese) 39, 43 & 44 (2004).

³⁰ Council on Foreign Relations, *Challenges Ahead for Cooperative Threat Reduction*, Nov. 1, 2005, available at <http://www.cfr.org/publication/9138> (last visited June 13, 2009).

Obama had acted as one member of the Foreign Relations Committee and Chairman of its European Affairs Subcommittee, and worked with senior ranking Senator Dick Lugar and others across the aisle to expand efforts to stop smuggling of nuclear material and keep conventional weapons out of terrorists' hands. Obama traveled together with Senator Lugar to Russia, Ukraine and Azerbaijan in August 2005 to oversee a number of the Nunn-Lugar Cooperative Threat Reduction Program. They then jointly launched the Lugar-Obama nonproliferation and Threat Reduction initiative-Cooperative Proliferation Detection, Interdiction Assistance, and Conventional Threat Reduction Act. The objective of the initiative was to establish cooperative relations between the U.S. and other willing countries, and to strengthen the ability of the U.S. and its allies to detect and interdict illegal shipments of WMD. In 2007, then Senator Obama, along with Republican Senator Chuck Hagel, put forward the Obama-Hagel Nuclear Weapons Threat Reduction Act, aiming at preventing nuclear terrorism, reducing global nuclear arsenals, and stopping the spread of nuclear weapons and related technology.

Obama welcomed the PSI, but also knew well about its shortcomings, most of which stemmed from its ad hoc, U.S. approach to act outside the UN.³¹ The PSI lacks the standard ingredients of traditional multilateral cooperation, without a treaty, budget, headquarters and secretariat, and a formal decision-making process. Participation by countries in the PSI is voluntary and they do not need to sign any formal agreement. All a country needs to do is announce its political support for the SOP through a diplomatic note or any other form of official letters, which does not incur long-term, legally binding responsibilities. The PSI also does not establish any mechanism for formal cooperation with the UN or any other multilateral or international bodies.³² The PSI's sole organ, the Operational Expert Group ("OEG"), excludes many of its partners and potential partners from the decision-making process. Therefore, the PSI is nothing but "another example of the Bush administration engaging in selective multilateralism; another "coalition of the willing" venture."³³

The PSI's structural deficiencies preclude its participants from joining in its activities, thus causing undesirable outcomes. For instance, there have been no major interdictions to be reported since 2004. Only approximately 70 countries participated, to various extents, in various kinds of the training exercises with only between two to 12 countries participating in each exercise.³⁴ However, "[t]he proliferation of weapons of mass

³¹ Mark J. Valencia, *The Proliferation Security Initiative: A Glass Half-Full*, 37 *ARMS CONTROL TODAY* 21 (2007).

³² See Bureau of International Security and Nonproliferation, *Proliferation Security Initiative Frequently Asked Questions*, May 26, 2008, available at <http://www.state.gov/t/isn/rls/fs/105213.htm> (last visited on July 21, 2009).

³³ Emma Belcher, *Throwing Out the Bathwater, but Keeping the Baby*, *THE HUFFINGTON POST*, Nov. 20, 2008, available at http://www.huffingtonpost.com/emma-belcher/throwing-out-the-bathwate_b_145298.html (last visited on Sept. 3, 2009).

³⁴ *Supra* note 32.

destruction remains the number one national security threat facing the United States and the international community.”³⁵ Thus, the consensus for many American nonproliferation experts and scholars is to change the PSI and enhance its effectiveness. In effect, the Lugar-Obama Act is a domestic law intensifying the PSI’s role, obtaining \$48 million for implementation, which was provided by the Senate Appropriations Committee.³⁶

President Obama incorporated the PSI into his presidential campaign, and committed himself to institutionalizing it. He stated that “[a] stronger PSI will produce greater international intelligence and police cooperation, maintain tougher export controls and criminal penalties for violations in countries around the world, and apply the tools developed to combat terrorist financing to shut down proliferators’ financial networks.”³⁷ Shortly after Obama took office, the US National Academy of Sciences released a report, recommending the Pentagon that Nunn-Lugar program be used to advance other multilateral instruments such as the PSI and Resolution 1540. Lugar urged the Obama administration to adopt the report’s recommendations.³⁸ In May 2009, President Obama officially accepted the PSI as part of his prevention of nuclear threat strategy in Prague, Czech Republic, when he stated:

A nuclear weapon acquired by terrorists is the most immediate and extreme threat to global security. . . . We must also build on our efforts to break up black markets, detect and intercept materials in transit, and use financial tools to disrupt this dangerous trade. Because this threat will be lasting, we should come together to turn efforts such as the Proliferation Security Initiative . . . into durable international institutions.³⁹

However, President Obama’s plan is not a carbon copy of the PSI. Instead, he creatively changed its provisional nature, so as to institutionalize it. As one commentator said, President Obama is throwing out the bathwater, but kept the baby.⁴⁰ There are two more differences. First, President Obama will expand the PSI’s focus on stopping illicit

³⁵ Richard G. Lugar, *Lugar introduces legislation to improve Nunn-Lugar program*, Apr. 23, 2009, available at <http://lugar.senate.gov/record.cfm?id=311928&> (last visited on Sept. 21, 2009).

³⁶ Press Release of Senator Lugar, *Obama, Lugar Secure Funding for Implementation of Nonproliferation Law*, June 28, 2007, available at <http://lugar.senate.gov/press/record.cfm?id=278019> (last visited on Sept. 21, 2009).

³⁷ *Confronting 21st Century Threats*, available at http://www.barackobama.com/pdf/issues/foreign_policy/Fact_Sheet_21st_Century_Threats.pdf (last visited on Aug. 8, 2009).

³⁸ *Supra* note 35.

³⁹ The White House Office of Press Secretary, *Remarks by President Barack Obama in Prague*, Apr. 5, 2009, available at http://www.whitehouse.gov/The_Press_Office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered (last visited on Aug. 8, 2009).

⁴⁰ *Supra* note 33.

proliferation-related shipments to shut down proliferators' financial networks and to eradicate nuclear black market networks.⁴¹ Second, President Obama's highest priority will be on combating nuclear proliferation.

IV. Reappraisal of China's Position on PSI

Institutionalization of the PSI by President Obama opens a window of opportunity for China to reconsider its stance. The opportunity is even greater due to the warming of the Sino-U.S. relationship and new changes in nuclear nonproliferation and disarmament.

A. Realistic Necessity of Reappraisal

Three factors weigh heavily in favor of China's reappraising its current position on the PSI. The most important factor is the establishment of a positive, cooperative and comprehensive Sino-U.S. relationship in the 21st century by Presidents Hu Jintao and Obama at the London G20 Summit in April 2009, which was reiterated when President Obama paid his first state visit to China in November of last year. As a major step for promoting the continuous development of the brand new bilateral relationship forward, the Sino-U.S. Strategic Economic Dialogue has been established, under which special representatives on behalf of the state heads of the two countries take charge of economic dialogues and strategic dialogues, respectively. The first round of the Dialogue was successfully held in Washington, D.C. in July 2009.

The new type of Sino-U.S. relationship has created a solid political basis and a harmonious political environment for China's participation in the PSI. In return, China's support will become an important strategic step of and catalyst for China's great efforts to push and deepen bilateral relations with the U.S., and will have a positive influence on the eventual formation of a mature and equal Sino-U.S. partnership, in the sense that China's participation is essential to the success of the PSI. One scholar pointed out that "[China's] continued absence will deny the PSI a truly global imprimatur and reinforce suspicions that it is yet another club for Western powers only."⁴²

Another factor favoring China's reappraisal of its position is the necessity of joining in the process of institutionalizing the PSI. It is well known that the essential

⁴¹ *Supra* note 37.

⁴² Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?* 34 *ARMS CONTROL TODAY* 12 (2004).

shortcoming of the existing nonproliferation regime is passive and negative in nature without teeth, so that it usually cannot take aggressive actions against some relevant countries that, under the umbrella of peaceful use of nuclear energy, refuse to cooperate with the international community to clarify their nuclear projects, threaten to or even withdraw from the Treaty on the Non-Proliferation of Nuclear Weapons (“NDT”). Enhancement of the international nonproliferation systems is not only a global consensus, but the world is also moving forward in that direction. The 2005 SUA Protocol is a good start of such efforts. A new Article 3*bis* of the Protocol defines unlawful and intentional transportation on board a ship of WMD for the purpose of the terrorist acts as offences within the meaning of the SUA Convention.⁴³ A new Article 8*bis* provides that a State Party, whether the flag State or not, can board and search a ship flying the flag of other State Party, subject to the express authorization of the flag State, when the requesting Party has reasonable grounds to suspect the ship or a person on board the ship has committed an offence. The US Senate proposed to ratify the protocol in 2008.

President Obama’s efforts to institutionalize the PSI will probably turn the PSI into a new rule of international law. Participation will enable China to play a constructive role in the PSI’s reform.

The third factor in favor of China reappraising its position is the necessity to avoid acting too passively and to properly adjust China’s nonproliferation policy. The general global response to the PSI has been positive. Former secretary-general Kofi A. Annan and High-Level Panel on Threats, Challenges and Change appointed by him welcomed the PSI. The PSI has made progress, with nearly 100 participants, holding 25 Operational Expert Meetings and 40 training exercises.⁴⁴ The PSI is making WMD trafficking increasingly difficult for proliferators, and increases traffickers’ operational costs and the risks associated with trafficking prohibited items,⁴⁵ so as to make some contributions to nonproliferation. The most well publicized success was the interception of the *BBC China*, a German ship transporting thousands of gas centrifuge components, equipment used for uranium enrichment, in the Suez Canal in October 2003. This interdiction promoted Libya to voluntarily give up its WMD program, to accept the international verification, and caused to unravel the underground nuclear proliferation network that was popularly known as the father of Pakistan’s nuclear program.

As the Obama administration eases concerns of related countries through smart

⁴³ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUA”), art. 3. Mar. 10, 1988.

⁴⁴ Bureau of International Security and Nonproliferation, *Calendar of Events*, available at <http://www.state.gov/t/isn/c27700.htm> (last visited on Jan. 22, 2010).

⁴⁵ *Supra* note 32

diplomacy, PSI participants will continue to increase. South Korea announced its full participation after North Korea's second nuclear test in May 2009. India also started to reappraise its PSI stance.⁴⁶ Therefore, if China remains outside the PSI, it will be incompatible with PSI's universal trend and the current Sino-U.S. relationship. China's participation will help to transfer passivity to the initiative, and expand the flexibility of China's nonproliferation strategy. North Korea's second nuclear test is the very illustration to this point. The nuclear test led to a sudden deterioration of the security situation on the Korean Peninsula, and almost ruined the efforts of the six-party talks. North Korea stated several times in international arenas that the six-party talks "have ended forever," and it "will never be absolutely possible to take part in the talks any more,"⁴⁷ which greatly damaged China's reputation as one of the leaders of the six-party talks. Some have said that China should increase its pressure on North Korea and try to seek a balance between the hard-line policy and the Sino-North Korea traditional friendship.⁴⁸ The PSI is a tool available for China to increase its influence in the nonproliferation arena. Only with a policy of both "hard and soft hands" can China be able to fully utilize the various methods to effectively deal with proliferation problems?

B. Possibility of Reappraisal

China has never actually opposed the PSI. On the contrary, China supports the purposes of the PSI to prevent proliferation.⁴⁹ Moreover, some interdictions have legal bases in international law. A state enjoys full sovereignty over its territory, including airspace, so it has rights to intercept, inspect and seize proliferation-suspected delivery tools or their cargo within its boundaries. According to international nonproliferation conventions, every state has the general obligation not to proliferate and the specific obligation to take necessary domestic enforcement measures, including penal measures.⁵⁰ These conventional obligations have been expanded to all countries by Resolution 1540. The Resolution decides that all States shall adopt, maintain and enforce appropriate effective laws and measures to stop and combat illegal proliferation-related shipments.⁵¹ Additionally, interception is also an expressly permitted enforcement measure in international law. The first paragraph of Article 3 *bis* in the Convention on International Civil Aviation provides that every State can intercept civil aircraft in flight

⁴⁶ See Shyam Saran, *Nuclear issues - Face-off with Obama Administration*, BUSINESS LINE, Apr. 2, 2009, available at <http://www.blonnet.com/2009/04/02/stories/2009040250150800.htm> (last visited on Aug. 24, 2009).

⁴⁷ See *North Korea is seeking other forms of dialogue*, PEOPLE'S DAILY, July 28, 2009, at 13.

⁴⁸ Qiu Zhenhai, *China should put pressure on North Korea*, THE CHINA PRESS, May 29, 2009, at 5.

⁴⁹ *Supra* note 3.

⁵⁰ NPT, art. 1; CWC, arts. 1 & 7; and BWC, arts. 3 & 4.

⁵¹ S/RES/1540 (Apr. 28 2004).

in case of the lives of persons on board and the safety of the aircraft. Making laws such as customs laws and criminal law, to prohibit illegal proliferation-related trafficking and to criminalize it, therefore, is a sovereign's responsibility, on the base of which it is indisputable to carry out interdiction activities within one state's boundary. This is the reason why the PSI stresses reviewing and strengthening participants' national legal authorities.

UNCLOS is the direct source of law related to interdiction at sea. The interdictions, undertaken within the national jurisdictional maritime areas and under the flag state jurisdiction on the high seas, are internationally legitimate. A coastal state has the same rights in its internal waters as on the land, and a foreign vessel enjoys no navigational rights. The Resolutions regarding sanction against North Korea and Iran call upon all States to inspect, in accordance with their national authorities and legislation, and consistent with international law, all prohibited cargo to and from North Korea or Iran within their territory, including seaports and airports.⁵²

Within a state's territorial waters, the only limit on the state's sovereignty is the right of innocent passage enjoyed by the foreign vessel through it. However, a coastal state may have sufficient reasons to believe that the ship suspected of proliferation-related trafficking is not innocent and may therefore stop it. Because the list of non-innocent activities in paragraph 2 of Article 19 is not exhaustive, the coastal state still has discretion to decide whether the passage is innocent. Paragraph 1 of the same article provides that such passage shall take place in conformity with other rules of international law. Moreover, Articles 19, paragraph 2, subparagraphs 1 and 7, and Article 27 are directly related to interdiction, provided that the proliferation-related trafficking constitutes any threat or use of force against the coastal state, or violates the coastal state's custom law prohibiting proliferation, or the consequences of the illegal proliferation-related trafficking crime extends to the coastal State, or if such crime is of a kind to disturb the peace of the country or the good order of the territorial sea. As one scholar pointed out, while none of articles regarding innocent passage through the territorial sea seems to be precisely on point in the abstract, in actuality, a state should have no difficulty fitting the threat of WMD into one of these justifications.⁵³

The reasoning above also applies to the straits used for international navigation and archipelagic waters being similar in nature to territorial waters. This is because the foreign vessel or aircraft, exercising the right of transit passage or right of archipelagic sea lanes passage, must comply with the customs laws of the states bordering straits or archipelagic States and the conditions of entry into that state. While in the contiguous

⁵² S/RES/1835 (Sept. 27, 2008); S/RES/1874 (June 12, 2009).

⁵³ Shulman, *supra* note 19, at 808.

zone, a coastal state may carry out interdiction activities on the ground of its jurisdiction over matters related to customs.⁵⁴ The Report of the Secretary-General in 2008 wrote that “its (UNCLOS) provisions regarding innocent passage, transit passage, archipelagic sea lanes passage, and the contiguous zone are particularly relevant to preventing illicit trafficking in small arms and weapons of mass destruction.”⁵⁵

In the exclusive economic zone (“EEZ”), the freedom of navigation enjoyed by the foreign vessel cannot effectively resist the jurisdiction of the coastal state over proliferation-related trafficking, the reason for which is that the foreign vessel shall comply with “other pertinent rules of international law” and “the laws and regulations adopted by the coastal State in accordance with . . . other rules of international law.”⁵⁶ This implies that the foreign vessel sailing in the EEZ shall comply with international treaties and Security Council Resolutions prohibiting proliferation and such laws and regulations of the coastal state. The Report of the Secretary-General recognized that “UNCLOS . . . provide[d] for the legislative and enforcement jurisdiction of coastal States in the territorial sea, and with respect to some specific threats to maritime security also in the contiguous zone and the EEZ.”⁵⁷ NPT, CWC and BWC “may also apply in the maritime context.”⁵⁸ The Report further recommended that a legal framework be adopted to allow coastal states to “intercept and board ships which threaten maritime security, to the extent allowed under international law, as well as to investigate and prosecute suspected offenders.”⁵⁹ Moreover, prohibition of shipping nuclear cargoes passing through the EEZ has become a new tendency in that many states have declared that ships carrying highly dangerous nuclear cargoes cannot pass through their EEZ.⁶⁰

The flag state jurisdiction is a general principle applicable to the high seas, under which law enforcement activities by the flag state over the foreign vessel on the high seas cause no legal problems. Meanwhile, such exclusive jurisdiction creates possibilities for relevant states to approve partnerships, through bilateral treaties, to interdict their ships. Thus far, the U.S. has signed the PSI shipboarding agreements with other nine states, including Panama and Liberia, the two largest ship registries in the world.⁶¹ These agreements, modeled after the counter-narcotics agreements between the U.S. and Caribbean and Central American countries, allow U.S. warships to board, search

⁵⁴ UNCLOS, arts. 33, 38, 42 & 54.

⁵⁵ *Report of the Secretary-General: Oceans and the Law of the Sea*, para. 74. A/63/63, (Mar. 10, 2008).

⁵⁶ UNCLOS, art. 58, paras. 2 & 3.

⁵⁷ *Supra* note 55, para.127.

⁵⁸ *Id.* para.78.

⁵⁹ *Id.* para.117.

⁶⁰ *Report of the Secretary-General: Oceans and the law of the sea*, para.53. U.N. Doc. A/58/65 (Mar. 3 2003).

⁶¹ Bureau of International Security and Nonproliferation, *Ship Boarding Agreements*, available at <http://www.state.gov/t/isn/c27733.htm> (last visited on Dec. 4, 2009).

the other party's ships suspected of carrying WMD on the high seas, and possibly detain the ships and their cargoes. By virtue of these agreements, the U.S. can freely board over 60 percent of the world's cargo vessels.⁶² The U.S. is still seeking to negotiate similar agreements with some other countries.

C. Feasibility of Reappraisal

The proliferation of WMD is among the most immediate threats to international peace and security. Nonproliferation has always been an important part of Sino-U.S. cooperation, whether it is in bilateral and multilateral negotiations, through official or unofficial channels, the two countries have worked closely with each other. China supported Resolution 1540 led by U.S., actively participated in the negotiation of the SUA review, joined in the U.S. Container Security Initiative, and the Global Initiative to Combat Nuclear Terrorism initiated by the U.S. and Russia in 2006. The two countries took joint efforts to denuclearize the Korean Peninsula and politically resolve Iran's nuclear issue, and signed the Sino-U.S. Memorandum of Understandings on Cooperation to Prevent Illicit Trafficking in Nuclear and Other Radioactive Substances. They have also cooperatively undertaken some interdictions. China, at the request of U.S., stopped a shipment of chemical products to North Korea in 2003, and denied an Iranian aircraft permission to fly over its territory on its way to North Korea to pick up missile parts.⁶³ China was also present at the 2008 Washington conference marking the five-year anniversary of the PSI.

The expansion of Sino-U.S. cooperation on nonproliferation and President Obama's new deal on nuclear nonproliferation and disarmament increase the feasibility of China's participation. Heads of both states agreed to expand consultations on nonproliferation at the London summit. The Washington Dialogue Conference reached an agreement to further elevate the bilateral cooperative level. President Obama also values multilateralism and the UN initiated and hosted the Security Council Summit of Nuclear Non-proliferation and Disarmament in September last year, which was the first time a U.S. president led such a summit. He advocates an ambitious idea of a world without nuclear weapons, and makes a promise that the U.S. will lead the nuclear disarmament, therefore, his administration will immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty, and will seek a new, verifiable treaty banning the production of fissile materials. He announced a new international initiative to secure all vulnerable nuclear material around the world within four years,

⁶² PHILIPP WENDEL, STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW 35 (2007).

⁶³ David E. Sanger, *U.S. and Russia Will Police Nuclear Terrorists*, N.Y. TIMES, July 15, 2006.

and will host a Global Summit on Nuclear Security this year. He also recognizes every nation's right to peacefully use nuclear energy, and proposed to build a new framework for civil nuclear cooperation, including an international fuel bank, international nuclear fuel cycle centers, and reliable fuel supply assurances.⁶⁴

Taking into consideration that President Obama has endorsed all three pillars of nuclear nonproliferation, peaceful use of nuclear energy and nuclear disarmament, especially a manifestation of the U.S.'s active posture on nuclear disarmament for the first time, is consistent with China's nuclear propositions, and has also been a catalyst for a change in nuclear nonproliferation and disarmament. In May 2009, all the Security Council permanent members issued a joint statement, reiterating their permanent and explicit commitment to nuclear disarmament, and stressing balance between the enhancement of nuclear nonproliferation and peaceful use of nuclear energy. The Conference on Disarmament in Geneva has established the working groups such as Cessation of the Nuclear Arms Race and Nuclear Disarmament and Prevention of An Arms Race in Outer Space. The U.S. just concluded a new Strategic Arms Reduction Treaty with Russia. The Security Council Summit unanimously passed the Resolution 1887 on Nuclear Non-Proliferation and Nuclear Disarmament.

The following facts provide further supports for review of China's position on PSI. First, China has the national legal authority to interdict. China has built a complete system of laws and regulations for the export control of nuclear, biological, chemical, missile and related dual-use items and technologies. The Regulations on the Control of Nuclear Export and the Regulations on the Control of Nuclear Dual-Use Items and Related Technologies Export, modified in 2006 and 2007 respectively, add new provisions regarding the prevention of nuclear terrorism. Chinese criminal law characterizes illegal shipments of nuclear materials or radioactive substances as crimes. In particular, China has right to exercise jurisdiction over foreign vessels suspected of proliferation in the contiguous zone on the basis of safety reason.⁶⁵

Second, participation is not a blank check permitting the U.S. or other PSI participants to freely board Chinese maritime vessels. Consent from related countries still forms the basis of all PSI cooperation. Different countries can arrange modalities for providing the consent on a case-by-case basis, on a blanket basis, or on some other basis as they best see fit.⁶⁶ In addition, participation may give Chinese ships better protection.

Third, China's participation will not necessarily damage the Sino-North Korea traditional friendship because PSI activities have many options, including expert

⁶⁴ *Supra* note 39.

⁶⁵ Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992), art. 13.

⁶⁶ See *Proliferation Security Initiative Frequently Asked Questions*, May 26, 2005, available at <http://www.state.gov/t/np/rls/fs/46839> (last visited on Aug. 17, 2005).

meetings, training exercises and actual interdiction. These do not necessarily involve military force. More importantly, implementation of any PSI activity is voluntary rather than compulsory.⁶⁷ China can choose not to participate in any PSI activity, if such activity is directed against North Korea, or lacks national legal authorities, or international legal grounds. Although China did not yet modify its original position after North Korea's second nuclear test,⁶⁸ China did not exclude the possibility of participation in the PSI. Resolution 1874 reflected some change in China's attitude. China supported not only the condemnation of North Korea's test in the strongest terms, but also inspection of vessels carrying prohibited items to and from the North Korea on the high seas, and seizure and disposal of the cargoes.

V. Conclusion

China has sufficient reasons to reappraise its position on the PSI's in terms of the continuous development of the Sino-U.S. positive, cooperative and comprehensive relationship, institutionalization of the PSI by President Obama, and new situations in nuclear nonproliferation and disarmament. China's timely participation is a strategic move to interact actively with U.S. and promote bilateral relations to a new level, and could contribute to strengthen the international nonproliferation regime. Now is the very time for China to make a political decision of participation.

China's participation is just the start, rather than the end-point, of taking part in institutionalizing the PSI and eliminating doubts as to its validity. In this light, China can take following efforts:

1. Have status as one core PSI partner and push to build the organizational structures. PSI is not a formal organization, only with one organ, the Operational Expert Group, a group of military, law enforcement, intelligence, legal, and diplomatic experts from 20 PSI countries. The group works on behalf of all PSI partners to develop operational plans, and to organize the exercise program.⁶⁹ However, the group lacks representation as many partners and potential key partners are excluded from PSI policymaking process. Both reform of the OEG to expand the size of PSI core members and establishment of similar organ like the UN General Assembly that all the partners can

⁶⁷ *Supra* note 32.

⁶⁸ See *Ministry of Foreign Affairs holds a regular Press Conference*, PEOPLE'S DAILY, June 3, 2009, at 3.

⁶⁹ *Supra* note 32.

access, are conformable to the collective and coordinative nature of PSI decision-making, and also allow China to obtain the identity commensurate with its international status;

2. Urge the U.S. to ratify UNCLOS as soon as possible. Although the U.S. is not yet a contracting party to this convention, the ratification of it has been the consensus in the U.S. academic world, especially the military circle. They all agree that the Convention will legitimize the PSI.⁷⁰ China may, together with other core PSI partners who are also parties to the Convention, push the U.S. to take the decisive step of ratification so as to achieve the universality of the Convention;

3. Push the U.S. to build the PSI's cooperative link with the UN. The PSI has no formal link with the UN, which is quite different from the international consensus that the UN should play a central role in nonproliferation. Establishment of a cooperative relationship between the PSI and the UN, *e.g.*, reporting the PSI's interdictions to the Security Council, will be useful to realize the PSI's validity and transparency. Security Council Resolution 1874 is such an example.

4. Encourage the U.S. to set up definite standards and procedures for interdiction. This is a requirement of the international rule of law. There are good examples available for formulating a list of unified prohibited items, procedures for boarding and the use of force, such as the Resolution 1874, the 2005 SUA Protocol and the PSI shipboarding agreements; and

5. Advocate to establish a PSI fund. The PSI's lacking of funding sources and reparation mechanisms impacts the participants' ability to be involved in PSI activities, and willingness of ships to accept inspection. Building a fund, modeled after the G8 Global Partnership Against Weapons and Materials of Mass Destruction in 2003, aiming at providing aid to PSI partners and compensating for damage or loss resulting from boarding ships without good reasons, will contribute to change the current situation and to attract more potential participants.

⁷⁰ *Statement of Admiral Gary Roughead, Chief of Naval Operations*, presented before The House Armed Services Committee on FY10 Department of Navy Posture, May 14, 2009, available at http://armedservices.house.gov/pdfs/FC051409/Roughead_Testimony051409.pdf (last visited on Aug. 5, 2009).